

## Joint Letter to Ms. Carmen Guzman Lowrey

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November 20, 1996

Commissioner of Patents and Trademarks  
Box 4  
Patent and Trademark Office  
Washington, D.C. 20231

attn. Ms. Carmen Guzman Lowrey  
Associate Commissioner for Governmental  
and International Affairs

These comments are submitted on behalf of the nation's major library associations concerning the Chairman's text for the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. As noted in previous correspondence, we believe that in a number of arenas and in particular, the "digital agenda" and the draft Treaty on Intellectual Property in Respect to Databases, it is premature for the United States delegation to the [World Intellectual Property Organization \(W.I.P.O.\)](#) to engage in treaty negotiations. Thus we urge that the treaty negotiations on these issues be deferred until there is a domestic consensus on all of the issues which the treaties address. We do believe, however, that it is appropriate for the U.S. delegation to actively participate in the W.I.P.O. discussions this December.

There are a number of key concerns with the chairman's text. These include issues relating to Articles 7, 10, 12, 13, and the draft "Treaty on Intellectual Property in Respect to Databases." The attached correspondence details our concerns with each of these issues and provides recommendations for consideration.

Article 7: Article 7 would inhibit browsing on the World Wide Web because it would extend the right of reproduction to all temporary copies, including ephemeral images captured in a computer's random access memory (RAM). If enacted, this provision when coupled with Article 10, would have a chilling effect on the ability of libraries and library users to access needed information resources due to serious concerns over liability.

Article 10: Article 10 of the Protocol would create a new exclusive "right of communication to the public." This new right appears to be broader than both the distribution right and the public performance right granted by the U.S. Copyright Act. Creation of this new right, again when coupled with Article 7, would significantly increase the exposure of online service providers including libraries to copyright infringement liability.

Article 12: Article 12 would undermine many of the exceptions created by Congress in support of educational and library activities, e.g. fair use, interlibrary loan, and more. Of particular concern is the second paragraph of Article 12 which limits exceptions to "certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." These fair uses, library, and education exceptions in U.S. law are fundamental to the operation of library and educational institutions. Any erosion of these critically important exceptions would seriously impair the ability of libraries to effectively serve their users.

Article 13: Article 13 would restrict copying currently permitted by law. It would impose liability on the manufacturer of devices that circumvent copy protection systems if the manufacturer had reasons to

know that just one out of a thousand devices produced would be used to make unlawful copies. Thus, if a manufacturer developed a device that enabled a library to circumvent copy-protection systems for the purpose of making "lawful" archival copies, the manufacturer could be held liable if a court determined that the manufacturer should have expected that at least one user would also use the device to make an infringing copy. Importantly, such language will preclude libraries from engaging in lawfully permitted activities in support of research, education, and public access to information.

Draft Treaty on Intellectual Property in Respect to Databases: Provisions in the database treaty would undermine the long standing U.S. tradition of protecting content, not facts. The treaty is outside the scope of copyright and does not include any exceptions for research and education. There has been no domestic discussion of the merits or drawbacks of the proposal on the public and private sectors. Indeed, there have been no compelling reasons provided regarding the need for such a sweeping new intellectual property regime. The U.S. delegation to W.I.P.O. should not engage in any discussions or negotiations on this draft treaty until domestic consensus on the need for such a regime has been developed.

Our associations have participated for many years in domestic intellectual property and copyright discussions. We, with others in the public and private sectors, have sought to achieve workable solutions for many of the thorny copyright concerns precipitated by the changing technological infrastructure. Despite all of these efforts, there are no clear solutions to many of these issues. In fact, many of the proposals considered this past year have failed because they would impose economic harm on some communities and thwart the advancement of the National Information Infrastructure. Until workable solutions for all communities and sectors are developed, it is premature to seek to achieve international consensus on such contentious issues. We urge the U.S. delegation to defer the full consideration of these matters until the U.S. Congress has had an opportunity to forge a national consensus that meets the needs of all communities.

Sincerely,

Duane E. Webster  
Executive Director  
[Association of Research Libraries](#)

Carol C. Henderson  
Executive Director, [Washington Office](#)  
[American Library Association](#)

Robert Oakley  
Washington Affairs Representative  
[American Association of Law Libraries](#)

Carla Funk  
Executive Director  
[Medical Library Association](#)

David Bender

Executive Director  
[Special Libraries Association](#)

Attachments:

Letter to Vice President Gore, July 12, 1996

Letter to Carmen Guzman Lowrey, September 13, 1996

Letter to Commissioner of Patents and Trademarks, October 8 and 12, 1996

[Letter to Dr. John Gibbons](#), November 7, 1996

[Letter to Daniel Tarullo](#), November 19, 1996



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