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Copyright Proposals for the National Information Infrastructure

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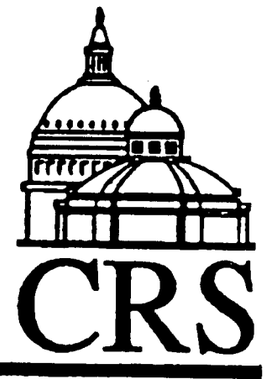

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COPYRIGHT PROPOSALS FOR THE NATIONAL INFORMATION INFRASTRUCTURE

SUMMARY

Full development of a national information superhighway of computer networks requires adaptation of the copyright law to use of copyrighted works in this environment.

This report summarizes and analyzes the pending legislative proposals (S. 1284 and H.R. 2441) to amend the Copyright Act to facilitate development of the National Information Infrastructure ("NII"). The bills seek to assure appropriate protection of intellectual property rights in the content distributed over computerized networks.

The pending bills track the draft legislation and proposals recommended by an Administration Working Group on NII intellectual property issues ("IP Working Group"), which issued its final report in September 1995.

The legislative proposals fall into six major areas: 1) expansion of the distribution right to include transmissions and related amendments to the definitions of "transmit" and "publication;" 2) expansion of the importation right to include transmissions; 3) exemptions for libraries and archives; 4) an exemption for reproductions for the visually impaired; 5) a new civil action for violations relating to circumvention of anti-copying systems; 6) new civil and criminal actions for violations related to false copyright management information or removal or alteration of such information.

The IP Working Group characterizes its proposals with respect to the rights of public distribution and importation as "clarifications" of existing law. That conclusion will likely be challenged by some groups. In any event, it seems fair to consider these proposals as major amendments of the Copyright Act.

The proposals are intended to bridge the gap between the "Gutenberg print world" that gave birth to copyright, and the computer-driven digital information world of the present and future. They are also intended to adapt copyright law to the convergence of telecommunications and computer technology. The Congress will likely want to examine this momentous transition in the light of the constitutional purpose of copyright legislation: To promote the progress of science and the useful arts for the benefit of the people of the United States.

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BACKGROUND

Policy-makers, members of the academic and library communities, members of the corporate world, and intellectual property rightsholders who have studied the policy issues involving the NII generally recognize that legal protection for, and public access to, copyrighted materials on computer networks remain among the major unresolved issues affecting development of the NII.

The IP Working Group of the White House Information Infrastructure Task Force issued a preliminary draft report in July 1994 containing recommendations for amendments to the copyright law. Following several months of public comment, including administrative hearings and conferences, the IP Working Group issued its final recommendations in September 1995.

In September 1995, Senator Hatch and Representative Moorhead introduced S. 1284 and H.R. 2441, respectively, to initiate legislative consideration of the IP Working Group proposals and other appropriate amendments of the Copyright Act with respect to use of copyrighted works on computerized networks.

In his introductory remarks, Senator Hatch noted that "[t]he bill deals with five major areas: (1) transmission of copies, (2) exemptions for libraries

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[1]DEPARTMENT OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS OF THE INFORMATION INFRASTRUCTURE TASK FORCE (September 1995)(Hereafter: "IP Working Group Report").

and the visually impaired, (3) copyright protection systems, (4) copyright management information, and (5) remedies."[2] The Senator also commented: "Without endorsing any of the specific language of [the IP Working Group] report, I believe that it provides useful background material for the recommended changes."[3]

Representative Moorhead in his introductory remarks commented that the "bill is a starting point. While it does not address all of the issues that need to be considered on protecting intellectual property on the NII and GII, including provisions regarding special uses by libraries, it represents generally the steps which we must undertake in protecting access to creative works."[4]

SUMMARY AND DISCUSSION OF IP WORKING GROUP RECOMMENDATIONS

1) Broader Distribution Right: Transmission May Constitute Distribution

Proposal: Amend 17 U.S.C. §106(3) (currently the *exclusive right "to distribute copies or phonorecords* of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending") to include transmissions to the public.

Related proposal: Amend the definition of "transmit" in 17 U.S.C. §101 (which now reads: "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"). The amendment would add a second sentence to the definition as follows: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent."[5]

Another related proposal: Amend the definition of "publication" in 17 U.S.C. §101 to expand the concept of publication to include transmissions. Under current law, distribution of a copy or phonorecord can constitute publication only if a material object (a tangible copy or phonorecord) changes hands. Also, under current law, a public performance or display even to millions of people is not a "publication" of the copyrighted work.

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[2]141 CONG. REC., 104th CONG., 1st SESS. S14550 (September 28, 1995).

[3]*Id.* at S14551.

[4]141 CONG. REC., 104th CONG., 1st SESS. E1892 (September 29, 1995).

[5]The proposed definition is arguably circular since transmissions are included in the operative word "distribute" by reason of the proposed amendment to §106(3).

Discussion

The proposal to expand the distribution right to include transmissions appears to constitute a major amendment of the copyright law, notwithstanding the IP Working Group's characterization of the change as a "clarification" of the law.[6]

If the end result of the transmission is a "hard" or printed copy or phonorecord that is publicly distributed, such a distribution may be within the control of the copyright owner, under existing law, subject to certain exceptions (e.g., the first sale doctrine; fair use). The distribution right is arguably not triggered under existing law, however, unless multiple copies are distributed amounting to an unauthorized publication of the work. The reproduction right might arguably be infringed by an electronic transmission that results in a printed copy, even if it is not distributed. An unresolved question might be whether or not the reproduction right is infringed if the copy is made for personal, noncommercial use by means of a personal computer in the privacy of the home.

The effect of the IP Working Group proposal is to treat the transmission itself as within the exclusive right of the copyright owner, (i) even if the transmission is not a "public performance," (ii) even if multiple copies or phonorecords are not made, and (iii) perhaps even if any copy resulting from the transmission is made for personal, noncommercial use. Both analog and digital transmissions would be covered by the expanded definitions, potentially creating new liability for traditional transmission services such as broadcasters, cable, and satellite services. Liability may arise at any point in the transmission process, either as a direct infringer or under the doctrines of contributory or vicarious infringement.[7]

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[6]IP Working Group Report at 217.

[7]The IP Working Group rejected proposals from online service providers that a higher threshold of knowledge or ability to control should be present to trigger their copyright liability than that required by the existing doctrines of vicarious or contributory infringement. IP Working Group Report at 122-124. Direct infringers are held to a standard of strict civil liability, generally without regard for the intent of the actor. Someone who has the right and ability to control the infringer's actions and a financial interest in use of the copyrighted work may be held vicariously liable for the infringement. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F. 2d 304 (2d Cir. 1962). Someone who, with knowledge of possible infringing activity, induces, causes, or materially contributes to an infringement, may be held liable as a contributory infringer. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971). A manufacturer, however, has the freedom to market any device that is capable of substantial noninfringing uses, without incurring contributory infringement liability. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The Report of the IP Working Group discusses the divergence of opinion on the issue of whether or not the existing distribution right encompasses transmissions.[8] It reports that some believe the existing distribution right includes transmissions to computer memories and no amendment is necessary. Others believe, that in any case, the reproduction right is implicated by reproducing the transmitted work in computer memories. In opposition to these views, some maintain that the current language of the Copyright Act cannot be stretched to include transmissions within the distribution right.

No court has held that the right of public distribution includes transmissions. The Report of the IP Working Group refers to one case (a district court opinion)[9] that suggests transmissions are "implicated" in the distribution right. That case, however, does not discuss transmissions or the relationship between a transmission and the distribution right. The court merely says that what the defendants did "implicated" the distribution right.[10] The court also held that defendant infringed the public display right.[11]

The existing statutory definition of "transmit" refers explicitly to the rights of "performance" and "display" only.[12]

Unlike the 1994 Draft Report, the final Report of the Working Group does not attempt to delineate by statute when a transmission becomes a "distribution" and when it remains a "performance" or "display." The Working Group leaves this important distinction for case-by-case development through litigation.

Under this proposal, anyone who transmits a copyrighted work (e.g., by a local, regional, national, or international computer network; by broadcasting; by satellite; by wireless communications, etc.) would have to hold a license from the copyright owner, unless yet to be articulated exceptions apply. The mere act of transmission by means of a computer system apparently triggers the broadened distribution right since a reproduction is made in the computer memory as a step in the transmission process.

Moreover, the transmission requires the copyright owner's authorization (i.e., a license) for transactions that would be exempt under existing law because the acts did not constitute a "public performance."

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[8]IP Working Group Report at 213-217.

[9]*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

[10]*Id.* at 1556.

[11]*Id.* at 1556-57.

[12]17 U.S.C. §101 (definition of "transmit").

Current Distinction between Restrictions on "Distribution" Compared to "Performance"

Current copyright law generally maintains a strong distinction between acts that constitute a "distribution of copies" of a copyrighted work and acts that constitute a "public performance" of a copyrighted work. The scope of rights and limitations on rights vary depending upon whether the alleged infringing act is a "distribution" or a "performance."

The distinctions between "distribution" and "performance" are illustrated by the following examples. Under certain circumstances, distribution of multiple copies (the exact number is not settled by law) may constitute a "publication." This result triggers several legal consequences (e.g., computation of the copyright term;[13] eligibility of foreign nationals to claim copyright;[14] application of the public broadcasting compulsory license;[15] library reproduction exceptions of 17 U.S.C. §108; and awarding of statutory damages and attorneys fees pursuant to 17 U.S.C. §§412, 504 and 505). Exposure of a copyrighted work to an audience of millions by means of a public performance, on the other hand, does not constitute publication.[16]

The limitations on the rights of "distribution" and "public performance" are markedly different: the first sale doctrine generally applies to distributions (i.e., the first authorized sale exhausts the right to license further distributions of that copy)[17] and not to performances. The limitations on the performance right, although many, are narrowly drawn. For example, performance of a motion picture in a face-to-face classroom setting is exempt,[18] but a license must be obtained from the copyright owner of the motion picture for use in instructional broadcasting.[19] A license does not have to obtained for performance of nondramatic literary or musical works in instructional broadcasting, however.

The current distinctions between "distribution" and "performance" originated in the beginning days of copyright law during the "Gutenberg-print" era: the distribution or reproduction of copies was assigned one set of legal

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[13]17 U.S.C. §§302-304.

[14]17 U.S.C. 104(b).

[15]17 U.S.C. §118.

[16]17 U.S.C. §101 (definition of "publication").

[17]17 U.S.C. §109.

[18]17 U.S.C. §110(1). The exemption does not apply if the copy was not lawfully made.

[19]17 U.S.C. §110(2).

rules; the live performance of a work, which involved no copy, was assigned another set of legal rules.[20] As new technologies developed, they were generally "pushed" into either the "copy" or "noncopy" set of legal rules. Computer-assisted printing and photocopying are treated under the distribution-reproduction ("copy") rules. Radio, television, cable, and satellite transmissions are treated under the ("noncopy") performance rules.

The convergence of computer and telecommunications technologies in the "information superhighway" and elsewhere leads to proposals to merge the separate forms of legal protection that have generally applied to these different technologies. The effect of the IP Working Group recommendations to broaden the distribution right to include transmissions would be to blur the traditional copyright distinctions between "copy" and "noncopy" infringing activities. In the electronic environment, it is argued, legal distinctions between "copy" and "noncopy" infringing activities no longer make any sense.

Even if these proposals make good sense as general principles (and that conclusion will be disputed by some),[21] the legislator may wish to consider carefully a doctrinal change of this magnitude.

Ordinarily, when proprietary rights are broadened, the purpose of the Copyright Clause of the Constitution -- to promote the progress of science and the useful arts -- requires an appropriate fine-tuning of the amendments. In this case, arguably, the grant of a broadened distribution right needs to be balanced by limitations on, or exceptions to, the broadened right.

The IP Working Group assumes that appropriate limitations would be developed by the judicial process in interpreting the existing statutory limitations. The Working Group asserts that the "limitations on the right -- which place certain distributions to the public outside the scope of the copyright owner's right -- would necessarily expand to also place similar distributions by means of transmission outside the scope of the right."[22] The justification for this assumption is not clear, especially since no authority was cited in the Report for this statement. One could argue that, under normal principles of statutory interpretation, limitations on a right are construed strictly. At a minimum, it is difficult to envision the courts struggling to apply doctrines that formerly applied only in the "copy" context to transmissions that do not result in a tangible copy with an existence beyond the memory of a computer. The first sale doctrine is a prime example of the difficulty the courts would face.

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[20]The "distribution" and "performance" models were not developed at the same time, but they had become established by the end of the 19th Century.

[21]Boyle, *Overregulating the Internet,* Washington Times, Nov. 14, 1995, at A17, col. 4. The IP Working Group Report, he writes, "is an astoundingly radical measure which makes reading a document on the screen of your Web browser a copyright violation...and dramatically restricts the 'fair use' of copyrighted material." *Ibid.*

[22]IP Working Group Report at 216.

First Sale Doctrine

The 1994 Draft Report proposed amendment of 17 U.S.C. §109 (which currently sets forth limitations or exceptions to the distribution right) to provide that the "first sale" doctrine does not apply to transmissions. The final Report reconsiders this point and recommends no change in the first sale doctrine. Instead, the courts would decide on a case-by-case basis the extent to which a doctrine that now applies only to printed copies or phonorecords would be applicable to electronic transmissions.

As noted above, the first sale doctrine means that the first authorized sale of a copy exhausts the distribution right of the copyright owner (e.g., textbooks and paperbacks can be resold). With some exceptions, this doctrine permits a secondary market in distribution of copies without the permission of the copyright owner. The first sale doctrine does not apply, however, to computer programs or to sound recordings.[23] Also, the first sale doctrine does not now apply to transmissions since they are not distributions under existing law.[24]

In expanding the distribution right to include transmissions, the IP Working Group proposes to let the courts decided which transmissions are exempt from the first sale doctrine or, alternatively, at what point the distribution right is exhausted in a sequence of transmissions. The effect of the proposal is that no one can determine without litigation whether a license from the copyright owner is required for a particular act of transmission in a sequence of transmissions.

Presumably, it would be possible by contract to clear the rights at the source of the transmission for future sequences of transmissions, either by individual transaction licenses or by collectively administered "blanket" licenses. The contract and the attendant compensation would presumably take account of the possible right of the copyright owner to authorize or deny the transfer of a copy via a secondary or tertiary transmission. The likely result would be to expand the distribution right to include most transmissions, even if the user could in theory invoke the first sale doctrine at some point.

Public Performance Right in Digital Transmissions of Sound Recordings

The final Report includes a general recommendation, unaccompanied by any statutory language, to amend 17 U.S.C. §106(4) to grant a public performance right in the *digital* transmission of a sound recording. The IP Working Group, while favoring a broad public performance right, apparently

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[23]17 U.S.C. §109(b).

[24]The IP Working Group apparently assumes that this issue is an open question and that, even without amendment of the Copyright Act, a court might hold that a transmission might be subject to the first sale doctrine. No court has reached this conclusion to date.

deferred to pending legislation,[25] which has been enacted since the Report was issued.[26] This recent enactment grants a narrow right in digital audio transmission of sound recordings in a new §106(6) of title 17 U.S.C.

Under the law in effect before November 1, 1995, sound recordings (recorded renditions of musical, literary, or dramatic works fixed in phonorecords such as vinyl records, cassette tapes, compact discs, digital audio tapes, etc.) did not enjoy a right of public performance. They were the only category of copyrightable work capable of performance that was denied a right of public performance.

Under the pre-November 1, 1995 law, when a musical recording was performed publicly, the copyright owner of the *underlying musical work* received compensation for the performance (unless one of the narrow exemptions applied), but the owner of the separate copyright in the sound recording (usually the recording company) was not entitled to compensation for the performance.

The recently amended law makes no change concerning live performances of sound recordings that are not transmitted (e.g., performances at a concert or a high school dance) or with respect to "analog" transmissions (e.g., conventional broadcasting). These public performances remain outside the control of the copyright owner of the sound recording. If, however, the law is further amended, as proposed in the pending bills, copyright liability would potentially exist for an analog transmission of a sound recording that constitutes a distribution. Also, with respect to digital transmissions, the broadened distribution right, which would include digital transmission of sound recordings, may conflict with the narrow exclusive right of new §106(6) legislated by Public Law 104-39.

2) Importation of Transmissions into the United States

Proposal: Amend 17 U.S.C. §602 to provide that the prohibitions on importation of *copies or phonorecords* under existing law apply to importation by *transmission*, without however requiring the United States Customs Service to enforce the prohibition on transmissions as it does with respect to traditional copies or phonorecords.

Discussion

Section 602 of the Copyright Act generally prohibits the unauthorized importation of copies or phonorecords embodying copyrighted works into the United States. Unauthorized importation constitutes an act of infringement, as a violation of the distribution right, even if the copies or phonorecords were

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[25]S. 227 and H.R. 1506, 104th Cong., 1st Sess. (1995).

[26]Pub. L. 104-39, Act of November 1, 1995.

authorized for distribution outside the United States (prohibition on "parallel importation").

While some courts have struggled with the relationship between the first sale doctrine of section 109 and the importation prohibition of section 602, the prevailing view is that parallel importation is an act of infringement. Section 602, of course, does not apply to performances or transmissions now.

Under current law, if the copies or phonorecords are infringing, the importation right can be enforced by the copyright owner through Customs Service intervention or through the courts. If the copies or phonorecords are lawfully made ("parallel imports"), the Customs Service has no authority to inhibit their importation, 17 U.S.C. 602(b), although copyright owners may sue for infringement of the importation right.

The IP Working Group recommends expansion of the Section 602 importation right to apply to transmissions from a foreign country into the United States, but, like the case of parallel imports, the Customs Service would not be expected to enforce the prohibition on transmissions from abroad.

The major purpose and effect of this proposal would be to give United States rightsholders the ability to require global licensing of their works, if foreign entities seek access to the lucrative American market. There are many foreign database vendors and suppliers of information products who utilize the existing Internet, and will want to participate in the NII. Under this proposal, they must obtain licenses to use American copyrights, if they seek access to the American market. With respect to noncommercial suppliers, however, the fair use doctrine of 17 U.S.C. §107 may excuse importation of a few copies.

Like the broadened distribution right, the extent to which the first sale or fair use doctrines might or might not apply to imported transmissions would be left to the courts to resolve.

3) Exemptions for Libraries and Archives

Proposal: Amend section 108 of title 17 U.S.C. explicitly to permit libraries or archives to make three copies of works in analog or digital form, of which no more than one copy may be in use at any time; to authorize libraries or archives to make digital copies for purposes of preservation but allow deposit only in facsimile (not digital) form for lending to another library or archive for research purposes; and to recognize explicitly that library reproductions may simply include any notice of copyright appearing on the original pages or other portions of the work the Library copies.

Discussion

Section 108 of the Copyright Act accords explicit exemptions to libraries concerning reproduction of copyrighted works. Libraries assert, although

copyright owners may disagree, that the exemptions of section 108 do not limit the fair use privilege of 17 U.S.C. §107.

Under the fair use rubric, many libraries have asserted the privilege of making preservation copies in digital form.

The IP Working Group, while generally noting that libraries "may make fair use of any copyrighted work,"[27] discusses the issue of library preservation in digital formats only in reference to section 108. The Working Group concludes that existing section 108 does not justify making digital copies even for preservation purposes.[28] It proposes amendment of the Copyright Act to give libraries the privilege of limited digital reproduction.

Under the proposed amendment, libraries could make no more than three copies in analog or digital form. The libraries could distribute no more than one of the copies or phonorecords at a time. In accordance with existing library practice under a claim of fair use, the libraries could have one copy or phonorecord as a secure master, one copy or phonorecord as a back-up, and one copy or phonorecord for public use. The "public use" copy or phonorecord could not be used for library lending in digital form; only a facsimile version could be used for lending. In a footnote, the IP Working Group explains its further intent that a digital reproduction could be made for replacement purposes under amended section 108(c) only if the copy or phonorecored is unavailable at a fair price in neither analog nor digital form.

A third library amendment proposes a minor change regarding a library's obligation to use a copyright notice on any reproduction it makes. The intent of the Working Group's recommendation is that the notice is not required if notice of copyright does not appear on the copy or phonorecord reproduced.

These amendments to 17 U.S.C. §108 essentially legitimize practices followed by many libraries under existing law, which the libraries have justified under either the fair use doctrine or existing section 108.[29]

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[27]IP Working Group Report at 225.

[28]The IP Working Group cites a comment in the legislative reports accompanying the 1976 Copyright Act, to the effect that the facsimile reproduction authorized in 17 U.S.C. §108 does not include reproduction of the work "in 'machine-readable' language for storage in an information system." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 75 (1976). Arguably, however, the comment restricts analog to digital conversion if public access is permitted to the information system, but may not apply if the conversion is made solely for preservation purposes. In any case, the Working Group draws no conclusion about the applicability of fair use to digital preservation. It proposes amendment of section 108 expressly to permit reproduction in digital form either for preservation or for replacement purposes (if, in the latter case, replacement copies cannot be obtained at a fair price after a reasonable effort in either analog or digital form).

[29]Copyright owners may not agree with the existing library practices, but they have not litigated the issues.

4) Reproduction for the Visually Impaired

Proposal: Add a new limitation in a new section 108A for reproduction and distribution of published literary works in analog or digital form by a nonprofit organization for the benefit of the "visually impaired."

Discussion

The IP Working Group's recommended exemption for the benefit of the visually impaired would arise one year after publication of the original work, if the copyright owner has not marketed an edition for the visually impaired within that period. Under the exemption, nonprofit organizations could reproduce and distribute, at cost, special editions suitable for the visually impaired. Only literary works are subject to the exemption.

Although other disabled users may merit a special exemption, the proposal is limited to the visually impaired because this is the only group that solicited the Working Group for an exemption.[30]

The recommendation is modeled on a provision of the Australian copyright law.

5) Protection of Anti-Copying Technology

Proposal: Add an entirely new chapter 12 to the Copyright Act, title 17 U.S.C., creating civil remedies for the importation, manufacture, and distribution of devices, or the offering or performance of services, the *primary purpose or effect* of which is to avoid, bypass, remove, deactivate, or otherwise circumvent anti-copying systems, without the authorization of the copyright owner or the law.

Discussion

A new section 1201 of title 17 U.S.C. would prohibit any person from importing, manufacturing, or distributing any device, product, or component thereof, or from offering or performing any service, the primary purpose or effect of which is to circumvent, without the authority of the copyright owner or the law, any copyright protection system. Only civil remedies are proposed for violation of §1201.

Any person who is injured by a violation of §1201 may bring a civil action. The remedies include: temporary and permanent injunctions; impoundment of infringing devices or products; costs; attorney's fees; destruction of infringing devices or products as part of a final judgment; actual damages and additional profits of the violator; or, in instead of actual damages and additional profits,

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[30]IP Working Group Report at 228.

statutory damages ranging from $200 to $2500 per infringing device, product, offer or performance of service, as the court considers just.

There have been earlier proposals to establish copyright liability for the marketing of "unlocking" devices that defeat proprietary anti-copying systems.[31] These proposals have been controversial.

Proponents of such proposals seek to harness technology to inhibit unlawful copying and are frustrated by the public availability of the "unlocking" technology. They point to provisions in the communications law that criminalize, for example, devices that facilitate theft of cable service.[32]

Opponents of such criminal remedies, note that many "unlocking" devices have noninfringing purposes. They deplore application of the criminal law to behavior engaged in by a substantial number of law-abiding citizens. The IP Working Group, apparently in deference to these arguments, recommends only civil liability for violation of proposed §1201 -- circumvention of copyright protection systems.

This proposal to create civil remedies is less controversial than criminal remedies.[33] Since the civil remedies do not track a criminal provision, however, some copyright owners may have concerns about granting a civil remedy to the authorized maker/distributor of copyright protection systems -- non-copyright owners. Section 1203(a) gives a civil remedy to "[a]ny person injured by a violation of Sec. 1201 or 1202." In the past, some copyright owners have argued that only rightsholders should be able to sue for copyright infringement.[34]

Users of copyrighted works, including the educational and library communities, have expressed concerns about the inhibiting effect technological

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[31]S. 1096, 102d Cong., 1st Sess. (1991); H.R. 3568, 101st Cong., 1st Sess. (1989) (bills relating to technological protection of motion pictures).

[32]47 U.S.C. §605(e).

[33]A precedent exists within title 17 itself: the serial copyright management system ("SCMS") enacted as part of the Audio Home Recording Act of 1992, Pub. L. 102-563, 106 Stat. 4237. Section 1009 of title 17 U.S.C. provides civil remedies to "[a]ny interested copyright party injured by a violation of section 1002" (incorporation of SCMS copying controls in specific digital recording devices).

[34]Again, the Audio Home Recording Act provides a precedent. "Any interested copyright party injured by a violation of section 1002" of title 17 U.S.C. may sue the violator. These copyright parties include featured recording artists, irrespective of whether or not they are rightsholders. 17 U.S.C. §1009. Similarly, broadcasters and primary transmitters of signals retransmitted by cable systems have a civil remedy for willful or repeated violation of the cable carriage rules, irrespective of the station's status as a rightsholder. 17 U.S.C. §111(c)(3) and §501(d).

protection systems could have on fair use access and the public domain.[35] They argue that the technological systems afford the equivalent of copyright protection for public domain works, which should be available for copying. The IP Working Group responds that their proposal protects access to public domain works because §1201 is not violated if the law authorizes the copying.[36] Devices to circumvent copyright protection systems would be lawful if the copying itself is lawful.

6) Integrity of Copyright Management Information

Proposal: Add a new Chapter 12 to title 17 U.S.C., to prohibit the knowing provision of false copyright management information and the fraudulent removal or alteration of copyright management information. Both civil and criminal remedies are proposed for violation of §1202.

Discussion

Section 506 of the current Copyright Act makes criminal the fraudulent use of a copyright notice or the fraudulent removal or alteration of a copyright notice. The IP Working Group proposes to create new civil and criminal liability for fraud with respect to disclosure or removal of copyright management information (hereafter "CMI"), that is, information about the terms and conditions for licensing use of a copyrighted work.

Copyright liability would be created for the following actions, if done without the authority of the copyright owner or of the law: knowing removal or alteration of the CMI; knowing distribution or importation for distribution of altered CMI; or knowing distribution or importation for distribution of copies or phonorecords from which the CMI has been removed.

The civil remedies are similar to those for illegal circumvention of copyright protection systems: injunction, actual damages and additional profits, impoundment, attorney's fees, and costs. Statutory damages are increased for each CMI violation, however, to a minimum of $2500 and a maximum of $25,000. Also, for repeated violations within a three year period, the court in its discretion may award triple damages.

Section 1204 sets criminal penalties for anyone who violates §1202 (the CMI provisions) "with intent to defraud." If convicted, the person could be fined not more than $500,000 or imprisoned for not more than 5 years, or both.

The CMI violation and remedy provisions represent a somewhat unusual proposal for the Copyright Act. The existing provisions of §506(c) and (d) relating to fraudulent copyright notices are only tangentially related to licensing information. It is true, however, that one purpose of the copyright notice has

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[35]IP Working Group Report at 231.

[36]*Ibid.*

been to inform the public of the name of the copyright owner, perhaps to facilitate licensing of works. The copyright notice is a concrete device, and is hedged by a statutory form and a long history.

By contrast, the CMI provisions are unknown territory, and even the final content of the CMI will not be established until the Register of Copyrights issues regulations.[37] It may be difficult, without experience, *a priori* to establish appropriate criminal provisions punishing distribution of false licensing information (what is omitted; what is false; how material is it; who is responsible?) or punishing alterations of the licensing information (altered how; altered in what way; by whom?).

The penalties proposed, moreover, are tremendously greater than the existing penalties for fraud relating to the copyright notice. Under current law, the only penalty is a maximum fine of $2500. There is no time in prison. Under proposed §1204, the maximum penalties would be a fine of $500,000, 5 years in prison, or both.

Rather than the fraudulent copyright notice provisions of section 506, a closer analogy for the IP Working Group's fraud proposals may be found in section 1002(d) of title 17 U.S.C., a provision of the Audio Home Recording Act of 1992,[38] which created a statutory license for reproduction of sound recordings by digital means. Section 1002(d) prohibits the encoding of inaccurate information about the copyright status of material embodied in a digital sound recording. Only civil remedies are provided for violation of this section, however.

OTHER NII COPYRIGHT POLICY ISSUES

The IP Working Group chose not to propose legislative action and/or statutory language for three major copyright policy issues affecting the NII: fair use of copyrighted works; criminal remedies against nonprofit infringers; and the liability of online service providers. Each of these issues was discussed in the Report of the Working Group. Except for the fair use issue, moreover, the Report adopts policy positions on these issues.

1) Criminal Remedies for Nonprofit Infringement

The existing *mens rea* standard for criminal copyright infringement requires proof beyond a reasonable doubt that the infringer acted "willfully and for

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[37]Proposed §1202(c) (definition of "copyright management information").

[38]Pub. L. 102-563, 106 Stat. 4237, Act of October 28, 1992.

purposes of commercial advantage or private financial gain."[39] This standard has been applied to criminal copyright prosecutions since 1897.

The IP Working Group Report endorses another pending bill, S. 1122, which changes the *mens rea* standard for criminal copyright infringement.[40] The bill would retain the willfulness standard but otherwise extend criminal liability to nonprofit infringers for the first time and provide that those who barter or exchange copyrighted works are subject to criminal copyright liability. S. 1122 also revises the statutory thresholds for distinguishing between misdemeanor and felony offenses, lengthens the statute of limitations period from three to five years, and makes an infringing transmission a felony offense for the first time.[41]

2) Online Service Provider Liability

Online service providers are potentially subject to copyright liability under the doctrines of vicarious or contributory infringement.[42] The IP Working Group considered but rejected suggestions from online service providers that their copyright liability for indirect infringement should be limited.[43] Therefore, the Working Group made no recommendation for statutory change regarding the potential liability of services such as CompuServe, America Online, Netscape, etc.; for libraries, governments, and other nonprofit service providers; or for operators of bulletin board services.

The IP Working Group concluded that online service providers should be responsible for the infringing activity of users of their services. Service providers should monitor the activity of their users, make clear that infringing activity is not tolerated, and reserve the right to remove infringing material or disconnect the offender. Implementation of preventative measures and monitoring should guard against copyright infringement, according to the IP Working Group. These measures may diminish but would not eliminate the copyright liability of the service providers for infringements that escape their preventative measures.[44]

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[39]17 U.S.C. §506(a). The penalties for criminal copyright infringement are set forth in 18 U.S.C. §2319.

[40]IP Working Group Report at 229.

[41]For a full summary and analysis of S. 1122, *see* Schrader, *Criminal Copyright Infringement: Proposal to Impose Criminal Liability on Nonprofit Infringers and Felony Liability for Transmissions,"* CRS Report 95-1035 S.

[42]Online service providers are also liable as direct infringers, but this liability presents no special concerns.

[43]IP Working Group Report at 114-124.

[44]*Id.* at 122-124.

Given the potential for substantial damages for copyright infringement, online service providers will likely petition the Congress to adjust their exposure to copyright liability. Proposals rejected by the IP Working Group would impose liability i) only where the infringement was willful and repeated or ii) "where it was proven that the service provider had both 'actual knowledge' of the infringing activity and the 'ability and authority' to terminate such activity."[45]

3) Application of Fair Use Doctrine in the NII

The IP Working Group discussed the issue of application of the fair use doctrine in the NII context, but made no recommendation for legislation to adapt fair use to the NII.[46] The IP Working Group convened a Conference on Fair Use ("CONFU"), which has been discussing possible nonstatutory guidelines since September 1994.

Discussion

Section 107, title 17 U.S.C., sets out the "fair use" doctrine. This judicially developed principle, which now has a statutory basis, exempts from copyright liability certain relatively minor, socially-approved borrowings of excerpts of copyrighted works. The uses most likely to fall within the fair use doctrine are those that have a noncommercial, scholarly, teaching, newsreporting, or social criticism purpose.

The statutory fair use provision represents a codification of the judicial doctrine. Section 107 consists of a preamble and four fair use factors. Congress gave the courts discretion to continue the common law tradition of fair use adjudication, observing that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." [47]

Courts begin their consideration of a fair use case with an analysis of the four statutory factors. In summary, these are: i) the purpose and character of the use; ii) the nature of the copyrighted work; iii) the amount copied in relation to the size and quality of the original work; and iv) the effect of the copying upon the potential market for the original work.[48]

The absence of a recommendation for new legislation highlights the complex, contentious nature of this issue. Preservation of an appropriate doctrine of fair use in the electronic environment is one of the most difficult issues faced by the IP Working Group and ultimately by the Congress.

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[45]*Id.* at 114.

[46]*Id.* at 73-84.

[47]H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976).

[48]For a summary and analysis of recent fair use cases, *see* Schrader, *Copyright and Fair Use after Acuff-Rose and Texaco,* CRS Report 95-888 S (August 3, 1995).

Proprietors of copyrighted works generally accept that the fair use doctrine will apply in the electronic environment, but are wary of any proposals to make the doctrine more explicit as it applies to electronic uses. The educational and library communities generally insist upon explicit recognition of fair use in the NII world, especially if the Copyright Act is amended to create a broadened distribution right that includes transmissions.

If new rights are created or existing rights broadened, librarians, educators, and other nonprofit users tend to argue for new limitations on those rights. For example, suggestions have been made to limit liability for long-distance teaching, for "browsing" in computer networks, for multimedia uses, and generally for adjustments in the exemptions for public performances, public displays, and the fair use doctrine.

CONFU participants are attempting to develop nonstatutory guidelines for the use of multimedia works, library preservation, "browsing" through works in electronic form, and "distance learning" (adaptation of instructional broadcasting to the NII context). No guidelines have been finalized to date. The IP Working Group expresses the hope that some guidelines may be finalized before the end of 1995.

Congress will probably be asked to decide whether it is appropriate and fair to proceed with the statutory recommendations of the IP Working Group without also developing statutory limitations on the new or broadened rights granted copyright owners, for example, by expressly adapting the fair use doctrine to digital and electronic uses.

CONCLUSION

Amidst all of the enthusiasm and high expectations about development of a national information superhighway of computer networks, there is a general understanding that copyright policy issues must be resolved to permit full realization of the potential of the NII.

As part of the effort to find copyright policy solutions, the Administration convened a Working Group on Intellectual Property, which issued its final report in September 1995. The legislative proposals of this Working Group have been introduced for consideration and public debate in S. 1284 and H.R. 2441.

The recommendations fall into six major areas: 1) expansion of the distribution right to include transmissions and related amendments to the definitions of "transmit" and "publication;" 2) expansion of the importation right to include transmissions; 3) exemptions for libraries and archives; 4) an exemption for reproductions for the visually impaired; 5) civil remedies for violations relating to circumvention of anti-copying systems; and 6) civil and criminal remedies for violations related to false copyright management information or removal or alteration of such information.

The Working Group also endorsed enactment of amendments to the criminal remedies for copyright infringement, which are contained in a separate pending bill, S. 1122.

Other than the proposed exemptions for libraries and the visually impaired, the IP Working Group recommended no new limitations on the broadened rights of public distribution and importation. The pending bills, therefore, do not adapt the first sale doctrine, the fair use doctrine, or other existing limitations to the NII context. In the judgment of the IP Working Group, these adaptations can be left to case-by-case judicial decision-making. The Working Group has, however, convened a series of meetings on fair use that it hopes will lead to nonstatutory guidelines or may pinpoint the need for legislative or regulatory action.

The IP Working Group characterizes its proposals with respect to the rights of public distribution and importation as "clarifications" of existing law. That conclusion will likely be challenged by some groups. Whether the "clarification" label is appropriate or not, it seems fair to consider these proposals as major amendments of the Copyright Act.

The proposals are intended to bridge the gap between the "Gutenberg print world" that gave birth to copyright, and the computer-driven digital information world of the present and the future. They are intended to adapt copyright law to the convergence of telecommunications and computer technology. The Congress will likely want to examine this momentous transition in the light of the constitutional purpose of copyright legislation: To promote the progress of science and the useful arts for the benefit of the people of the United States.