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The U.S. Digital Agenda at WIPO

PAMELA SAMUELSON*

I. INTRODUCTION

In December 1996, the World Intellectual Property Organization (WIPO) hosted a diplomatic conference in Geneva to consider three proposals to update world intellectual property law. The conferees considered draft treaties to revise treatment of copyright

* Professor of Information Management and of Law, University of California at Berkeley. Copyright 1997 by Pamela Samuelson. I am grateful to the following persons for an understanding of the proposals made and considered at the diplomatic conference in Geneva: Prue Adler, Jonathan Band, Peter Choy, Adam Eisgrau, Paul Geller, Seth Greenstein, Peter Harter, Peter Jaszi, Shira Perlmutter, Jerome Reichman, and Thomas Vinje. Thanks also go to Mitchell D. Kapor and the Kapot Family Foundation for the support they provided to the Digital Future Coalition, which, as a consequence, was able to be an active participant in the events discussed in this Article, both in the United States and in Geneva.


2. An invaluable resource for understanding the daily happenings at the diplomatic conference in Geneva were the day-by-day reports prepared by Seth Greenstein for the Home Recording Rights Coalition, which could be found at <http://www.hrrc.org/news.wipo.html> until they were taken down off this website a month or so after the conference ended. Copies of these reports [hereinafter Greenstein Daily Report] are on file with the author. For the WIPO website, containing texts of the draft treaties considered, of the treaties concluded, and of agreed-upon statements of interpretation for the treaties and other documents considered at the conference, see <http://www.wipo.org>.
issues, legal protection for sound recordings, and legal protection for the contents of databases. Each contained provisions intended to respond to challenges that global digital networks pose for intellectual property law. This Article will trace the fate of the U.S. digital agenda for these treaties. It will show that the treaties which were eventually concluded in Geneva, particularly the copyright treaty, are more compatible with traditional principles of U.S.

3. Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, WIPO Doc. CRNR/DC/4 (Aug. 30, 1996) [hereinafter WIPO Draft Copyright Treaty]. This proposal was the draft treaty initially considered at the diplomatic conference in Geneva. The final treaty was intended to be a "special agreement" (or protocol) to supplement the major international copyright treaty, known as the Berne Convention, under article 20 of that convention. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention].


6. Among the important goals that WIPO officials had set for this diplomatic conference was an implementation of a digital agenda in one or more treaties. See, e.g., Mihaly Ficsor, Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument, in The Future of Copyright in a Digital Environment 118-28 (P. Bernt Hugenholtz ed., 1996) [hereinafter The Future of Copyright] (discussing interrelated digital agenda issues of proposed Berne Protocol and New Instruments). All three of the draft treaties had digital agenda components. For example, all three contained provisions to outlaw technologies and services useful for defeating technological protection for digital copies of protected works. See WIPO Draft Copyright Treaty, supra note 3, art. 13; Draft New Instrument, supra note 4, art. 22; WIPO Draft Database Treaty, supra note 5, art. 10. The Draft Copyright and Draft New Instrument treaties also had very similar provisions on two other digital agenda issues. In particular, the provisions on temporary copies and on protection of rights management information were similar. See WIPO Draft Copyright Treaty, supra note 3, arts. 7(1), 14; Draft New Instrument, supra note 4, arts. 7, 23.

7. Although the United States made a number of other submissions to WIPO concerning its goals for the treaties that were to be negotiated, this Article focuses upon two documents as the submissions that contained the U.S. digital agenda at WIPO. See Letter from Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, to Arpad Bogsch, Director General, World Intellectual Property Organization (Nov. 29, 1995), and accompanying proposal [hereinafter First U.S. Submission to WIPO] (on file with author); Proposal of the United States of America on Sui Generis Protection of Databases, WIPO Doc. BCP/CE/VII/2—INR/VII/2 (May 20, 1996) [hereinafter Second U.S. Submission to WIPO].

copyright law than was the high-protectionist agenda that U.S. officials initially sought to promote in Geneva.9

The digital agenda was not the only, or even the most pressing, part of the U.S. agenda in Geneva. Of more immediate importance to U.S. copyright industries were provisions in the draft treaty (generally known as “the New Instrument”) that concerned the rights of performers and producers of sound recordings.10 Weaknesses in earlier international accords on rights in sound recordings had made it difficult for the U.S. recording industry to control large-scale unauthorized reproductions and distributions of their products in markets outside the United States.11 A treaty to strengthen and harmonize international rules about rights of producers of sound recordings was thus of great concern to this sector of the U.S. entertainment industry.12

Also of importance to the U.S. entertainment industry were draft treaty provisions that would have accorded certain rights to performers of audiovisual works.13 Although the U.S. and European delegations were allied on almost all other intellectual property issues at the diplomatic conference,14 they were bitterly divided on a proposal to universalize European norms about rights of performers of audiovisual works which the U.S. motion picture industry regarded as an anathema.15 After the Europeans finally

9. See infra notes 366-384 and accompanying text.
14. See infra notes 80, 104 and accompanying text.
15. See Draft New Instrument, supra note 4, at 20 (containing commentary on article 2 indicating that differences exist between U.S. and E.U. positions on inclusion of audiovisual works in New Instrument). The U.S. motion picture industry has opposed granting moral rights to creative contributors of motion pictures, including performers. See David A. Honicky, Film Labelling As a Cure for Colorization [And Other Alterations]: A Band-Aid for a Hatchet Job, 12 Cardozo Arts & Ent. L.J. 409, 428 (1994).
agreed to put off to another day the debate over international rights for audiovisual performers, the New Instrument could be finalized. The final treaty provides a much improved framework for protecting the rights of producers and performers of sound recordings.

As interesting and important as were the WIPO New Instrument negotiations, this Article does not focus on these negotiations as they mainly concern the present day struggles of a sector of the entertainment industry. Rather, the digital agenda negotiations warrant attention because they were a battle about the future of copyright in the global information society. To use that awful, shopworn metaphor just this once, the U.S. digital agenda at WIPO aimed to write the rules of the road for the emerging global information superhighway. Under these rules, copyright owners would have considerably stronger rights than ever before, and the rights of users of protected works would largely be confined to those for which they had specifically contracted and paid.

More specifically, Clinton administration officials sought approval in Geneva for international norms that would have (1) granted copyright owners an exclusive right to control virtually all temporary reproductions of protected works in the random access memory of computers; (2) treated digital transmissions of pro-

16. Greenstein Daily Report, supra note 2, at Dec. 10, 1996 (recounting the debate on audio versus audiovisual issues). To accommodate European concerns on audiovisual work performer rights, the President of the Conference proposed a resolution calling for further consideration of treaty proposals concerning the rights of performers of audiovisual works, which passed in the final minutes of the conference. See Draft Resolution, WIPO Doc. CRNR/DC/87 (Dec. 19, 1996); Greenstein Daily Report, supra note 2, at Dec. 20, 1996.


19. See, e.g., Ficsor, supra note 6, at 118-22; Bruce Lehman, Intellectual Property and the National and Global Information Infrastructures, in The Future of Copyright, supra note 6, at 103-09.


21. See WIPO Draft Copyright Treaty, supra note 3, art. 7; infra notes 75-90 and accompanying text.
ected works as distributions of copies to the public;\textsuperscript{22} (3) curtailed the power of states to adopt exceptions and limitations on the exclusive rights of copyright owners, including fair use and first sale privileges;\textsuperscript{23} (4) enabled copyright owners to challenge the manufacture and sale of technologies or services capable of circumventing technological protection for copyrighted works;\textsuperscript{24} (5) protected the integrity of rights management information attached to protected works in digital form;\textsuperscript{25} and (6) created a \textit{sui generis} form of legal protection for the contents of databases.\textsuperscript{26} U.S. negotiators worked with their European counterparts in pursuit of high-protectionist norms that these delegations believed would enable their industries to flourish in the growing global market for information products and services.\textsuperscript{27}

The digital agenda that Clinton administration officials pursued in Geneva was almost identical to the digital agenda they had put before the U.S. Congress during roughly the same time period.\textsuperscript{28} Notwithstanding the fact that this digital agenda had proven so controversial in the U.S. Congress that the bills to implement it were not even reported out of committee,\textsuperscript{29} Clinton administration officials persisted in promoting these proposals in Geneva and pressing for an early diplomatic conference to adopt them. For a time, it appeared that administration officials might be able to get in Geneva what they could not get from the U.S. Congress, for the

\textsuperscript{22} WIPO Draft Copyright Treaty, supra note 3, art. 10; see infra notes 175-177 and accompanying text.

\textsuperscript{23} WIPO Draft Copyright Treaty, supra note 3, art. 12; see infra notes 161-179 and accompanying text.

\textsuperscript{24} WIPO Draft Copyright Treaty, supra note 3, art. 13; see infra notes 229-277 and accompanying text.

\textsuperscript{25} WIPO Draft Copyright Treaty, supra note 3, art. 14; see infra notes 262-277 and accompanying text.

\textsuperscript{26} Second U.S. Submission to WIPO, supra note 7, at 4-5.


\textsuperscript{28} See infra notes 332-338 and accompanying text.

draft treaties published by WIPO in late August 1996 contained language that, if adopted without amendment at the diplomatic conference in December, would have substantially implemented the U.S. digital agenda, albeit with some European gloss.\textsuperscript{30} Had this effort succeeded in Geneva, Clinton administration officials would almost certainly have then argued to Congress that ratification of the treaties was necessary to confirm U.S. leadership in the world intellectual property community and to promote the interests of U.S. copyright industries in the world market for information products and services.\textsuperscript{31}

Realizing the potential for an end run around Congress, many of those who had argued before Congress that the Clinton administration's digital agenda was an unwise and unbalanced extension of rights to information publishers redirected their efforts toward lobbying the administration about the WIPO negotiations.\textsuperscript{32} They not only successfully lobbied the Clinton administration, persuading it to moderate or abandon parts of its digital agenda at WIPO,\textsuperscript{33} they also attended WIPO-sponsored regional meetings to acquaint other states with their concerns about the draft treaties, and went to Geneva in large numbers to participate informally in the diplomatic conference as observers and lobbyists.\textsuperscript{34} These expressions of concern found a receptive audience among many national delegations to the diplomatic conference.\textsuperscript{35} In the end, none of the original U.S.-sponsored digital agenda proposals emerged

\textsuperscript{30} See WIPO Draft Copyright Treaty, supra note 3, arts. 1-18; Database Treaty, supra note 5, arts. 1-13; see also infra notes 329-344 and accompanying text for a discussion of how the draft copyright treaty would have implemented the U.S. digital agenda.

\textsuperscript{31} See infra notes 338-339 and accompanying text.

\textsuperscript{32} See Letter From Digital Future Coalition to Vice President Albert Gore (July 12, 1996) (on file with author); Letter From Ad Hoc Copyright Coalition to Vice President Albert Gore (July 12, 1996) (on file with author); Letter of James Billington, Librarian of Congress, to Laura D'Andrea Tyson, Assistant to the President for Economic Policy (Nov. 7, 1996) (on file with author).

\textsuperscript{33} See infra notes 93-108 and accompanying text.

\textsuperscript{34} Peter Choy, for example, went to regional bloc meetings about the draft treaties and to Geneva as a nongovernmental observer (NGO) on behalf of Sun Microsystems, Inc. and the American Committee for Interoperable Systems. Adam Eisgrau, a lobbyist for the American Library Association and for the Digital Future Coalition, went to Geneva as an NGO to express the concerns of these organizations about the draft treaties. Peter Harter, public policy counsel for Netscape Communications Corp., went to Geneva as an NGO to discuss Netscape's concerns about the treaty. Vanderbilt Law Professor Jerome H. Reichman went to Geneva as an NGO on behalf of the International Council of Scientific Unions.

\textsuperscript{35} See infra notes 323-324 and accompanying text.
unscathed from the negotiation process, and at least one—the proposed database treaty—did not emerge at all. 36

Insofar as the copyright treaty emanating from the diplomatic conference contains provisions addressing digital agenda issues, these provisions reflect an approach that strongly resembles the balancing-of-interests approach that has been traditional in U.S. copyright law. 37 The WIPO Copyright Treaty even affirms "the need to maintain a balance between the interests of authors and the larger public interest, particularly education, research and access to information." 38 This expression of renewed faith in the abiding value of a balanced public policy approach to copyright in the digital environment suggests that predictions of the end of copyright 39—that is, its displacement by trade policy in the aftermath of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 40—may have been premature. Still, defeat of the high-protectionist digital agenda at WIPO was a close enough call that its story deserves to be told in some detail.

II. ORIGINS OF THE U.S. DIGITAL AGENDA AT WIPO

Shortly after the United States finally acceded to the major international copyright treaty, known as the Berne Convention, in 1989, 41 the governing body of the Berne Union called upon WIPO

36. See infra notes 326-328 and accompanying text. The diplomatic conference adopted a resolution calling for additional work to be done toward a possible treaty on database protection. See Recommendation Concerning Databases, WIPO Doc. CRNR/DC/100 (Dec. 20, 1996) [hereinafter Database Resolution]; Greenstein Daily Report, supra note 2, at Dec. 20, 1996.
37. See infra notes 371-374 and accompanying text.
38. WIPO Copyright Treaty, supra note 8, pmbl.
41. Berne Convention, supra note 3. The United States officially joined the Berne Convention on March 1, 1989. Two actions were needed to accomplish this accession: completion of U.S. Senate advice and consent on the treaty on October 20, 1988, and
to form a Committee of Experts concerning a possible supplementary agreement (or "protocol") to the Berne Convention "to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies." Given that the Berne Convention had last been revised in 1971, and that it had typically been amended or supplemented every ten to twenty years, the decision to form a Committee of Experts to consider a supplemental agreement to the Berne Convention was, in a sense, a relatively routine matter.

However, the decision in this case was also a product of a growing awareness within the international intellectual property policymaking community that advances in digital technologies raised some challenging questions for copyright law. Many of these had been surveyed in the European Commission's 1988 Green Paper on Copyright and the Challenge of Technology. If any one document can be credited with formulating the questions whose answers came to comprise the digital agenda at WIPO, it was this Green Paper.


42. See WIPO Draft Copyright Treaty, supra note 3, at para. 1 (quoting WIPO Document AB/XX/2, Annex A, item PRG.02(2)).

43. See Stewart, supra note 11, §§ 5.28 to 5.65.

44. Id. at 98.


The European Commission did not issue its Green Paper on Copyright and Related Rights for the Information Society until July 1995, and although its White Paper on this
Insofar as the United States had a digital agenda at WIPO in the early period of Berne protocol negotiations, it was to persuade the international community to use copyright law to protect computer programs. Under pressure from the United States, Japan had already acceded to this demand. In view of an earlier WIPO proposal for a *sui generis* form of legal protection for computer programs and the European Commission's expressed willingness to consider something other than copyright as a means by which to protect computer programs, there was, for a time, some reason to doubt that the United States would succeed in convincing the international community to make copyright protection for computer programs an accepted norm.

After the European Council of Ministers directed member states of the European Community to protect computer programs by


The European Union's main digital agenda in Geneva for the 1996 diplomatic conference was its database treaty proposal. See Proposal Submitted by the European Community and Its Member States for the Sixth Session of the Committee of Experts on a Possible Protocol to the Berne Convention, WIPO Doc. BCP/CE/VII13 (Feb. 1, 1996) [hereinafter First E.U. Submission to WIPO]. However, it also submitted draft treaty language for treating digital transmissions as communications of protected works to the public, as well as a proposal on the temporary reproduction issue and alternative treaty language to the anti-circumvention provision proposed by the United States. See Proposals of the European Community and Its Member States for the Seventh Session of the Committee of Experts on a Possible Protocol to the Berne Convention and for the Sixth Session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, WIPO Doc. BCP/EC/VII1-INRI/ECVI/1 (May 20, 1996) [hereinafter Second E.U. Submission to WIPO].


51. See Reichman, supra note 47, at 2480-88 (reporting on various *sui generis* proposals for legal protection of computer programs); see also Pamela Samuelson et al., A Manifesto Concerning the Legal Protection of Computer Programs, 94 Colum. L. Rev. 2303, 2311-13 nn.5-6 (1994) (citing sources proposing *sui generis* approaches to legal protection of computer programs).
means of copyright law, the prospects for eventual success of this U.S. digital agenda improved substantially. Even so, copyright protection for computer programs remained a high priority for the United States in the negotiations that followed formation of the Committee of Experts on a possible Berne protocol, as well as during the negotiations that eventually led to the successful conclusion of the TRIPS Agreement which the World Trade Organization (WTO) administers. Because the TRIPS Agreement now obliges states to protect computer programs and databases by means of copyright law, this part of the U.S. digital agenda at WIPO became less urgent. Nevertheless, it is worth mentioning that the copyright treaty recently concluded in Geneva contains provisions requiring the use of copyright law to protect original computer programs and databases in line with draft treaty language previously submitted by the United States.

52. Software Directive, supra note 46. There was substantial opposition to the copyright approach within the Commission at the time the software directive was under consideration. See, e.g., Thomas Vinje, The Legislative History of the E.C. Software Directive, in A Handbook of European Software Law (Michael Lehmann & Colin Tapper eds., 1993).

53. See, e.g., Comparative Table of Proposals and Comments Received by the International Bureau for the Sixth Session of the Committee of Experts on a Possible Protocol to the Berne Convention, WIPO Doc. BCP/CE/VI/12 (Jan. 10, 1996) [hereinafter Comparative Table of WIPO Proposals].


55. TRIPS Agreement, supra note 40, art. 10.

56. WIPO Copyright Treaty, supra note 8, art. 4 (“Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression”). Computer programs may once again become controversial in the international arena on scope of protection issues. See Smith, supra note 12, at 576-77. This, in turn, may give rise to a perceived need for supplementary protection for programs. See also Samuelson et al., supra note 51, at 2429-31 (explaining why copyright is less than an optimal form of legal protection for computer programs and why a sui generis form of legal protection for program innovations would be desirable).

57. WIPO Copyright Treaty, supra note 8, art. 5. In its entirety article 5 reads as follows: Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

58. See Comparative Table of WIPO Proposals, supra note 53, at 5, 7.
The more recent U.S. digital agenda grew out of work done under the auspices of the Clinton administration’s Information Infrastructure Task Force (IITF). The principal goal of the IITF was to make policy recommendations that would promote optimal development of the emerging information infrastructure, which held considerable promise as an enabler of commerce, education, and a host of other communication functions. Formation of the IITF was hailed at the time as a forward-looking step that would prepare the United States for the twenty-first century. The IITF established a number of working groups to focus on specific policy areas. Bruce Lehman, a former copyright industry lobbyist who had become the Commissioner of Patents and Trademarks, was named chair of the Working Group on Intellectual Property Rights. That group produced a “Green Paper” in July 1994 and a “White Paper” in September 1995, which analyzed existing copyright law as applied to works in digital form. It also recommended some changes to the law, which it found to be necessary to

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induce copyright owners to make their commercially valuable works available in digital networked environments.67

Although the main focus of these reports was domestic law, the White Paper also saw in the ongoing WIPO negotiations about a possible Berne Protocol an opportunity to gain international acceptance for the copyright rules that the White Paper was urging for the United States.68 The global nature of the emerging information infrastructure contributed to the importance of seizing this opportunity to gain international consensus on digital copyright issues.69 Facilitating the internationalization of the White Paper’s digital agenda was the fact that Commissioner Lehman was head of the Clinton administration’s delegation to the WIPO negotiations on a possible Berne Protocol and New Instrument.

III. COMPONENTS OF THE U.S. DIGITAL AGENDA AND HOW THEY FARED AT WIPO

The U.S. White Paper’s digital agenda aimed to:

(1) give copyright owners control over every use of copyrighted works in digital form by interpreting existing law as being violated whenever users make even temporary reproductions of works in the random access memories of their computers;

(2) give copyright owners control over every transmission of works in digital form by amending the copyright statute so that digital transmissions will be regarded as distributions of copies to the public;

(3) eliminate fair-use rights whenever a use might be licensed . . . ;

(4) deprive the public of the ‘first sale’ rights it has long enjoyed in the print world . . . because the White Paper treats electronic forwarding as a violation of both the reproduction and distribution rights of copyright law;

(5) attach copyright management information to digital copies of a work, ensuring that publishers can track every use made of digital copies and trace where each copy resides on the network and what is being done with it at any time;

67. Id. at 211-36, app. 1-2.
68. Id. at 130-55.
69. Id. at 148-50.
(6) protect every work technologically (by encryption, for example) and make illegal any attempt to circumvent that protection; [and]
(7) force online service providers to become copyright police . . . .}

The only new element in the U.S. digital agenda at WIPO, as compared with the digital agenda reflected in the White Paper, was a late-added proposal by the U.S. delegation calling for a treaty to create a new form of legal protection for the contents of databases. U.S. officials submitted this in reaction to a European proposal that they apparently thought needed improvement.2

In analyzing the U.S. digital agenda at WIPO, this Article will discuss in separate subsections how U.S. officials sought to accomplish this agenda internationally by proposing or supporting draft treaty provisions concerning temporary reproductions in computer memory, digital transmissions, curtailment of user rights, regulation of technologies capable of circumventing technological protection, rights management information, and protection of database contents. By tracing the evolution of the U.S. proposals, the draft treaty prepared by Jukka Liedes (who chaired the WIPO Committee of Experts), alternative treaty language proposed at the diplomatic conference, and the provisions contained in the final treaty, we will see that the White Paper's high-protectionist digital agenda met with limited favor at the diplomatic conference, even though it had been substantially embodied in the draft treaties considered at that conference.

70. Samuelson, The Copyright Grab, supra note 20, at 136.
71. See Second U.S. Submission to WIPO, supra note 7.
72. See First E.U. Submission to WIPO, supra note 46; see also Reichman & Samuelson, supra note 27, at 76-110 (discussing differences between U.S. and E.U. models for sui generis protection of contents of databases).
73. Because online service provider liability issues arose in Geneva in the context of discussion of draft treaty proposals on temporary copying and digital transmissions, this Article will consider online service provider issues in the context of discussion of these treaty provisions. See infra notes 90-103 and accompanying text.
74. An earlier article dealt with the elimination of first sale rights and of fair use rights as separate components of the White Paper's digital agenda. Samuelson, The Copyright Grab, supra note 20, at 136-38, 188. This Article consolidates user rights issues in one subsection because the draft treaty had a single provision on national authority to grant exceptions to and limitations on rights. See WIPO Draft Copyright Treaty, supra note 3, art. 12. In addition, the context for consideration of these issues in Geneva differed from that in the U.S. White Paper, which dealt with first sale and fair use rights in separate subsections. See White Paper, supra note 29, at 73-84, 90-95; infra notes 161-174 and accompanying text for a discussion of the digital agenda at WIPO as to user rights.
A. Temporary Copies as Reproductions

Echoing the White Paper's views on U.S. copyright law, a key component of the U.S. digital agenda at WIPO was the establish-

75. See White Paper, supra note 29, at 64-66. There has been a considerable controversy in the United States about the U.S. Green Paper's, and later the White Paper's, assertions that reproductions in the random access memory (RAM) of computers were already "reproductions" that copyright owners were entitled to control by means of the reproduction right under existing U.S. copyright law. The plausibility of this claim rested on an appellate court decision that had ruled that the loading of a computer program in the random access memory of a computer by an unlicensed party infringed the program copyright. See, e.g., MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993). The White Paper gave numerous examples of computer uses of copyrighted works that, in its view, required, if not authorization of the copyright owner, at least authorization of law. See White Paper, supra note 29, at 65-66. The White Paper did not recommend legislative clarification of the RAM copying issue, even though there was, in truth, more ambiguity about this issue than about the digital-transmission-as-distribution issue concerning which the White Paper recommended legislative clarification. See Samuelson, NII Intellectual Property Report, supra note 65, at 22-23.

Opponents of the White Paper's position on the RAM-copying issue in the United States have taken issue not only with the Paper's interpretation of existing law, but also with its view about what the law should be. See, e.g., Litman, supra note 65, at 43. But see Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 287-88 (1996). Concerning present law, opponents argue: (1) that the U.S. copyright statute requires a fixation in "a tangible medium," see 17 U.S.C. § 102 (1994), before something is defined as a copy and thus within the reach of the reproduction right, see id. § 101; (2) that the congressional report constituting its legislative history gives temporary storage in computer memory as an example of what should not be considered a copy under the statute, see H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976); (3) that decisions that had ruled otherwise were wrong as a matter of law, as was demonstrated by other caselaw not mentioned in the White Paper that had regarded temporary copying as not within the reach of the reproduction right, see, e.g., Agee v. Paramount Communications, Inc., 59 F.3d 317 (2d Cir. 1995) (holding that temporary copy made in broadcast was not a reproduction); NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231 (7th Cir. 1995) (plaintiff's motion for attorneys fees and costs granted, 916 F. Supp. 751) (accepting that temporary copy could infringe, but holding that no reproduction occurred in this case); and (4) given the long U.S. tradition of regarding copyright as a limited monopoly and the absence of evidence that Congress had contemplated such a drastic step as conferring on copyright owners an exclusive right to control all uses of copyrighted works in digital form, it would be inappropriate to infer that Congress had already decided this issue. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 417-40 (1984).

Concerning what the law ought to be, the principal argument against treating RAM copying as a reproduction of the work has been that it seriously overstretches the reproduction right. Some point to the results that would attend such a characterization of the reproduction right. See P. Bernt Hugenholtz, Adapting Copyright to the Information Superhighway, in The Future of Copyright, supra note 6, at 86-88. Some assert this would confer an undue monopoly on copyright owners. And some perceive this characterization as threatening the very existence of the Internet; others deride the technological ignorance that such a position bespeaks. (For example, when I recently described the temporary-copy-as-reproduction provisions of the WIPO Draft Copyright Treaty at the Second Annual USENIX Conference on Electronic Commerce, one questioner asked: "Are the people who are proposing this venal, or stupid?") Still others suggested that such a rule would defy "common sense." Taken literally, it would make illegal the act of holding the
ment of an international right in copyright owners to control temporary copies of their works in computer memory.\textsuperscript{76} If successful, adoption of this norm would not only lay the groundwork for giving copyright owners the right to control every access, viewing, and use of protected works in digital form;\textsuperscript{77} it would also help accomplish another goal set forth in the White Paper: to make intermediate institutions, such as online service providers, strictly liable for user infringements.\textsuperscript{78} This would, conveniently for copyright industries, have placed the bulk of the responsibility for enforcing copyright interests on these intermediate institutions.\textsuperscript{79}

Although representatives of the European Union (E.U.) strongly supported this aspect of the U.S. digital agenda,\textsuperscript{80} neither U.S. nor E.U. delegations initially submitted draft treaty language to implement this agenda item. E.U. representatives proposed only that a statement should accompany the final treaty, saying that a treaty provision on temporary copying was unnecessary because article 9(1) of the Berne Convention already recognized

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\footnotesize{text of a book up to a mirror. See Samuelson, NII Intellectual Property Report, supra note 65, at 22. A few suggest that even if it might be necessary or desirable to permit copyright owners to have control over some reproductions of their works in RAM, it would be better for those instances to be identified through the common law process than by a flat legislative fiat. See, e.g., David Nimmer, Brains and Other Paraphernalia of the Digital Age, 10 Harv. J.L. & Tech. 1 (1996).

76. See Greenstein Daily Report, supra note 2, at Dec. 9, 1996 (reporting U.S. support for temporary copying provision in WIPO Copyright Treaty).


79. To guard against liability for user infringements, online service providers would likely feel compelled to closely monitor user accounts. See Niva Elkin-Koren, Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 Cardozo Arts & Ent. L.J. 346, 404-07 (1993); Samuelson, The Copyright Grab, supra note 20, at 190 (explaining why online service providers would become copyright police under a strict liability regime).

80. See Second E.U. Submission to WIPO, supra note 46, at 3; Greenstein Daily Report, supra note 2, at Dec. 9, 1996 (reporting European Commission officials' support for temporary copying provision in treaty). This support was unsurprising, given that other recent E.U. directives have regarded temporary copying as controllable by rights holders. See Software Directive, supra note 46, art. 5; Database Directive, supra note 46, art. 5.

81. See Second E.U. Submission to WIPO, supra note 46, at 3. This submission recommended inclusion of the following in an official report on the treaty: "Contracting parties confirm that the permanent or temporary storage of a protected work in any electronic medium constitutes a reproduction within the meaning of the Berne Convention. This includes acts such as uploading and downloading of a work to or from the memory of a computer." Id. For discussion of the agreed-upon statement of interpretation of the WIPO Copyright Treaty on the reproduction right, see infra notes 121-130 and accompanying text.
the rights of authors to control reproductions of their works "in any manner or form."^82

However, Chairman Liedes decided to include a provision on temporary copying in the draft treaty he prepared for consideration at the diplomatic conference. Article 7(1) of the draft copyright treaty provided:

The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.^83

Commentary on this provision explained that such a treaty provision was desirable because diverse opinions existed in the international community about whether ephemeral copies were reproductions of copyrighted works within the meaning of article 9(1) of the Berne Convention.^84 Because "[s]ome relevant uses may, now or in the future, become totally based on a temporary reproduction,"^85 the commentary went on to say that the right to control temporary copies was of such importance that a rule on it "should be in fair and reasonable harmony all over the world."^86

Instead of leaving to member states the task of articulating circumstances in which temporary copies could reasonably be privileged in national laws,^87 the draft treaty proposed a special limitation provision as article 7(2):

Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such

^82. See Berne Convention, supra note 3, art. 9(1) ("Authors ... shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.").

^83. WIPO Draft Copyright Treaty, supra note 3, art. 7(1). This article differed from article 9(1) of the Berne Convention in two respects: the references to "direct and indirect" copying, and the clause "whether permanent or temporary." There was little discussion about the "direct" and "indirect" copying issue at the diplomatic conference, although there was much discussion about the temporary copying issue. See, e.g., Greenstein Daily Report, supra note 2, at Dec. 9, 1996.

^84. WIPO Draft Copyright Treaty, supra note 3, Note 7.14.

^85. Id. Note 7.13.

^86. Id. Note 7.15.

^87. This has been the general approach under Berne. See Berne Convention, supra note 3, art. 9(2); WIPO Draft Copyright Treaty, supra note 3, art. 12.
reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.\textsuperscript{88}

It is reasonable to infer that this provision was added to the draft treaty in anticipation of concerns that without it, the reproduction right would be overbroad.\textsuperscript{89}

Draft article 7(2) would certainly have enabled states to exempt from infringement the making of temporary copies necessary to enable a computer to "read" data on a lawfully purchased CD-ROM or to view content on an unrestricted website.\textsuperscript{90} However, it was sufficiently narrowly drawn that it would not, for example, have relieved telephone companies or online service providers from potential liability for temporary copies of infringing material made in company equipment as the material passed through their systems en route from sender to recipient.\textsuperscript{91} Such copies would, of course, meet the transient or incidental standard of draft article 7(2), but they would not have "take[n] place in the course of use of the work that [wa]s authorized by the author or permitted by law."\textsuperscript{92}

A number of telephone and high technology companies were among those who objected to the breadth of draft article 7(1)\textsuperscript{93} and the narrowness of draft article 7(2).\textsuperscript{94} Some of them formed the Ad Hoc Alliance for a Digital Future to lobby against it.\textsuperscript{95} This

\textsuperscript{88.} WIPO Draft Copyright Treaty, supra note 3, art. 7(2).


\textsuperscript{90.} This would generalize a principle now found in U.S. copyright law that allows owners of copies of computer programs to load their copies onto their computers. See 17 U.S.C. § 117(1). Presumably, article 7(2) of the Draft Copyright Treaty would allow countries to make it legal for users to look at material that had been posted on the Internet without password or other restrictions.

\textsuperscript{91.} See, e.g., Comments of Netscape Communications Corp. on the Chairman's Text of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions to Be Held in Geneva from Dec. 2 to 20, 1996, at 2-3 [hereinafter Netscape Comments] (explaining necessity of making temporary copies in course of transmission of a work from one computer node on a network to another).

\textsuperscript{92.} WIPO Draft Copyright Treaty, supra note 3, art. 7(2).

\textsuperscript{93.} Draft article 7(1) was troublesome not just because of its reference to "temporary" copies, but because of its reference to "indirect" reproductions which seemed to prefigure intermediate institution liability. Id. art. 7(1).

\textsuperscript{94.} See, e.g., Netscape Comments, supra note 91, at 3.

\textsuperscript{95.} See, e.g., Ad Hoc Alliance for a Digital Future, Suggested Revisions to the Chairman's Basic Proposal for the Treaty Formerly Known as the Berne Protocol 1-2, (Oct. 31, 1996) <http://www.ari.net/dic/intl/euah1.html> [hereinafter Ad Hoc Alliance Report] (expressing concerns about this implication of article 7). This Alliance was formed by
Alliance proposed alternative treaty language that would have mandated exemption of temporary copies where such reproductions (i) have the purpose of making perceptible an otherwise perceptible work; (ii) are of a transient or incidental nature; or (iii) facilitate transmission of a work and have no economic value independent from facilitating transmission; these being special cases where such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.\(^9\)

The Alliance pointed out that "requiring the exempt reproduction to take place in the course of use of the work that is authorised by the author or permitted by law ignores the reality of the digital world."\(^9\) It also seemed to place responsibility for ensuring compliance with copyright law on intermediate institutions, such as telephone companies. The Alliance explained that "[j]ust like the postal service cannot (and indeed should not) monitor the contents of all the envelopes it handles, it is simply not possible for an infrastructure provider to monitor whether the millions of electronic messages it transmits daily have been authorized."\(^9\)

Telephone and other high technology companies worried that article 7 might be construed as curtailing the power of national legislatures to grant additional exemptions regarding temporary copies beyond those authorized in article 7(2).\(^9\) Telephone companies strongly believed they should not be precluded from lobbying for an exemption for temporary copies made in telephone equipment during the transmission process, especially given that their common carriage responsibilities require them to transmit what customers use the system to send. Online service providers worried that they too would be disabled from seeking exemptions for similar kinds of store-and-forward copying done on behalf of their customers. These companies thus recommended that article 7 be revised to grant explicit permission for states to adopt additional

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96. Id. at 1.
97. Id. at 2.
98. Id.
99. Id. Concern about this issue surfaced in the diplomatic conference discussion of article 7. See Greenstein Daily Report, supra note 2, at Dec. 9, 1996.
exemptions for temporary copying so long as these exemptions would not conflict with a normal exploitation of protected works.100

These industry concerns about article 7(2) might have seemed unwarranted, and possibly even paranoid, but for two things: first, by setting forth only two extremely limited situations in which privileges for temporary copying were permissible, draft article 7(2) implicitly questioned the viability of any additional exceptions for temporary copies; and second, the White Paper had already taken the position that intermediate institutions, such as online service providers, were and should be strictly liable for user infringements, both directly (on account of the copies made or distributed in their systems) and indirectly (as vicarious infringers because they benefited financially from infringing activities).101 It was reasonable to expect that the U.S. delegation would want intermediate institutions outside the United States to be treated in the same manner as the White Paper had sought to treat them in the United States.102 A number of U.S. telephone and online service executives were so concerned about draft article 7 that they wrote a letter to President Clinton shortly before the diplomatic conference stating that they would oppose ratification of any copyright treaty containing a provision such as article 7.103

The high-protectionist position reflected in draft article 7 initially seemed to be on its way to acceptance at the diplomatic conference. Not only had the Chairman of the Committee of Experts endorsed it by including it in the draft treaty, but it also had the support of WIPO officials, the U.S. and E.U. delegations, and some

100. Ad Hoc Alliance Report, supra note 95, at 1-2.
102. Senator Orrin Hatch realized this danger when he wrote to Commissioner Bruce Lehman expressing support for the efforts to negotiate a protocol to the Berne Convention, but also concern about the prospect that the U.S. delegation to the WIPO diplomatic conference would negotiate a treaty in Geneva that would constrain Congress from deciding how to resolve open issues, such as online service provider liability. Letter from Senator Orrin Hatch to Bruce Lehman, Assistant Secretary of Commerce (Sept. 3, 1996) [hereinafter Hatch Letter] (on file with author). During the preconference review of U.S. positions in Geneva, the Clinton administration reportedly instructed Lehman to support modifications of article 7 that would leave room for congressional resolution of this issue.
allies of the United States and the European Union. However, considerable opposition to article 7 emerged at the diplomatic conference.

Some countries, such as Australia, questioned the need for a provision covering temporary copying in the copyright treaty. As the Ad Hoc Alliance for a Digital Future had pointed out, the notion that article 9(1) already covered temporary copies in computer memory was doubtful given that "[c]omputers did not exist in any great numbers in 1971 when the reproduction right was expressly included in the Berne Convention, and computer networks had hardly been imagined." Others objected to the seeming preclusionary character of article 7(2). Still others, including Singapore, South Africa, and Denmark, favored redrafts of article 7(2) akin to those proposed by the Ad Hoc Alliance for a Digital Future to weed out economically insignificant temporary copies and preserve fair uses.

Toward the end of the second week of the diplomatic conference, Chairman Liedes responded to this ferment by redrafting article 7(2) so that its provisions would be "without prejudice to the scope of applicability of Article 9(2) of the Berne Convention." Though he denied that his draft had been meant to preclude other exceptions, the revised provision made explicit that countries could adopt additional limitations or exceptions on temporary copying so long as the limitations or exceptions did not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of authors.111

106. Ad Hoc Alliance Report, supra note 95, at 1; see also Greenstein Daily Report, supra note 2, at Dec. 9, 1996 (discussing early intentions of article 7(2)).
108. See id.; Ad Hoc Alliance Report, supra note 95, at 1-2; Amendment to Articles 7, 10, 13 and 14 of Draft Treaty No. 1, WIPO Document CRNR/DC/56 (Dec. 12, 1996) [hereinafter African Bloc Proposals].
109. See Partly Consolidated Text of Treaty No. 1, Prepared by the Chairman of Main Committee I, art. 7, WIPO Doc. CRNR/DC/55 (Dec. 12, 1996) [hereinafter Chairman’s Redraft of Copyright Treaty]. Another possibility discussed at the diplomatic conference was dropping article 7(2) altogether and relying on article 9(2) as setting forth the permissible scope of exceptions to the reproduction right. See Greenstein Daily Report, supra note 2, at Dec. 9, 1996.
111. This would have conformed the provision to article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.
From the standpoint of telephone companies and online service providers, this revised draft was obviously better than the initial draft. However, these parties still had objections because the revised article 7(2) did not explicitly contemplate an exclusion for temporary copies made while transmitting digital copies. Revised article 7(2) also meant that these companies would have to fight for special exemptions in every national legislature. They much preferred other redrafts of article 7(2), such as those put forward by the African Bloc and the Norwegian delegation.\footnote{112} Different people have different theories about what turned the tide on the temporary copying issue at the diplomatic conference. Some say it was due to prominent copyright scholars making their reservations about article 7's overbreadth known at the diplomatic conference.\footnote{113} Others thought that the explanation lay in no one proposal attracting enough support to become a consensus position. Still others suggest that it may have been the result of a faux pas committed by Chairman Liedes when he published African Bloc and some other national proposals as separate documents,\footnote{114} rather than including them as alternative treaty language proposals in his redraft of the treaty.

In the day or so following release of the Chairman's redraft, many delegations expressed their disappointment that so few of the treaty proposals discussed during the first two weeks of the diplomatic conference were incorporated into this redraft.\footnote{115} Selective inclusion of some national proposals as alternatives in the Chairman's redraft\footnote{116} gave rise to complaints that the Committee of Experts was marginalizing other states' proposals. African Bloc anger over this slight was especially strong because it drew on years of frustration over inattention to the principal African agenda for

\footnotesize{112. E.g., African Bloc Proposals, supra note 108, at 1-2.}

\footnotesize{113. A well-respected Swedish copyright scholar, Henry Olsson, expressed a number of doubts about article 7(2). See Greenstein Daily Report, supra note 2, at Dec. 9, 1996. This was important partly because this expression of concern meant that the E.U. delegates could no longer put forward a united stand on article 7. Also expressing concerns about the breadth of article 7 was the well-known U.S. copyright scholar, David Nimmer, co-author of a standard U.S. copyright treatise, who went to Geneva as a non-governmental observer on behalf of Bell Atlantic. In addition, see Nimmer, supra note 75, at 36-37 (noting that it is premature to conclude that copyright owners should be able to control all temporary copies).}

\footnotesize{114. See, e.g., African Bloc Proposals, supra note 108.}

\footnotesize{115. Greenstein Daily Report, supra note 2, at Dec. 12, 1996.}

\footnotesize{116. See, e.g., Chairman's Redraft of Copyright Treaty, supra note 109, art. 16 (showing text for a newly added alternative).}
supplementing the Berne Convention, namely, gaining international acceptance of their proposal to protect folklore.\(^\text{117}\)

Following the eruption of dissatisfaction with the Chairman’s redraft, negotiations over the copyright treaty went into closed sessions.\(^\text{118}\) Chairman Liedes must have hoped these sessions would result in a consensus provision on temporary copying. However, no such consensus was achieved. On the final day of the diplomatic conference, a motion was made and carried to delete article 7 from the copyright treaty.\(^\text{119}\) The WIPO Copyright Treaty, as a consequence, contains no provision on temporary copying.

There are, however, some who will argue that the WIPO Copyright Treaty should be understood as regarding temporary copies as copyright-significant acts owing to a last-minute resolution that the U.S. delegation insisted be voted on in the final hour of the diplomatic conference. Like Cinderella at the fancy ball, the diplomatic conference had to end before 12:00 a.m. on December 21, 1996. Sometime after 10:30 p.m., many hours after the text of the copyright treaty had been finalized, after the unanimously acceptable agreed-upon statements of interpretation had been voted on, at a time when nearly half of the delegates had already gone home and those who remained were near exhaustion from more than twelve hours of work that day, the U.S. delegation called for a vote on a proposed three sentence statement about digital reproductions. The U.S. agreement to the deletion of article 7 from the copyright treaty, it asserted, had been contingent on the conference’s acceptance of a statement on the reproduction right.\(^\text{120}\)

The first sentence of the U.S. proposal affirmed that article 9 of the Berne Convention and exceptions thereto applied in the digital environment.\(^\text{121}\) More controversial and hotly debated was a sec-

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117. Another factor that may have affected the mood of the African delegations regarding the favor that the Chairman was showing to U.S. proposals was displeasure over the U.S. opposition to a second term for U.N. Secretary-General Boutros Boutros Ghali, which occurred around the time of the WIPO diplomatic conference.


119. Id. at Dec. 20, 1996.

120. Id.

121. As adopted, it reads: “The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form.” See Agreed Statements, supra note 8, Concerning Article 1(4). Some may argue that this statement of itself endorses the view that copyright owners have rights to control temporary copies of their works for two reasons: first, because article 9 says that authors have the right to control reproductions “in any manner or form,” and second, because the agreed-upon statement itself makes reference to “use” of works in digital form, which arguably includes temporary
ond sentence of the U.S. proposal which read: "It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." In an attempt to quell questions about and budding opposition to this part of the U.S. proposal, Mihaly Ficsor, a senior WIPO official, asserted that it reflected a longstanding, well-accepted principle that could not be questioned. Yet many did question it, partly because they were unsure what the term "storage" might mean. Some did so by abstaining from the vote on this statement, and others by voting against it. Still, a majority of those in attendance at that late hour did vote in favor of this second sentence. A third sentence saying that up- and downloading of works by computer was a reproduction within the meaning of the Berne Convention was, however, voted down.

Even at the same time, some delegates asserted that the U.S. resolution could not be an agreed-upon statement of interpretation of the WIPO Copyright Treaty because it did not satisfy the standards for binding treaty interpretation statements set forth in the Vienna Convention on the Law of Treaties. WIPO may have wrangled internally about this question for, although the Copyright Treaty

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122. Id. An earlier draft of this statement had said that "any storage" of a work was a reproduction, but this was amended to "the storage." Greenstein Daily Report, supra note 2, at Dec. 20, 1996.
124. Greenstein reports Mihaly Ficsor as saying that the term "storage" was open to interpretation. If merely transient or incidental, they might not be the type of storage on which one could say there was a reproduction; but under some interpretations it could be. So, it would be possible to reach consensus on the second sentence understanding that there could be different interpretations at the national level.

Id. It is not clear whether such activities as caching of commonly visited websites by online service providers in order to speed network access for users would be a "storage" of protected material within the meaning of this resolution.
125. Greenstein reports that 48 delegates voted in favor of this second sentence, and 13 against, and that 28 abstained; another 63 delegates were absent. Id.
126. According to Greenstein, the result in the only vote on a combination of the second and third sentences of the U.S. proposal was 25 in favor, 44 opposed, and 21 abstentions. Id.
went up on the WIPO website within days of the diplomatic conference’s conclusion, it was almost a month before the agreed-upon statements of interpretation to the Treaty were to be found there. When finally they were, the first two sentences of the U.S.-sponsored resolution were included as an agreed-upon statement of interpretation to article 1(4) of the treaty.\textsuperscript{128}

Exactly what weight and scope should be given to this statement will likely be a source of contentious debate and discussion in coming years. Commissioner Lehman and others who supported article 7 will likely regard these two statements and article 9(1) of the Berne Convention as sufficient to establish that temporary copies are reproductions that copyright owners have the right to control.\textsuperscript{129} Others will see in the defeat of article 7 and the “up- and downloading” part of the U.S. resolution an international repudiation of the position that temporary copying is a reproduction. The most honest thing that can be said about the temporary copying of works in computer memory is that there is no international consensus on this subject. Still, it is significant that the copyright treaty signed in Geneva does not include a provision on temporary copying given how intent the U.S. and E.U. delegations had been about getting such a treaty provision.\textsuperscript{130}

B. Digital Transmissions

A second component of the U.S. digital agenda at WIPO was the attainment of international recognition of a right in copyright owners to control digital transmissions of their works. In line with the approach taken in the U.S. White Paper,\textsuperscript{131} the U.S. delegation to

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\item supported by a bare majority as being agreed-upon statements. Such a rule had been adopted at the WIPO diplomatic conference.
\item \textsuperscript{128} Agreed Statements, supra note 8, Concerning Article 1(4).
\item \textsuperscript{129} See supra notes 81-107 and accompanying text regarding the import of article 9(1) and the Agreed Statements for temporary copies.
\item \textsuperscript{130} Nor does the WIPO Copyright Treaty take a stance on the status of temporary copying under article 9(1) of the Berne Convention.
\item \textsuperscript{131} The White Paper said that U.S. copyright law was somewhat uncertain about whether digital transmissions were distributions of copies to the public. White Paper, supra note 29, at 213. It relied on Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding a system operator liable for user uploading and downloading of digital images of photographs from Playboy magazine); and Sega Enters., Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994) (holding a system operator liable for user uploading and downloading of Sega videogames) as precedents supporting the treatment of digital transmissions as distributions of copies to the public. White Paper, supra note 29, at 67-69. The White Paper recommended amendments to the U.S. copyright law that would make it clear that digital transmissions were distributions of copies. Id. at 213. Section 106(3)
the WIPO negotiations submitted draft treaty language calling for
digital transmissions to be treated as distributions of copies to the
public.\textsuperscript{132} Although the E.U. delegation agreed about the need for
an international accord on the right of authors to control digital
transmissions of their works, it proposed to accomplish this goal in
a different manner. The E.U. draft treaty language called for digi-
tal transmissions to be regulated as communications of protected
works to the public.\textsuperscript{133}

At first glance, it might seem that differences in these two char-
acterizations of digital transmissions were of little import. How-
ever, there was at least some symbolic significance in this U.S.-E.U.
divide.\textsuperscript{134} Within the international copyright policymaking commu-
nity, there is a struggle underway over whose conceptions about
copyright should have ascendance in the international arena. The
United States and the European Union are the leading contenders
for this hegemony.\textsuperscript{135} It is worth noting that U.S. copyright law
grants authors an exclusive right to distribute copies to the public,
but not an exclusive right to communicate works to the public.\textsuperscript{136}

already grants authors an 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." 17 U.S.C. § 106(3). The U.S. White Paper recommended adding "or by
transmission" to the end of this list of transfers. White Paper, supra note 29, at App. 2.
Related amendments sought by the U.S. White Paper concerned the definition of the term
"publication" (adding transmissions to the list of acts that would constitute same) and to
the term "transmit" (reflecting that transmissions of reproductions would be covered by
the statute). Id.

132. See First U.S. Submission to WIPO, supra note 7, attach. at 2-3.
133. See Second E.U. Submission to WIPO, supra note 46, at 3.
134. See infra notes 144-151 and accompanying text concerning reasons to think it may
have had substantive significance as well.
135. The Berne Convention resulted from efforts of European rights holders to gain
international acceptance of the legitimacy of their claimed rights to control
commercializations of European intellectual products outside national boundaries. See
Rickston, supra note 1, at 39-40. Even after the United States ceased being a copyright
renegade in the international arena, it resisted joining the Berne Convention, in large part
because of national traditions that did not comply with Berne minimum standards. See,
e.g., Ginsburg & Kernochan, supra note 41, at 1-4. The European ascendency in Berne
Convention proceedings is longstanding. The United States, by contrast, is a latecomer to
Berne. See supra note 41. Its insistence on exercising leadership in the current round of
WIPO meetings is disruptive of this tradition, and is not entirely welcome, particularly
when the U.S. delegation leads delegates from other states to understand that U.S. favor
on other issues may depend on agreement to the norms it is promoting in Geneva.
136. See 17 U.S.C. § 106. The United States has tended to treat broadcasts of protected
works, for example, under the rubric of the exclusive right to control public performances
of protected works, see, e.g., Agee v. Paramount Communications, Inc., 59 F.3d 317 (2d
Cir. 1995), rather than as communications of the works to the public, as has been common
elsewhere. See, e.g., Hugenholtz, in The Future of Copyright, supra note 6, at 89.
In contrast, the laws of most other states, including many member states of the European Union, contain no exclusive distribution right as such, but do grant authors rights to control communications of protected works to the public. Also noteworthy is the fact that the United States has been a member of the Berne Union for less than a decade, whereas the Europeans have been the dominant players in Berne Convention treaty negotiations since its inception. As welcome as the belated U.S. conversion to high-protectionist norms might be, many Europeans remember the errant nature of earlier U.S. ways. For such a latecomer to Berne, the United States was behaving in the WIPO Copyright Treaty negotiations in a very aggressive manner, especially in regard to its digital agenda.

Chairman Liedes took a Solomonic approach to resolving these differences in national approaches in the draft copyright treaty. The draft treaty contained a provision to require all states to confer on copyright owners an exclusive right to control distributions of copies of protected works to the public, as well as to confer on them an exclusive right to control communications of protected works to the public. Although granting the wish of the U.S. delegation for international recognition of a distribution right as such, the draft treaty favored the E.U. proposal and treated digital transmissions as communications to the public.

The Chairman's commentary to the draft treaty did not explain why it opted for the communication right approach to digital transmissions, so it is difficult to judge whether the Chairman believed there was any substantive difference between the communication

137. See, e.g., Follow-Up to 1995 European Green Paper, supra note 46, at 17 (explaining that European states accept principle of a distribution right but have varying provisions on it).
138. Id. at 12-14 (discussing public communication rights).
139. For the first hundred years of its history, the United States did not extend copyright protection to the works of foreign nationals. Charles Dickens, for example, made no royalties on the ample sales of copies of his books in the United States. The longstanding U.S. insistence on copyright formalities, such as the inclusion of copyright notices on all published copies of protected works, were abhorrent to the Continental European conception of authors' rights, norms which the Berne Convention attempts to universalize. See Ginsburg & Kernochan, supra note 41.
140. See WIPO Draft Copyright Treaty, supra note 3, art. 8.
141. Id. art. 10. The draft treaty aimed also to standardize and expand the categories of works subject to the right to control communications of works to the public. Id. arts. 17-20.
142. See First U.S. Submission to WIPO, supra note 7, attach. at 2-3; WIPO Draft Copyright Treaty, supra note 3, art. 8.
143. WIPO Draft Copyright Treaty, supra note 3, Note 10.14 (explaining that digital transmissions were to be treated as communications to public).
and distribution approaches to regulating digital transmissions. Insofar as there is no substantive difference between the two proposals, the Chairman's decision may simply have been a gesture in deference to European sensibilities or a demonstration of the Chairman's independence from the U.S. delegation to fend off potential criticism that his draft was unduly deferential to that state's proposals.

However, from both European and U.S. sources, there is reason to believe that the decision to treat digital transmissions as communications to the public, instead of as distributions of copies to the public, may have important practical effects. European scholars who studied this issue contemporaneous with the WIPO Expert meetings leading up to the diplomatic conference had argued for treating digital transmissions as communications to the public rather than as distributions of copies. They did so partly because of similarities between digital transmissions and broadcast transmissions which Europeans have long regulated as communications to the public. Some also favored the digital-transmission-as-communication approach because it would more clearly permit users to make occasional private transmissions of digital works (for example, an exchange between two friends).

Some might question that there might be a substantive difference between public distributions and public communications under U.S. law. It, after all, grants copyright owners an exclusive right to control distribution of copies "to the public." An untutored reading of this provision might suggest that U.S. law would distinguish between private and public distributions of copies, perhaps leaving the former unregulated. There is, however, some authority in U.S. caselaw for treating the transfer of a single unauthorized copy to a single member of the public as a distribution to the pub-

144. Broadcast companies opposed the White Paper's proposal to treat digital transmissions under the rubric of the distribution right out of concern for the impact this would have on their existing contracts, which had been negotiated in contemplation of the public performance right, as well as on their ability to move toward greater use of digital transmissions. Working Group on Intellectual Property, 1996: Public Hearings on Intellectual Property Issues Involved in the NII Initiative, U.S. Dep't of Com., U.S. Patent and Trademark Office, Nov. 18, 1993 (testimony of Benjamin F.P. Ivins, Assistant General Counsel, National Association of Broadcasters).

145. See, e.g., Ficsor, in The Future of Copyright, supra note 6, at 133-34; Hugenholtz, in id. at 87.

146. See Ficsor, in id. at 133-35.

147. See Hugenholtz, in id. at 99-100.

This contrasts with the U.S. public performance right, which grants copyright owners the right to control performances only if they occur outside of a circle of family members or a small group of friends. As experienced copyright lawyers, Commissioner Lehman and his staff would have been aware of this difference. Their preference for treating digital transmissions as distributions of copies, rather than as communications or performances, likely stemmed from the greater control that they thought copyright owners would have if the first characterization became the norm.

Although controversies abounded at the December 1996 diplomatic conference, the proposal to treat digital transmissions as communications to the public was not among them. The U.S. delegation apparently found this approach acceptable as long as the United States could satisfy such a treaty obligation without amending U.S. law to add another exclusive rights provision. Hence, the final treaty includes as article 8 a provision that authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.


151. The U.S. White Paper seemed to hold out the possibility that some digital transmissions between private individuals that had not been authorized by the copyright owners might still be lawful; after all, a digital transmission that has been authorized by law would not infringe. See White Paper, supra note 29, at 93. However, given the U.S. White Paper’s very restrictive view about sharing a digital copy of a work with a friend, see infra notes 165-169 and accompanying text, it is far from clear that the drafters of the White Paper would accept private distributions between friends as privileged by law. I have suggested elsewhere that the IITF Working Group’s distribution right proposal was, sub silentio, an effort to repeal the ‘public’ requirement from the public performance right, at least as regards digital works. See Samuelson, NII Intellectual Property Report, supra note 65, at 23.

152. It is fairly common for WIPO to accept that Berne Union members can use different designations for rights, as long as the practical result of the alternative designation is to accord substantially the same protection. It was unclear in Geneva whether the Clinton administration would continue to push for the transmission-as-distribution approach in the United States. Under Berne Convention norms, it could, of course, adopt a stricter rule on digital transmissions than other states. The Berne Convention, after all, generally only establishes minimum norms, not maximum ones.

153. WIPO Copyright Treaty, supra note 8, art. 8. It should be noted that this will expand the public communication right for some countries, such as Germany, whose
This article contains no specific reference to digital transmissions, but will nonetheless be understood as encompassing them.154

Telephone companies and online service providers had many of the same concerns about the draft treaty provision on the communication right as they had about the draft treaty provision on temporary copying.155 Under one interpretation, these firms could be viewed as communicating protected works to the public whenever they provided users with facilities for transmitting works.156 In response to these concerns, delegates to the diplomatic conference adopted an agreed-upon statement of interpretation to the WIPO Copyright Treaty which said that merely providing services for transmission of digital works should not be construed as a communication to the public.157 This, along with the omission of article 7 from the final treaty,158 meant that telephone companies and online service providers could finally breathe easily about the copyright treaty that would emanate from Geneva.

Had the initial U.S. digital agenda fared somewhat better at the diplomatic conference than it actually did, the U.S. delegation might well have raised again an issue that it had raised in earlier submissions to the Committee of Experts about the desirability of an international accord on the meaning of the term "public" in relation to exclusive rights accorded to copyright owners.159 A treaty provision on this issue might have resolved the private distri-
bution/communication issue that was latent in the different characterizations of digital transmissions as communications or distributions to the public. The U.S. decision not to pursue this matter at the conference left to another time consideration of an international accord that would grant copyright owners control over a greater range of private acts.  

C. Curtailing User Rights

Expansion of the rights of copyright owners over temporary copies and digital transmissions would not have been complete without achievement of a third component of the U.S. digital agenda at WIPO: a substantial curtailment of national authority to limit the rights accorded to copyright owners (for example, by providing that a particular exclusive right could only be infringed by literal copying) or to grant exceptions to those rights for certain classes of users or classes of uses (for example, enabling veteran groups to perform dramatic works without permission).

The initial aim of the U.S. delegation was not only to prevent the adoption of new limitations and exceptions to the expanded rights that the copyright treaty would recognize, but also to call into question the viability of existing limitations and exceptions, particularly as they might apply to digital works. The principal targets of this effort were the so-called "first sale" rule, under which consumers are generally free to redistribute their own copies of a protected work, and fair use2 and kindred privileges and doctrines, under which private or personal copying of protected works has often found shelter.  

Although the U.S. delegation to WIPO did not formally propose draft treaty language to curtail user rights, its submissions to WIPO and the Committee of Experts expressed concern about the potential for limitations and exceptions to undermine the legiti-

160. See, e.g., Elkin-Koren, supra note 79, at 391-99 (explaining challenges of redefining public/private distinction in copyright law as applied to digital environment).
161. See 17 U.S.C. § 109(c). This is known elsewhere as "exhaustion of rights." See, e.g., Follow-Up to 1995 European Green Paper, supra note 46, at 17.
164. Id. at NETH-64-68 (discussing Dutch private copying privilege).
165. Neither the U.S. delegation nor any other to the WIPO treaty-making process proposed treaty language to expand or grant new exceptions or limitations on the scope of copyright owner rights. See Comparative Table of WIPO Proposals, supra note 53.
mate interests of rights holders. It also opposed a private copying proposal made by the Uruguay delegation. Given the hostility that the White Paper had expressed towards first sale, fair use, and similar privileges in digital networked environments, as well as statements by U.S. officials about the desirability of harmonizing norms at higher levels of protection, there was reason to expect that the U.S. delegation to WIPO would favor a treaty provision curtailing authority to create limitations and exceptions in the WIPO treatymaking process.

Although its origins are something of a mystery—there having been no counterpart to it in national submissions to the Committee of Experts and no explanation of its genesis in the Chairman's commentary—the following was proposed in the draft treaty as article 12:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein 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.

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166. First U.S. Submission to WIPO, supra note 7, at 2.
167. See Comparative Table of WIPO Proposals, supra note 53, at 31.
169. See, e.g., Lehman, supra note 19, at 103-05.
170. This article may owe its origins to an informal suggestion from Commissioner Lehman or another member of the U.S. delegation. Inferring U.S. inspiration for this article is reasonable for several reasons. First, the U.S. delegation had expressed concerns about limitations and exceptions during the WIPO negotiations. See supra note 166 and accompanying text. Second, the United States had supported a similar provision in the TRIPS Agreement. Third, major U.S. copyright industries to whose interests the U.S. delegation to WIPO was especially attentive would perceive themselves to be the beneficiaries of any curtailment on first sale, fair use, and similar privileges, especially as it might apply to the digital environment.
171. WIPO Draft Copyright Treaty, supra note 3, Notes 12.01-12.10.
172. WIPO Draft Copyright Treaty, supra note 3, art. 12.
Although draft article 12 was the main focus of the debate about national authority to create or maintain limitations and exceptions, it was not the only provision in the draft treaty that would have affected user rights.\footnote{173} A significant—and intended—consequence of the draft treaty’s characterization of digital transmissions as communications to the public was to ensure that no “exhaustion of rights” would occur as to digital transmissions.\footnote{174}

Although the U.S. delegation would have preferred to characterize digital transmissions as distributions of copies\footnote{175} this did not mean that the U.S. delegation supported application of “first sale” (or the European equivalent, “exhaustion of rights”) principles to allow recipients of digitally transmitted copies to redistribute their copies.\footnote{176} Consistent with the White Paper’s assertions, the U.S. position was that first sale privileges did not apply to digitally transmitted copies because, in contrast with secondary transfers of physical copies, the secondary transfer of a digital copy could not be accomplished without making additional copies of the work for which there would be no authorization from the copyright owner or the law.\footnote{177}

The curtailment of fair use and kindred privileges was a somewhat more subtle and indirect project. Proponents of draft article 12 argued that it merely restated international treaty obligations

\footnote{173} Because it does not bear on the digital agenda at WIPO, this Article will only note two other substantial curtailments of user rights that the U.S. delegation supported at WIPO: limiting first sale and exhaustion principles to national or regional boundaries and limiting the right to rent copies of protected works. See WIPO Draft Copyright Treaty, supra note 3, arts. 8, 9. Taken to its logical conclusion, the latter limitation would outlaw renting houses or other buildings protected by copyright as architectural works unless national legislation exempted such rentals (an exemption that the draft treaty would have permitted). Id. art. 9(3).

\footnote{174} See WIPO Draft Copyright Treaty, supra note 3, Note 10.20.

\footnote{175} See supra note 22 and accompanying text.

\footnote{176} See White Paper, supra note 29, at 90-95. The White Paper argued against the existence of first sale rights in digital copies on account of the potential for infringement that would arise from recognition of such a right. Id. at 91.

\footnote{177} The U.S. Green Paper had initially recommended amending copyright law in order to deprive owners of digital copies of their first sale rights. See U.S. Green Paper, supra note 64, at 53-56, 124-25. When they discerned that it was necessary to make a copy of a digital work in order to redistribute it, the drafters of the White Paper realized they could achieve their goal by statutory interpretation. The first sale rule, after all, only limits the exclusive distribution right, not the reproduction right. See White Paper, supra note 29, at 92-94. Other commentators argue that temporary copies necessary to effectuate first sale rights are fair uses under precedents such as Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527 (9th Cir. 1992) (incidental copying necessary to get access to unprotected ideas in a computer program held fair use). See Nimmer, supra note 75, at 19; Samuelson, The Copyright Grab, supra note 20, at 188.
already embodied in article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.\textsuperscript{178} Because there had been no challenges to fair use or other existing privileges under these treaties, proponents of article 12 assured fair use advocates that there was no cause for worrying about such a provision in the WIPO Copyright Treaty.\textsuperscript{179}

There were a number of reasons why it was difficult for fair use advocates to take heart from these assurances. Some arose from textual differences between draft article 12 and its predecessor provisions, some from the Chairman’s commentary to draft article 12, and some from contextual differences between draft article 12 and its predecessors.

On its face, draft article 12 was more restrictive than its ancestors. There was, for example, no antecedent in the Berne Convention to draft article 12(2) which provided that states “\textit{shall, when applying the Berne Convention, confine any limitations of or exceptions}”\textsuperscript{180} to those meeting the three-step test. In addition, article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement provided that states could grant limitations or exceptions “in certain special cases.” Draft article 12(1) would have inserted the word “\textit{only}” just before this clause,\textsuperscript{181} an insertion that would almost certainly have been construed as strengthening the potential bite that such an article might have in subsequent challenges to national exceptions or limitations before WTO panels.\textsuperscript{182}

The ancestral provisions to draft article 12 had also been concerned about limitations and exceptions insofar as they conflicted with “a normal exploitation of the work,” whereas draft article 12 spoke of conflicts with “the normal exploitation of the work.”\textsuperscript{183} Chairman Liedes did not explain this difference in wording in his commentary to the draft treaty, and perhaps he meant it to have no significance. However, fair use advocates did not think that even this difference could be ignored given how closely the three provisions otherwise adhered to common wording and given how theo-

\begin{itemize}
\item \textsuperscript{178} See Berne Convention, supra note 3, art. 9(2); TRIPS Agreement, supra note 40, art. 13; June Besek, Remarks at the National Research Council Symposium on Proposed Changes to Intellectual Property Law: Balancing the Diverse Interests (Nov. 21, 1995) [hereinafter NRC Symposium].
\item \textsuperscript{179} See, e.g., Keith M. Kupferschmid, Address, NRC Symposium, supra note 178.
\item \textsuperscript{180} WIPO Draft Copyright Treaty, supra note 3, art. 12(2) (emphasis added).
\item \textsuperscript{181} Id. art. 12(1).
\item \textsuperscript{182} See Netanel, supra note 54, at 480-89 (discussing possible challenges to fair use and similar privileges before WTO); see also Dreyfuss & Lowenfeld, supra note 54, at 366-07.
\item \textsuperscript{183} WIPO Draft Copyright Treaty, supra note 3, art. 12(1)-(2).
\end{itemize}
logical the debate among copyright lawyers has become of late.\textsuperscript{184} It was conceivable that a substitution of "the" for "a" would be regarded as significant insofar as copyright owners sought to expand the manner in which they exploited their works.\textsuperscript{185}

Although some special issues arise in connection with article 13 of the TRIPS Agreement, it is worth first understanding the more limited character of article 9(2) of the Berne Convention as compared with article 12 of the draft copyright treaty. The former has regulated exceptions to and limitations on the reproduction right,\textsuperscript{186} whereas draft article 12 would have regulated all exceptions and limitations on all exclusive rights of copyright owners.\textsuperscript{187} It is an interesting question whether the adoption of article 12 in the final treaty would, in effect, repeal other articles of the Berne Convention which have long been understood to permit some national exceptions and limitations on the basis of their consistency with national custom and "fair practice."\textsuperscript{188} The Chairman's commentary to the draft treaty was silent on this point.

To give the issue more concreteness, consider that article 9(2)'s conflict-with-normal-exploitation standard would have had no pertinence to a determination about the acceptability of a national exception, such as that found in U.S. law, which enables teachers and students to perform copyrighted works in educational settings.\textsuperscript{189} Such an exception would traditionally have been judged under the "compatibility with fair practice" standard of other articles of the Berne Convention.\textsuperscript{190} Under draft article 12, a classroom performance exception would need to meet the three-step test of article 9(2). This would arguably be difficult if copyright

\textsuperscript{184} See, e.g., Hugh C. Hansen, International Copyright: An Unorthodox Analysis, 29 Vand. J. Transnat'l L. 579, 592 (1996) (speaking of need to convert those who are not true believers in copyright "by the sword").

\textsuperscript{185} Suppose, for example, that a state excepted classroom performances of protected works from the scope of copyright owner control. See 17 U.S.C. § 110(1). If this exception interfered with a copyright owner's opportunities to expand its exploitation of protected works, the viability of this privilege might depend on whether the state could argue that "a normal exploitation" of the works was still protected (for example, through sales of copies) or could prove that there was no interference with an expanded notion of what constituted the "normal exploitation" of the works.

\textsuperscript{186} Berne Convention, supra note 3, art. 9(2).

\textsuperscript{187} WIPO Draft Copyright Treaty, supra note 3, Notes 12.01-12.10.

\textsuperscript{188} See Berne Convention, supra note 3, art. 10. For example, if publishers decided that it had become possible to charge for every quotation from a work still in copyright, would the Berne-recognized right of fair quotation under article 10 be overridden by article 12 of the WIPO Copyright Treaty? See id. art. 10(1).

\textsuperscript{189} 17 U.S.C. § 110(1).

\textsuperscript{190} See Berne Convention, supra note 3, art. 10(2).
owners retargeted their market strategies so as to capture licensing revenues from classroom performances, for a classroom performance exception would conflict with this new exploitation of their works.191

Though it is true that the universalization of article 9(2)'s three-step test had already become an international norm by the adoption of article 13 of the TRIPS Agreement,192 there are a number of contextual reasons why article 13 seemed to pose less of a threat to fair use and other limitations and exceptions than draft article 12.

The most obvious factor was that there was no commentary accompanying article 13 emphasizing the sharpness of its constrictions or suggesting that some existing national exceptions would not meet the three-step test. In contrast, Chairman Liedes' commentary on draft article 12 repeatedly emphasized that it was intended as a constraint on national authority: "Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with normal exploitation of the protected subject matter. Finally, any limitations or exceptions may never unreasonably prejudice the legitimate interests of the author."193 Although the Chairman's commentary did not disapprove of an earlier official comment on article 9(2) that had illustrated the range of acceptable limitations and exceptions with an example of a national exception to permit the making of a small number of photocopies for scientific or individual use,194 the 1996 commentary said pointedly that it was "clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed."195 Moreover, it went on to say that "[i]n the digital environment, formally 'minor reservations' may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason. The purpose of the protection must be kept in mind."196 Although the Chairman's commentary nodded in the direction of balancing a high level of protection with other important values in

191. See supra note 185 for an example of this argument.
192. TRIPS Agreement, supra note 40, art. 13.
193. WIPO Draft Copyright Treaty, supra note 3, Note 12.02 (emphasis added). The commentary also said that the so-called "minor reservations" in national laws, which have generally been tolerated in the Berne Union, would also need to meet the three-step test of article 12. Id. Note 12.07.
194. Id. Note 12.05.
195. Id. Note 12.08.
196. Id.
society, its overall tone was hostile to limitations and exceptions. The digital environment was singled out as a source of the Chairman's special concerns.

Another contextual factor worth considering is that at the time article 9(2) became part of the Berne Convention, there was, in actuality, not very much that one state could do if another state enacted an exception to copyright's reproduction right that conflicted with a normal exploitation of works of the former's nationals. Even if it was abundantly clear that the exception violated article 9(2), there was little that the complaining state could do about the problem other than engaging in bilateral negotiations to resolve the dispute. The Berne Convention had no built-in enforcement mechanism. Prior to adoption of the TRIPS Agreement, member states of GATT would have been forbidden from imposing tariffs or other sanctions on unrelated products as a means of resolving complaints about such things as the inadequacy of copyright protection in other GATT member states.

TRIPS, however, is "trade with teeth." In the post-TRIPS world, firms that believe that a foreign copyright exception interferes with normal exploitations of their works in a certain country need only convince their own government to lodge a complaint against it with the World Trade Organization. If a WTO panel or appellate body agrees that the challenged exception does not meet the three-step test of article 13, the offended country can impose trade sanctions on unrelated products of the offending country until the problem created by the exception has been rectified.

Adoption of draft article 12 in the WIPO copyright treaty would have significantly advanced the potential for a successful WTO challenge to national exceptions or limitations. This was partly because of the more restrictive text of draft article 12 and the

197. Id.
198. See, e.g., Nimmer, supra note 39, at 1392-97 (discussing limitations of pre-TRIPS enforcement process).
199. Id. at 1393.
200. Id. at 1395-97.
201. Id. at 1392 (quoting a statement by Ralph Nader at legislative hearings).
202. See Otten & Wager, supra note 54, at 411-12 (discussing WTO dispute settlement process); Dreyfuss & Lowenfeld, supra note 54 (anticipating how disputes might be settled).
203. Nimmer, supra note 39, at 1397. WTO will also do its monitoring of national intellectual property laws to ensure that they are trade-neutral. See, e.g., Otten & Wager, supra note 54, at 409-11.
204. See, e.g., Smith, supra note 12, at 577-78 (anticipating challenges to private copying privileges under TRIPS).
Chairman's commentary indicating that exceptions "must never" fail any part of the three-step test.205 Without article 12, it would have been difficult for states to challenge the application of fair use and kindred doctrines in the digital environment because article 13 had become part of TRIPS before international policymakers had given any thought about the appropriate scope of intellectual property rights in the digital networked environments.206 Moreover, draft article 12 appeared in a document that explicitly aimed to protect copyright owner interests in markets they were not currently exploiting. Indeed, this was the very reason for the proposal to grant broad rights to control temporary copying.207 The document's goal suggested that article 12 would be interpreted as broadening the conventional understanding of what constituted "normal exploitation."208

Still another contextual reason to worry that draft article 12 was intended to lay the groundwork for elimination or a substantial curtailment of exceptions and limitations, such as the U.S. fair use doctrine, was that Chairman Liedes' warnings that some existing exceptions did not meet the three-step test of draft article 12 resonated ominously with doubts expressed in the U.S. White Paper about the future of fair use in digital environments.210

205. See supra note 193 and accompanying text; see also Netanel, supra note 54, at 455-63 (discussing intricate and partially interrelated character of three major treaties as Berne-qua-Berne, Berne-in-TRIPS, and TRIPS-qua-WIPO Copyright Treaty).
207. See WIPO Draft Copyright Treaty, supra note 3, Notes 7.05-7.07.
208. See supra note 185 for an example of how unamended draft article 12 might have affected publisher expansions of normal exploitations.
209. WIPO Draft Copyright Treaty, supra note 3, Note 12.08.
210. White Paper, supra note 29, at 82 (predicting reduced application of fair use in digital networked environments). The U.S. White Paper mischaracterized some U.S. fair use caselaw. Id. at 79 (mischaracterizing the rationale of the Supreme Court decision in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440 (1984), as having based its fair use finding on the absence of a licensing system for recording television programs off the air). It also omitted reference to some important digital fair use cases, such as Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) and Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832 (Fed. Cir. 1992). Id. Both decisions held that intermediate copying of a computer program code that was necessary to get access to ideas embodied in the program were fair uses. Sega, 977 F.2d at 1520-21; Atari Games, 975 F.2d at 843. As a lobbyist, Bruce Lehman had argued that such actions were infringing. See, e.g., Jessica Litman, Copyright and Information Policy, Law & Contemp. Probs., Spring 1992, at 185, 196-201. As Commissioner of Patents and Trademarks, he opposed efforts by the Japanese government to amend their law to permit a similar decompilation privilege. See, e.g., T.R. Reid, A Software Fight's Blurred Battle Lines: U.S. Computer Companies Are on Both Sides as Japan Considers Copyright Law Changes, Wash. Post., Jan. 11, 1994, at D1.
Had article 12 been adopted as originally proposed, major British publishers might have used it to persuade their government to file a complaint against the United States challenging its fair use doctrine. They would likely have argued that the U.S. fair use doctrine contravenes article 12 of the WIPO Copyright Treaty and article 13 of the TRIPS Agreement in not being confined "to certain special cases" and that in any event, this defense conflicts with normal exploitation of protected works because a great many so-called "fair use" copies can now be licensed. Major U.S. publishers might have relied on a similar argument to initiate a challenge to the private use privileges in other national laws, particularly as they might apply in the digital domain. Even if such disputes were not brought before WTO panels, adoption of draft article 12 and its commentary would have been useful to fend off the enlarged role for fair use and similar privileges that had been predicted by some commentators. It would certainly have helped in combating proposals for new exceptions and limitations on the rights of copyright owners.

Fair use advocates in the United States and elsewhere recognized the potential for this sort of use of draft article 12. In the United States, they brought substantial pressure to bear on the Clinton administration to instruct the U.S. delegation to Geneva to seek changes to draft article 12 to moderate its reach and preserve fair use and similar privileges in U.S. law. This effort was successful. The U.S. delegation went to Geneva with instructions to support amendments to the text of article 12 to omit the word "only" before "in certain special cases," and to conform the normal exploitation language (switching back to "a" from "the"). In addition, they were to support changes in the commentary to article 12 to make clear that fair use and other existing privileges were consistent with this article.

211. Eric Smith has identified the compatibility of private use privileges with article 13 of TRIPS as a substantive issue that might be submitted to the WTO dispute process. See Smith, supra note 12, at 577-78. Had draft article 12 and its commentary been accepted at the diplomatic conference, multinational publishers, such as Reed Elsevier, might have worked with other U.S. publishers to persuade the U.S. government, for example, to challenge the Dutch private copying privilege, and with English publishers to persuade the U.K. to challenge the U.S. fair use privilege.

212. See, e.g., Dreyfuss & Lowenfeld, supra note 54, at 308-16 (explaining complexities of pursuing trade-based challenges to national intellectual property rules which may constrain somewhat resort to WTO dispute resolution processes).

Fairly soon after the diplomatic conference got down to business, considerable support emerged for conforming the text of article 12 to that of article 13 of TRIPS, as well as for an agreed-upon statement to accompany it that would preserve existing fair use-like privileges in national laws and permit evolution of new exceptions in the digital environment.

The seeming consensus on this sort of “fix” to article 12 was upset for a time by a relatively late Israeli proposal initially aimed at broadening national authority to create exceptions and limitations. It would have permitted states to provide for exceptions that were “consistent with exceptions or limitations provided for in the Berne Convention and in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” European delegates announced their willingness to support this alternative proposal so long as one word—the “and” between the two clauses—was omitted. The U.S. delegation quickly announced its support for the European amendment to the Israeli proposal, and for a time the European amendment gathered some steam. However, in the final days of the conference reservations grew about this alternative treaty provision because the European amendment appeared to some to convert article 12’s three-step test into a four-step test.

Although support for the European amendment to the Israeli proposal subsided, it took some effort to reinstate the previous “fix” to article 12 because the U.S. delegation did not want to take the initiative to reintroduce it. The Canadian delegation finally did so. The WIPO Copyright Treaty thus contains a provision on national authority to create and maintain exceptions that conforms to the text of article 13 of TRIPS. The diplomatic conference also voted in favor of an agreed statement of interpretation for this provision, permitting Contracting Parties “to carry forward and appropriately extend into the digital environment limitations and

214. See Greenstein Daily Report, supra note 2, at Dec. 10, 1996. Substantial concern also arose about article 12(2), and for a time, it appeared likely to be dropped from the treaty. Id.
215. See id.; Agreed Statements, supra note 8, Concerning Article 10.
217. Id.
218. See id.
219. See id.
220. See id. at Dec. 20, 1996.
221. WIPO Copyright Treaty, supra note 8, art. 10.
exceptions in their national laws which have been considered acceptable under the Berne Convention . . . [and] to devise new exceptions and limitations that are appropriate in the digital network environment." 222 A kindred agreed-upon statement indicates that this article neither extends nor reduces the scope of acceptable exceptions under the Berne Convention. 223

Not only was there support at the diplomatic conference for recognition of national authority to grant exceptions and limitations as a means of balancing the interests of copyright owners and the public, there was also support for making the principle of balance a fundamental purpose of the treaty by adding a new clause to the treaty's preamble. The preamble to the Chairman's original draft treaty had three parts:

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works[.]. 224

To these, the final treaty added another purpose:

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention[.]. 225

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222. Agreed Statements, supra note 8, Concerning Article 10.
223. Id.
224. WIPO Draft Copyright Treaty, supra note 3, pmbl.
225. WIPO Copyright Treaty, supra note 8, pmbl. The phrase "as reflected in the Berne Convention" was added in the final iteration of the treaty, apparently out of concern that without it the preamble might be construed as providing more latitude for national exceptions than was intended. The final treaty also included a preamble provision "[e]mphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation." Id.
This new preamble provision represents a major development in international copyright policy.\textsuperscript{226}

If copyright policy on an international scale had seemed to be veering away from traditional purposes such as the promotion of knowledge in the public interest and toward a solely trade-oriented set of purposes,\textsuperscript{227} this treaty can be seen as a timely correction in the course of international copyright policy. Though the Chairman's initial draft was consistent with a trade-based approach to copyright policy, the final treaty reaffirms faith in the concept of maintaining a balance between private and public interests in copyright policymaking and of recognizing that education, research, and access to information are among the important social values that a well-formed copyright law should serve.\textsuperscript{228}

D.\textit{ Regulating Circumvention Technologies}

An important part of the U.S. digital agenda at WIPO was establishment of a new international norm to regulate technologies and services likely to be used to circumvent technological protection for copyrighted works. The electronic future envisioned in the U.S. White Paper, as well as that for which many major content providers seem to be planning, contemplates broad use of technological measures, such as encryption, to protect content in digital form.\textsuperscript{229} As promising as such technologies are, they too pose a problem:

\textsuperscript{226} Another significant, although not much heralded, aspect of the WIPO Copyright Treaty is article 2, which states: "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." Oddly enough, the idea/expression distinction as such had not been embodied in the Berne Convention or supplemental agreements to it. Agreed-upon statements of interpretation to the WIPO Copyright Treaty make it clear that article 2's proscriptions apply to computer programs and databases. See Agreed Statements, supra note 8, Concerning Article 4, Concerning Article 5.

\textsuperscript{227} See, e.g., Nimmer, supra note 39, at 1386, 1416.

\textsuperscript{228} This also augurs well for integrating democratic and free speech concerns in international disputes on copyright policy, such as those discussed in Netanel, supra note 54, at 475-79.

what one technology can do, another can generally undo.\textsuperscript{230} Hence, the perceived need for law to regulate infringement-enabling technologies and services.

The impetus for this provision came largely from the U.S. motion picture industry, which has for many years been keen on the idea of regulating technologies that enable infringement.\textsuperscript{231} Although unsuccessful in previous efforts to persuade Congress to pass a broad law to allow them to sue makers of circumvention technologies,\textsuperscript{232} the motion picture industry saw in the Clinton administration’s National Information Infrastructure (NII) intellectual property initiative a new opportunity for getting the desired legislation.\textsuperscript{233} As other content owners came to understand the desirability of technological solutions to the problem of protecting digital content,\textsuperscript{234} the motion picture industry gained new allies to support stronger regulation of circumvention technologies and services.\textsuperscript{235}

The ongoing WIPO treatymaking process offered an opportunity for an international accord on regulation of infringement-enabling technologies and services. This was important because without such an accord the effectiveness of any national regulation could not be assured. Even if the U.S. Congress could be persuaded to outlaw distribution of circumvention software in the United States, the availability of such software on servers in, for example, Finland or Indonesia would not stop U.S. nationals from gaining access to that software via the global Internet.

\textsuperscript{230} See, e.g., White Paper, supra note 29, at 230; Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988) (maker of software copy-protection system brought copyright suit against maker of software capable of undoing that copy-protection system).

\textsuperscript{231} See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (motion picture companies brought infringement suit against maker of video tape recording machines charging maker knew they would be used to make unauthorized copies of copyrighted works); see also 17 U.S.C. §§ 1001-1010 (imposing restrictions on digital audio tape recording technology).


\textsuperscript{233} See, e.g., Testimony of Jack Valenti on behalf of the Motion Picture Association of America, NII Hearings, supra note 29, at 22-24. There are also ongoing negotiations concerning the digital video disk (DVD), about which the motion picture industry is anxious for much the same reason as the recording industry was anxious about DAT technologies. See, e.g., White Paper, supra note 29, at 232-33 n.568.

\textsuperscript{234} See, e.g., Burns, supra note 229.

\textsuperscript{235} See, e.g., Testimony of Richard Robinson, Association of American Publishers, NII Hearings, supra note 29, at 188-90; Testimony of Robert Holleyman, Business Software Alliance, id. at 60-61.
Still, national legislation was a logical starting place for anti-circumvention regulation. Hence, the White Paper recommended enactment of the following provision:

No person shall import, manufacture, or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism, or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106.\(^{236}\)

The only policy analysis offered in support of the report’s assertion that this provision “is in the public interest and furthers the Constitutional purpose of the copyright laws”\(^{237}\) was this:

Consumers of copyrighted works pay for the acts of infringers; copyright owners have suggested that the prices of legitimate copies may be higher due to infringement losses suffered by copyright owners. The public will also have access to more copyrighted works via the NII if they are not vulnerable to the defeat of protection systems.\(^{238}\)

The White Paper dismissed as unfounded suggestions that such a provision would threaten fair use or public domain material.\(^{239}\)

The U.S. submission to WIPO contained an almost identical provision.\(^{240}\) The only noteworthy difference between the U.S. White Paper’s proposal and the U.S. submission to WIPO was that the latter would have regulated circumventions done “without authority,”\(^{241}\) whereas the former focused on circumventions done “without the authority of the copyright owner or the law.”\(^{242}\) The wording of the submission to WIPO seemed to reflect U.S. concerns that some countries would circumvent any anti-circumvention regulation the treaty might contain by adopting sufficiently

\(^{236}\) White Paper, supra note 29, app. 1 at 6 (proposed as 17 U.S.C. § 1201).
\(^{237}\) Id. at 230.
\(^{238}\) Id.
\(^{239}\) Id. at 231-32.
\(^{240}\) First U.S. Submission to WIPO, supra note 7, attach. at 5-6.
\(^{241}\) Id. at 5.
\(^{242}\) White Paper, supra note 29, app. 1 at 6.
broad exceptions as to enable circumventions to occur "with authority of law."

Article 13 of Chairman Liedes' draft copyright treaty was closely modeled on the U.S. proposal:

Contracting parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.243

It defined the term "protection-defeating device"—in terms that closely track the U.S. proposal—as "any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty."244 Draft article 13 would have required "appropriate and effective remedies" for violations of this provision.245

The principal difference between draft article 13 and the U.S. White Paper provision was the knowledge requirement in the former, which had no counterpart in the latter.246 The Chairman's commentary to draft article 13 explained that the knowledge requirement "focuses on the purpose for which the device or service will be used."247 This knowledge requirement responded to a common criticism of the White Paper proposal,248 which asserted

243. WIPO Draft Copyright Treaty, supra note 3, art. 13(1). The Committee's commentary on this provision indicates that a number of countries had submitted proposals on this issue. Id. Note 13.07. The U.S. "without authority" proposal was dropped in favor of a without-authority-of-the-rights-holders-or-the-law standard.
244. Id. art. 13(3). Compare White Paper, supra note 29, app. 1 at 6; First U.S. Submission to WIPO, supra note 7, at 5-6.
245. WIPO Draft Copyright Treaty, supra note 3, art. 13(2).
246. The idea for inserting this knowledge requirement came from the European Union. See Second E.U. Submission to WIPO, supra note 46, at 3.
247. WIPO Draft Copyright Treaty, supra note 3, Note 13.02. Notice that this anticipated that rulings under such a provision would need to be based on predictions about the uses to which a device or service would be put, rather than to proof of actual uses in the market.
248. See, e.g., Testimony of Edward J. Black, NII Hearings, supra note 29, at 68-69; Ad Hoc Alliance Report, supra note 95. Many other criticisms have been leveled at this provision as well. See, e.g., Pamela Samuelson, Regulation of Technologies to Protect Copyrighted Works, Comm. ACM, July 1996, at 17, 19-21; Thomas Vinje, A Brave New
the unfairness of imposing strict liability on manufacturers who had expected their equipment to be used in a lawful manner.249

Recognizing that a provision on circumvention technologies would be a new feature for copyright laws of many countries, Chairman Liedes tried to alleviate potential concerns about the breadth of his proposal by indicating that there would be substantial latitude for national implementations of this norm.250 States would, for example, be "free to choose appropriate remedies according to their own legal traditions,"251 and they could "design the exact field of application of the provision[ ] . . . taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain."252

Neither the insertion of a knowledge requirement nor the Chairman's assurances regarding latitude in national implementations sufficed to overcome serious concerns about draft article 13. Many delegates to the diplomatic conference expressed deep concerns about the implications of such regulation for the public domain and for fair use.253 Even a knowledge-based standard for regulating technologies with infringing uses represented a dramatic change in policy. Under existing U.S. law, for example, firms have been free to sell a device (or presumably to provide a service) to customers as long as it had a substantial noninfringing use.254

There was also reason to doubt whether a provision with a "knowing or having reason to know" requirement would, in practice, have been meaningfully different from the U.S. White Paper standard. Rights holders could surely be expected to argue that


249. Most other laws regulating circumvention technologies contain knowledge or intent requirements. See, e.g., Vinje, supra note 248, at 433.

250. WIPO Draft Copyright Treaty, supra note 3, Note 13.02.

251. Id. Note 13.04. The commentary went on, however, to say that the "main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts." Id.

252. Id. Note 13.05. It also said that "[h]aving regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of [this provision]." Id.


254. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440-42 (1984) (holding motion picture copyright owners not entitled to control sale of videotape recording machines because of substantial noninfringing uses); Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 267 (5th Cir. 1988) (no infringement by software that bypassed technical protection because it enabled consumers to make backup copies).
people intend the natural consequences of their actions. In addition, the commentary to draft article 13 made clear that the anti-circumvention provision could be employed to challenge the sale of technologies based on predictions about their primary uses,255 which meant that technologies could be challenged before the opportunity arose to see what the primary uses of the product would actually be.

At the diplomatic conference, there was little support for the Chairman’s proposal. Some countries, such as Korea, opposed inclusion of any anti-circumvention provision in the treaty.256 Others, such as Singapore, proposed a “sole purpose” or “sole intended purpose” standard for regulating circumvention technologies.257 Some delegations wanted an explicit statement that carved out circumvention for fair use and public domain materials.258 The European Union emphasized the importance of a knowledge of infringement requirement in any provision regulating devices and services possessing technology-defeating purposes.259

Facing the prospect of little support for the Chairman’s watered-down version of the U.S. White Paper proposal, the U.S. delegation was in the uncomfortable position of trying to find a national delegation willing to introduce a compromise provision brokered by U.S. industry groups that would simply require states to have adequate and effective legal protection against circumvention technologies and services.260 In the end, such a delegation was found, and the final treaty embodied this provision in article 11.261

255. See supra note 245.
257. Id. (discussing remarks of delegates from Ghana and Singapore). The Ad Hoc Alliance for a Digital Future had recommended treaty language of this sort. Ad Hoc Alliance Report, supra note 95, at 4-5.
259. Id.
260. See Memorandum from Brian Kahin to the Working Group on Intellectual Property, Interoperability, and Standards, U.S. Advisory Committee on International Communications and Information Policy (Nov. 17, 1996) (regarding consensus draft provision on circumvention technologies and services) (on file with author); see also Ejan Mackaay, The Economics of Emergent Property Rights on the Internet, in The Future of Copyright, supra note 6, at 20-22 (arguing that it may be premature to regulate fencing techniques in the digital environment).
261. Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or
This compromise was, of course, a far cry from the provision that the United States had initially promoted. Still, it was an accomplishment to get any provision on this issue in the final treaty. The inclusion of terms like "adequate" and "effective" protection in the treaty means that U.S. firms will be able to challenge national regulations that they deem deficient.

E. Protecting Rights Management Information

A fifth component of the U.S. digital agenda at WIPO was acceptance of a second unprecedented norm for an international copyright treaty, namely, an agreement to protect the integrity of copyright management information (CMI) that might be attached to digital copies of protected works. In keeping with the White Paper's proposal to amend U.S. copyright law to protect CMI from depredations by would-be pirates who might strip the CMI from distributed copies of digital content, falsify, or otherwise tamper with CMI in aid of infringing activities, the U.S. delegation to WIPO recommended a virtually identical provision to the Committee of Experts for inclusion in the WIPO copyright treaty.

The legislation that the U.S. White Paper had proposed to Congress provided:

(a) No person shall knowingly provide copyright management information that is false, or knowingly publicly distribute or import for public distribution copyright management information that is false.

(b) No person shall, without authority of the copyright owner or the law, (i) knowingly remove or alter any copyright management information, (ii) knowingly distribute or import for distribution copyright management information that has been altered without authority of the copyright owner or the law, or (iii) knowingly distribute or import for distribution copies or phonorecords from which copyright management information has been

the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

WIPO Copyright Treaty, supra note 8, art. 11. There is a difference of opinion among U.S. commentators about whether implementing legislation is needed for this part of the WIPO Copyright Treaty. I have argued it is not. See Samuelson, Big Media Beaten Back, supra note 20, at 180, 182. Others argue that such legislation is necessary. See, e.g., Seth Schiesel, Copyright Pacts Are Still Facing Foes in Congress, N.Y. Times, Jan. 1, 1997, at 61.


263. First U.S. Submission to WIPO, supra note 7, attach. 1 at 7.
removed without authority of the copyright owner or the law.264

The White Paper offered a provisional definition of CMI: "the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation."265 Both civil and criminal penalties for violations of this provision were recommended.266

As with the anti-circumvention provision, Chairman Liedes modeled the draft treaty provision on rights management information on the U.S. proposal, albeit with some differences in terminology and reorganization of its structure. Subsection (1) of article 14 of the draft treaty read:

Contracting parties shall make it unlawful for any person knowingly to perform any of the following acts:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority.267

Subsection (2) defined "rights management information" as information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.268

The commentary accompanying this subsection stated the Chairman’s expectation that criminal as well as civil penalties should be available for violations of this provision.269
Article 14 of the draft treaty provided for a more limited form of regulation of rights management information (RMI) than did the U.S. proposal, principally in its narrower definition of RMI.\(^{270}\) This restricted definition responded to criticism that focused on potential uses of CMI to monitor usage of copyrighted works, raising potential privacy concerns which the White Paper had not addressed.\(^{271}\) As he had done in relation to the draft anti-circumvention provision, Chairman Liedes indicated that member states would have flexibility to "design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices."\(^{272}\)

The RMI provision of the draft treaty proved to be one of the least controversial parts of the digital agenda at WIPO. But even this limited version of the U.S. proposal was further trimmed in the course of diplomatic negotiations.\(^{273}\) Concerns had arisen that the U.S. proposal would inadvertently make illegal some alterations to RMI that presented no threat to the legitimate interests of rights holders.\(^{274}\) An alteration to RMI attached to licensed copies to correct RMI after a change in copyright ownership should not be

\(^{270}\) The U.S. White Paper provision had included "terms and conditions of use" among the items that should be considered rights management information. In addition, the White Paper proposed that the U.S. Copyright Office hold hearings about copyright management information to determine what else should be considered CMI. It further contained a provision addressing the distribution of copies with false copyright management information for which there was no counterpart in the Draft Copyright Treaty. See White Paper, supra note 29, at 235, app. 1 at 8-11; see also Samuelson, supra note 248, at 18-19 (expressing criticism of the U.S. White Paper's CMI provision).

\(^{271}\) See Julie E. Cohen, A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace, 28 Conn. L. Rev. 981 (1996); Samuelson, The Copyright Grab, supra note 20, at 191.

\(^{272}\) WIPO Draft Copyright Treaty, supra note 3, Note 14.04.

\(^{273}\) The one respect in which the WIPO Copyright Treaty's RMI provision is broader in scope than that originally proposed by the Chairman lies in an expanded definition of RMI. RMI is now defined to include terms and conditions of use. On this count, compare WIPO Copyright Treaty, supra note 8, art. 12(2), with WIPO Draft Copyright Treaty, supra note 3, Art. 14(2). When implemented in U.S. copyright law, it would federalize and confer copyright significance on the enforcement of licensing agreements, a matter that heretofore was largely left to state contract law. According to my colleague, Jerome Reichman, who was in Geneva last December, this change was apparently not discussed at the diplomatic conference, and even some astute observers there were unaware of this aspect of the treaty. Telephone Conversation with Professor Jerome H. Reichman (Jan. 1, 1997).

\(^{274}\) See, e.g., Loren Brennan, Analysis by the American Film Marketing Association and the Video Software Dealers Association Regarding S. 1284 National Infrastructure Protection Act 1-6 (Feb. 23, 1996) (on file with author).
illegal, but would have been under the Chairman's original draft. To overcome this problem, the RMI provision was amended so that alterations to RMI and distributions of copies with altered RMI would only be illegal insofar as they facilitated or concealed infringing activities.

As with the anti-circumvention provision in the WIPO Copyright Treaty, the U.S. delegation did not get exactly what it had originally sought. However, it was no small achievement to get as article 12 of the final treaty a provision that will significantly protect rights management information attached to digital copies of protected works transmitted via global networks.

F. Protecting the Contents of Databases

A late-added component of the U.S. digital agenda at WIPO was acceptance of the U.S. proposal for an international treaty to pro-

275. Id. at 2-3.
276. The final treaty provision is actually somewhat more complicated:
Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
(i) to remove or alter any electronic rights management information without authority;
(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

WIPO Copyright Treaty, supra note 8, art. 12(1).
The conference also approved the following agreed-upon statement of interpretation of this provision:
It is understood that the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.
It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

Agreed Statements, supra note 8, Concerning Article 12.

277. Some have argued that the U.S. obligation as to article 12 of the WIPO Copyright Treaty can be satisfied by Section 43(1) of the Lanham Act, which prohibits acts that give a false impression of a work's origin. See 15 U.S.C. § 1125(a) (1994). Telephone Interview with Neil Smith, Esq., Limbach & Limbach (Feb. 12, 1997). This argument would be plausible but for the fact that RMI is now defined in the treaty as including terms and conditions of use. See supra note 273. I have elsewhere argued that implementing legislation is necessary if the United States is to satisfy the demands of article 12. See Samuelson, Big Media Beaten Back, supra note 20, at 180, 182.
tect investments in database development by granting database makers exclusive rights to authorize or prevent extractions and uses of database contents.278 Had the European Union not included a material reciprocity provision in a recent directive calling for the creation of a new form of intellectual property protection for the contents of databases,279 and had the Europeans not proposed a draft treaty to universalize this new norm in the ongoing round of WIPO treaty negotiations,280 the United States might have been content to let this agenda item simmer somewhat longer. The U.S. White Paper had expressed only general support for the idea of protecting database contents, but made no specific proposal about it.281

Because of substantial U.S. industry objections to some parts of the European approach to database protection,282 including its reciprocity provision,283 the U.S. delegation decided to submit a counterproposal so that the United States could have some influence on the text of whatever database treaty might emerge from Chairman Liedes' word processor.284 Once the Chairman decided to propose a database contents treaty, members of the U.S. delegation pledged their "unswerving support" for such a treaty.285

As the concept of a database contents law is sufficiently new, it may aid understanding to examine the origins and essential contours of the European directive. In planning for the future of the information society, the Commission of the European Communities noticed that there was an uneven level of investment in database development in E.U. states.286 It noticed, as well, that there was considerable disharmony, as well as some uncertainty, about the extent of legal protection available to database makers in

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278. See Second U.S. Submission to WIPO, supra note 7, at 1-5; see also Reichman & Samuelson, supra note 27, at 102-110 (discussing U.S. proposals).

279. Database Directive, supra note 46, art. 11; see Reichman & Samuelson, supra note 27, at 96-97 (discussing impact of material reciprocity provision).

280. First E.U. Submission to WIPO, supra note 46.


283. Id. at 2, 25.

284. Second U.S. Submission to WIPO, supra note 7.

285. See, e.g., Kupferschmid, supra note 179; Samuelson, Big Media Beaten Back, supra note 20, at 184 (quoting Lehman).

the European Union. The database market, both domestically and internationally, was already substantial and its potential for growth was considerable. The Commission was quite frank in expressing its desire for Europe to become a more substantial player in the world database market. Seemingly trying to explain the generally low level of investment in databases in the European Union (with the exception of the United Kingdom, where copyright protection had long been available to data compilers on a “sweat of the brow” basis), the Commission observed that many commercially valuable electronic databases were vulnerable to market-destructive appropriations. Existing law provided no or uncertain remedies for such appropriations, either because some of these databases could not be copyrighted or because even when copyright protection was available, this law did not protect the data they contained. Reselections and rearrangements of these data might not infringe copyright, but they could undermine the commercial viability of the databases from which the data came.

To induce higher levels of investment in databases, the Commission proposed a directive to create a new law to protect databases against appropriations of the whole or substantial parts of their contents. As finally adopted, the European directive gave database makers who had made substantial investments in the

287. Id.; Database Directive, supra note 46, pmbl.
289. Id.
293. Reichman & Samuelson, supra note 27, at 66-69.
development or maintenance of databases fifteen years of protection for their contents.\textsuperscript{295} These rights could be renewed by making additional substantial investments in the database.\textsuperscript{296} To prod other states to adopt similar laws, the E.U. directive mandated that this new form of legal protection would be available to databases of non-E.U. nationals only if their country of origin had an equivalent law.\textsuperscript{297}

Although the reciprocity clause of the European directive was probably the most immediate cause for database protection becoming part of the U.S. digital agenda at WIPO,\textsuperscript{298} it was not the only cause. U.S. database developers were, of course, upset at the prospect that European database makers would be able to extract and reuse data from U.S. databases because the United States had no equivalent law.\textsuperscript{299} It was also true, however, that some U.S. database developers were unhappy with other provisions of the E.U. directive.\textsuperscript{300} In addition, some worried about Asian competitors who were taking advantage of the "gap" in existing international intellectual property law that permitted extraction of the whole or substantial parts of unoriginal databases, such as telephone directories, to develop databases to compete with U.S. producers.\textsuperscript{301}

Once the European Union submitted its proposed treaty language to the WIPO Committee of Experts, U.S. officials saw a way to kill three birds with one stone. By submitting its own proposal for a database treaty, the United States could cure a number of perceived deficiencies in the European proposal, ensure that the United States would adopt an equivalent law to the E.U. directive,

\textsuperscript{295} Database Directive, supra note 46, arts. 7, 10.
\textsuperscript{296} Id. art. 10.
\textsuperscript{297} Id. art. 11.
\textsuperscript{299} IIA Report, supra note 282.
\textsuperscript{300} Id. at 19-23 (complaining about European Database Directive as to duration of protection and invalidation of certain contractual provisions).
\textsuperscript{301} Chinese database developers have reportedly been extracting data from U.S. compilations. This practice may pose a competitive threat to U.S. database firms. NRC Symposium, supra note 178.
and protect U.S.-originated databases from unfair competition outside the United States by universalizing norms that seemed likely to maintain U.S. dominance in the world market for databases.\footnote{A treaty on database protection might also have helped to avert questions about congressional authority under the U.S. Constitution to enact legislation granting intellectual property rights in the data contained in databases. See IIA Report, supra note 282, at 26-28 (discussing constitutional authority for database contents law); Jane C. Ginsburg, No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone, 92 Colum. L. Rev. 338 (1992) (discussing constitutional objections to legal protection for unoriginal factual works). Missouri v. Holland, 252 U.S. 416 (1920), suggests that Congress has authority under the treaty clause of the Constitution to enact legislation that would otherwise violate the Constitution, but some constitutional law scholars question whether the Supreme Court would reaffirm this principle today. Conversation with Professor Lawrence Lessig, Harvard Law School (Sept. 27, 1996).}

It was a major victory for the U.S. delegation when Chairman Liedes issued a draft treaty on database protection that was an amalgam of the European and U.S. proposals.\footnote{WIPO Draft Database Treaty, supra note 5; Reichman & Samuelson, supra note 27, at 109-13 (comparing draft treaty with U.S. and E.U. proposals).} Where the U.S. and E.U. proposals were in agreement, such as in making eligibility for protection depend on a substantial investment in the collection, assembly, verification, organization or presentation of database contents, and in enabling a renewal of rights upon substantial additional investments in the database, the draft treaty unsurprisingly adopted the same approach.\footnote{WIPO Draft Database Treaty, supra note 5, arts. 1, 6, 8.} On one issue about which the two proposals differed, namely, the duration of protection, the draft treaty took no position, offering as alternative A, the U.S. proposal of twenty-five years, and as alternative B, the E.U. proposal of fifteen years.\footnote{Id. art. 8. The European directive had adopted a fifteen year term. See Database Directive, supra note 46, art. 10. U.S. database producers had objected to this as insufficient. See, e.g., IIA Report, supra note 282, at 23-24 (proposing perpetual protection). The United States proposed a 25-year term for the database treaty. Second U.S. Submission to WIPO, supra note 7, at 4.}

In a number of respects, however, the draft treaty more closely resembled the U.S. than the E.U. proposal. This too represented a victory for the U.S. delegation. For example, the draft treaty would have required contracting states to grant makers of
databases the right to authorize or prohibit the extraction and utilization of database contents. The use right had been proposed for the first time in the U.S. submission. In line with the U.S. proposal, the draft treaty would also have accorded protection to databases of foreign nationals on a national treatment basis, that is, states would protect the databases of foreign nationals in the same manner as they did the databases of their own nationals. The draft database treaty also had a provision to regulate circumvention technologies derived from the U.S. database treaty proposal.

The thread that led to the unraveling of the coordinated U.S.-E.U. strategy to push for adoption of a database treaty at the December 1996 diplomatic conference was a joint letter to U.S. Secretary of Commerce Mickey Kantor from the presidents of the National Academy of Sciences, National Academy of Engineering, and National Institute of Medicine. This letter expressed “serious concern” about the proposed database treaty. The presidents of these science agencies thought that the treaty and its

306. WIPO Draft Database Treaty, supra note 5, art. 5(1). The E.U. proposal had been narrower than the U.S. proposal in recommending rights to control only extraction and reuses of database contents, and in making clear that these rights only protected against extraction and reuse of the whole or substantial parts of database contents. See First E.U. Submission to WIPO, supra note 46, at 3.

307. Second U.S. Submission to WIPO, supra note 7, at 3; see Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong., 2d Sess. § 3(a) (1996). To overcome potential objections to the breadth of a “use right” in data, the draft treaty would have allowed states to provide that the utilization right “does not apply to distribution of the original or any copy of any database that has been sold or the ownership of which has been otherwise transferred in that Contracting Party’s territory by or pursuant to authorization.” WIPO Draft Database Treaty, supra note 5, art. 3(2). This suggests that Chairman Liedes realized that the utilization right was so extensive that unless countries created the exception to rights granted under the database treaty, those who had purchased a copy of a database could not have lawfully used the data in that copy. The fact that the drafters thought it was necessary for the treaty to contain permission to adopt such a limitation provision demonstrates just how protectionist the mindset of the drafters of treaty was.

308. WIPO Draft Database Treaty, supra note 5, art. 7; Second U.S. Submission to WIPO, supra note 7, at 5.

309. WIPO Draft Database Treaty, supra note 5, art. 13; Second U.S. Submission to WIPO, supra note 7, at 4.

310. See Letter from Bruce Alberts, President, National Academy of Sciences, William A. Wulf, President, National Academy of Engineering, & Kenneth Shine, President, National Institute of Medicine, to Mickey Kantor, U.S. Secretary of Commerce (Oct. 9, 1996) [hereinafter Academy Presidents’ Letter] (on file with author). The authors sent copies of this letter to thirty other senior government officials, including Vice President Albert Gore. Id. at 3.

311. Id. at 1.
implementing legislation, if adopted without substantial changes, "would seriously undermine the ability of researchers and educators to access and use scientific data, and would have a deleterious long-term impact on our nation's research capabilities."\textsuperscript{312} The presidents found it "especially disconcerting" that these proposals had been made by administration officials for consideration at the WIPO Diplomatic Conference in December 1996 "without any debate or analysis of the law's potentially harmful implications for our nation's scientific and technological development."\textsuperscript{313} Moreover, although the consequences of the law "appear very grave to those studying these issues, very few individuals at the science agencies or in the academic community appear even to be aware that such changes are about to take place, nor has there been any effort made to solicit their views."\textsuperscript{314}

Within weeks, similar expressions of concern or opposition to the database treaty emanated from a number of quarters,\textsuperscript{315} including in a letter from Jack Gibbons, President Clinton's Science Advisor, to Laura Tyson, the head of the National Economic Council, which was then reviewing U.S. positions on treaty matters in anticipation of the December diplomatic conference.\textsuperscript{316} These outpourings of concern finally sparked media interest in the WIPO negotiations.\textsuperscript{317} Patent & Trademark Office (PTO) officials initially sought to avert scientific opposition to the database treaty by proposing changes to the draft treaty to address concerns raised by

\begin{footnotesize}
312. Id.
313. Id. at 2.
314. Id.
315. See, e.g., Memorandum from Marjory Blumenthal, Director, Computer Science and Telecommunications Board of the National Research Council, to Norman Metzger, Executive Director, Commission on Physical Sciences, Mathematics and Applications of the National Research Council (Nov. 18, 1996) (on file with author) (reporting on a resolution of Federal Networking Council Advisory Committee requesting that U.S. delegation to WIPO refrain from pursuing this treaty at diplomatic conference); Letter from Kenneth L. Berns, M.D., Ph.D., President, American Society for Microbiology, Gail H. Cassell, Ph.D., Chair, Public and Scientific Affairs Board, & David Pramer, Ph.D., Chair, Task Force on Biotechnology, to Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks (Nov. 19, 1996) (on behalf of the American Society for Microbiology).
316. Letter of John Gibbons, National Science Advisor, to Laura Tyson, Chair, National Economic Council (Nov. 4, 1996).
\end{footnotesize}
the science agencies\(^{318}\) and by offering to have a representative of the science agencies join the U.S. delegation in Geneva in an advisory capacity.\(^ {319}\) This did not suffice to stem the tide of concern over the database treaty. Even so, on the eve of their departure for Geneva, PTO officials were still saying publicly that they were going to Geneva with the intention of negotiating and concluding a database treaty.\(^ {320}\)

There is, of course, ample reason to doubt whether a database treaty would have been concluded in Geneva in December 1996, even without the substantial U.S.-based opposition to the treaty. After all, the European Union was the only governmental entity that had adopted such a law, and its adoption was so recent that no member state of the European Union had actually implemented the directive by the time of the diplomatic conference. Given that the norms of the treaty were vague (for example, forbidding unauthorized use of a substantial part of a database),\(^ {321}\) that the idea of such a law was still very new, and that some delegations to WIPO meetings had previously expressed reservations about it,\(^ {322}\) it would have been somewhat surprising if a database treaty had been concluded in December 1996.

It is unquestionably true, however, that as news of substantial U.S.-based opposition to the database treaty spread among the delegations to the WIPO negotiations, it valorized expressions of doubt about the database treaty. In the cloister of copyright spe-

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318. See, e.g., Memorandum from Keith M. Kupferschmid, Patents and Trademark Office, U.S. Department of Commerce, to Mike Nelson, OSTP (Nov. 6, 1996) (on file with author) (proposing additions to draft database treaty permitting states to make exceptions to database right “for uses of databases for noncommercial scientific or educational purposes”).

319. See Letter of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, to Laura Tyson, Assistant to the President for Economic Policy (Nov. 6, 1996) (on file with author). The scientific organizations decided against accepting this offer because being an advisor to the U.S. delegation would have meant that the science representative would have been tasked to advise Commissioner Lehman, but would not have been able to discuss the merits of the proposed treaty with other delegations. On balance, the National Academies decided it would be better to send as their representative in Geneva a nongovernmental observer, Professor Jerome H. Reichman, who would be able to discuss their reservations about the database treaty with other delegations.

320. See sources cited supra note 317.

321. See WIPO Draft Database Treaty, supra note 5, art. 2(v) (defining “substantial part”).

322. At preconference meetings in Geneva, so many red flags went up when the subject of the draft database treaty came up that the prospects for such a treaty seemed quite dim. Conversation with Michael Nelson, Office of Science and Technology Policy, Executive Office of the President, in Paris, France (Dec. 1, 1996).
cialists at WIPO, proposals of E.U. and U.S. delegations are generally accorded considerable deference. When it came to assessing the impact of digital technologies on intellectual property law, most WIPO delegates knew little more than that these technologies did pose challenges for content owners. If the U.S. and E.U. authorities had studied these issues carefully and come to the conclusion that the additional legal norms they proposed were needed, who were they to say that these norms would be a bad idea?

There is also peer pressure among copyright specialists at gatherings such as WIPO meetings constraining somewhat their willingness to express doubts about strong protectionist positions. Amidst a flock of copyright fundamentalists, delegates do not want to find themselves cast as agnostics or atheists. Even less do they want to appear to be contributing, wittingly or unwittingly, to international piracy of copyrighted works. The U.S. and E.U. delegations would naturally be inclined to take advantage of this reluctance. News of scientific opposition to the database treaty changed the dynamics of the diplomatic conference. Suddenly, delegates who had doubts about the database treaty could feel that they were standing up for science.

Widespread criticism of the Chairman’s draft database treaty caused its quick removal from the conference agenda. Consideration of the draft database treaty has, however, not merely been postponed or sent back to the Committee of Experts for further refinement; it has been taken off the table. In order for database protection issues to be raised again at WIPO, the governing body of WIPO will have to constitute a new Committee of Experts to study the matter. This new committee should be charged, as the previous Committee of Experts did not believe itself to be, with

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323. Seth Greenstein, who had attended previous WIPO Experts meetings about a possible Berne Protocol, reported that there were far more expressions of concern about the digital agenda proposals at the diplomatic conference than had occurred in previous meetings. Telephone Conversation with Seth Greenstein, Home Recording Rights Coalition, author of Greenstein Daily Reports (Dec. 27, 1996).

324. See, e.g., Hansen, supra note 184, at 582-84 (characterizing copyright law as a “secular priesthood” that today must deal with “agnostics,” “atheists,” and engage in “missionary” work).

325. On the fourth day in Geneva, the sense of the diplomatic conference was that the database treaty was not ready or necessary or appropriate for action to be taken on it. See Greenstein Daily Report, supra note 2, at Dec. 5, 1996. After this, it was not discussed again during the conference, although a resolution for further study of the issues was passed in the final moments of the conference. Id. at Dec. 20, 1996.

326. See Database Resolution, supra note 36 ("[r]ecommend[ing] the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of
first inquiring whether any such treaty is actually needed. Only after concluding that a treaty is necessary should the Committee consider proposals for new treaty language to protect database contents, and even then, it should consider other alternative solutions to any database protection problem that exists.327 Although this aspect of the U.S. digital agenda at WIPO was not successful at the December 1996 diplomatic conference, database protection will unquestionably be part of the international digital agenda in years to come.328

IV. Reflections on the Outcome in Geneva

The U.S. delegation went to Geneva with first- and second-order plans for implementing its digital agenda at WIPO. The unfolding of events there derailed both sets of plans. Even though the U.S. delegation did not achieve all that it had hoped in Geneva, Commissioner Bruce Lehman was not just engaging in spin control when he announced a successful outcome for U.S. industries from the copyright treaty signed in Geneva.329

A. The Best Laid Plans Often Go Awry

Commissioner Lehman's first and most optimistic scenario for accomplishing his formulation of the U.S. digital agenda at WIPO involved the following steps:

(1) publishing the White Paper with its digital agenda by the end of summer 1995;
(2) getting the White Paper legislation introduced with bipartisan support in both the House and Senate by the end of September 1995;
(3) submitting draft treaty language to WIPO to implement this agenda in November 1995 so that it could be
considered at the February 1996 meeting of the Committee of Experts;

(4) gaining congressional approval of the White Paper legislation in time for the Experts' February meeting, or at least by the May meeting;\(^{330}\)

(5) persuading WIPO authorities in May 1996 to set firm dates for a diplomatic conference in Geneva in December 1996 aimed at concluding one or more treaties to implement the U.S. digital agenda;

(6) working with the Committee of Experts and in particular its chair, Jukka Liedes, to persuade the Committee that the U.S. digital agenda should be reflected in the draft treaties that the Chairman would publish by late August 1996;

(7) between May and December 1996, attending the various regional consultative meetings about the draft treaties to marshal support for the treaty insofar as it embodied the U.S. digital agenda (or at least to ensure that opposition to it did not have a chance to build);

(8) going to Geneva in December to negotiate and conclude treaties that would implement the U.S. digital agenda and promote the interests of U.S. industries; and

(9) bringing back to the United States in January 1997 a set of treaties that would receive prompt Senate ratification.\(^{331}\)

Although internal White House review of the White Paper slowed down the first step in the process, Commissioner Lehman did manage to publish the White Paper in early September 1995 with considerable fanfare and favorable publicity.\(^{332}\) By the end of that month, bipartisan sponsors had introduced bills embodying

\(^{330}\) This would not only have explicitly endorsed the parts of the digital agenda which required legislation to accomplish—it would also have implicitly endorsed other parts of the agenda that the White Paper had sought to implement through its aggressive interpretations of existing law. See Samuelson, The Copyright Grab, supra note 20, at 136.

\(^{331}\) Commissioner Lehman undoubtedly hoped that this would occur in the first month of the second term of the Clinton presidency. Lehman's victory in Geneva would demonstrate that the confidence that major U.S. copyright industries had put in the Clinton administration had not been misplaced, nor had their campaign contributions gone for naught.

the White Paper proposals in both houses of Congress. Similar treaty proposals went off to Geneva on schedule. Cultivation of WIPO officials, of the Committee of Experts, and other delegations to support moving forward with a diplomatic conference in Geneva was proving successful, as was work with the Chairman aimed at persuading him to propose treaty language that would implement the U.S. digital agenda. In all of the steps of the process where the insider skills of a long-time copyright lobbyist might come in handy, Commissioner Lehman did very well.

The principal fly in the ointment—first in the U.S. Congress, then inside the administration, and finally in Geneva—was the openness of the democratic process. Commissioner Lehman may have been convinced that he had charted an appropriate digital future for copyright law, but others were not. When the White Paper's legislative package encountered such substantial opposition in the U.S. Congress that it did not even get reported out of the relevant subcommittees, Lehman's reaction was not to reconsider what the U.S. position in Geneva should be or to slow down the treaty making process on these issues until domestic consensus could be achieved. Rather, his response was to redouble efforts to put the international treaty making process on as fast a track as possible to take advantage of the momentum toward international adoption of the White Paper proposals that he had been striving to achieve. Perhaps he could get in Geneva an implementation of the digital agenda that he had not yet been able to get from Congress. This, then, became Lehman's second order strategy for accomplishing the White Paper's digital agenda.

334. See First U.S. Submission to WIPO, supra note 7.
335. The February 1996 meeting of the WIPO Committee of Experts recommended that the diplomatic conference be held in December 1996. See WIPO Draft Copyright Treaty, supra note 3, at 3. The first preparatory meeting for this conference was held in May 1996. Id.
337. A number of groups, among them organizations affiliated with the Digital Future Coalition, tried to persuade the administration not to push for a diplomatic conference in December 1996. These efforts were not successful.
338. When interviewed about what the administration would do if the White Paper legislation failed in Congress, Commissioner Lehman responded:
If the diplomatic conference could be persuaded to adopt a treaty that implemented the U.S. digital agenda, chances of implementing this agenda in the U.S. Congress would dramatically improve. Commissioner Lehman would argue that the United States had successfully exercised leadership in the world intellectual property policy making community by proposing these treaties, and that the U.S. Congress needed to promptly confirm that leadership by a rapid and unanimous ratification of the new treaty to set an example for other countries. This would also promote the interests of the U.S. copyright industries, both domestically and in the world market, and ensure that the United States would maintain its dominant position in these markets. Vast new quantities of commercially valuable content would then flow into NII pipelines, as rights holders finally attained the legal rights necessary to feel secure in digital networked environments. And if representatives from countries around the world had signed a treaty embodying the U.S. digital agenda provisions, this would show that the digital agenda was never the extreme policy initiative that its hysterical critics had charged.

The most important step in this second-order process was to persuade the Chairman of the Committee of Experts to propose treaty language that would implement, with at most minor changes, the U.S. digital agenda. Once this was done, Commissioner Lehman and his allies would be in a good position to persuade other delegations to accept these norms. In Geneva, after all, he alone would be in charge of presenting the U.S. position. The delegates with whom he would chiefly be negotiating were other intellectual property professionals who, by training, tend to be solicitous toward the interests of rights holders. E.U. delegates could be expected to work with the U.S. delegation to support high-protectionist norms in the draft treaties, for they too believed that such norms would

The thing we are going to do is go to Geneva in December. . . . We are going to see if we can't negotiate some new international treaties and get [the international situation] straightened out. Now it may be that those treaties will require some legislative implementation. They will certainly have to be ratified by the Senate in any event, but they also might have to be implemented and that gives us a second bite at the apple.

Interview with Bruce Lehman, BNA Electronic Information Law & Policy Report 264 (June 21, 1996).

339. Hansen, supra note 184, at 582 (referring to copyright professionals as a "secular priesthood").
benefit their native industries. WIPO officials were also on record as supporting a high-protectionist digital agenda. In the event that word about dissenting views in the United States somehow spread to other delegations, Lehman likely believed he could dismiss them as representing minority viewpoints. To the extent any such concerns were given credence, Lehman could suggest that any potential overbreadth problems could be dealt with by national legislatures crafting appropriate limitations on or exceptions to rights granted in the treaty.

By August 1996, the second-order plan for achieving Commissioner Lehman's digital agenda at WIPO seemed well on its way to success. Chairman Liedes' draft treaties were largely modeled on U.S. digital agenda proposals with some European-inspired refinements. Although in regional meetings concerning the draft treaties some delegations had been somewhat restive about a number of proposed treaty provisions, Lehman was still relatively confident that most, if not all, of the U.S. digital agenda would be within reach once the diplomatic conference began.

The second-order strategy for accomplishing the U.S.-sponsored digital agenda for WIPO began to run into trouble. Prominent members of Congress, including most importantly, Senator Orrin Hatch, chair of the Senate Committee before which any copyright legislation would need to come, expressed concern that Commissioner Lehman's lobbying in Geneva for support for copyright pro-

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340. Id. at 585 n.13. There was, however, some tension between the U.S. and E.U. delegations at the December 1996 conference. This was due, in part, to the desire of each to have its digital agenda proposals accepted on matters where their proposals differed. But the main source of tension concerned their substantial differences over the draft treaty concerning audiovisual performer rights. See supra notes 10-18 and accompanying text. The E.U. delegates may also have been somewhat miffed at having been hurried by the Americans. The European Commission published its "very green" Green Paper on Copyright and Related Rights in the Information Society in July 1995. See 1995 European Green Paper, supra note 46. The Commission had hoped to issue its White Paper on digital copyright issues by January 1996, but this Paper had not even come out before the start of the diplomatic conference in Geneva. All that the Commission managed to do before the December 1996 conference was a Follow-Up Report on its Green Paper. See Follow-Up to 1995 European Green Paper, supra note 46.

341. See, e.g., Ficsor, in The Future of Copyright, supra note 6, at 118-21, 133-37.

342. See WIPO Draft Copyright Treaty, supra note 3, art. 12; TRIPS Agreement, supra note 40, art. 13; supra notes 161-185 and accompanying text.

343. See supra text accompanying notes 243-249.

344. Preconference meetings of the Asian delegations had produced some dissent over the temporary copying and anti-circumvention provisions of the draft treaty. Telephone Conversation with Peter M.C. Choy, Deputy General Counsel, Sun Microsystems (Jan. 1, 1997).
posals might preclude Congress from making its own determinations about appropriate legislation to govern the Internet. In addition, those who had previously gone to Congress with reservations and concerns about the digital agenda reflected in the White Paper legislation now turned their attention to officials in the Clinton administration who might listen to these reservations and concerns.

Two important components of the pre-diplomatic conference process in the United States included a somewhat-belated, but nonetheless welcome, opportunity for public comment on the draft treaties and a review of the U.S. diplomatic position within the Clinton administration in the month or so before the diplomatic conference. The public comment period resulted in the compilation of a record of substantial concerns and opposition to the draft treaties insofar as they would implement the U.S. White Paper's digital agenda or protect the contents of databases. Similar expressions of concern made their way to Clinton administration officials involved in the internal review of the U.S. position. This review ultimately led to Commissioner Lehman receiving a set of instructions about the positions the U.S. delegation should take on a number of draft treaty provisions dealing with digital agenda issues. Some of these were at variance with positions that he had previously supported in the White Paper and at WIPO meetings. In particular, Lehman was to seek clarification that article 12 of the draft treaty was consistent with fair use and related limitation and exception provisions of U.S. copyright law. Thus, by the time he got to Geneva Lehman's hands were tied, at least in part, on some digital agenda issues.

Several other factors help to explain why the initial U.S. digital agenda at WIPO did not succeed. One was that many U.S. firms

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345. Hatch Letter, supra note 102, at 1 ("Surely you will not want to be in the position of negotiating final language on a treaty that as yet commands no clear support in the full Senate and which may not ultimately be ratified. Congress will not wish to be in the position of having its hands tied by international developments on the basis of proposed legislation that has stalled precisely because it contains so many unresolved issues.").
346. This included organizations affiliated with the Digital Future Coalition.
348. The National Economic Council was responsible for this internal review of the U.S. position for the diplomatic conference.
349. See, e.g., Memorandum from Jonathan Band, Morrison & Foerster, LLP (reporting on comments submitted to USPTO about draft WIPO treaties) (on file with author).
350. See, e.g., CEO Letter, supra note 103.
351. See supra notes 213-214 and accompanying text.
352. See id.
concerned about the draft treaty's digital agenda, especially its temporary copying provision—including telephone companies, computer companies, software companies, online service providers, and library groups—sent representatives to Geneva to try to persuade delegations to drop article 7 or to amend it significantly.\footnote{Diplomatic Conference on Certain Copyright and Neighboring Rights, Questions, List of Participants, WIPO Doc. CRNR/DC/INF.2 (Dec. 20, 1996). Peter M.C. Choy, Gregory Gorman, and David Nimmer attended the diplomatic conference on behalf of the Computer & Communications Industry Association. Id. at 58. Peter Harter attended on behalf of Netscape Communications Corp. Id. at 63.} They did so, in part, because they had reason to believe that they could not count on Commissioner Lehman's support for any exemptions in implementing legislation if the final treaty contained an unamended article 7.\footnote{See White Paper, supra note 29, at 64-66, 114-23 (asserting that temporary copies were reproductions that copyright owners had rights to control and that online service providers were strictly liable for infringement). Telephone and online provider companies worried that their opportunity to persuade Congress to adopt appropriate exemptions would be foreclosed if the WIPO Copyright Treaty contained an unamended article 7. See supra notes 90-102 and accompanying text.} He had, after all, stood by the White Paper positions and had refused to compromise on this issue when the White Paper legislation had been before Congress in 1996.\footnote{In spring 1996, Congressman Moorhead tried to broker compromise legislation which would have included a provision limiting online service provider liability, but this did not meet with favor from the content industries or the administration.} With so many U.S. companies, as well as U.S. scientific, educational, and library associations making their concerns about the digital agenda known,\footnote{For example, Adam Eisgrau went to Geneva on behalf of the American Library Association and the Digital Future Coalition, Jamie Wodetzski, the International Federation of Library Associations, and Professor Jerome H. Reichman, the International Council of Scientific Unions.} U.S.-based discontent with the treaty could no longer be treated as marginal.\footnote{Copies of newspaper articles critical of the high-protectionist digital agenda at WIPO were widely circulated at the diplomatic conference. Telephone Conversation with Professor Jerome H. Reichman (Dec. 23, 1996).}

Another factor that changed the dynamics of the diplomatic conference, as compared with previous meetings conducted by the WIPO Committee of Experts, was that the national delegations attending the diplomatic conference in Geneva included not only officials who had previously attended the Committee of Experts meetings, but also other government officials who were not necessarily copyright specialists.\footnote{Id.} This may have made it more difficult for U.S. and E.U. negotiators to command the deference to which they had become accustomed during prior WIPO meetings.
In addition, the early and complete failure of the database treaty profoundly changed the dynamics at the WIPO conference. It hurt the credibility of U.S. negotiators who had been pushing as earnestly for the database treaty as for the other two treaties. They hoped to have three treaties to take back to please the information industries in the United States, which had so strongly supported President Clinton in his re-election bid. Failure of the database treaty also tarnished the image that the U.S. delegation had previously tried to project as farsighted and disinterested futurists who had studied the complex issues in depth and arrived at the right solution for the future. And it made it easier for delegates to express broad concerns about the implications for science, research, and education likely to flow from the high-protectionist norms that the U.S. and E.U. delegations had been promoting in both the copyright and database treaties. These concerns spilled over to affect negotiations on draft articles 7 and 12 of the draft treaty, as well as on the preamble to the copyright treaty affirming the treaty’s aim to balance the rights of authors and rights of users with due consideration to the needs and concerns of science and education.\(^\text{359}\)

The U.S. and E.U. delegations may also have been overconfident about their ability to persuade other states to adopt the high-protectionist norms they had been promoting at WIPO. Their success in coordinating efforts to gain international acceptance of the TRIPS Agreement may have given them unwarranted confidence that they could prevail in the WIPO meetings as well, particularly after Chairman Liedes issued treaties so much to the liking of U.S. and E.U. delegations. TRIPS was different, however, in that the intellectual property norms it sought to universalize were already substantially supported in the intellectual property policy-making community, whereas the digital agenda in the draft WIPO treaties aimed to establish wholly new norms for a digital future which had yet to evolve.

B. Measures of Success for the U.S. Digital Agenda at WIPO

Whether one judges U.S. efforts to promote a digital agenda at WIPO as a success or a failure depends on what one decides to measure. By comparison with the high-protectionist agenda reflected in the White Paper and the U.S. submissions to WIPO, one would have to say that the U.S. efforts were largely unsuccess-

\(^{359}\) See WIPO Copyright Treaty, supra note 8, pmbl.
The conference rejected the temporary copying proposals that had initially had U.S. support. It decided to treat digital transmissions as communications to the public, rather than as distributions of copies (which may bring with it a widened possibility for some private transmissions of works). The treaty not only preserved existing user right privileges in national laws; it recognized that new exceptions might appropriately be created. The Chairman's variant on the U.S. White Paper's anti-circumvention provision garnered almost no support. Even though the treaty contains a rights management information provision, it is watered down by comparison with what the U.S. delegation had sought. Moreover, the U.S. model for a database treaty was so objectionable that it was dropped virtually without discussion from the agenda in Geneva.

Seen from another perspective, however, the U.S. digital agenda had considerable success. It is now clear that copyright law applies in the digital environment, and that storage of protected works is a reproduction that can be controlled by copyright owners. The treaty also protects copyright owners from digital transmissions insofar as they constitute communications to the public. The treaty reaffirms the three-step test that limits national authority to adopt exceptions or limitations to certain special cases that do not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. It also requires states to have adequate protection and effective remedies against circumvention technologies and services, and to protect rights management information from alteration and removal insofar as these conceal or facilitate infringement. Finally, WIPO is to sponsor further discussions concerning a database treaty.

The copyright treaty that emerged from the diplomatic conference was a real success for the United States in part because that treaty is actually more consistent with the letter and spirit of U.S. copyright law than the digital agenda that Commissioner Lehman initially sought to promote in Geneva. For example, the conference decision not to overstretch the reproduction right of copyright law by insisting that it gives rights over all temporary copies, as

360. Agreed Statements, supra note 8, Concerning Article 1(4).
361. See supra text accompanying notes 134-160.
362. WIPO Copyright Treaty, supra note 8, art. 10.
363. Id. art. 11.
364. Id. art. 12.
365. See supra note 326 and accompanying text.
draft article 7 would have done, is consistent with the general trend in U.S. caselaw which has thus far treated some temporary copies, but not others, as reproductions. Insofar as the original draft of article 7 would have made online service providers and other intermediate institutions liable for all user infringements, including those of which they knew nothing, the treaty's rejection of article 7 is consistent with U.S. caselaw. U.S. courts lately have been holding intermediate institutions liable only when they knew of infringement and took no action to control it.

U.S. copyright law has long accorded copyright owners the right to transmit their works to the public. Hence, the treaty's endorsement of treating digital transmissions as communications to the public is consistent with U.S. copyright law. Now that the treaty has confirmed that copyright owners do have rights to control digital transmissions that communicate their works to the public, perhaps they will feel sufficiently protected and will begin digitally transmitting more of their commercially valuable works to the public.

The treaty's endorsement of balancing principles in copyright law, in particular, the importance of considering the impact of copyright rules on education, research, and access to information, is consistent with longstanding principles of U.S. copyright law. The treaty's confirmation of the viability of existing exceptions and limitations preserves the U.S. fair use defense, as well as

366. See, e.g., MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (holding that loading a program in RAM by unlicensed party infringed reproduction right); Agee v. Paramount Communications, Inc., 59 F.3d 317 (2d Cir. 1995) (holding that a temporary copy made during a satellite broadcast was not a reproduction and is therefore protected by ephemeral recording exception); and NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231 (7th Cir. 1995) (accepting that temporary copy could infringe, but holding that no reproduction occurred in this case).


369. See supra note 37 and accompanying text.

370. It is unclear whether the United States will assert that its compliance with article 8 of the WIPO Copyright Treaty can be satisfied by the public performance right or by the public distribution right of U.S. law. See supra notes 148-154 and accompanying text for a general discussion of these issues.

371. WIPO Copyright Treaty, supra note 8, pmbl., art. 10.

372. See Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 440, 442 (1984) (emphasizing balance between the interests of copyright owners and the public interest in access to copyrighted works); see also Netanel, supra note 75, at 292-97, 341-47 (discussing delicate balance between copyright law and democracy).
other privileges embodied in the U.S. copyright statute.\footnote{373} Also consistent with U.S. copyright principles is the treaty’s stated expectation that new exceptions and limitations may emerge or evolve in digital networked environments.\footnote{374}

Insofar as the U.S. copyright law already has a number of rules that regulate circumvention technologies,\footnote{375} the treaty’s provision on this subject is also consistent with U.S. law. The overbroad provision that the U.S. delegation to WIPO had wanted to include in the treaty would have been a break from the general thrust of U.S. law.\footnote{376} Even the RMI provision has some counterpart in existing U.S. copyright rules on removal and falsification of copyright notices.\footnote{377} The more narrowly tailored treaty provision on RMI, as compared with the provision initially sought by the U.S. delegation, is also consistent with balancing principles of U.S. law.\footnote{378}

Finally, the repudiation of the database treaty is consistent with the preservation of freedom of information principles that also have a long history in U.S. copyright law.\footnote{379} The Supreme Court’s decision in \textit{Feist Publications, Inc. v. Rural Telephone Service Co.} recognized that the constitutional purposes of copyright law are promoted when second comers are free to extract and reuse data from one work in order to make another work.\footnote{380} This does not mean that a well-crafted database treaty to protect data compilers from market-destructive appropriations of the whole or substantial parts of their data compilations would not also be consistent with the U.S. legal tradition.\footnote{381} There is general agreement in the United States that market-destructive appropriations of information, such as that which occurred in \textit{International News Service, Inc. v. Associated Press},\footnote{382} can and should be regulated.\footnote{383}

\begin{footnotesize}
\begin{enumerate}
\item See Agreed Statements, supra note 8, Concerning Article 1(4).
\item See \textit{Sony}, 464 U.S. at 429-34; Samuelson, supra note 213, at 102-18.
\item See \textit{Sony}, 464 U.S. at 442 (explaining that copyright owners can control technologies if their only substantial use is to aid infringement); 17 U.S.C. § 1002.
\item See Samuelson, supra note 213, at 20-21.
\item See 17 U.S.C. § 506(c), (d).
\item See, e.g., Cohen, supra note 271 (explaining why broad CMI provision would conflict with constitutional free speech principles).
\item See Reichman & Samuelson, supra note 27, at 126-30, 144 (explaining conflict between database treaty proposals and U.S. freedom of information principles).
\item See, e.g., Reichman & Samuelson, supra note 27, at 139-45.
\item 248 U.S. 215 (1918) (competitor’s appropriation of current news held to be an actionable misappropriation); see also National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (setting standards for misappropriations of information that would not be preempted by federal copyright policy).
\end{enumerate}
\end{footnotesize}
lem with the draft database treaty was that its overbreadth threatened to unduly interfere with many socially desirable extractions and reuses of data. The diplomatic conference in Geneva rightly refused to endorse it.

Although this Article has depicted the outcome of the digital agenda at WIPO in relatively rosy terms, this success should not be seen for more than it is. Just because balancing principles found their way into the recent copyright treaty does not mean that there will cease to be pressure to grant more extensive protection to copyright owners. Clinton administration officials may still choose to pursue the same legislative package in the U.S. Congress as they sought before. The Berne Convention, after all, only establishes minimum rules for national laws, not maximum rules. Moreover, other developments, such as widespread use of shrinkwrap licenses or electronic equivalents that substantially limit user rights, as well as emerging use of encryption and other technological protections may make the balancing principles of copyright law something of an historical anachronism.

However, there is still reason to cheer the digital agenda reflected in the copyright treaty signed in Geneva on December 20, 1996. Confidence in balancing principles, such as those reflected in the copyright treaty, may yet be carried over to other legal rules


385. It is unfortunate that refined conflict-of-laws principles for global digital networks were not addressed at the diplomatic conference. The territorial-based rules that have long been used to resolve international disputes are not readily adaptable to global networks. See, e.g., Jane C. Ginsburg, Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure, 42 J. Copyright Soc'y 318 (1995); Paul E. Geller, Conflicts of Law in Cyberspace: International Copyright in a Digitally Networked World, in The Future of Copyright, supra note 6, at 27.

386. See Berne Convention, supra note 3, arts. 19-20.

387. See, e.g., ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (enforcing “home use” restriction in shrinkwrap license); see also U.C.C., art. 2B, Licenses (Dec. 12, 1996 Draft) <http://www.law.uh.edu/ucc/ucc2b>.


regulating digital information, such as those that will govern electronic commerce in digital information products and services. Moreover, consumer preference for unrestricted or more lightly restricted copies of digital works over the highly protected copies may cause many publishers to abandon the otherwise appealing mindset that would seek ever stronger technological protection for digital content. The right motto for the digital future may be: "protect revenues, not bits."  

The phenomenal success of the software industry has, after all, occurred notwithstanding the unprotected nature of most copies sold in the mass-market. This should hearten traditional copyright industries which are now trying to retool their products and processes so they can commercially distribute works in digital networked environments. The market for copyrighted works in digital form is already very substantial, and it will continue to grow. Copyright owners cannot expect a digital future in which no unauthorized copies will be made. What they can expect, and what the digital agenda in the just-completed WIPO Copyright Treaty will bring, is enough protection so that the leakage that occurs does not become a hemorrhage.
