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A Response to the Working Group

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**Technological protection systems and information**

- The Working Group recommends that the Copyright Act be amended to include a new Chapter 12, which would prohibit the importation, manufacture or distribution of any device or product, or the provision of any service, the primary purpose or effect of which is to deactivate, without authority of the copyright owner or the law, any technological protections that prevent or inhibit the violation of exclusive rights under the copyright law.

- The Working Group recommends that the Copyright Act be amended to prohibit the dissemination of copyright management information known to be false and the unauthorized removal or alteration of copyright management information. Copyright management information is defined as 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.

**Support of pending legislation**

The report also generally supports legislation that would amend the copyright law and the criminal law (which sets out sanctions for criminal copyright violations) to make it a criminal offense to will-

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**A response to the Working Group**

By Pamela Samuelson

Among the most controversial points in the White Paper is its insistence that under existing law, on-line service providers are already strictly liable for any copyright infringements committed by their users and should remain so. Insofar as the White Paper offers a policy argument in favor of a strict liability rule, it is that on-line service providers are better situated than copyright owners to enforce copyrights.

It dismisses arguments by on-line service providers that it is infeasible for them to engage in constant monitoring of user accounts and that they should only be expected to warn users against infringement and take action when they learn about infringing activity.

The first post-White Paper decision concerning service-provider liability has, it should be noted, rejected the White Paper's position on the strict-liability issue.

Why, though, does the White Paper insist that on-line service providers are and should be strictly liable? Established copyright industries favor such a rule because it would push off onto on-line service providers the costs of enforcing their copyrights. It would provide incentive for service providers to become copyright police who, out of concern for their own potential liability, would monitor everything that goes in and out of user accounts.

Enforcing copyright law is important, but is it so important that users of computer systems should have to give up their privacy rights?

Another questionable aspect of the White Paper is its position that all uses of copyrighted materials in digital form can be controlled by copyright owners because use requires making temporary copies in the random access memory (RAM) of a computer, and these temporary copies infringe the reproduction right.

Jessica Litman's article, "The Exclusive Right to Read," 13 Cardozo Arts & Ent. L.J. 29 (1994) explains why it is not a fair interpretation of the Copyright Act of 1976 to say that Congress intended to treat all unauthorized RAM copies as infringing reproductions. Copyright owners may want to control all uses of their works, but there is as yet no exclusive right to control use granted in that statute.

Had the White Paper sought legislative clarification about the RAM copy issue, an interesting debate might have ensued about whether it is possible to maintain the balance embedded in existing law — something the White Paper says it seeks to do — if one grants exclusive rights to control all uses of protected works.

As with the on-line service-provider issue, the White Paper favors an aggressively pro-publisher interpretation of existing law to a balanced policy analysis.

For a more detailed critique of the White Paper and its proposed legislation, see "The Copyright Grab," in Wired 4.01 at 134 (January 1996).
fully infringe a copyright by reproducing or distributing copies with a retail value of $5,000 or more (S. 1122). By setting a monetary threshold and requiring willfulness, S. 1122 ensures that merely casual or careless conduct resulting in distribution of only a few copies will not be subject to criminal prosecution and that criminal charges will not be brought unless there is a significant level of harm to the copyright owner’s rights.

The report also supports a public performance right for sound recordings. The Digital Performance Right in Sound Recordings Act of 1995, which grants a limited public performance right for sound recordings, was passed by Congress last fall and signed into law by the president on Nov. 1, 1995.

The report also includes recommendations that the Patent and Trademark Office (PTO) obtain public comment related to measures that can be adopted to ensure the authenticity of electronically disseminated publications, particularly with respect to verifying the contents and date of first public dissemination of the publication, and evaluating the substantive value of the information contained in the publication as to its role in patentability determinations; and that the PTO explore the feasibility of establishing requirements or standards that would govern authentication of the date and contents of electronically disseminated information for purposes of establishing their use as prior art. In addition, it recommends that the PTO, in the context of World Intellectual Property Organization meetings on the trademark International Classification system, propose changes to ensure that the system accommodates the goods and services of modern information technology; and that the PTO regularly update its trademark Manual for the Identification of Goods and Services to reflect new goods and services used on or in connection with the NII and GII.

In addition, the Working Group supports further study in the following areas:

- The Working Group encourages copyright owners to explore with libraries and schools special institutional licenses, and endorses increased funding for libraries and educational institutions to assist in their ability to purchase and license works in digital format.

- The Working Group supports the efforts presently under way to revise Article 2 of the Uniform Commercial Code to encompass licensing of intellectual property. Where parties wish to contract electronically, they should be able to form a valid, enforceable contract online.

- Recognizing the important role of encryption technology in fostering a secure and useful NII, the Working Group supports efforts to work with industry on key-escrow encryption technologies and other encryption products that could be exported without compromising U.S. intelligence gathering and law enforcement. Proliferation of such technology will enable U.S. industry to meet the needs of the international marketplace for these products and continue to lead the development of the GII.

- The Working Group believes it is — at best — premature to reduce the liability of any type of service provider in the NII environment. Exempting or reducing the liability of service providers prematurely would choke development of marketplace tools that could be used to lessen their risk of liability and the risk to copyright owners, including ensuring against harm caused by their customers, shifting responsibility through indemnification and warranty agreements, licensing, education and the use of technological protections. At this time in the development and change in the players and roles, it is not feasible to identify a priori those circumstances or situations under which service providers should have reduced liability. However, it is reasonable to assume that such situations could and should be identified through discussion and negotiation among the service providers, the content owners and the government. The Working Group strongly encourages such actions in the interest of providing certainty and clarity in this emerging area of commerce.

The Working Group continues its work with the Conference on Fair Use and the Copyright Awareness Campaign. The Conference on Fair Use brings together copyright owner and user interests to discuss fair use issues and, if possible, to develop guidelines for uses of copyrighted works by librarians and educators. Some 60 interest groups are participants in the conference and have been meeting regularly since September 1994. The Copyright Awareness Campaign, co-sponsored with the departments of Education and Commerce, coordinates educational efforts of approximately 40 individuals and organizations to increase public awareness of the importance of intellectual property in the information age.

A copy of the full report may be obtained by calling the PTO Office of Public Affairs at 703-305-8341. The report is also available through the PTO home page on the World Wide Web (www.uspto.gov) or on the IITF bulletin board, which can be accessed by pointing the gopher client to iitf.doc.gov or by telnet to iitf.doc.gov (log in as gopher).
MARCH 1996
25 TeleConference:
ERISA PREEMPTION
(Cosponsored with the Sections of Labor and
Employment Law, Real Property, Probate and
Trust Law, Taxation, Tort and Insurance Practice
and the Society of Actuaries)

28-31 SPRING MEETING
Opryland Hotel
Nashville, Tenn.
Herbert S. Wander, Chair

APRIL 1996
18-19 National Institute:
EMPLOYEE BENEFITS IN MERGERS
AND ACQUISITIONS
New York City
(Cosponsored with the Sections of Labor and
Employment Law, Real Property, Probate and
Trust Law, Taxation, Tort and Insurance Practice)

24-26 National Institute:
ERISA BASICS
Los Angeles
(Cosponsored with the Sections of Labor and
Employment Law, Real Property, Probate and
Trust Law, Taxation, Tort and Insurance Practice)

MAY 1996
9-10 National Institute:
CRITICAL AND EMERGING LEGAL ISSUES
FOR BANKS: THE MIDYEAR REVIEW
Washington
(Cosponsored by the Sections of Administrative
Law and Regulatory Practice)

JUNE 1996
6-7 National Institute:
MERGERS AND ACQUISITIONS
Locations to be determined

AUGUST 1996
1-8 ABA ANNUAL MEETING
Orlando, Fla.

OCTOBER 1996
16 Committee meeting:
COMMERCIAL FINANCIAL SERVICES
Sheraton Hotel
Chicago
Helen D. Chaitman, Chair

25-28 Committee meeting:
CORPORATE GENERAL COUNSEL
Ritz Carlton Amelia Island
Amelia Island, Fla.
Harold S. Barron, Chair