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Journal of Civil Rights and Economic Development

Volume 11
Issue 3 *Volume 11, Summer 1996, Issue 3*

Article 5

June 1996

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Recommended Citation

Fowler, Peter N. (1996) "Universally Accepted Standards of International Copyright Protection on the Information Superhighway: An Improbable Dream," *Journal of Civil Rights and Economic Development*: Vol. 11 : Iss. 3 , Article 5.
Available at: https://scholarship.law.stjohns.edu/jcred/vol11/iss3/5

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UNIVERSALLY ACCEPTED STANDARDS OF INTERNATIONAL COPYRIGHT PROTECTION ON THE INFORMATION SUPERHIGHWAY: AN IMPROBABLE DREAM

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Many people wonder what a copyright attorney is doing in the Office of Legislative and International Affairs at the Patent and Trademark Office (PTO).[1] In part, the answer to that question is that copyright protection is an integral component of intellectual property. The Patent and Trademark Office is primarily responsible under both law and regulation to advise the Executive Branch of the United States government, from the White House to the United States Trade Representative and the Department of State, on issues of intellectual property protection.[2]

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[1] *Cf.* 15 U.S.C. § 1511 (1994) (providing Secretary of Commerce with control over Patent and Trademark Office); *cf. also* 15 U.S.C § 1123 (1994) (empowering Commissioner of Patent and Trademark office with establishing PTO's rules and regulations); 35 U.S.C. § 361 (1994) (designating PTO as government agency which receives domestic and foreign patent applications and performs duties related to patent registration).

[2] *See* 35 U.S.C. § 14 (1994) (requiring annual reporting to Congress by Commissioner of PTO); *see also* 35 U.S.C. § 6 (1997) (assigning various duties to Commissioner of PTO under direction of Secretary of Commerce and guidance of Secretary of State to study patent law issues and forecasting patent issues with regards to future technology); 35 U.S.C. § 362 (1994) (appointing PTO as International Searching Authority and International Preliminary Examining Authority for international applications).

For much of our nation's history, technology has been relatively crude. It took a great deal of effort for an individual both to pirate a work and to derive any commercial success out of the endeavor.[3] In effect, they would have had to set up their own printing press to do so, and the commercial reality was that for the amount of investment and resources required, the amount of commercial revenue to be gained was fairly minimal. As technology has improved, however, copying has improved as well.[4] It is probably axiomatic to think that as soon as something of value can be created, someone figures out how to steal it and distribute it, and usually at a lesser cost.

The last generation has seen the advent and prevalence of reproduction devices such as photocopying and videotaping, which has facilitated the widespread copying and distribution of copyrighted and protected works. Both types of reproduction are relatively routine, inexpensive, efficient, feasible and, thus, most people can do it, at least if they can figure out how to program their VCR.

Publishers and content providers have always had a different perspective. Publishers and content providers realize that the ease with which an individual is able to reproduce, distribute, and copy their works leads to widespread loss of sales. In fact, one of the axioms of copyright protection is that the way to foster a creative industry, whether it is music, composition, or written material or information based technology or computer software, is to

[3] *Cf.* U.S. CONST. art. I, § 8, cl. 8 (establishing basis for intellectual property protection in United States: "The Congress shall have the power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *cf. also* Henry Barry, *Toward a Model for Copyright Infringement*, 33 COPYRIGHT L. SYMP. (ASCAP) 1, 30-31 (1987) (discussing history of copyright protection in United States); Richard Taylor, *Texas's New Trademark and Anti-dilution Statute—Useful or Useless New Protection for Texas trademarks?*, 21 ST. MARY'S L.J. 1019, 1021 (1990) (outlining origins of patent law in United States); Peter Thea, Note, *Statutory Damages for the Multiple Infringement of a copyrighted Work: A Doctrine Whose Time Has Come Again*, 6 CARDOZO ARTS & ENT. L.J. 463, 470 (1988) (outlining history and development of copyright statutes and remedies throughout U.S.).

[4] *Cf.* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (holding that sampling of published and copyrighted song constitutes violation of U.S. copyright law); *cf. also* Jeffery H. Brown, *"They Don't Make Music The Way They Used To": The Legal Implications Of "Sampling" In Contemporary Music*, 1992 Wis. L. Rev. 1941, 1966-68 (discussing music sampling as new mode of copyright infringement and arguing that *Grand Upright Music* failed to establish concrete criteria for what constitutes copyright infringement in sampling music).

provide copyright protection,[5] and this is a concept which the United States preaches to many other countries as well.[6]

One of the great quantum shifts over the last few years has been a shift away from just the United States and its private sector arguing that intellectual property and copyright protection is important for the protection of our works in foreign countries.[7] That particular policy stance led to the United States being perceived as the "international bad cop" beating up on small countries for piracy.

There has been a shift in emphasis under the World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT), via the Trade Related Aspects of Intellectual Property Agreement (TRIPS), to level the playing field. This has created a new international foundation of minimum standards whereby all countries that wish to be members of the WTO must meet intellectual property protection requirements and obligations.[8]

Believe it or not, today many countries do not have trademark, copyright, or patent laws.[9] These are protections which our polit-

[5] *See* 15 U.S.C. § 1118 (1997) (providing for destruction of articles which infringe upon protected copyright); *see also* Jon A. Baumgarten & Eric J. Schwartz, *Outline of Domestic Copyright Law, in* UNDERSTANDING BASIC COPYRIGHT LAW 1996, at 423 (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 450, 1996) (discussing nature, subject matter, ownership, duration, and protection of copyrights).

[6] *See* Jon A. Baumgarten & Eric J. Schwartz, *Summary Outline of Copyright Restoration Provisions of the Uruguay Round Agreements Act, in* UNDERSTANDING BASIC COPYRIGHT LAW 1995, at 127, 129 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 412, 1995) (noting that United States sought to strengthen its leadership role in intellectual property protection during Uruguay Round); *see also* Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1064 (1968) (criticizing U.S. involvement in copyright law in developing world).

[7] *See generally* Doris E. Long, *The Protection Of Information Technology In A Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMPUTER INFO. L. 129, 134-35 (1996) (discussing globalization of world market place and stressing importance of multinational agreements regarding intellectual property and copyright production).

[8] *See, e.g.*, Heather L. Drake, *The Impact of the Trade Wars Between the United States and Japan on the Future Success of the World Trade Organization*, 3 TULSA J. COMP. & INT'L L. 227, 282 (1996) (discussing GATT signatory states and in particular Japan's duty to comply with WTO regulations and panel reviews based on GATT requirement that all states conform their domestic laws, regulations, and administrative procedures to standards of WTO Agreement); *see also* Katherine C. Spelman, *Combatting Counterfeiting, in* GLOBAL TRADEMARK & COPYRIGHT 1995: MANAGEMENT & PROTECTION, at 309, 332-33, (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series).

[9] *See* Than Nguyen, *To Slay a Paper Tiger: Closing the Loophole in Vietnam's New Copyright Laws*, 47 HASTINGS L.J. 821, 822 (1996) (discussing how Vietnamese copyright laws were never enforced by Vietnamese government); *see also* Maggie Heim & Greg Goeckner, *International Anti-Piracy and Market Entry*, 17 WHITTIER L.REV. 261, 262 (noting predicament faced by motion picture industry when it releases films in foreign countries which do

ical and legal systems, as well as our attorneys, take for granted. If the states without these protections want to be players in the international trade arena in the twenty-first century, they will have to create such protections at a level which provides adequate and effective protection for intellectual property.

Today, many issues arising out of both patent and trademark law interplay domestically, with the National Information Infrastructure (NII),[10] and internationally, with the Global Information Infrastructure (GII).[11] Here, however, I think the focus will be primarily on copyright issues, because that is really what I believe provides the most protection for creative works and their content.[12]

A lot of the technology of the Internet and the NII— computers, scanners, television, fax machines, etc.—focus on the hardware. Well, what really runs it? What will make the NII, or the GII a true global marketplace in which there will be more than just a congregation of hand me down public domain documents available for research, and for education?[13]

not have adequate copyright protection); Aspen Law & Business, *Japan Sponsors Asian Intellectual Property Seminar*, 6 No. 12 J. PROPRIETARY RTS. 29, 30-33 (1994) (chronicling Japan's leadership in forcing developing Asian States to provide for copyright protection).

[10] *See* Ronald H. Brown & Bruce H. Lehman, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (Dep't Commerce 1995). *See generally United States National Information Infrastructure Virtual Library* (last modified Nov. 13, 1996) <http://nii,nist.gov> (providing central database for all government documents relating to NII).

[11] *See* Ronald Brown & Bruce Lehman, *News Conference On Intellectual Property Rights Working Group*, Sept. 5, 1996 *available in* 1995 WL 522740 (discussing plans for GII); *see also* Jane C. Ginsburg, *Global Use / Territorial Rights: Private International Law Questions Of The Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y 318, 323, 330 (1995); Raymond T. Nimmer, *Licensing On The Global Information Infrastructure: Disharmony In Cyberspace*, 16 NW. J. INT'L & BUS. 224, 235-38 (1995) (discussing licensing and contracts in context of GII). *See generally Global Information Infrastructure Commission Organizational Description* (visited Nov. 21, 1996) <http://www.gii.org> (providing information regarding establishment, goals and policies of GII program).

[12] *See* Ralph J. Andreotta, *The National Information Infrastructure: Its Implications, Opportunities and Challenges*, 30 WAKE FOREST L. REV. 221, 222, 225 (1995) (defining NII and discussing role of Government in its growth); *see also* Henry Perritt, *Access to the National Information Infrastructure*, 20 WAKE FOREST L. REV. 51, 61 (1995) (discussing legal sources of authority for public access to NII). *See generally* Jonathan D. Blake & Lee J. Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 FED. COMM. L.J. 397, 400, 410 (1994) (discussing role of industry and government in developing NII).

[13] *See* Ginsburg, *supra* note 11, at 323, 330 (reviewing effect of national copyright laws and choice of law contractual provisions on copyright issues in context of GII); *see also* Vice President Al Gore, *Bringing Information to the World: The Global Information Infrastructure*, 9 HARV. J.L. & TECH. 1, 3-4 (1995) (discussing background and legal and technological development of GII); Nimmer, *supra* note 11, at 235-38 (discussing licensing and contracts in context of GII).

The NII and GII will have a more significant effect and become more viable through the implementation of copyright protection in the United States and internationally. The need for international protection is exemplified in the truly global reach of users. A database in Canada can be downloaded in Argentina and copied in Korea. A work that an author wants to publish today can be uploaded and 10,000 copies of that person's article, novel or song, can be distributed without their permission, literally at a point and click.

In effect, the great irony of the GII is that it will simplify our lives, but at the same time it will also complicate them. The good news is that the GII will simplify our lives because it allows for the quick, efficient and technically perfect reproduction in a digital format in distribution of copyrighted works. The bad news is that it allows for the quick, efficient, and technically perfect reproduction and distribution of copyrighted works.[14] Thus, from a publisher or a content provider's perspective, the GII is the best and worst of all possible worlds. The GII embodies the potential for the efficient world wide distribution of works but at the same time it creates world wide distribution without adequate copyright and trademark protection.

One of the issues that the United States is currently pushing very strongly for is an extension of the Berne Convention.[15] The Berne Convention is the leading treaty containing the universally accepted standards for the copyright protection of literary works. The United States, along with the European Union and a few

[14] *See* 17 U.S.C. § 108 (1994) (prohibiting libraries from duplicating electronically or digitally for any legal purpose unless original source was in such format); *see also* Robert S. Risoleo & Kathryn E. Rorer, *Registration Statement Preparation and Related Matters, in* MECHANICS OF UNDERWRITING 1995, at 81, 251 (PLI Com. L. & Practice Handbook Series No. 740, 1995) (discussing emerging technology of digital audio tape (DAT) and government and industrial attempts to limit capability to duplicate digital material); Eric H. Smith, *Worldwide Copyright Protection Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 559, 577 (1996) (noting that protection of TRIPS also applies to digitally reproducible materials). *But see* Jessica Littman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 37 (1996) (arguing that digital reproduction is necessary incident to use of digital materials and reproduction is not appropriate test of copyright infringement).

[15] Berne Convention Implementing Act of 1988, Pub. L. No. 100-658, 102 Stat. 2853 (1988) (codified in scattered sections of Title 17) (enabling United States to join Berne Convention by modifying domestic law to conform with provisions of Berne Convention); Sen. Orrin G. Hatch, *Better Late Than Never: Implementation of the 1986 Berne Convention*, 22 CORNELL INT'L L.J. 171, 171 (1989) (discussing Berne Convention and Berne Convention Implementing Act of 1988). *See generally* William Belanger, *U.S. Compliance With the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 374, 390 (1995) (reviewing background, scope, and impact on U.S. law and policy of Berne convention).

other countries in the Western Hemisphere, are advocating a revision in the Berne protocol focusing on the development of new agreements for the adequate protection for digital works.[16]

The United States government is advocating a focus on fair use policy, which is based on the realization that it is the most important consideration in terms of protecting the commercial viability of the GII. There has been much commentary regarding the White Paper Report,[17] the report of the Working Group on Intellectual Property of the National Information Infrastructure. Critics of the White Paper Report argue that the new focus removes fair use from the equation.[18] Nothing, however, could be further from the truth. In fact, the Working Group on Intellectual Property Rights (IPR) convened a conference on fair use. This conference consists of over 65 organizations including content providers, users, educators, researchers, and librarians. The focus of the conference has been to review the current guidelines of the 1976 copyright law, focusing on reproduction and use in an attempt to develop new guidelines for digital works.[19] This process is ongoing, and it is hoped that the voluntary guidelines will be intro-

[16] *See* Aspen Law & Business, *WIPO Plans to Draft Protocol to the Berne Convention*, 8 No. 4 J. PROPRIETARY RTS. 28 (Apr. 28, 1996) (announcing diplomatic conference planned for December of 1996 to draft protocol to Berne Convention which will advance copyright protection of TRIPS agreement under GATT); *see also* Robert A. Cinque, *Making Cyberspace Safe For Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258, 1291 (1995) (reviewing proposed protocols offered in 1991 by WIPO for enhanced enforcement of Berne Convention protection).

[17] *See* John Carmichael, *In Support of the White Paper: Why Online Service Providers Should Not Receive Immunity From Traditional Notions of Vicarious and Contributory Liability for Copyright Infringement*, 16 LOY. L.A. ENT. L.J. 759, 771 (1996) (discussing benefits of White Paper arguments imposing liability on on-line service providers); *see also* Gary Glisson, *A Practitioner's Defense of the White Paper*, 75 OR. L. REV. 277, 280 (1996) (reviewing recommendations of White Paper).

[18] *See* Barry D. Weiss, *Barbed Wires and Branding in Cyberspace: The Future of Copyright Protection*, *in* UNDERSTANDING BASIC COPYRIGHT LAW 1996, at 397, 408 (PLI Pat. Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3974, 1996). Bruce Lehman, author of the White Paper, has remarked that the fair use protection should have been maintained for non-commercial users. *Id.*; *see also* Glisson, *supra* note 17, at 280 (summarizing and responding to criticisms of fair use doctrine developed in White Paper); Alfred C. Yen, *Entrepreneurship, Copyright, and Personal Home Pages*, 75 OR. L. J. 331, 333 n.13 (1996) (criticizing White Paper's hasty application of copyright law to Internet before recommendations were offered from committee studying relevance of fair use doctrine).

[19] *See* Brown & Lehman, *supra* note 10, at 83-84 (discussing NII & IPR proposals for reproductions of digital works); *see also* Benjamin R. Kuhn, *A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed Over the Information Superhighways of Today and Tomorrow*, 10 TEMP. INT'L & COMP. L.J. 171 n.190 (1996) (describing IPR conference on fair use).

duced as part of a legislative history with the NII legislation which is working its way through Congress.[20]

It appears that most realize and recognize the whole cyberworld that is being created around us every day. Some are concerned, some are eloquent about surfing the Net, and others are simply too technophobic to use a fax machine. Thus, it is unreasonable to expect unanimity of opinion or acclaim for any type of legislation or regulation.

Most people, including the vast majority in the intellectual property field, are of the belief that the only way that the GII is going to grow into a true global marketplace is to protect adequately works that are placed on the Internet.[21] Otherwise, publishers and authors will never allow their works to be distributed and be put on the Internet—much in the same way that individuals would not consider driving a car on a highway in which there are no rules; it is a little scary.

Intellectual property lawyers look at the Internet and the GII and acknowledge that an information superhighway exists. These intellectual property lawyers are cognizant of the need for protection, and today in Washington it is one of the most interesting legislative discussions.

[20] S. 982, 104th Cong. (1995); H.R. 2441, 104th Cong. (1995).

[21] *See, e.g.*, Kuhn, *supra* note 19, at 191 (noting cognizance and motive of NII Working Group with respect to need to provide adequate protection on Internet to avoid stunting of Internet's growth).