

# **FROM THE GREEN PAPER TO THE WHITE PAPER: INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE**

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Abstract: The Clinton Administration has proposed changes to the U.S. Copyright Act intended to afford adequate protection to content transmitted on the National Information Infrastructure. This article reviews these proposed changes, as well as critiques of these changes.

## **I. INTRODUCTION**

The Information Infrastructure Task Force ("IITF") was established in February 1993 to articulate and implement the Clinton Administration's vision of the National Information Infrastructure ("NII"). Among other committees, the IITF established the Information Policy Committee, which in turn created the Working Group on Intellectual Property ("Working Group"). The Working Group, chaired by Bruce Lehman, the Commissioner of Patents and Trademarks, was charged with examining the intellectual property issues raised by the NII. In July 1994, the Working Group released a draft report entitled Intellectual Property and the National Information Infrastructure (the "Green Paper"). When this article was submitted for publication, the Working Group was still preparing its final report (the "White Paper"). The White Paper is expected to be released during the late Spring or early Summer of 1995.

The Green Paper focuses on copyright law and "its application and effectiveness in the context of the NII." The Green Paper proposes several changes to the U.S. Copyright Act purportedly necessitated by the advanced technology of the NII. This article reviews these recommendations as well as the public reaction to the Green Paper evidenced by the voluminous written and electronic comments received by the Working Group.

## **II. THE GREEN PAPER'S RECOMMENDATIONS**

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The Report's primary concern with the current state of copyright law is that it has and will become increasingly difficult to apply current copyright law principles to the rapidly changing technologies of today and the future. NII technologies allow increased access and ability to copy copyrighted works. Thus, according to the Report, the NII will only flourish if greater protection of works accessible on the Information Superhighway is provided to copyright owners. Accordingly, the Report proposes "a few alterations" to the existing copyright law to accommodate such technological advances and to provide the appropriate protections to maximize full development of the NII.

**A. Distribution by Transmission**

**1. The Distribution Right**

The Report initially proposes an amendment to the distribution right of the copyright owner. The Copyright Act affords the copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work" to the public. A copy is a material object in which a copyrighted work is fixed, such as a cassette tape, book or film. Traditionally, distribution of a copy required a material object to change hands. Using new technology, however, a copyrighted work can be transmitted without a material object ever literally changing hands. For example, the Report uses the illustration of the transmission of a computer program from one computer to ten other computers. When the transmission is complete, the original copy remains in the transmitting computer while a copy resides in the ten other computers. To accommodate such new technology, the Green Paper proposes an amendment to Section 106(3) of the Copyright Act to indicate that a distribution of a copy can be effected by transmission, and that such transmissions are within the copyright owner's exclusive distribution right.

Correspondingly, the Report recommends amendment of the definition of "transmit" in Section 101 of the Copyright Act to make clear that reproductions, as well as

performances and displays, can be transmitted. The Report's final recommendation with respect to the distribution right is to amend Section 602 of the Copyright Act to prohibit unauthorized importation by transmission.

## **2. Publication**

The current definition of the term "publication" was also of concern to the drafters of the Report. In particular, the legislative history of the Copyright Act makes clear that "any form of dissemination in which a material object does not change hands . . . is not a publication no matter how many people are exposed to the work." In the context of the Information Superhighway, the transmission of a work does not require a material object to change hands. Given the law's legislative history, such transmission would not be considered a publication. Therefore, the Report recommends amending the definition of "publication" to include publication by transmission.

## **3. First Sale Doctrine**

The Working Group also highlights the first sale doctrine as another subject for potential amendment. Although the owner of a copyright has the exclusive right to distribute copies of the work, the first sale doctrine permits the owner of a lawfully-made copy of a work to dispose of that particular copy in any manner, subject to certain restrictions. The Working Group reasons that the first sale doctrine should not apply to transmissions because the original owner of the particular copy retains that copy and transmits a reproduction of the work to someone else. The Report thus recommends that Section 109 of the Copyright Act be amended to clarify that the first sale doctrine does not apply to transmissions.

## **B. Technological Protection**

Next, the Report turns its attention to the technological protections available to the copyright owner. The Report points out that technology itself can be used to defeat technological protections. The Report concludes that the public interest is served by prohibiting devices, products, components and services used to defeat technological methods of preventing unauthorized use. Accordingly, the Report proposes the addition of Section 512 to Chapter 5 of the Copyright Act and amendments to Sections 501, 503 and 506, which would make it a violation of the Act to import, manufacture or distribute devices or provide services used primarily to defeat technological methods of protecting a copyrighted work against infringement. Any violation of the amendment would constitute copyright infringement of the work that uses the technological protection.

**C. Copyright Management Information**

The Green Paper predicts that copyright management information related to a work, e.g., the name of the copyright owner and the conditions for use of the work, will be essential to the effective and efficient operation of the NII. To this end the Working Group recommends amending Section 506 of the Copyright Act to prohibit both the fraudulent inclusion of copyright management information and the fraudulent removal or alteration of such information.

**D. Public Performance Right**

The copyright owner of a sound recording does not have the exclusive right of public performance. For example, in order for a radio station to play a record on the radio, the radio station need only get a license from the copyright owner of the underlying musical work, but not from the owner of the sound recording or the person performing the work. The Working Group believes it is time to rectify this inequity and points to two bills introduced in the 103rd

Congress, H.R. 2576 and S. 1421, which would have granted the owner of a sound recording the exclusive right to perform or authorize another to perform the record by "digital transmission."

**E. Fair Use**

The Working Group recognizes that special problems are posed by the information infrastructure for the fair use doctrine. The Working Group acknowledges that institutions such as public libraries and schools serve as the cornerstones for providing access to information and emphasizes that these institutions must be able to continue in that role in light of the NII. The Report notes that guidelines for library and educational use of printed matter and music were widely and voluntarily adopted by a wide range of groups. The Working Group has sponsored a series of meetings to develop similar guidelines in the context of the NII.

**F. Licensing**

The Report points out that the issue of licensing has traditionally been left to the dictates of the marketplace and recommends that the marketplace should again be allowed to develop a licensing system for multimedia works in the NII environment.

**III. COMMENTS ON THE GREEN PAPER**

The Working Group issued the preliminary draft of the Green Paper in order to solicit comments on the Report, especially the preliminary findings and recommendations. Response to the Green Paper has followed a somewhat predictable pattern, with copyright owners generally applauding the recommendations of the Report and users of copyrighted works expressing concern that the recommendations give copyright holders too many rights in relation to the consumers of those works.

In its comments on the the Green Paper, for example, the Alliance to Promote Software Innovation ("APSI") is overwhelmingly supportive of the Report's recommendations. APSI "fully endorse[s]" what it identifies as the Reports two principal themes and conclusions (1) that "with only minor clarifications and amendments, current copyright law is adequate to ensure the availability and protection of works and materials on the NII; and (2) that "technological means must be implemented as early as possible to mitigate the exposure to misuse and misappropriation of works made available through networks."

Academics and librarians are among the group that feels that the Report, in its quest to promote the NII through greater protection for content providers, neglects to balance such increased protections with the rights of users. For instance, the American Library Association's ("ALA") comments identify two key areas disregarded by the Report. First, the Report pays little attention to the opportunities posed by the NII for public access to information, instead focusing and attempting to cure the threat posed to the copyright owner's rights. In response, the ALA points out that it "is opposed to any reduction in the rights of the public to use information because its form or format has changed." Second, the ALA recommends that "no expansion of the copyright holders' rights to include electronic transmissions should be enacted without enactment of corresponding limitations on those rights in areas such as fair use, classroom use, and library use." Not surprisingly, the ALA's concern lies with open access to the NII.

The Interactive Multimedia Association ("IMA") criticizes the Green Paper for failing to cover important issues such as multimedia patents, the relationship between intellectual property and interoperability, and the scope of the adaptation right. The IMA also objects to the Green Paper's conclusion that the marketplace would efficiently resolve the complex problems relating to multimedia licensing.

The Home Recording Rights Coalition ("HRRC") criticizes the Green Paper's recommendations regarding technological protections, what the HRRC terms the "circumvention

provision." The HRRC is concerned that the circumvention provision as "potentially applied to technologies addressed to private, noncommercial home recording of entertainment programming" inadequately preserves fair use principles.

Online service providers have their own concerns regarding the Green Paper. In particular, online service providers are concerned about the Report's implications for contributory infringement liability. A group of the nation's largest online service providers, including American Online, Inc., CompuServe Inc., Delphi Internet Service Corp., GE Information Services, Inc., LEXIS Counsel Connect, Prodigy Services Co., and Ziff Communications Co. submitted comments to the Working Group recommending that liability for service providers be akin to the standards for contributory liability articulated in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984). Accordingly, service providers would only be liable if "(1) they have actual knowledge that infringing material has been or is being transmitted to, or resides on, their systems and (2) having knowledge that such material is infringing, and the ability and authority to stop its transmission or remove it, fail to stop the transmission or remove it from their systems in a reasonable time."

Groups such as the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc., ("BMI") and the National Association of Broadcasters oppose the Green Paper's recommendation regarding the creation of performance rights. As stated in the comments from ASCAP, "we must also question the wisdom of the Preliminary Draft's recommendation that an exclusive and broad performance right [sic] in sound recordings should be granted. . . . [S]uch rights cannot be granted to the detriment of [the] existing rights . . . of the creators and copyright owners of the musical compositions which are recorded. We fear that the Preliminary Draft's proposals will do just that."

Finally, the Copyright Office's comments on the Green Paper signal a need for restraint and further consideration before many of the Working Group's proposals are adopted. With respect to the proposed modifications to the definitions of the terms "publication" and

"transmit," for example, the Register of Copyrights is concerned that such modifications could create unintended consequences in areas such as entitlement to claim copyright in the United States, applicability of some compulsory licenses, the mandatory deposit obligation, fair use and library reproduction activities, awarding of statutory damages and attorney's fees under section 412, and Copyright Office registration practices.

#### **IV. CONCLUSION: BEYOND THE GREEN PAPER**

The final recommendations of the Working Group, the "White Paper," are expected by June of 1995. At this time, however, it is difficult to predict what form the final recommendations will take. In light of recent Congressional changes, it is possible that the final recommendations will propose less aggressive changes to the Copyright Act and thus require less Congressional action in order to encourage passage of the Report's proposals. The White Paper may also reflect heightened interest in the Global Information Infrastructure, which is only touched upon in the Green Paper. To this end, moral rights may receive more thorough consideration.