

# **The WIPO Copyright Treaty: A New International Intellectual Property Framework for the Digital Age**

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## **ABSTRACT**

*The World Intellectual Property Organisation, an agency of the United Nations, adopted a copyright treaty at the end of 1996. Some of the provisions considered at the Diplomatic Conference, including those directed at temporary reproductions, the scope of permitted exceptions, and technological protection measures, had the potential to significantly impede the development of the Global Information Infrastructure. Ultimately, the Conference rejected the more extreme proposals, and produced a balanced treaty which will foster the rapid growth of the GII.*

Late in the night of December 20, 1996, after three tense weeks in Diplomatic Conference in Geneva, two new intellectual property treaties were adopted.<sup>1</sup> Upon the opening of the Conference, this success was far from a foregone conclusion. Although near-consensus had been reached with respect to several issues discussed in Committee of Experts meetings since 1991, the so-called “Digital Agenda” had been introduced during 1996, and certain controversial elements of that agenda threatened to derail the entire process. In particular, controversy had erupted over proposals on the reproduction right and technical protection systems.<sup>2</sup>

Suspense reigned until the last possible moment. Until the final day of the Conference, there was no guarantee any treaties would see the light of day. In the end, however, champagne finally flowed at WIPO Headquarters, and rightfully so. Those who had laboured hard to achieve results, including the representatives of about 120 countries and 70 non-governmental organisations, deserved to be proud of their work.<sup>3</sup> Although to some the digital agenda had contained radical proposals that threatened to hinder rather than foster the development of the Information Society, the actual treaties constitute a measured and balanced response to the digital age.

In some areas, the treaties little more than mirror GATT TRIPs obligations, reformulated in the language of the Berne Convention. But in others, the treaties reached new ground, and right owners obtained desirable new protections. In particular, the establishment of the “making available” interactive right is a valuable and important advance in the digital networked world, and provisions on technological measures and rights management information are also new and responsive to digital challenges. At the same time, the treaties

recognise the broader public interest in, among other things, access to information and freedom of speech.

### *Defining the Reproduction Right to Include Ephemeral Copies*

Of all the difficult issues haunting the Diplomatic Conference, the proposal to include temporary (or “ephemeral”) copies within the reproduction right had perhaps the greatest potential to defeat the entire Copyright Treaty. This question first arose in the last Committee of Experts meeting before the Diplomatic Conference (in May 1996), when the European Community and its Member States proposed the adoption of a statement in the records of the Diplomatic Conference to the effect that temporary copies should be included within the reproduction right.<sup>4</sup> The following proposal then appeared as Article 7 in the actual text of the Chairman’s Basic Proposal for the Copyright Treaty issued in August 1996:

- (1) 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.
  
- (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 reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.<sup>5</sup>

Two main, and closely related, issues arose in the context of Article 7, namely (1) the scope of the proposed temporary reproduction right and whether it constituted new or settled law and (2) the scope and nature of the exceptions or limitations to that right.

With respect to the first point, Article 7 would appear to have required signatories to treat each of the vast number of ephemeral copies made as essential aspects of the operation of digital devices and networks as acts falling within the reproduction right. For example, Article 7 would appear to have required treaty signatories to treat temporary copies, such as ephemeral copies in network servers’ random access memory (RAM), as reproductions falling within the exclusive reproduction right.

While some insisted that this broad definition of “reproduction” was settled law, the truth is that the extent to which temporary reproductions fall within the reproduction right was (and remains) far from settled, and indeed is highly controversial around the world. For example, American copyright scholar David Nimmer characterised Article 7 as “novel and unprecedented” and as a “polemical formulation [that] does not simply restate and clarify the existing laws of 120 members of the Berne Union”.<sup>6</sup>

European scholars agreed. In particular, the Legal Advisory Board (LAB), a body of scholars mandated by the European Commission to advise it on matters relating to the Information Society, criticised the possible inclusion of temporary copies within the reproduction right:

In the opinion of the LAB, applying this approach to the digital networked environment will have far-reaching consequences, which the Commission may have overlooked. In the process of being transmitted and routed through a switched digital network, information is constantly being “stored and forwarded”. The Commission’s approach would imply that practically every act of transmitting a work over the network, as well as each subsequent act of downloading and screen display would qualify as countless acts of reproduction of the protected work. Thus, for example, sending electronic mail, “browsing” the Internet and viewing a digital file would become restricted acts.

In fact, the catalogue of restricted acts would be extended with a novel right of digital usage. Such a use right is antithetical to the traditional principle that copyright and neighbouring rights do not protect against acts of consumption or reception of information. Reading a book and watching television involve basic rights of privacy (Article 8 ECHR) and freedom of reception (Article 10 ECHR), and are therefore not considered restricted acts. In the opinion of the LAB, the same must be true for the digital environment. In consequence, the extension of traditional copyright to cover acts which amount to mere consumption of works is highly questionable.<sup>7</sup>

Moreover, the European Commission’s Follow-up to the Green Paper on Copyright and Related Rights in the Information Society acknowledged that EC Member State “provisions differ widely as to the scope of [the reproduction] right and the exemptions to it”, and that “Member States appear to agree that permanent electronic storage is a restricted act, but views differ with respect to the treatment of transient or ephemeral acts of reproduction”.<sup>8</sup>

Apart from the question whether Article 7 merely restated or significantly expanded the existing reproduction right, delegations took highly divergent views of Article 7 at the Diplomatic Conference. Some, including a number of EC Member States and the European Commission, were willing to accept Article 7 essentially as proposed in the Basic Proposal. Others sought its elimination entirely. From the outset of the Conference, Canada, for example, said that Article 7 should be deleted because it did not allow sufficient flexibility for the courts to deal with new technologies. The existing Article 9(1) of the Berne Convention was adequate.

Other delegations were willing to accept Article 7(1) if it were made subject to clearer limitations or exceptions. In this regard, several approaches emerged. Norway, for example, supported by a number of other delegations, including the other Nordic countries and the Netherlands, proposed the deletion of Article 7(2) and the inclusion of a limitation in Article 7(1) that would have excluded from the reproduction right “temporary reproductions made for the sole purpose of making a work perceptible, or which are of a purely transient or incidental character as part of a technical process.”<sup>9</sup> In supporting this approach, Denmark, for example, expressed “profound doubt” about Article 7, noting that certain acts should be clearly outside the scope of the reproduction right and that “incidental acts” should not depend on exceptions. Therefore, according to Denmark and others, Article 7(2) should, as Norway proposed, be deleted and Article 7(1) amended to make it clear that certain temporary copies fall outside the scope of the reproduction right.<sup>10</sup>

Other delegations supported the retention of Article 7(1) without alteration, but only if Article 7(2) were significantly amended. Proposals along these lines were submitted by Australia, Singapore, and the African Group.<sup>11</sup> Although contained in Article 7(2), the effect of these proposals would have been similar to the Norwegian proposal, namely by limiting the scope of the reproduction right to exclude certain temporary copies. Israel also submitted an essentially equivalent proposal, but under the Israeli approach the limitation would have been placed in the general article on limitations and exceptions rather than in the article on the reproduction right.<sup>12</sup>

In short, a substantial majority of delegations opposed Article 7 as proposed, and would have been willing to accept the inclusion of any provision on temporary copies in the treaty only if it were limited along the lines suggested in the proposed amendments. Others, including the United States, the European Commission and some EC Member States, were unwilling to accept any of the amendments proposed to Articles 7(1) or 7(2).

The common denominator underlying objections to Article 7 were concerns that Article 7 would inappropriately tilt the balance in copyright law and hinder the growth of the information infrastructure. Many had general concerns about the unforeseeable effects of an expanded reproduction right on, *inter alia*, public access to information, and many had questions about the impact of the proposal upon broadcasters. Perhaps most importantly, many delegations feared that, unless properly circumscribed, Article 7 would threaten the legality of browsing and deprive infrastructure providers (like Internet access and backbone providers) of legal security by threatening them with the risk that they would engage in copyright infringement by unknowingly making ephemeral copies (for example in server and router memory) of infringing works put onto their systems by users.

In particular, many delegations were troubled by the final phrase of Article 7(2), which would have limited the exception to temporary copies made in the course of *authorised or permitted* uses. Although at first blush such an approach might have appeared appropriate, upon closer analysis it suffered from the fundamental failing that it would not have allowed enactment of exceptions relieving an infrastructure provider from infringing copyright for unknowingly serving as a conduit for *unauthorised* copies put on its network by users. Every day, infrastructure providers automatically transmit tens of millions of digital messages, and transmitting each message invariably requires the infrastructure provider to make several ephemeral copies of the message.

Because it is technically and economically unfeasible for a provider to monitor all these messages (and because democratic societies would not wish them to do so), the provider will not know whether items transmitted on its network are authorised or unauthorised. Moreover, even if a network provider *were* to look at the content of individual messages, it usually would not be able to tell whether the material were infringing. Thus, the provider should not be deemed to infringe copyright by unknowingly serving as a conduit for infringing copies put on its network by users. As formulated in the Basic Proposal, however, Article 7(2) provided no respite to infrastructure providers at all, because only “authorised” ephemeral reproductions made by providers during the course of transmissions would have been rendered non-infringing.<sup>13</sup>

Thus, Article 7 as proposed threatened to create a legal regime depriving infrastructure providers of legal security and requiring them to accept the risk that they would engage in copyright infringement with every transmission. Many of the delegates to the Diplomatic Conference appear to have believed that this threat would have inhibited both investment in the Information Infrastructure and development of new public services by libraries and distance-learning activities by educational institutions. Delegates also feared that Article 7 would result in oligopolistic and ineffective markets for copyrighted works. Moreover, many delegations objected to the elective nature of Article 7(2); they felt that in a *global* information infrastructure, limits upon any temporary reproduction right should be mandatory for all signatories.

It would be unfair to suggest, as some appear to have done, that the many delegations who opposed Article 7, and who made proposals to amend it, did so out of solicitude to the world's telecommunications companies. Instead, these delegations, who certainly cannot be branded as "anti-copyright," genuinely felt that the adoption of Article 7 as proposed was unnecessary to protect the legitimate interests of authors and they feared that adopting the proposal would damage public welfare. In particular, they appear to have believed that the adoption of Article 7 would have restrained Information Infrastructure development, thus reducing the number of on-and-off ramps to the information superhighway, to the detriment of authors and users alike.

Finally, after the floating of several un-official compromise proposals and a number of stormy late-night negotiating sessions behind closed doors, the decision was taken to delete any reference to the reproduction right in the Copyright Treaty. In the end, the most the Diplomatic Conference could do was to agree to a statement on the reproduction right that did not address the temporary copying question.<sup>14</sup> Even this statement generated controversy and, unlike all the other agreed statements of the Conference, having been adopted not by consensus but by majority vote after a debate that highlighted the variety of interpretations to which it is subject, has limited, if any, value.<sup>15</sup>

Thus, no decision was taken at the Diplomatic Conference on the extent to which the reproduction right includes temporary copies. Perhaps this result was unsurprising, given the short period of time between the raising of the temporary copy issue in May 1996 and the adoption of the Treaty in December. Although it may have been preferable for the delegates to have worked out a balanced, globally applicable, provision that met the concerns of both right owners, infrastructure providers and the general public, this simply did not prove possible in the time available.

In any event, deletion of Article 7 was far preferable to the hasty adoption of an unbalanced provision that, rather than encouraging the creation and dissemination of works in the digital environment, threatened to stifle the development of the Information Infrastructure. By fostering the concentration of copyright ownership and the distribution of copyright works in the hands of a few large companies, the adoption of an overly-expansive temporary reproduction right would have undermined the ability of smaller actors (including individual authors, collecting societies, and smaller publishers) to play a meaningful role in the Information Society.

Rather than becoming subject to the straightjacket of Article 7, the law will remain free to evolve, in light of technological developments, through the interpretation of the existing Article 9 of the Berne Convention and national law implementing that article. Compared to several of the other possible outcomes of the Diplomatic Conference, this is indeed a happy result.

In light of this result, it might be worth looking to the future, and in particular to questions arising in connection with the proposals expected later this year from the European Commission on the reproduction right. In this context, it would seem wise for all to concede that the current scope of the reproduction right, especially with respect to ephemeral copies, is unclear and controversial. Rather than continue to squabble over whether Article 7 of the Basic Proposal simply restated existing law or would have significantly expanded it, it would seem wise to focus on what the law *should* be. In particular, it would seem appropriate to address the unresolved concerns raised with respect to Article 7 about the legality of browsing and infrastructure provider liability.

Inevitably, some will say that every temporary (or ephemeral) copy should fall within the reproduction right. Good reasons might exist in some cases for placing the making of ephemeral copies within the exclusive reproduction right, but it would seem fair to ask those who seek this result to explain in detail why they do so. Changes in copyright law can have dramatic economic and social consequences, and such changes should be undertaken only after careful and complete analysis of their consequences.<sup>16</sup> Moreover, the burden of demonstrating a need for new legislation should fall on those demanding new rights.

The digital revolution by its very nature will inexorably lead to the making of vast numbers of ephemeral copies, for example in consumer electronic products, computer hardware, and telecommunications networks. But should every one of those ephemeral copies constitute an infringing reproduction? Are not many, perhaps most, ephemeral copies different in their fundamental nature from permanent reproductions, and should not the law reflect that difference? Will every, or even most, of those ephemeral copies have economic significance justifying their characterisation as an infringing act? What would be the social, technological and economic consequences of deeming the vast numbers of essential ephemeral copies to fall within the copyright holder's exclusive right of reproduction? Assuming the conclusion is reached that certain temporary copies should be included in the reproduction right, how should that result be achieved? Would it not be preferable to follow an approach whereby most temporary copies fall outside the reproduction right, and those that are covered be treated as the exception rather than the rule?

Does not society deserve to have each of these questions addressed fully, and debated by all stakeholders in the copyright regime, including users of digital works? If all these questions are debated broadly and soberly, it should be possible to reach a wise and balanced legislative solution to this difficult and complex dilemma. In the meantime, one should not lose faith in our courts, nor assume that they will, under existing law, be unable to decide which temporary copies properly fall within the reproduction right and which do not.

### *Technical Protection Systems*

Another issue that caused controversy leading up to the Diplomatic Conference was the question of technical protection systems.<sup>17</sup> This issue first arose in 1995, when the Clinton Administration National Information Infrastructure White Paper proposed a wide-ranging provision on this topic.<sup>18</sup> Along with the infrastructure provider liability issue, the proposed legislation failed in the U.S. Congress in large measure because of a broad spectrum of opposition to the technical protection proposal, including opposition by libraries, the computer and consumer electronics industries, and the education community.

Despite this domestic defeat, the United States continued to press forward on the international front, demanding adoption of a provision in the Copyright Treaty nearly identical to the one that proved too controversial for resolution at home.<sup>19</sup> One major problem with the US proposal was that it outlawed devices the primary purpose or effect of which was circumvention of a technical protection system, even where the primary purpose or effect of the circumvention was to make copies permitted by law. In other words, the US proposal inappropriately condemned *circumvention* alone, rather than circumvention for *infringing purposes*. Moreover, the US proposal lacked a knowledge requirement on the part of the manufacturer: a manufacturer could be held liable even where he had no knowledge that the device would be used for infringement.

The European Community and its Member States also made a proposal for the Copyright Treaty on this topic.<sup>20</sup> The EC proposal for the Berne Protocol was preferable to the US proposal in that it imposed a knowledge requirement, but like the US proposal it still focused solely on circumvention, not circumvention for infringement. Thus, a manufacturer could still find himself liable if he knew that the primary purpose or effect of the device was simply circumvention, even if all the copies facilitated by the device were lawful.

Drawing on the US and EC proposals, the Chairman's Basic Proposal also contained the following proposal on technical protection systems:

- (1) 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 authorised by the rightholder or the law.
- (2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).
- (3) As used in this Article, "protection-defeating device" means 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.<sup>21</sup>

The Chairman clearly made a serious and good-faith effort to deal with the difficulties of drafting legislation on this topic and to improve on both the US and EC proposals, but unfortunately Article 13 of the Basic Proposal remained unbalanced and threatened not only the public domain and the copyright/author's right balance, but also innovation and legitimate

business behaviour. Although Article 13 had a knowledge requirement *and* that requirement was directed at *infringement* -- the manufacturer had to know or have reason to know the device would be “used for, or in the course of, the exercise of rights provided under this Treaty that is not authorised by the rightholder or the law” -- a manufacturer would remain liable if he had reason to know that just one of the one thousand devices he produced would be used to make an unlawful copy.

European scholars and others took the view that a provision on technical protection systems such as Article 13 would have risked effectively writing the various existing exceptions out of the applicable copyright/author’s right laws -- without any consideration ever having been given to whether such a change in existing law was appropriate. The Legal Advisory Board, for example, noted that encryption mechanisms could gradually replace copyright as the principal means of protecting information, and expressed concern that “the widespread use of technical protection devices might result in the *de facto* creation of new information monopolies. This would be especially problematic in regard of public domain materials.”<sup>22</sup>

The WIPO Copyright Treaty itself,<sup>23</sup> and the Agreed Statement concerning Article 10 of the Treaty,<sup>24</sup> emphasise the importance of the vitality of copyright exceptions to maintaining a balanced copyright regime. The Agreed Statement provides in part:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.<sup>25</sup>

Industry joined the scholarly voices arguing that Article 13 of the Basic Proposal threatened the delicate balance of copyright, and also highlighted dangers to innovative consumer electronics and computer products. Consumer electronics manufacturers observed that Article 13 could be interpreted to require them to alter their equipment, such as VCRs, to function with a variety of different protection systems. This would be technically and economically impossible. Computer manufacturers expressed the fear that Article 13 could outlaw computers as “protection-defeating” devices, and recommended the adoption of an anti-circumvention approach that focused on the “act of infringement, rather than on the ever-changing technologies that are used.”<sup>26</sup>

At the Diplomatic Conference, the above concerns were echoed by numerous delegations, and no country insisted on adoption of Article 13 as proposed. Some delegations opposed in principle the inclusion of any provision on technical protection systems in the Treaty. Others, Australia for example, noted that Article 13 could unwittingly restrict access to public domain material and uses of copyright material sanctioned by law, and therefore preferred an approach focused on the *use* of devices for the purpose of infringement. Numerous other delegations shared similar concerns about possible restrictions on legitimate activities, including Canada, the United Kingdom, Korea, Singapore and Norway. Other delegations, such as the European Commission, noted the importance of including a “knowledge” element, and stated that this element should be linked to infringement.

South Africa took the lead in promoting an alternative proposal on this topic:

Contracting parties shall provide adequate legal protection and effective legal remedies against *the circumvention* of effective technological measures that are used by rights holders in connection with the exercise of their rights under this treaty and that restrict acts, in respect of their works, which are not authorised by the rights holders concerned or permitted by the law.<sup>27</sup>

This proposal was based on language that had been agreed by certain interested parties in advance of the Diplomatic Conference, and this formulation was ultimately adopted as Article 11 of the Copyright Treaty.<sup>28</sup>

This provision has the great advantage of applying to the *act of circumvention*, rather than to the manufacture or distribution of the device used to engage in the circumvention. This focus on *acts* facilitating *infringement* follows the tradition of copyright law, and avoids the problems inherent in any provision focusing instead on *devices*. In particular, it avoids threatening legitimate dual-use technology, diminution of the public domain, and evisceration of copyright exceptions. By assuring that the sphere of application of the circumvention provision corresponds to that of copyright infringement, the Copyright Treaty preserves the delicate copyright balance.

### ***Implementation of the Treaty***

After adoption of the Copyright Treaty, activity shifted to the Contracting Parties — the individual countries which now must decide how to implement the Treaty in domestic law. Not surprisingly, the United States and the European Union have tackled implementation more vigorously than most other countries.

The Clinton Administration in the United States determined that U.S. law generally complied with the Treaty's requirements, with the exception of the Treaty's provisions regarding technical protection systems and copyright management information. The Administration drafted legislation to address these two issues, which was introduced in both the Senate and the House of Representatives as S. 1121 and H.R. 2281, respectively. While the provision concerning copyright management information encountered little opposition, the technical protection system measure generated great controversy. This is because it would prohibit the manufacture of circumvention devices — precisely the approach rejected in Geneva in December, 1996. Additionally, the Administration's proposal would prohibit production and use of technologies which would provide access to copyrighted works without authorisation — a measure not required by the Treaty.

Believing that the Administration's approach would prohibit devices with legitimate uses, Senator Ashcroft of Missouri introduced S. 1146, which only prohibits the circumvention of effective copy protection systems for the purpose of engaging in infringement. Senator Ashcroft's narrow approach is far closer to the spirit and the letter of the Treaty than the Administration's approach. Congressmen Boucher and Campbell introduced a bill similar to Senator Ashcroft's in the House of Representatives. Senator Ashcroft's bill also limits the liability of online service providers for their subscriber's infringement — an issue ignored by the Administration.

At the writing of this article in November, 1997, it is unclear whether the Ashcroft/Boucher/Campbell approach or the Administration approach will prevail. As a practical matter, though, the Congress will have to decide how to implement the Treaty before the Senate will ratify it. By proposing the controversial approach which was rejected in Geneva, the Administration has erected a serious obstacle in the way of the ratification of the Treaty it has sought so determinedly.

Meanwhile, in the fall of 1997, the directorates-general of the European Commission began an interservice consultation process aimed at producing a draft directive by December, 1997. The draft directive would then have to be approved by both the European Parliament and the Council of Ministers before it took effect. Once a directive is adopted, it will have to be implemented by all member states of the European Union.

At the writing of this article, it is too early to predict the contours of the draft directive which will emerge from the Commission. However, an early version circulated within the Commission seemed to repeat many of the mistakes of Chairman's Basic Proposal. That is, it strayed into temporary copy quagmire of Article 7, and outlawed circumvention devices rather than just circumvention conduct leading to infringement.

Implementation activity has also occurred in Asia. The copyright council within Japan's Agency for Cultural Affairs has also begun considering how to implement the Treaty. It probably will adopt new provisions relating to communicating with the public, while deferring the technical protection issue until global trends emerge for technological and legal standards. Finally, before the turnover to China, Hong Kong amended its copyright law to comply with the Treaties.

### ***Conclusion***

Those who provide, deliver and consume content in the Information Society are each economically dependent on one another. Content providers must have adequate and effective protection or they will not produce works and place them into a digital environment. Infrastructure providers must have predictability about, and appropriate limitations upon, their liability for copyright infringement or they will not open new avenues for the distribution of copyright works by building and providing the Information Infrastructure. Consumers must have adequate access to copyright works at reasonable cost or there will be no market for Information Society products.

The need to strike a balance in the copyright/authors right law between these interdependent interests was recognised in the Preamble of the WIPO Copyright Treaty.<sup>29</sup> Fortunately, the WIPO Copyright Treaty actually achieved this balance. By providing new and valuable rights to copyright holders, avoiding the adoption of provisions that risked stifling innovation and investment in new delivery technology, and taking account of the needs of the consuming public, the Copyright Treaty should help fulfil the promise of the Information Society to make more information available to more people than ever imagined, furthering the advance of culture, learning, and democratic participation. Now it is up to the Treaty signatories to make sure that the implementations of the Treaty maintain this critical balance.

<sup>1</sup> WIPO Copyright Treaty, WIPO Document CRNR/DC/94 (<http://www.wipo.org/eng/diplconf/distrib/94dc.htm>) (“WIPO Copyright Treaty”), and WIPO Performances and Phonograms Treaty, WIPO Document CRNR/DC/95 (<http://www.wipo.org/eng/diplconf/distrib/95dc.htm>).

<sup>2</sup> See T. Vinje, ‘All’s Not Quiet on the Berne Front’ [1996] 11 EIPR 585; T. Vinje, ‘A Brave New World of Technical Protection Systems: Will There Still Be Room For Copyright?’ [1996] 8 EIPR 431 (‘Brave New World’). Although the Performances and Phonograms Treaty is highly important, and both the reproduction right and technological measures proposals had their counterparts in that treaty, this Opinion will focus on these two issues in the context of the Copyright Treaty.

<sup>3</sup> Among the non-governmental organisations present at the Diplomatic Conference, eleven were broadcasting organisations, ten were writers’, directors’ or composers’ organisations, eight were publishers’ organisations, eight were general intellectual property protection organisations, seven were telecommunications organisations, seven were interpreters/translators’ organisations, six were library/information organisations, four were software organisations, four were performers’ organisations, two were literary and artistic organisations, and two were actors’ organisations. Second Provisional List of Participants, WIPO document CRNR/DC/INF.2 Prov. 2, 2 December 1996.

<sup>4</sup> Committee of Experts On A Possible Protocol to the Berne Convention: Proposals of the European Community and its Member States, WIPO document BCP/CE/VII/1-INR/CE/VI/1 at 3, 20 May 1996 (‘EC Proposal’).

<sup>5</sup> 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, prepared by the Chairman of the Committee of Experts on a Possible Protocol to the Berne Convention, Article 7, WIPO Document CRNR/DC/4 at 29, 30 August 1996 (‘Basic Proposal’).

<sup>6</sup> D. Nimmer, public letter on ‘WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions,’ 11 December 1996 (on file with author).

<sup>7</sup> Legal Advisory Board Reply to the Green Paper on Copyright and Related Rights in the Information Society, November 1995, at 6-7 (‘LAB Paper’).

<sup>8</sup> Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society, Commission of the European Communities, COM(96) 568 final, 20 November 1996, at 9. At first blush, including temporary copies within the reproduction right would appear to be consistent with the approach taken in the EC Computer Programs and Database Directives. With the development of the Internet, however, the technological environment has changed, and new questions have arisen regarding the extent to which temporary copies should fall within the reproduction right.

<sup>9</sup> Amendment to Article 7 of Draft Treaty N° 1, proposed by the Delegation of Norway, WIPO Document CRNR/DC/22, 10 December 1996.

<sup>10</sup> A cogent, accurate and humorous day-by-day account of the Diplomatic Conference proceedings can be found at “News from the WIPO Diplomatic Conference,” by Seth Greenstein, <http://www.hrrc.org/wiponews.html> (‘Greenstein’).

<sup>11</sup> Amendments to Articles 2, 7, 9 and 10 of Draft Treaty N° 1, proposed by the Delegation of Australia, WIPO Document CRNR/DC/53, 12 December 1996; Amendments to Articles 6, 7, 8, 10, 12, 13 and 14 of Draft Treaty N° 1, proposed by the Delegation of Singapore, WIPO Document CRNR/DC/12, 6 December 1996; Amendments to Articles 7, 10, 13 and 14 of Draft Treaty N° 1 proposed by the Delegations of Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d’Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe, WIPO Document CRNR/DC/56, 12 December 1996 (‘African Proposal’).

<sup>12</sup> Amendments to Articles 6, 7 and 12 of Draft Treaty N° 1, proposed by the Delegation of Israel, WIPO Document CRNR/DC/68, 13 December 1996. China also proposed eliminating temporary copies from the scope of the reproduction right, Amendments to Partly Consolidated Text of Draft Treaty N° 1 (CRNR/DC/55), proposed by the Delegation of the People’s Republic of China, WIPO Document CRNR/DC/64, 13 December 1996, and a group of Latin American countries proposed a more limited

amendment to Article 7, Amendment to Article 7 of Draft Treaty N° 1, proposed by the Delegation of Colombia on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela, WIPO Document CRNR/DC/73, 13 December 1996.

<sup>13</sup> Concerns were also raised that Article 8 of Treaty (Right of Communication to the Public) might have been interpreted to mean that network providers would violate the communication to the public right by providing a conduit for infringing materials. This concern was addressed by the unanimous adoption of the following Agreed Statement:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.

Agreed Statements Concerning The WIPO Copyright Treaty, WIPO Document CRNR/DC/96, Agreed Statements Concerning Article 8, 23 December 1996 ('Agreed Statements').

<sup>14</sup> "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. 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." Ibid. at Agreed Statement Concerning Article 1(4).

<sup>15</sup> See Greenstein, note 10 above, report on 20 December 1996.

<sup>16</sup> For cogent perspectives on the social consequences of over-protection, see Justice Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated?' [1996] 5 EIPR 259 and J. Philips, 'The Diminishing Domain' [1996] 8 EIPR 429.

<sup>17</sup> See Brave New World, Note 2 above, which highlighted the difficulties in crafting a law on technical protection systems that would maintain the existing balance in the copyright/author's right law.

<sup>18</sup> See National Information Infrastructure Task Force, Report of the Working Group on Intellectual Property and the National Information Infrastructure (September 1995).

<sup>19</sup> See Proposals Submitted by the United States of America to Committee of Experts on A Possible Protocol to the Berne Convention, Sixth Session, Geneva, 1 to 9 February 1996 ('US Proposal').

<sup>20</sup> See EC proposal, Note 4 above.

<sup>21</sup> Basic Proposal, Note 5 above, Article 13.

<sup>22</sup> LAB Paper, Note 7 above, at 13.

<sup>23</sup> WIPO Copyright Treaty, Note 1 above, Article 10.

<sup>24</sup> Agreed Statements, Note 13 above, Agreed Statement Concerning Article 10.

<sup>25</sup> Ibid.

<sup>26</sup> Letter of October 26, 1996 from the Computers Systems Policy Project (an organisation representing the leading U.S. providers of information technology products and services) to the U.S. Secretary of Commerce (on file with author). The letter pointed out that Article 13 'by focusing on devices that could be used to circumvent copy-protection mechanisms, rather than on acts of infringement -- creates a significant risk that general purpose computers and related hardware and software will be caught in its reach. At the same time, the focus on devices may shift enforcement resources away from the infringers themselves.'

<sup>27</sup> African Proposal, Note 11 above (emphasis added).

<sup>28</sup> WIPO Copyright Treaty, Note 1 above, Article 11. An equivalent provision is found in Article 18 of the Performances and Phonograms Treaty.

<sup>29</sup> WIPO Copyright Treaty, Note 1 above, Preamble ('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.').