Copyright: Internet Service Provider Rights and Responsibilities

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Abstract

Effective copyright law requires balancing the rights and responsibilities of Internet service providers (ISPs) in regards to copyrighted material that flows through their networks. The World Intellectual Property Organization (WIPO) and the signatory nations to the Berne Convention have developed a new international treaty, known as the Berne Protocol, to extend the rights of authors in the digital era. ISPs have worked with other service providers to remove language from the draft treaty that would have extended authors' rights to indirect and temporary reproductions. The service providers were also able to have an agreed-upon statement added to the treaty that makes clear that merely providing physical facilities for making a communication does not abridge the author's right to authorize communications to the public. Although the treaty does not fully balance ISP rights and responsibilities, it leaves room for national legislatures to do so.

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Introduction

During the past two years, there have been extensive efforts at both national and international levels to revise copyright laws to address the challenges of digitalization and the Internet. Internet service providers (ISPs) have been active in these debates to ensure that revisions in copyright law do not create untenable liabilities for ISPs. Copyright laws that can be construed to hold ISPs liable for any content that is accessed will threaten not only the ISP industry but the Internet as we know it.

ISPs transmit more than half a billion messages each day, and cannot realistically be expected to monitor the content of those transmissions. Moreover, the instantaneous nature of digital communications precludes access providers from viewing, judging, monitoring, or editing the content of most messages posted or accessed by their

subscribers. Finally, ISPs are similar to common carriers in that they have no control over which members of the public use their facilities, or the content members of the public choose to transmit. Requiring ISPs to monitor user transactions for copyright violations would not only violate the rights of users, but would fundamentally change the ISP business model. It would force ISPs to sell content, not access.

Content owners certainly have the right to receive compensation for the use and reproduction of their material. There are potential legal, contractual, and technical methods for ensuring that they do, even in the digital era. What must not be done is to create potential liability for ISPs for any copyrighted content that flows through their network. Effective copyright reform requires balancing ISP rights and responsibilities in regards to copyrighted material.

Berne Convention

In December 1996, the World Intellectual Property Organization (WIPO) hosted a diplomatic conference to create a new protocol to the Berne Convention on Copyright. The Berne Convention is an international treaty dating back to 1896. Currently, 120 nations have signed the treaty and have agreed to bring their copyright laws into conformance with it.[1] Under this treaty nations have agreed to extend copyright protection to citizens of other signatory nations. The convention has gone through revisions approximately every 20 years as the signatories tried to harmonize their evolving national copyright laws. The last revision of the treaty occurred in 1971. For the past six years, WIPO has been looking at how to either revise the Berne Convention or to create a new protocol to it specifically to deal with the onslaught of digital recording and transmitting technology.

Digitalization

Digitalization, by transforming media into ones and zeroes, has significantly lowered the barriers to making exact reproductions of text, images, video, and music. At the same time, the Internet has made it possible for individuals to almost instantaneously distribute reproductions all over the world at minimal cost. Though this has potentially made it easier for content owners to sell their content, it has also made piracy easier still. To complicate matters, most existing copyright legislation is biased toward physical reproductions. Under many statutes it is not as clear whether an author has rights to all virtual reproductions of his work, including those stored in the random access memory (RAM) of a computer or on a screen.

Europe and authors' rights

Europe, which has a long tradition of supporting authors' rights, has taken the lead in writing both national and European Community legislation that extends the rights of authors to temporary reproductions of their works.(2) The European delegation was very active in the decision more than six years ago to begin negotiating a new protocol to the Berne Convention. During the February 1996 Expert Committee sessions that worked out the terms of this new protocol, the European delegation put forward language to extend the rights of authors to all reproductions, whether permanent or temporary and direct or indirect. The United States offered its own recommendation from its 1995 White Paper on Copyright that the definition of publication be revised to include transmission of a work.[3]

United States

As the United States Patent and Trademark Office (PTO)'s "transmission is publication" language was being offered for consideration in the Berne Protocol, it was being severely questioned in the U.S. Congress. Here ISPs and other telecommunications companies challenged the draft legislation based on the PTO's White Paper, in particular the concept that access providers should be held responsible for having published everything that they have transmitted. Scott Purcell of HCL-Internet testified in hearings on the potential impact of copyright restrictions on ISPs.[4] The Commercial Internet Exchange (CIX), a trade association of ISPs, was asked to

participate in a special negotiating conference that included both access providers and content owners.[5] In May 1996, a compromise was reached in Congress that recognized that providers are not liable for content that they unknowingly transmit. In return, providers would be held responsible for taking down content that copyright owners can show to violate their copyright rights. The compromise included notification and takedown procedures to protect the rights of content owners, users, and access providers. Most importantly, the compromise made clear that it is the responsibility of content owners, not ISPs, to monitor content. Though the compromise never became law, it represents an important model of how national legislation can balance the rights and responsibilities of ISPs.

Chairman Liedes's draft

As the expert committee reconvened in May of 1996, the U.S. delegation was still pushing its "transmission as publication" language, though they were letting it be known that they were open to the European language, which focused on expanding the rights of authors. By August 1996, Expert Committee Chairman Liedes of Finland had submitted a draft of the Berne Protocol. The draft incorporated the suggestions of the Europeans and extended the rights of authors to indirect and temporary reproductions and to authorize any communication to the public.

The Berne Protocol, officially known as the *Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works,* was only one of three treaties drafted by Liedes for consideration by the diplomatic conference in December 1996. There was also the *New Instrument: Treaty for the Protection of Performers and Producers of Phonograms*. This treaty generated much less debate at the conference and was accepted. The *Treaty on Intellectual Property in Respect of Databases* created a storm of concern that it was not well thought out and could potentially give database owners rights over facts. The Database Treaty was tabled for further consideration.

Ad Hoc Copyright Coalition

The CIX joined with a group of other trade associations and global providers to form the Ad Hoc Copyright Coalition to ensure that the diplomatic conference did not define rights for copyright owners in a manner that would place ISPs and other providers in jeopardy. The Ad Hoc Copyright Coalition was in part responsible for having the national delegates choose at the end of the diplomatic conference to remove Article 7 of the draft treaty, which would have extended authors' rights to any indirect or temporary reproduction. In addition, an agreed-upon statement was added that clarified that though authors were given a right to control communications of their work to the public, the mere provision of carriage did not mean that a provider had made a work available.

Between September and November 1996, regional conferences in Africa, Asia, and Latin America were held on the three treaties. The coalition attended these meetings and began to publicly articulate concerns with the Berne Protocol. Their major concern was that the treaty would treat Internet and online service providers as infringers for merely providing services and facilities for the carriage and routing of third parties' data. They warned that the Berne Protocol would create broad international rights unbalanced by corresponding limitations, and might preclude the signatories from adopting national liability limitations for such providers. In other words, the treaty had the potential of preventing nations from crafting legislation that balanced the rights and responsibilities of service providers.

The coalition drafted language for the treaty itself that sought to limit the rights of authors and balance the rights and responsibilities of access providers. There was a strong resistance to this attempt from those closely associated with WIPO and the Berne Protocol itself. Historically, the Berne Convention only establishes minimum rights that all countries agree to. To try and establish rights of ISPs was seen as putting limits on the rights of authors. As it goes against Berne Convention tradition to try to set maximums on the rights of authors in an international treaty, the coalition was not able to gather much support for its draft language.

Article 7

Instead, the coalition focused its efforts on throwing into question the language of Article 7 that established the right of authors of literary and artistic works to "include direct and indirect reproduction of their works, whether permanent or temporary in any form."[6] Though Article 9(1) of the Berne Convention recognizes the right of authors to the authorize the reproduction of their works, it does not specify what constitutes a reproduction. The Ad Hoc Copyright Coalition pointed out that "whether permanent or temporary" is more than a clarification, as some of the supporters of Article 7 claimed. In addition, they pointed out that it was far from clear what "indirect" meant and what technologies it included. They asked whether the copies made by proxy servers or even routers would in fact count as reproductions under this language. They warned that such language was very ambiguous and could easily be applied to the actions of providers who merely provide communication services and facilities.

The second paragraph of Article 7 purports to permit nations to narrow this sweeping right of reproduction. The coalition, however, questioned whether it was so narrow as to be of minimal value. The paragraph allows the right of reproduction to be limited only when it takes place in the course of use of the work that is authorized by the author or permitted by law. The coalition warned that Article 7(2) could have the negative implication that no further national limitations would be possible, especially legislation that protects access providers who unknowingly transmit unauthorized material.

The coalition also pointed out that in some nations the treaty would be self-executing and would immediately become national law when the Berne Protocol was signed by the country. There would be no possibility of establishing limitations on ISP liability. Thus, even if these nations were given the opportunity to limit the rights of authors they would not be able to do so.

Article 10

The Ad Hoc Copyright Coalition also focused on Article 10 because it would create a new exclusive right for authors of literary and artistic works to "authorize any communication to the public of their works, including the making available to the public of their works by wire or wireless means..." [7]

Though Article 10 did not recognize the rights of access providers, a note in the draft of 10.10 acknowledges that "what counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals." The coalition agreed with the note, but argued that the language needed to be in the article itself as a limitation on the broad new exclusive right of communication.

In order to build support for its positions, the coalition created education materials for the government delegations, drafted alternative treaty language, held three press briefings, and worked long hours meeting with individual delegates, regional delegations, and other nongovernmental organizations. The coalition mobilized pressure on the U.S. delegation and was responsible for having a group of CEOs from major U.S. telecommunications firms send a letter to President Clinton warning that they would have to oppose ratification of the Berne Protocol in the U.S. Senate if Articles 7 and 10 were not modified.

Debate and action

There was an immense amount of debate both on and off the floor on Article 7. More than 30 delegations took to the floor to make comments. During floor debate Singapore stated that it had no objection to Article 7(1), but it had submitted a new proposal for Article 7(2). The European Community emphasized that Article 7(1) was of fundamental importance and a clarification only. Korea argued that browsing should not be covered as a right controlled by the author. South Africa stated it had problems with 7(2) because the nature of the Internet transcends national borders and there is a possibility of conflict. Australia argued that Article 7 should carve out

not only rights but limitations of the right and must define rights with clarity. India pointed out that 7(2) exists because of ambiguity and if it is removed 7(1) must be also.

The vote on Article 7 was pushed to the last day of the conference. When it came up, the delegate from South Africa moved to delete Article 7. The U.S. delegate supported the motion on condition that the conference accept a statement that storage in digital form is a reproduction. Without a vote the motion to delete Article 7 carried.

Agreed-upon statement in place of Article 7

Later on, the United States proposed its agreed-upon statement for approval by the conference:

> 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.[8]

During debate on the U.S. proposal, some argued that the United States was trying to sneak in the same language that was removed when Article 7 was voted out. Others were concerned about what "storage of a digital form" actually meant. After much debate and a number of procedural maneuvers, the U.S. statement was approved.

Agreed-upon statement in regard to Article 10

Earlier in the day, another agreed understanding, this time in regard to Article 10, was accepted that made it clear that although authors had rights to authorize communication of their works to the public, communications should not be defined so broadly as to encompass the facilities needed to make communication possible:

> 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 the Treaty or the Berne Convention.[9]

The understanding made clear that national legislatures could continue to develop their own limitations and exceptions, 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.[10]

Though these two agreed understandings are not part of the actual language of the Berne Protocol, they give nations the room they need to craft solutions that limit the liabilities of ISPs.

Given that the Internet is an international phenomenon, it is unfortunate that nations did not develop a universal set of rules for ISPs. It is probable that countries will establish different approaches to ISP liability for copyright infringement and that a patchwork of copyright law will result. ISPs operating in multiple countries will be confronted with different liabilities in different countries. It is also possible that an ISP operating a Web hosting site in one country might be found liable for copyright violations in another country where that site is accessed.

Conclusion

The diplomatic conference did not clearly lay out the rights and responsibilities of ISPs in regard to copyright material that their users access or make available.[11] In removing Article 7, the conference deleted language that would have created a great deal of ambiguity over whether the mechanisms used by an ISP impinge on the rights of the author.

ISPs also achieved an important victory with the agreed-upon understanding that "providing facilities for a communication does not itself amount to communication." Though it would have been preferable to have the Berne Protocol actually state this limitation on access provider liabilities, the understanding was the best ISPs could get given the historical predilection against limiting authors' rights.

Many of the complexities that emerged during the conference will resurface in national legislatures and courts. The Internet does not have one method of delivery that can be easily circumscribed in legislation. ISPs provide users with the ability to access and make available Web pages, Usenet, e-mail, chat rooms, and host of evolving interactive environments. ISPs are providing a network that facilities a wide range of user-driven applications. The role of ISPs in facilitating different applications depends on the application, the user, and the ISP. Extending blanket rights to authors to every possible form of reproduction, without establishing limitations on ISP liabilities, could radically change the Internet. Some in Hollywood may want to turn ISPs into the movie theaters of the 21st century and collect admission on every view. However, if this were to happen the Internet, as we are coming to know it, would be dead. The compromise legislation enacted by the U.S. House of Representatives in May 1996 demonstrates that it is possible to draft language that can protect the rights of copyright holders without creating intolerable liabilities for ISPs.

ISPs have helped shape an international treaty that leaves room for national legislatures to craft legislation that balances ISP rights and responsibilities. Now is the time for ISPs to begin working at the national level for such legislation.

Notes

1. WIPO, "Copyright Information" <http://www.wipo.int/eng/general/copyrght/intro.htm>
2. Chairman Liedes, "Briefing on Chairman's Text," 22 November 1996, Miller Reporting Co.
3. Dept. of Commerce, "Intellectual Property and the National Information Infrastructure," September 1995 <http://www.uspto.gov/web/offices/com/doc/ipnii/>
4. Scott Purcell, "Testimony before the Subcommittee on Courts and Intellectual Property" <http://www.cix.org/Current/Governance/Legislative/nii-copyright.html>
5. Carlos Moorhead, "Letter on Copyright Negotiations" <http://www.cix.org/Current/Governance/Legislative/Negotiator/congress.letter.html>
6. WIPO, "Draft Berne Protocol," September 1996
7. Ibid.
8. WIPO, "Agreed Statements Concerning the WIPO Copyright Treaty," CRNR/DC/96, 23 December 1996 (currently not on WIPO web site)
9. WIPO, "Draft Agreed Statement Concerning Treaty No. 1," CRNR/DC/92, 20 December 1996 <http://www.wipo.org/eng/diplconf/distrib/92dccorr.htm>
10. Ibid.
11. WIPO, "WIPO Copyright Treaty," CRNR/DC/94, 23 December 1996 <http://www.wipo.int/eng/diplconf/distrib/94dc.htm>