

Copyright: Making the Old New

By: Stephen Fraser

Introduction

The question of what rules to apply in digital and network environments has been controversial and fraught with difficulties. The tendency has initially been to rely on industry developed standards to set the "rules of the road." However, terms like information infrastructure and copyright all imply particular methods of organizing and codifying that essentially centralize decision making and enforcement.

The Internet: A "Public" Network

Because of the international nature of networks like the Internet, it should come as no surprise that rule making has focused on international relations and harmonization. Copyright law has been the chosen vehicle for much of these efforts. Institutionally and historically, however, copyright law has encouraged a centralized and complex system of distribution of copyrighted materials. This is seen in nearly all media, be it the press, publishers, entertainment conglomerates or broadcasters. They act as gatekeepers and filters of the information we receive. The Internet, on the other hand, makes it possible to disseminate information to a wide audience without the gatekeeping/filtering traditional media have provided. The technological backbone of the Internet is similarly decentralized, encouraging efficient and fast transfer of packets of information. See Richard Wiggins, *How the Internet Works*, INTERNET WORLD, Oct. 1996, at 60; *Shea v. Reno*, 930 F. Supp. 916, 925-30 (S.D.N.Y. 1996). Therefore, if the potential of the Internet to turn everyone into a "publisher/distributor" is to be restricted because of governmental pressures to assert control over the Internet by using an old model, its impact must be understood.

International Copyright

The Treaties:

- ✓ The Berne Convention (140 nation members). Berne Convention for the Protection of Literary and Artistic Works, Berne Convention (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), at Brussels (1948), at Stockholm (1967) and at Paris (1971), and amended in 1979.

- ✓ World Trade Organization (WTO)/Agreement on Trade-Related Aspects of Intellectual Property (1994) (134 nation members).
- ✓ WIPO Copyright Treaty (1996). Ratified by Belarus, Burkina Faso, El Salvador, Hungary, Indonesia, Kyrgyzstan, Panama, the Republic of Moldova, and the United States.
- ✓ WIPO Performers and Phonograms Treaty (1996). Ratified by Belarus, Burkina Faso, El Salvador, Hungary, Panama, the Republic of Moldova, and the United States.

International copyright is concerned with the rights of authors and owners of copyrighted works when those works are made or cross into other countries. Historically, copyright laws have been changed whenever new technologies have emerged. Stephen M. Stewart, *International Copyright and Neighbouring Rights* at 185 (London: Butterworths, 2d ed. 1989). The process has always appeared as one of catch-up. Photography, motion pictures, photocopiers, video tape recorders and computer programs all led to changes in copyright laws or jurisprudence, usually years after their introduction. Until now. Copyright industries, such as the computer and entertainment sectors, were at the forefront in seeking to protect their works in digital form and in network environments before the World Wide Web, e-mail, browsing and caching became everyday words. Out of these negotiations have arisen two new copyright treaties that could have a significant impact on the Internet and digital works: the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performers and Phonograms Treaty (together, the "WIPO Treaties"). These treaties, concluded in December 1996, were negotiated to specifically extend the protections of copyright to works that are made available in digital form.

So far, few major countries other than the United States, a leading proponent, have ratified these treaties and they are not yet in effect. This may be because there remains a whiff of controversy over how far the protections of the print/analogue world should be extended to the digital realm. See Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 191; James Boyle, *Sold Out*, N.Y. TIMES, Mar. 31, 1996, at E15. For example, throughout the negotiations of the treaties, the United States took the position that the "browsing" (viewing on your computer screen) of a work available on the Internet creates a copy in the computer of the viewer. Because copyright law forbids the making of copies without the authorization of the copyright owner, the U.S. position was that browsing implicated the reproduction right of copyright. The Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure (Sept. 1995) ("U.S. White Paper on Copyright"). While not going so far as to argue that browsing equaled copyright infringement, if the U.S. view had been adopted,

that is exactly what the result would have been in a significant number of countries unless they specifically exempted browsing in their copyright rules.

Millennial Amendments to the U.S. Copyright Act

Adoption by thirty countries is required before the WIPO treaties become effective. On October 28, 1998, U.S. President Clinton signed into law the Digital Millennium Copyright Act (the "DMCA"). Part of the DMCA's provisions enact adherence to the WIPO Treaties by the United States. The DMCA is a lengthy and intricately detailed piece of legislation. In regards to digital works and the Internet, its important provisions are the following:

Technological Protection. For the first time, the U.S. Copyright Act will make it illegal to provide devices or services to circumvent technological measures designed to prevent access to, as well as copying of, copyrighted works. The access provisions are held in abeyance for two years from the DMCA's enactment to allow parties to petition for exemptions to the access prohibition. The prohibitions against circumventing technological protections used to prevent copying are, however, now in place. Technological protections include scrambling, encryption and other similar technological measures. U.S. Copyright Act, 17 U.S.C.A. § 1201 (1999).

Copyright Management Information. The DMCA prohibits the removal, alteration or distribution of false copyright management information ("CMI") with the intent to facilitate or conceal copyright infringement. CMI is defined as information about the work and includes the title, author, owner, performer and terms and conditions for use, of the copyrighted work. Ibid. § 1202.

Limitations and Safe Harbors for Online Service Providers. The DMCA includes several limitations of liability for infringement of copyright by certain online or Internet service providers ("ISPs"). These limitations relate to transitory communications, linking, system caching and information storage by ISPs for their users. The safe harbors against liability apply where the copyright owner gives proper notice to the ISP of subscriber infringing activity. It allows the ISP to promptly block access to or remove the allegedly infringing material without risk of liability to the copyright owner or the subscriber disseminating the work. To use an analogy, it protects your telephone company if it cuts off your service. If the disseminator chooses to respond, there are provisions involving the re-posting of the material within a set time if the copyright owner does not bring an action seeking a court order against the disseminator. Ibid. § 512. (Note that because

of the haste in implementing various new copyright bills in 1998, there are now two sections numbered 512 in the U.S. Copyright Act). In the meantime, you are without service.

It is expected that Canada will also be implementing the WIPO Treaties in the next phase of amendments to the Canadian Copyright Act, called Phase III. Final Report of the Information Highway Advisory Council, Preparing Canada for a Digital World (Sept. 9, 1997), available at <http://strategis.ic.gc.ca/SSG/ih01650e.html> (visited November 25, 1999). However, it might do well to take a lighter approach than the one undertaken in the U.S.

Conclusion

Commentators have noted that the public is being left out of the debate over whether and how copyright laws should be changed in the information world. That debate has intensified with the emergence of the Internet and the ability to disseminate copyrighted materials world wide on an unprecedented basis. Internationalization of copyright makes it very difficult to reverse the upward trend in copyright protection if it proves ill-considered. The new international rules show a concerted attempt to redraw the Internet in the image of centralized dissemination of information.

Economics defines efficiency as including access to all necessary information. However, what the new/old rules are doing in the digital realm could not be done in the analog world. It is hard to be convinced that the Internet would exist today, as a vast library of information, debate and entertainment, as well as a facilitator of commerce, if strict copyright rules had been applied at its inception. Freedom of expression would hardly exist to the extent that it does today, if repeating stories about what you read, saw, heard or experienced from copyrighted (or otherwise protected) works had been more restricted all along. Rule-makers from the United States are taking for granted freedom of expression in favor of rules that have, as an effect, increased international restrictions on freedom of information. Not everyone lives in an area where such freedoms can be taken for granted. Copyright laws meant to encourage access to information by protecting their dissemination in the analog world are being redesigned to specifically restrict access to information in both the analog and digital worlds. Not only is the new old, but the old is becoming dangerously new.

First published in *Canadian International Lawyer*, Winter 2000.