THE WIPO COPYRIGHT TREATY

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The World Intellectual Property Organization (WIPO), an arm of the United Nations created to deal with international intellectual property issues, adopted two new treaties dealing with copyright law on December 20, 1996.[1] The treaties were created in response to the arrival of the digital age, which has made information a key business asset, expanded international commerce, and enabled faster and easier copying of copyrighted work. The value of harmonizing global copyright law has grown accordingly.[2] The Copyright Treaty was formed both to harmonize global copyright law and to extend that law into the digital domain.[3] The Treaty builds on the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), which set out some international copyright standards in 1886.[4]

The United States played an important role in the drafting of the Treaty and is expected to ratify it. The Copyright Treaty will be incorporated into an already evolving United States copyright law; U.S. courts have been struggling to interpret portions of the Copyright Act in terms of the growing digital environment, and the government has been attempting to create new standards in the area. Groups supporting wide dissemination of information, such as the Digital Future Coalition and the Home Recording Rights Coalition, have lobbied for minimal copyright protection in the digital environment.[5] Groups such as content providers have countered with the idea that maximum copyright protection is necessary as an

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1. *See* WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 [hereinafter Copyright Treaty]; WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, CRNR/DC/95. WIPO declined to adopt another proposed treaty dealing with copyright protection of databases.

2. *See* BUREAU OF NATIONAL AFFAIRS, INC., INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 1 (Marshall A. Leaffer ed., 2d ed. 1997).

3. *See* Jeffrey P. Cunard et al., *WIPO Treaties Raise International Copyright Norms*, N.Y.L.J., Mar. 10, 1997 at S4.

4. *See* Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, 828 U.N.T.S. 221, S. Treaty Doc. No. 99-27, 99th Cong. (1986) (revised at Paris, July 24, 1979) art. 8, 9, 11, 12 [hereinafter Berne].

5. *See, e.g., Digital Future Coalition* (last modified Nov. 26, 1997) <http://www.ari.net/dfc> (providing information about the Digital Future Coalition); *Home Recording Rights Coalition* (last modified Jan. 20, 1998) <http://www.hrrc.org> (Home Recording Rights Coalition's home page).

incentive to create copyrightable works and to allow them to be disseminated on the Internet.

I. THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

WIPO is one of the sixteen specialized agencies of the United Nations (UN) system of organizations. Headquartered in Geneva, WIPO was established during the Stockholm Convention of 1967, and entered into force in 1970.[6] With its specialized knowledge and expertise in the field of intellectual property, WIPO's goal is to maintain and increase respect for intellectual property throughout the world, fostering industrial and cultural development by stimulating creative activity and facilitating the transfer of technology and the dissemination of literary and artistic works.[7]

WIPO's functions include promotion of intergovernmental cooperation in the administration of intellectual property rights, as well as substantive and programming activities such as establishing expert commissions, preparing studies, and publishing a monthly journal.[8] WIPO also creates and administers international treaties, such as the 1996 Copyright Treaty.[9]

II. THE PRESENT STATE AND SOURCES OF INTERNATIONAL COPYRIGHT LAW

A. The Berne Convention

The Berne Convention was established in 1886 in Berne, Switzerland, and entered into force on December 5, 1887.[10] The United States joined Berne in March of 1989.[11] Berne, administered by WIPO, was the first treaty to attempt to harmonize international copyright law. As of January 1, 1996, 117 states were party to Berne.[12]

Berne protects literary and artistic works, requiring member nations to protect the right of reproduction, translation, adaptation, public performance, public recitation, broadcasting, and film. It sets out exclusive rights for copyright owners,[13] and limits those rights through a fair use provi-

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6. *See* WIPO, INTELLECTUAL PROPERTY READING MATERIAL 31 (1995).
7. *See id.* at 33.
8. *See id.*
9. *See id.*
10. *See* BUREAU OF NATIONAL AFFAIRS, INC., *supra* note 2, at 357-58.
11. *See id.*
12. *Id.*
13. *See* Berne, *supra* note 4, art. 8, 9, 11, 12, 14.

sion.[14] It ensures that no formalities such as notice or registration may be required of foreign nationals. It adheres to national treatment, so that each member nation must give the same copyright protection to works from other member nations as it does to domestic works.[15] WIPO's new Copyright Treaty is a special agreement within Article 20 of Berne.[16]

B. The World Trade Organization's TRIPS

Concerns with the enforcement of WIPO's treaties led to the establishment of the GATT Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994. TRIPS entered into force on January 1, 1995, and is administered by the World Trade Organization (WTO), which the United States joined in 1994.[17] TRIPS requires members to comply with the Berne Convention (except for a provision granting authors moral rights).[18] TRIPS sets out general international copyright protections. It protects expression but not ideas, methods of operation, or mathematical concepts,[19] and it protects computer programs as literary works.[20]

III. SUMMARY OF WIPO'S NON-CONTROVERSIAL PROVISONS

WIPO's members gathered in Geneva to create new rules and interpret existing ones to accommodate "new economic, social, cultural and technological developments."[21] The Copyright Treaty is a special agreement meant to increase the rights and obligations of its members, authorized under Berne's Article 20.[22] It consists of 25 Articles, and WIPO published along with it the Agreed Statements Concerning the WIPO Copyright Treaty, which attempts to clarify some of the articles in the treaty.

Much of the Copyright Treaty globally extends law already in force in the United States. As in the Berne Convention and section 102 of the Copyright Act, the Copyright Treaty protects expressions and not ideas,

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14. *See id.* art. 9.
15. *See id.* art. 5.
16. *See id.* art. 20.
17. *See* BUREAU OF INTERNATIONAL AFFAIRS, INC., *supra* note 2, at 12.
18. *See* General Agreement on Tariffs and Trade: Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, 33 I.L.M. 81 art. 9 (1994) [hereinafter TRIPS].
19. *See id.*
20. *See id.* art. 10.
21. Copyright Treaty, *supra* note 1, pmbl.
22. *See id.* art. 1.

methods of operation, or mathematical concepts.[23] Article 3 of the Treaty incorporates Articles 2 to 6 of the Berne Convention, which consist mainly of procedural rules, such as the rule that parties cannot impose formalities on the nationals of other parties as a condition for claiming protection.[24]

Article 4 of the Treaty ensures that copyright protection is extended to computer programs, by explaining that they are "literary works" under Article 2 of the Berne Convention.[25] The Berne Convention does not list computer programs in its non-exhaustive list,[26] but notes that literary works include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."[27] Section 117 of the Copyright Act allows for the copyrightability of computer programs,[28] and TRIPS protects computer programs as well.[29]

Article 5 of the Copyright Treaty protects original compilations of data (databases) that incorporate copyrightable authorship.[30] As in section 103 of the Copyright Act, this protection does not extend to the data or material itself.[31] Article 5 adds to the Copyright Act by noting that the protection is extended by virtue of the compilation's selection and arrangement, but this idea is already embodied in U.S. copyright law in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*[32] TRIPS also extends copyright protection to authors' original selection and arrangement of compilations.[33] The Treaty's global database protection appears to be similar to database protection in the U.S. To the extent that that protection is unclear, WIPO's decision not to adopt a Database Treaty at this time suggests that it will remain unclear at least in the near future.

Article 6 of the Copyright Treaty provides a right of distribution for all categories of works through sale or transfer of ownership. It notes that the

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23. *See id.* art. 2.
24. *See* Berne, *supra* note 4, art. 5.
25. *See* Copyright Treaty, *supra* note 1, art. 4.
26. Berne's article 2 list of enumerated literary works begins with "such as."
27. *See* Berne, *supra* note 4, art. 2.
28. *See* 17 U.S.C. § 117 (1994).
29. *See* TRIPS, *supra* note 17, art. 10.
30. *See* Copyright Treaty, *supra* note 1, art. 5.
31. *See* 17 U.S.C. § 103 (1994).
32. 499 U.S. 340, 348 (1991) (determining that an alphabetically listed compilation of phone numbers was not protectable in part because it did not incorporate any creativity in selection or arrangement).
33. *See* TRIPS, *supra* note 17, art. 10 (protecting compilations of data "which by reason of their selection or arrangement of their contents constitute intellectual creations").

Contracting Parties are free to create a first sale doctrine.[34] Berne only provides a right of distribution for cinematographic rights.[35] Section 106 of the Copyright Act provides a right of distribution for copies of any copyrighted work.[36] Section 109 presents the first sale doctrine: distribution rights of the copyright owner end after the first sale of a work.[37] By providing an "exclusive right of authorizing the making available to the public" of originals and copies and allowing for a restriction of that right after the "first sale or other transfer of ownership" of the work,[38] Article 6 of the Treaty seems to be in accord with U.S. law providing an "exclusive ... [right] ... to distribute copies"[39] qualified by allowing the owner of lawful copies to "sell or otherwise dispose" of them "without the authority of the copyright owner."[40]

Article 7 provides an exclusive post-first-sale right of rental for computer programs, cinematographic works, and works embodied in phonograms.[41] Section 109(b) of the Copyright Act also provides for such an exception to the doctrine of first sale in the case of record or computer program rentals.[42]

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34. *See* Copyright Treaty, *supra* note 1, art. 6 ("Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right ... applies after the first sale ....").

35. *See* Berne, *supra* note 4, art. 14.

36. *See* 17 U.S.C. § 106 (1994) (providing that the owner of a copyright has the "exclusive ... [right] ... to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending").

37. *See id.* § 109(a) (providing that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord").

38. Copyright Treaty, *supra* note 1, art. 6.

39. 17 U.S.C. § 106 (1994).

40. 17 U.S.C. § 109 (1994).

41. *See* Copyright Treaty, *supra* note 1, art. 7 ("Authors of computer programs; cinematographic works; and works embodied in phonograms as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.").

42. *See* 17 U.S.C. § 109(b) (1994) ("[N]either the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program ... may ... dispose of, or authorize disposal of, the possession of that phonorecord or computer program ... by rental, lease, or lending ....").

IV. SUMMARY OF WIPO'S CONTROVERSIAL ISSUES

A. Temporary Copies

The WIPO Copyright Treaty incorporates the "exclusive right of authorizing the reproduction"[43] of protected works set forth in Article 9 of the Berne Convention.[44] Section 106 of the Copyright Act sets out an "exclusive" right "to reproduce the copyrighted work" as well.[45] The United States' general exclusive right of reproduction, then, seems to be in accord with the Treaty's exclusive right of reproduction.

U.S. law, however, is still unclear as to whether or not temporary copies created automatically in a computer's random access memory (RAM) during the running or transmission of a program are infringing reproductions. In *MAI Systems Corp. v. Peak Computer Inc.*,[46] the Ninth Circuit held that transitory copies in RAM created in the loading or running of a program were copies which infringed the right of reproduction. These copies may satisfy the Copyright Act's section 106 requirement of fixation because they are accessible until the computer is turned off—thus being "sufficiently permanent" to be perceived "for a period of more than transitory duration."[47] However, the Seventh Circuit has suggested that the rule related in *MAI* might be narrow, and that the use of dedicated phone lines and dumb terminals to access programs could be a way to circumvent the rule.[48] Also, commentators have taken issue with the holding in *MAI* on several grounds, and suggested that it be overruled. Many argue that assigning liability for the "reproduction" of temporary copies is equivalent to creating copyright liability for reading a book, and that the *MAI* court

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43. Berne, *supra* note 4, art. 9.

44. The Copyright Treaty in Article 1 incorporates Berne's Article 9 right of reproduction by stating that parties will comply with Articles 1 to 21 of Berne. *See* Copyright Treaty, *supra* note 1, art. 1(4).

45. 17 U.S.C. § 106 (1997).

46. 991 F. 2d 511, 517-18 (9th Cir. 1993).

47. 17 U.S.C. § 101 (1994) (explaining that a "work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration"); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08[A][1], at 8-113 to 8-115 (1997).

48. *See* NLFC, Inc. v. Devcom Mid-America, Inc., 45 F. 3d 231, 235-36 (7th Cir. 1995) (explaining that a party which did not download software onto its own computers to manipulate it but instead accessed the software via dumb terminals or dedicated phone lines to accomplish the same manipulation had not reproduced the software in its own computers' RAM, and so had not violated the right of reproduction).

ignored an obvious application of the doctrine of fair use.[49] Commentators have also argued both that such copies are not really fixed, and that there is no need to assign liability because such transitory copying will not undermine a work's market value.[50]

The hotly contested proposed Article 7, which would have expressly stated that transitory reproductions are copies in violation of the right of reproduction, was eventually dropped from the Treaty.[51] However, the Agreed Statements that WIPO produced along with the Copyright Treaty maintain that temporary copies are infringements, stating 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."[52] While this statement would seem to bring the Copyright Treaty's reproduction right into accord with *MAI*, it is unclear what weight the Agreed Statements will carry, considering the decision not to include such a clarification in the Treaty itself.

Those in favor of minimal copyright protection are concerned that if the Treaty is interpreted to mean that all temporary copies are reproductions, liability will spread quickly to every user of the Internet.[53] It would be impossible for a user to download or run a copyrighted program without incurring liability. While the fair use defense in U.S. law should protect most users rightfully utilizing copyrighted works,[54] the parties in favor of minimal protection fear, as discussed below, that fair use may not survive all aspects of the WIPO Treaty. Those in favor of maximal copyright protection argue that fair use would still exist in most situations, and that only users committing flagrant violations of the right to reproduction for commercial use would be prosecuted.

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49. *See, e.g.*, Bradley J. Nicholson, *The Ghost in the Machine:* MAI Systems Corp. v. Peak Computer, Inc. *and the Problem of Copying in RAM*, 10 HIGH TECH. L.J. 147, 170 (1995). Fair use is a defense of infringement, provided for in the Copyright Act, for purposes such as criticism, comment, news reporting, teaching, scholarship or research. *See* 17 U.S.C. § 107 (1994).

50. *See id.* at 173-74.

51. *See WIPO Releases Treaty Proposals on Transmission Right, Databases,* (BNA Int'l, London, England),10 WIPR 375, Nov. 1996 (discussing proposed draft treaty).

52. Agreed Statements Concerning the WIPO Copyright Treaty, Dec. 20, 1996, World Intellectual Property Organization, Concerning Article 1(4).

53. *See Digital Future Coalition* (last updated Nov. 26, 1997) <http://www.dfc.org>.

54. Though note that fair use was not applied to defend the use in *MAI*.

B. Service Provider Liability

Service providers fear that the new Copyright Treaty might render them liable when infringing copies are posted on the Internet. In part, this fear stems from the Treaty's grant of an exclusive right authorizing "any communication to the public of their works, by wire or wireless means" under Article 8.[55] Such an exclusive grant may create a right not previously available under U.S. law.[56] The Berne Convention provides varying protection for different kinds of communications and works, but nothing like such an exclusive right,[57] which seems to dictate that an unauthorized posting of copyrighted material on the World Wide Web would be a violation of the treaty.[58] The uncertainty of the scope of such a new right, then, is part of what makes service providers fear that they might be held liable for the posting of infringing material on the Web.

Another basis for service providers' concerns stems from the treatment of access providers' liability under the U.S. copyright laws' rights of reproduction, distribution, display, and performance.[59] Courts have declined to find service providers contributorily liable for users' unlawful posting of copyrighted information on the Web when those service providers lacked knowledge of the infringing activity.[60] Such holdings are not surprising because U.S. law requires knowledge of infringing activity along with inducement or material contribution for a party to be found contributorily liable based on participation in an infringement.[61] But direct liability for service providers in the United States whose users violate copyright laws is a possibility. One court found an on-line bulletin board operator directly liable for infringing distribution and public display rights when customers used it to access copyrighted material.[62] In *Playboy Enterprises v. Frena*, the court found that the defendant bulletin board operator had violated the plaintiff's distribution right though the operator had supplied only a service, and not a material embodiment of the work.[63] Also in *Playboy*, the court found that the bulletin board operator had vio-

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55. Copyright Treaty, *supra* note 1, art. 8.

56. *See* Cunard, *supra* note 3, at S4.

57. *See* Agreed Statements of the Diplomatic Conference that Adopted the Treaty, April 12, 1997, S. TREATY DOC. NO. 105-17. (submitting the WIPO Treaties to the Senate).

58. *See* Cunard, *supra* note 3, at S4.

59. *See* 17 U.S.C. § 106 (1994).

60. *See, e.g.*, Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552, 1554.

61. *See* NIMMER & NIMMER, *supra* note 47, § 12.04[A][2][a], 12-72 to 12-76.

62. *See Playboy*, 839 F. Supp. at 1557 (M.D. Fla. 1993).

63. *See id.*

lated the plaintiff's right to public display, although it is arguable that the public display was really the user's, and not necessarily the operator's.[64] However, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,[65] another court refused to find an Internet service provider directly liable when a user posted information which may have infringed the Church of Scientology's copyright. Netcom, the Internet service provider, provided an unmonitored system which sent out copies such that postings of the information became available throughout the world.[66] Although direct liability for copyright infringement is a strict liability standard, the court in *Religious Technology* held the Internet service provider not liable because there was no "volition or causation" by Netcom, which was "merely used to create a copy by a third party."[67] The court also noted that it was "practically impossible" for Internet service providers to screen out infringing material.[68]

The Copyright Treaty's Article 8 right of communication to the public may, under *Playboy*, increase the basis of direct liability for service providers. Under *Religious Technology*'s reasoning, though, service providers without knowledge or direct contribution and without practical ability to police the Internet should still not be held liable. Because the Copyright Treaty does not specifically speak to the issue of Internet service provider liability, resolution of the issue remains unclear in the United States. Groups in favor of minimal copyright protection argue along the lines presented in *Religious Technology* that it would be unfair and impractical to make service providers liable. Service providers, under this argument, are just common carriers of information, and should be regulated similarly to telephone companies, which are not responsible for the legal status of content traveling through the telephone lines. Those in favor of strong copyright protection maintain that copyright infringement is a strict liability rule, and that strict liability is a necessary incentive to content providers to continue to make information available on the Internet. Also, while it may be "practically impossible" for Internet service providers to police the Internet for infringing materials, those service providers may still be the most efficient policers. Ultimately, the issue's resolution calls for a

64. *See* NIMMER & NIMMER, *supra* note 47, § 12.04[A][3][e], 12-101 to 12-107.
65. 907 F. Supp. 1361 (N.D. Cal. 1995).
66. *See id.* at 1367-68.
67. *Id.* at 1369-70.
68. *Id.* at 1372-73.

political judgment as to where liability should end and begin,[69] a judgment which arguably should be made by a legislative body.

C. Prohibition Against Circumvention of Security Devices

Article 11 of the Copyright Treaty provides that parties must provide "adequate legal protection and effective legal remedies" against circumvention of technologically based security measures used to prevent copyright infringement.[70] The Copyright Act already prohibits certain circumvention devices—under Section 1002, it prohibits the importation, manufacture, or distribution of a device with the primary purpose of circumventing a certain "Copy Management System."[71] Those who favor minimal copyright protection argue that broader direct liability levied against those who circumvent security devices will lead to contributory liability being levied against those who make and sell devices used to circumvent copyright security. The result might stifle technological innovation.

In the United States, courts have held that a party can be liable for contributory infringement if they know or have reason to know of a third party's infringing activity, and induce, materially contribute to, or further those infringing acts.[72] However, a party providing a device to others who use it to infringe a copyrighted work is not liable for contributory infringement if the device "is capable of commercially significant noninfringing uses."[73] In *Sony* the Supreme Court held that the distributors of videotape recorders were not liable as contributory infringers based on videotape users infringing the copyright of certain programs by copying them with their VCRs.[74] The Court found that movie studios authorized time-shifting[75] which qualified as a significant noninfringing use of the videotape recorders.[76]

The Clinton Administration's White Paper proposed to change the U.S. standard for contributory liability in cases like *Sony* to a standard under which a device provider would be liable if the device's "primary pur-

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69. *See, e.g.*, NIMMER & NIMMER, *supra* note 47, § 12.04[A][3][e], 12-101 to 12-107.

70. Copyright Treaty, *supra* note 1, art. 11

71. 17 U.S.C. § 1002 (1997).

72. *See, e.g.*, Gershwin Publishing Corp. v. Columbia Artists Mgt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

73. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

74. *See id.*

75. Time-shifting is the taping of a program for the purpose of watching it at a later time.

76. *See Sony*, 464 U.S. at 443.

pose or effect" was to infringe.[77] The White Paper's proposal would place a higher hurdle in front of device makers trying to escape a charge of contributory infringement. Those who prefer minimal copyright protection argue that the potential makers of the next new device might be discouraged from creating anything people might possibly use to infringe, thereby stifling technological innovation. *Sony* might have come out differently under the White Paper's standard, cutting off the VCR market and with it the many other noninfringing uses later discovered.

Article 11 of the Copyright Treaty does not contain language limiting liability to those devices or methods of circumvention that do not have substantial non-infringing uses, which would be consistent with the holding in *Sony*. Neither does the Treaty incorporate the White Paper's standard of assigning liability if a device's primary use is to infringe. Whether or not either U.S. law as it stands according to *Sony* or U.S. law as it may be changed in the future by proposals like the White Paper would be consistent with the Treaty, then, is unclear. The impact of Article 11 on U.S. law may depend on legislation chosen to implement the Treaty.

D. Fair Use

The Copyright Treaty does not specifically address the issue of fair use. U.S. law, through section 107 of the Copyright Act, provides a fair use defense of infringement "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[78] The defense's purpose is to allow courts to avoid rigidly applying the Copyright Act when it would stifle the creativity that copyright law is meant to foster.[79] A determination of whether or not a use is fair involves a case-by-case analysis of the following factors: the purpose and character of the use; the nature of the copyrighted work; the amount of the part used in relation to the

77. *See* Working Group on Intellectual Property Rights (Bruce Lehman, Chair), *Intellectual Property and the National Information Infrastructure* 230 (1995) [hereinafter White Paper]. The Clinton Administration formed a National Information Infrastructure Task Force (IITF) to recommend policy regarding communications in the new global information infrastructure. In 1995 the IITF put forward the White Paper, which suggested strengthening copyright protection in the digital environment, and was therefore backed by content providers. *Id.* at 1. The White Paper failed to graduate from the Senate committee level. *See Digital Future Coalition* (last modified Nov. 26, 1997) <http://www.ari.net/dfc>.

78. 17 U.S.C. § 107 (1994).

79. *See* NIMMER & NIMMER, *supra* note 47, § 13.05, 13-149.

copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.[80]

One potential application of the fair use defense is ephemeral reproduction.[81] If temporary copies do infringe the right of reproduction under U.S. law and the WIPO Copyright Treaty, it is possible that they are a fair use. One commentator has suggested a fortuitous use may be fair because the work does not supplant the function of the original work and is unlikely to affect its market.[82] However, at least one case has refrained from applying the doctrine of fair use to ephemeral copying.[83] Parties supporting minimal copyright protection fear that the Copyright Treaty may lead to the treating of ephemeral copies as infringements, and yet may not extend the fair use defense to them.

Another application of the fair use defense is reverse engineering.[84] Other parties are free to use the unprotected elements of a work, and this includes taking the work's ideas (rather than expression) and shaping them into a new work.[85] In order to take apart certain works, like computer programs, some reproduction or adaptation of the works is necessary. *Sega Enterprises Ltd. v. Accolade, Inc.*[86] held that when there is no other readily available mechanism for achieving the permissible purpose of manipulating a work's code, the infringing copy created during the reverse engineering process can be defended by the fair use doctrine.

Backers of minimal copyright protection fear that the fair use defense for reverse engineering may be stifled by the Copyright Treaty's expansion of the scope of infringement. As noted, Article 11 of the Treaty provides that parties must provide "adequate legal protection and effective legal remedies" against circumvention of technologically based security measures used to prevent copyright infringement.[87] Article 12 of the Treaty requires member states to have remedies against persons having grounds to know they have removed or altered electronic rights manage-

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80. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); 17 U.S.C. § 107 (1)-(4) (1997).

81. For example, where temporary copies are created in a computer's RAM during the running of a program. *See* MAI Systems Corp. v. Peak Computer, Inc., 991 F. 2d 511 (9th Cir. 1993).

82. *See* NIMMER & NIMMER, *supra* note 47, § 13.05[D][3], 13-228 to 13-229.

83. *See MAI*, 991 F.2d at 511 (lacking discussion of fair use).

84. Reverse engineering is the process of examining and taking apart a work in order to understand and build on its ideas. *See* NIMMER & NIMMER, *supra* note 47, § 13.05[D][4], 13-230 to 13-238.

85. *See id.*

86. 977 F.2d 1510, 1527-28 (9th Cir. 1992).

87. Copyright Treaty, *supra* note 1, art. 11.

ment information without authority or distributed such works.[88] In order to reverse engineer a computer program, most users will need to circumvent copyright protection or alter rights management information. The U.S. fair use defense purports to apply to all exclusive rights listed in section 106 of the Copyright Act,[89] but the rights to prevent circumvention of copyright protection or alteration of rights management information dictated by the Copyright Treaty are not listed in the Copyright Act's section 106.[90] Fair use, therefore, does not necessarily apply to these new methods of infringement. If it does not, then there is a danger that fair use will no longer apply to many cases of reverse engineering following implementation of the Treaty.

While the Copyright Treaty does not explicitly provide for a doctrine of fair use, neither does it limit the doctrine of fair use as suggested by the White Paper. The White Paper intimated that fair use should only apply in instances of market failure, when licenses for the use could not be obtained.[91] Rather, Article 10 of the Treaty allows the Contracting Parties to provide for limitations and exceptions that do not conflict with a normal exploitation of the work or unreasonably prejudice the author.[92] By doing so, the Treaty leaves open the door for the application of the fair use defense to temporary reproduction, to reproduction incidental to reverse engineering (where it currently applies in the U.S. under *Sega*), and even to circumvention of copyright protection or alteration of rights management information. Whether or not fair use in the U.S. will apply to these situations following implementation of the Treaty will likely depend on which legislation is chosen to implement the Treaty.

V. PRESENT STATUS OF COPYRIGHT TREATY AND POTENTIAL IMPLEMENTING LEGISLATION

A. Further Steps Necessary for Treaty to Become Law in US

Under Article 20 of the Copyright Treaty, the Treaty will enter into force three months after 30 instruments of ratification or accession by

88. *See id.* art. 12.

89. 17 U.S.C. § 107 (1994) (providing that "[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work ... is not an infringement of copyright").

90. 17 U.S.C. § 106 (1994) (enumerating the rights to reproduce, prepare derivative works based on, distribute copies of, perform publicly, and display publicly certain copyrighted works).

91. *See* White Paper, *supra* note 77, at 79-82.

92. Copyright Treaty, *supra* note 1, art. 10.

States have been deposited.[93] The Treaty was introduced into the U.S. Senate for ratification on July 28, 1997.[94] The Treaty is not self-executing in the United States, so even if the Senate ratifies it with a two thirds vote, Congress needs to enact enabling legislation to ensure that U.S. law is in compliance with the Treaty.

B. Proposed Implementing Legislation

Due to the Treaty's general language concerning controversial issues, there is disagreement as to what implementing legislation is required in order to bring U.S. law into compliance with the Treaty. Groups on either side of the minimum/maximum protection debate have been suggesting implementing legislation in accord with their ideals. These suggestions, fueled by the various lobbying groups, arguably go much further to change U.S. law than is necessary to bring U.S. law into conformity with the Treaty.

So far, three pieces of implementing legislation have been suggested. On July 29, 1997, Representative Coble introduced H.R. 2281, the WIPO Copyright Treaties Implementation Act. This bill would prohibit the manufacture or sale of any service or device designed primarily to circumvent copyright protection, which may have other uses as long as those uses are "limited."[95] It would change *Sony*'s rule (of no contributory infringement if there are substantial non-infringing uses) to the White Paper's rule (of liability if the primary use of the device infringes.) It would further prohibit intentional removal or alteration of copyright management information, or alteration of that information by a party knowing such acts will induce or conceal infringement.[96] This prohibition is called for by the Treaty's Article 12 requirement that parties provide remedies for knowing removal or alteration of rights management information. Finally, H.R. 2281 provides damages for violations, and gives the court discretion to lower or eradicate any damages award where the violator is found to have not known and not had any reason to be aware she was committing a violation.[97]

On September 3, 1997, Senator Ashcroft introduced S. 1146, The Digital Copyright Clarification and Technology Education Act of 1997. This bill, backed by the Digital Future Coalition and the Home Recording

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93. *Id.* art. 20.

94. *See* Agreed Statements of the Diplomatic Conference that Adopted the Treaty, April 12, 1997, S. TREATY DOC. NO. 105-17.

95. H.R. 2281, 105th Cong. § 3 (1997) (amending 17 U.S.C. § 1201).

96. *Id.* § 3 (amending 17 U.S.C. § 1202).

97. *Id.* § 3 (amending 17 U.S.C. § 1203).

Rights Coalition, groups devoted to the dissemination of works to the public, was an attempt to limit possible liability of service providers and to limit liability for users of the Internet in general by ensuring a fair use defense to copyright infringement. Under S. 1146, service providers are not liable for direct or contributory infringement unless they receive a specified, formality-laden form of notice and do not do what they reasonably can to limit the infringement.[98] Section 202 of S. 1146 provides that fair use shall exist as a defense, and in that defense the means of performance, display, or distribution are irrelevant, ensuring the fair use defense's application in the digital environment. Section 204 builds on the idea of fair use by providing exceptions for educational use. Section 305 provides that transitory, incidental digital copies made in the course of the use of a work otherwise lawful are not infringements. Section 1201 notes that it is an infringement to circumvent copyright protection, but not to manufacture or distribute an infringement device. Section 1202 provides that a party may not knowingly, intending to mislead or induce infringement, remove or alter any copyright management or distribute material that has been altered.[99] This requirement of specific intent ensures that accidental infringement cannot occur in this area.

On November 13, 1997, Representative Boucher introduced H.R. 3048, The Digital Era Copyright Enhancement Act. This bill, also backed by the Digital Future Coalition, provides that if a party knowingly removes or alters "any effective technological measure" used by a copyright owner to protect his work, for the purpose of aiding an infringement or committing one, that party is liable for copyright infringement.[100] As in S. 1146, H.R. 3048 requires specific knowledge and intent in altering copyright management information for that act to be an infringement, thus preventing a finding of infringement for an accidental occurrence.[101] The bill also adds analog or digital transmissions to those items protected by the fair use defense,[102] to ensure that fair use will apply in the digital environment. The legislation also provides that ephemeral digital copies are not infringements.[103] It restricts the use of shrinkwrap licenses, providing that they are not enforceable when they limit dissemination of uncopy-

98. S. 1146, 105th Cong. § 101 (1997).
99. *See id.*
100. H.R. 3048, 105th Cong. §8 (1997) (amending 17 U.S.C. § 1202).
101. *Id.*
102. *See id.* § 2.
103. *See id.* § 5.

rightable material, or when they restrict the Copyright Act's exclusive rights.[104]

VI. CONCLUSION

In an attempt to harmonize global copyright norms, WIPO drafted a Copyright Treaty which may affect U.S. copyright law in several ways, depending on Congress' use of language in any Treaty implementing legislation. Two sides came into the talks in Geneva fighting the well-worn copyright battle of dissemination versus protection. The correct balance needed to be struck because, while the ultimate purpose of copyright protection is to disseminate more information amongst the public, copyright can only achieve that goal by protecting information strongly enough to provide incentives to authors to produce and provide information. Unfortunately, with regard to some of the most important issues in global copyright protection, the WIPO Copyright treaty led to very few actual resolutions. The Treaty does prohibit circumvention of security devices. It does prohibit knowing alteration or removal of electronic rights management information. But the Treaty itself does not clarify the issues of the fair use defense or potential service provider liability. It does not even mention, notwithstanding the Agreed Statements, the important issue of the status of ephemeral copies. Both sides of the minimum/maximum protection debate have attempted to claim victory in the WIPO arena, noting that the other side's agenda has not been explicitly adopted. The fight between the two sides rages on in the United States under the guise of interpreting the Treaty and creating U.S. law to comply with it. However, the fact that the Treaty might be interpreted in so many different ways—from the highly protectionist H.R. 2281 to the freely disseminating H.R. 3048—reveals the primary disappointment of the WIPO Copyright Treaty. It fails in important ways to unify global copyright law.

104. *See id.* § 7.