COPYRIGHT BULLETIN

Vol. XXXVI N°4, 2002

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ISSN 1814-358X

DOCTRINE

THE EXHAUSTION OF RIGHTS IN THE ANALOGUE AND DIGITAL ENVIRONMENT

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1. However one looks at it, copyright plays and has always played an essential role in the delicate relationship between authors, their works and the public. This classic triptych is based on a balance between the interests of each party: the author wishes to be remunerated for the exploitation of his or her intellectual creation, the public wants to obtain access to that creation and make it a part of its own world, and the work itself demands respect and protection.

In a context of globalization and with the proliferation of media protected by copyright, the concept of the exhaustion of rights has been built up as a rampart against what is considered to be the illegitimate exercise of copyright. Indeed, the exhaustion of copyright makes it impossible for the holder of the rights to oppose the importation by a third party of the media produced and distributed with his or her consent.

2. The exhaustion of intellectual property rights is currently giving rise to a good number of questions which represent just so many challenges for copyright. Exhaustion of rights is not a purely legal problem at either the regional or the international level: it is connected in many ways with world or regional politics and competition.

The concept, a product of German law in the early twentieth century,[1] has been considerably developed in different areas of industrial property law, both as regards national rights and in the context of the European Union.[2] Whereas it seemed legitimate under the various laws for a rightholder to obtain compensation in respect of the distribution of a subject of law in the territory of a Member State, at the same time it appeared unfair for the rightholder to be remunerated twice or to exploit the differences between markets to block parallel imports and thus set up a barrier between countries and markets.

3. In the information society, where technology ensures the perfect and unlimited low-cost reproduction of works and rapid distribution over the networks, copyright has had to respond

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1 The famous analogy between the exhaustion of a right which only provides protection until the specific purpose has been achieved and a lemon which, once pressed, gives no more juice.

2 See the ground-breaking judgment in the field of patents: ECJ, 31 Oct. 1974, Centrafarm c/Sterling Drug, 15/74, Rec., 1147. In the field of copyright: ECJ, 8 June 1971, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, Rec.1971, p.487.

and adapt in order to preserve its regulatory and protective function. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the 1996 WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) and the European Directive on the information society (Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society) have broached the question of the exhaustion of rights in a digital world. The point is to gauge how far the interests of the various parties can be safeguarded.

4. We shall therefore deal first with the foundations and the current application of the concept of the exhaustion of rights before addressing the challenges and issues of the digital environment with regard to the exhaustion of rights. Throughout this study reference will be made to the particular needs of public libraries and other research centres and how they may be affected by the new technologies, along the lines of the study on fair use of limitations and exceptions to copyright and neighbouring rights in the digital environment carried out by the Culture Sector of UNESCO in 2002.

I. Foundations and application of the concept of the exhaustion of rights

5. The aim here is to see how exhaustion has been incorporated in legal systems and how such systems manage to evolve from an analogue to a digital context.

a) Establishment of the principle

6. Community exhaustion is applied on the territory of the 15 Member States of the European Union instead of international exhaustion, in accordance with the existing directives in the field of copyright.[1] Consequently, when a product protected by copyright such as a CD or CD-ROM is put on the market in the Community by the rightholder or with his or her agreement, the right of distribution is declared to be "exhausted", which means that further distribution inside the Community is not restricted by any right. On the basis of the principle of the free circulation of goods, parallel imports will therefore be authorized throughout the Community but the rightholder will still have protection against parallel imports from third countries[2] in order to protect the internal market.

7. Several decisions have helped to define the limits of exhaustion. In the previously mentioned case of Deutsche Grammophon, the point at issue concerned records marketed in France by a subsidiary of the company. Deutsche Grammophon opposed the parallel import of these sound recordings into Germany. The Court of Justice decided that the "specific subject-matter" of copyright is respected if the author has been enabled to authorize the first sale in the territory of a Member State. It must be possible for a medium marketed in this way to be distributed throughout the Community without the author being entitled to prevent such distribution on the basis of an exclusive right deriving from the national law of the importing country. The Court concluded:

> "It is in conflict with the provisions prescribing the free movement of products within the Common Market for a manufacturer of sound recordings to exercise the exclusive

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1 Directive 91/250 of 14 May 1991 on the legal protection of computer programs, hereafter referred to as "software protection" (article 4).
Directive 96/9 of 11 March 1996 on the legal protection of databases (article 5c).
Directive 2001/29 of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (article 4).

2 Court of First Instance of the European Communities, 16 Dec.1999 "Microsoft", JCP 2000 II 10370, note Ch. Boutard-Labarde and P.-Y. Gautier. See also European Court of Justice 9 February 1982, "Polydor v. Harlequin", 270/80, Rep.329.

> right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that state of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State."

8. The Polydor v. Harlequin case[3] concerned the importation into the United Kingdom of records manufactured in Portugal, before the latter country had entered the European Union. The Court of Justice decided that there were no grounds for upholding the principle of exhaustion in relation to products reaching the Union from third countries, as exhaustion was only recognized within the European Community.

9. In the case of Musik-Vertrieb Membran GmbH v. GEMA[4] of 20 January 1981,[5] the judgement of the Court of Justice defined the scope for agreement by the rightholder to the exhaustion of rights, although the reproduction of the records in question was carried out in the context of a system of statutory licences. Since the specific subject-matter of the right was protection prior to the first distribution of the work, the right could not be deemed exhausted if its marketing was not ascribed to the rightholder. The reference here is obviously to cases of piracy but the case law has not extended the argument to statutory licences. Indeed, the European Community judge gave a ruling on this point in relation to works protected by copyright in the Musik-Vertrieb case.

The scenario referred to distribution in the country of origin under a system of statutory licences. It involved record and cassette phonogram recordings manufactured and sold in the United Kingdom and imported into Germany. The German authors' rights society GEMA claimed from importers the difference between the royalties paid in the United Kingdom, where a system of statutory licences was in operation, and the (higher) royalties which would have been due in Germany had the recordings first been distributed there. The Court, having before it a preliminary point of law, ruled that:

> "… no provision of national legislation may permit an undertaking which is responsible for the management of copyrights and has a monopoly on the territory of a Member State by virtue of that management to charge a levy on products imported from another Member State where they were put into circulation by or with the consent of the copyright owner and thereby cause the common market to be partitioned."

In order to arrive at that conclusion, the Court asserted that:

> "… an author, acting directly or through his publisher, is free to choose the place, in any of the Member States, in which to put his work into circulation. He may make that choice according to his best interests, which involve … the level of remuneration provided in the Member State in question […]".[6]

This judgement seems open to criticism, however, as it demonstrates excessive rigidity in the application of exhaustion, together with an interpretation of the rightholder's consent which is too broad. It does appear that, in the present case, the consent of the rightholder was

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3 ECJ, 9 Feb.1982, Polydor v. Harlequin, 270/80, Rep.329.

4 Musik-Vertrieb Membran GmbH v. GEMA of 20 January 1981 (Rep.1981, p.147).

5 Rep.1981, p.147.

6 On the other hand, in relation to patents, the Community judge ruled differently: the patent proprietor may invoke his right of ownership in order to successfully oppose parallel imports since his right will not be deemed exhausted: in compensation, the rightholder will be required to authorize, in return for remuneration, the duplication of the item protected by a legally binding norm (statutory licence system) (ECJ, Pharmon v. Hoechst, 9 July 1985, 19/84, Rep.2281).

only implicit, in the sense that the author had authorized the first reproduction and marketing but could not oppose the second.

10. Nevertheless, the Community exhaustion accepted in respect of the right of reproduction cannot be applied to the provisions of services.[7] The case before the Court of Justice (Coditel 1) concerned the public representation of a cinematographic work. In this case, the Court affirmed that:

> "A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect, the problems involved in the observance of copyright in relation to the requirements of the treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records".

The community judges attempted in this case to reduce the influence of the principle of exhaustion for works not dependent on a physical medium. This approach is still current and is becoming increasingly important with the transition to a digital environment. The various national legal systems will have to take account of the converging concepts of reproduction, distribution and performance in their approach to the subject in terms of legislation and case law. The challenge is to preserve traditional rules whenever possible despite the increasing convergence of the components of economic rights.

11. likewise, exhaustion has not been recognized in relation to the rental of videograms by community law:

> "Articles 30 and 36 of the Treaty do not prohibit the application of national legislation which gives an author the right to make the hiring-out of video-cassettes subject to his permission, when the video-cassettes in question have already been put into circulation with his consent in another Member State whose legislation enables the author to control the initial sale, without giving him the right to prohibit hiring-out."[8]

12. the Microsoft case, already referred to, provided the European judges with an opportunity to draw attention to the rejection of international exhaustion of rights in relation to parallel imports of software into France from Canada. The judges pointed out that, in accordance with article 4 of the Software Directive:

> "… The marketing in Canada of copies of MC software does not exhaust MC's copyright over its products since that right is exhausted only when the products have been put on the market in the community by the owner of that right or with his consent […]."

13. Thus, an online database or the rental of a medium will not be subject to exhaustion by virtue of the particular nature of their exploitation and, hence, the nature of the specific object protected by their right.[9]

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7 Coditel 1, 18 March 1980, case 62/79, Rep.881.

8 ECJ, "Warner", 17 May 1988, 158/86, Rep. p.2605.

9 See, for example, art. L 122-6 of the Intellectual Property Code (France): "The first sale of a copy of a software package in the territory of a Member State of the European Community or of a State party to the European Economic Space agreement by the author or with his or her consent exhausts the right to market this copy in all Member States with the exception of the right to authorize the subsequent rental of a copy" (emphasis added).

The right of public performance transmitted by the author to a third party in a Member State is subject to the principle of territoriality, that is to say that each country's legislation relating to the right of public performance will apply in its territory of application. One cannot adduce the hypothetical exhaustion of the right of public performance to refuse the author the exercise of his or her rights, particularly when the specific object of the right subsists. The full importance of the Court's solution in the "Coditel 1" judgement is evident today as technology provides the general public with almost unlimited access to works that are now digitalized.

14. Reference may be made, by way of example, to file-sharing sites such as the defunct "Napster" and "AudioGalaxy" or those still operating such as "Kazaa". These servers and techniques enable data to be transferred between the hard discs of users who "share" files and to be downloaded by absolutely anyone, thus providing a perfect copy in digital form. It is thus possible to build up, at very low cost, an impressive collection of films, records and software through these sites. The rightholders, who are well aware of these abuses, have brought cases against the companies producing these sites aimed at closing them down. However, successful sites are often replaced a few months later by a new clone.

15. The approach adopted by the contracting parties to the TRIPS Agreement within the ambit of the World Trade Organization is somewhat different from the European approach since the purpose of this agreement is to defend most particularly what is referred to as "corporate copyright" in an international context. It is significant that the legislation makes no reference to authors but to "rightholders".

The TRIPS Agreement is superimposed on the 1886 Berne Convention to a certain extent. It requires Members to comply with certain minimum rules for the protection of the intellectual property rights which it sets out. Members may, however, decide to grant wider protection in their legislation than is required in the agreement, provided that such protection does not conflict with the other provisions of the agreement and the overall structure of the treaty. The agreement also states that the signatories are free to determine the method which is appropriate for the application of its provisions within their own legal systems and practice.

The TRIPS Agreement takes no stance on the issue of the exhaustion of rights. Article 6 of the agreement provides that:

> "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 [on national treatment and most-favoured-nation treatment] nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights".

The agreement thus allows the survival of territorial protection under national law. This article seems to cast some doubt over Article 28 of the TRIPS Agreement which establishes the right to import where patents are concerned.[10]

[10] A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process. Nevertheless, at the word "importing" in (a), the agreement has the following note: "This right, like all other rights under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6."

16. The North American Free Trade Agreement (NAFTA), a tariff-reduction agreement concluded in January 1994 between Canada, the United States and Mexico, recognizes international exhaustion.[11]

17. The 1996 WIPO Treaties leave States free to apply the type of exhaustion they wish after the first lawful distribution of a medium. With regard to the digital transmission of works online, examination of the preparatory studies brings out an interesting application of analogue mechanisms to a digital environment. The contracting parties attempted wherever possible to refer to and interpret the Berne Convention for the purpose of defining the systems of reproduction and distribution rights rather than to establish a new right. The communication of works by digital technology was included by means of the concept of public communication, a broad concept enabling the "classic" rules to be adapted to the new phenomena.

b) From the analogue to the digital environment

18. The dematerialization of works challenges a number of ways of thinking concerning the exhaustion of rights, with particular reference to the notions of reproduction and performance.

The solution sanctioned by Coditel 1, referred to above, is based on the premise that the exhaustion of rights can only be recognized once the "specific subject-matter" of the right has been "liquidated"; in other words, it is considered that the protection granted should cease to be effective from the moment that a trigger event (i.e. marketing) has taken place. Insofar as the cinematographic work has to be protected at each new public showing, the rights in this work cannot be said to be exhausted by the same reasoning as in the case of material goods. The distribution of a protected digital work has to be assimilated to a provision of services that is repeated indefinitely to impede the unauthorized copying of files and thus to attempt to curb such practices.[15]

19. The attitudes and legal conceptions of States are key factors in the copyright field, insofar as the question of the exhaustion of rights is one that "deprives" rightholders of part of their prerogatives. Some countries such as Japan and Australia apply the exhaustion of rights internationally, albeit within a context confined by case law. Nevertheless, various systems exist with respect to exhaustion, depending on the intellectual property right in question (patents, trademarks, copyright, etc.). This highlights the economic dimension of the concept.

In the past, copyright managed to adapt to the emergence of new media. As an evolving corpus of rules, it successfully accommodated the dematerialization of certain works – such as choreography and theatrical productions – and protected them in the course of performance.

The solutions to questions concerning the exhaustion of rights can vary depending on the context, which may be national or global. When an artist agrees to his producer's marketing one of his works in digital form on a website, he has to make contractual provision for the fact that in practice, given the distribution techniques involved, the musical item is

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[11] Article 1705 on copyright provides that: "2. Each party shall provide to authors and their successors in interest those rights enumerated in the Berne Convention in respect of works covered by paragraph 1, including the right to authorize or prohibit: (a) the importation into the Party's territory of copies of the work made without the rightholder's authorization; (b) the first public distribution of the original and each copy of the work by sale, rental or otherwise;".

[15] The specific subject-matter of the trademark is for example exhausted from the time the product is first placed on the market and is only revived in the context of opposition to an infringement, such as counterfeiting. It is defined in relation to the rightholder, as distinct from the essential function of a right that can be described as having a social purpose, namely, informing the consumer in the case of a trademark.

likely to cross frontiers. Software producers who frequently have to contend with unauthorized parallel imports have thus been able to plead the theory of the exhaustion of rights – demonstrating precisely that there is no exhaustion – so as to bring in lawful measures for the protection of their rights.[16] It is necessary to bear in mind the concept of the dematerialization of media: the phenomenon of parallel imports is accentuated, albeit in a manner that is in principle non-profit-making, through the action of the public turning to account the new ways in which works are distributed.

Similarly, the applications of the theory at the Community level imperil the practice whereby an author assigns his or her exclusive rights to different publishing houses in the various geographical areas, since the mere distribution of a work in one of the territories will automatically serve to authorize, in the context of the free circulation of goods, parallel imports and will compromise all the previous contracts he/she may have signed. This observation does not, however, constitute an impediment to the exercise of the rights granted to secondary literary publishers in the various countries in respect of languages for which they have acquired the rights. In these cases, the publications are different; and if exhaustion applies to copies of works or if translations are involved, it does not permit a third party to publish a translation without the agreement of the author or his/her successor in title.

20. The 1996 WIPO "Internet" Treaties gave expression to the desire of States to strengthen the situation of copyright and related rightholders while reaffirming the need to ensure a balance between the latter and the general public. The intention was also to react to "libertarian" tendencies that contested the monopolies arising from national intellectual property legislation from the standpoint of development of a global communication network. It is true that the Internet initially seemed to be a legal no-man's-land, uncontrolled and uncontrollable, whether by the State authorities or by the technical operators, until the courts established a corpus of Internet law derived from the rules applicable to analogue media.

21. A practical consequence of the transition that has led to the digital age has been the desire of opponents of copyright to see the exhaustion of rights applied to themselves on the basis of an analogy between digital networks and the "traditional" distribution of media. Taking this as postulate, it would no longer have been possible for the holders of copyright or related rights to prohibit the online use of a work or a service once it had been placed on the network. This view is unanimously rejected by the producers of software or other works subject to digitization, for whom such a rule would mean a significant loss of earnings. [17]

The exhaustion of rights represents a kind of expropriation of a part of rightholders' prerogatives in order to satisfy the higher requirement of the free exchange and circulation of works, without calling into question the specific subject-matter of the intellectual property right, whose monopoly is maintained until the medium is placed on the market with the author's consent,

22. Specific entities can thus, on a strictly non-profit basis, enjoy access to protected works, for example for research or educational purposes.

Thus, the European Directive of 22 May 2001 allows a possible exception to copyright at the discretion of Member States as regards *acts of reproduction made by publicly accessible establishments which are not for economic or commercial advantage*. This

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16 See the aforementioned "Microsoft" judgement, para. 12 above.

17 "This position was facilitated by the US notion of distribution right. It is true that, at first sight, the 'distribution' of copies of works on the Internet could be assimilated, from the functional point of view, to the distribution of copies in the traditional environment. In any case, the user is left in the dark" (Séverine Dussolier, Internet et droit d'auteur, 2001, site: www.droit-technologie.org).

exception naturally concerns libraries, but it remains very limited in scope. It is useful to allow access to information in public documentation facilities, in terms of the right of reproduction.[18] This possible exoneration is accompanied by the legitimate and widely recognized requirement that the source should be indicated. The principle of equal access to information by way of lending could lead to the introduction of accelerated exhaustion in some countries, which could see their libraries exonerated from licensing in the exercise of their public service function. Directive 92/100 of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property moreover provides, in article 5, limits to the lending right, since not only may the exclusive right be replaced by a right to remuneration (paragraphs 1 and 2) but also: "Member States may exempt certain categories of establishment from the payment of the remuneration referred to in paragraphs 1 and 2".

23. Libraries are also concerned by monopolies on file formats. The possibility of controlling a file format means that each electronic book (e-book) format will have its own reading software and will be readable only with an apparatus of the same brand. To provide sustained access to all forms of reader formats will require resources in terms of staff and skills that are beyond the capacity of libraries at present, not to mention the cost of the e-book readers they will have to purchase for their users. There would seem to be a need to introduce a simplified scheme to guarantee the access of all to information without compromising authors' rights.

This reading software could become more accessible by means – for example – of an exhaustion mechanism available to research and documentation centres only and operated in partnership with collecting societies to ensure better monitoring. These avenues remain to be explored, if the parties concerned are motivated to do so.

The problem of the specific requirements of libraries and research centres open to the public needs to be addressed from the standpoint of the implications for restrictions on copyright. The exhaustion of rights falls into this category, if one considers that it impinges on the prerogatives of a monopoly rightholder. The philosophy is the same: to enable a social or higher competing aim to be achieved while opposing any blocking tactics by the author.

24. UNESCO is organizing an extensive consultation on fair use as applied to copyright exceptions and limitations. The Organization is particularly concerned to see how the new information and communication technologies and their repercussions on copyright are going to impact on public access to information. The underlying assumption is that the previously mentioned cultural establishments should be able to fulfil their information function while adapting to technological change with the aim of providing a quality service to the public, including rights management.

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[18] ["(The exception) does not allow information professionals to seek remuneration for the service of providing copies. It also poses many difficulties as regards defining the establishments concerned. Can a company documentation service be considered a 'publicly accessible establishment'? Can it be said to be not for economic or commercial advantage? The Directive 92/100/EC on 'lending right' defines economic and commercial advantage as an amount that exceeds what is necessary to cover the operating costs of the establishment. In the context of the development of the Information Society, all governments and the European Commission itself recognize the strategic character of information. The debate on the value of information is more than ever a core concern. Given the added value provided by information professionals, it would seem very difficult to meet the conditions laid down by the Directive so as to benefit from this exception." (Michèle Lemu, the European Directive on the harmonization of copyright, presentation to the Inforum meeting held in Brussels on 9 March 2001 by the Belgian Documentation Association (ABD), to mark the twentieth anniversary of the European Council of Information Associations (ECIA), on the theme: "Europe, a diversity of experience for common skills". Site: www.abds.fr)].

Far from wishing to call into question the rights of copyright holders, the intention is to consider how, on the basis of a wide-ranging consultation, the concept of "fair use" can facilitate the role of public libraries. In the United States, this concept has established the economic impact of the authorized exception as the key criterion of the lawfulness of this limitation. It seems clear that the wide dissemination of works in documentation centres should be governed by a scheme giving access to works at reduced cost in keeping with positive law in many states.

The introduction of provisions for the exhaustion of authors' rights and related rights in national legal systems presupposes an awareness of the technical difficulties posed by the development of the digital environment. While the solutions adopted in the digital era remain valid, it is still true that, in some cases, a gap exists between the objectives set and the legal means deployed to that end.

II. Challenges and issues in the digital environment as regards the exhaustion of rights

25. In this part, we shall study the consequences of the technological developments relating to media and compare the exhaustion of rights and exceptions.

a) New media

26. The core feature of the move towards digitization of items protected by copyright in the broad sense is the transition from the tangible to the intangible. A work still exists in its virtual state and depends on its medium only to ensure it reaches the public. But it still exists outside that medium.

The dematerialization of works now taking place involves only the mode of public communication. But this dematerialization has the effect of transferring a mode of communication by material media to a mode of communication by means of computer storage. This leads to some doubt as to whether such a communication can be properly described as a good or service. The applicable system governing the exhaustion of rights will depend on how the medium of communication of the work is classed. If the dematerialized transmission is classed as reproduction in the various computer memories, the question arises of the survival of exhaustion, whereas if this phenomenon is classed as a communication taking the form of an online service provision, it shall not involve exhaustion in accordance with the generally recognized solutions.

27. Furthermore, digitization makes it harder to identify the place of first distribution of the protected object, whereas the whole question of exhaustion resides in the first place of marketing.

28. International legal rules (notably the 1996 WIPO Treaties) and the regional and national ones derived therefrom attest to a growing awareness of the commercial consequences of the continual infringement of intellectual property rules on the various networks. Solutions are being introduced to restore a fairer balance of power between the public and the authors in the broad sense, as are technological protection measures (encoding, encryption, authentification systems).

The success of these measures depends as much on their intrinsic qualities as on the resolve of States to combat attempted circumvention of these measures effectively. Pursuant to the 1996 WIPO Treaties, the American Copyright Act of 1998 (the Digital Millennium

Copyright Act)[19] and the Directive of 22 May 2001, in particular, have included provisions to this effect. For instance, Chapter III of the Directive states that:

> "Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carried out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective" (Article 6).

29. We have seen that the goals of the concept of exhaustion were originally to do with free trading. The purpose of giving enterprises or publishing companies less scope for interfering with the circulation of protected items was to prevent media from enjoying a system of exception prejudicial to the public interest. Nor was the aim to impose expropriation on rightholders, which would have been tantamount to terminating the various monopolies created under national legislation.

If a State chooses to endorse the exhaustion of the right of international distribution (but not of reproduction) and by analogy applies this mechanism to digital works, it jeopardizes the interests of rightholders given the reconciliation of the two rights in practice as a result of the dematerialization of media. Hence the international conventions should allow the continuation of areas of national protection for intellectual works, without the other requirements of international free trade being too greatly affected. The EC Treaty has made this exception in its Article 30, which permits restrictions on the free circulation of goods so as to protect, *inter alia*, intellectual property rights. In fact, this article states that:

> "The provisions of Articles 28 and 29[20] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or <u>the protection of industrial and commercial property</u> [emphasis added]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States" (ex Article 36).

Preamble 29 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society seems to us to be an accurate synopsis of the solution in community law in respect of exhaustion:

> "The question of exhaustion does not arise in the case of services and online services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is in fact an act which should be subject to authorization where the copyright or related right so provides".

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19 See on this subject, for example, Ms Jane Ginsburg's News From the US, RIDA No. 179, January 1999, and No. 180, April 1999.

20 Article 28: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States" (ex Article 30).
Article 29: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States" (ex Article 34).

30. Exhaustion depends on the economic and legal levels of development. Therefore regional exhaustion is admissible, for instance in the European Union, but very rarely recognized at the global level. The point is that recognizing international exhaustion often means substantially reducing the income of the authors and other rightholders and hindering their strategy.

Exhaustion limits the exercise of the rights of author or other rightholders, as do exceptions and limitations, from which they nevertheless differ in terms of purposes and procedures, particularly as regards remuneration.

b) Exhaustion of rights and exceptions

31. Along with exceptions comes the exhaustion of rights. These limits are increasingly, and exclusively, a result of economic forces.

32. As mentioned earlier, the exhaustion of rights can be explained by the demands of free trade. The argument for the use of exceptions is based increasingly on their financial impact – in principle small – on the rights of authors and less and less on other considerations.

In some national legal systems, as for example under existing French law, exceptions have been introduced in a limited manner ("closed system") and are justified by non-economic criteria such as protection of privacy (private copies), freedom of expression (quotations and analyses, press reviews, news reporting, parodies, pastiches and caricatures) and sometimes ancillary character (reproduction of works prior to action for judicial sale). Such a system may end up admitting of exceptions which results in considerable prejudice to authors, for example the exception in the case of private copies.[21] This exception permits individuals to make copies for home use only. Nevertheless, the number of copies diffused and the fact that they are of excellent quality owing to digital technology represent a considerable loss of profit for authors and other rightholders.[22] In an open system based on the economic consequences of exceptions, such an exception might not be admissible.

In common law systems, the general criteria used to determine the admissibility of exceptions are largely economic. The "fair use" exception, a feature of the United States legal system, includes two such criteria, namely (1) whether such use is of a commercial or a non-commercial nature, and (2) the effect of the use upon the potential market for the work in question (section 107).

The criterion of the "three-stage test" places distinct emphasis on assessment of the economic impact of exceptions which might be admissible within a legal system.

The Berne Convention introduced this mechanism for the regulation of exceptions to authors' rights in respect of the right to reproduction. Article 9(2) of the Convention stipulates that "[…] It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

In the agreed statement concerning Article 1(4) of the WIPO Copyright Treaty of 20 December 1996, the parties demonstrated their desire to address the transition between the analogic and digital worlds. The statement reads: "The reproduction right, as set out in

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21 A frequently raised question is whether this exception, in the digital era and given the present practices of Internet users, fulfils the conditions of the three-stage test.

22 The compensation established under national laws is only a stopgap solution since digital technology could make it possible for authors or other rightholders to exercise their exclusive rights in the framework of improved technological measures.

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".

Moreover, Article 10 of the Treaty reintroduces the criterion of the three-stage test.[23]

The aim of the test is to restrict the practices permitted by States which would deprive authors of their traditional monopoly in the case of specific uses which are not of a directly commercial nature.

Each exception must first be limited to a special case, meaning a situation which is exceptional or unusual in relation to the customary and general conditions under which the work is exploited. Furthermore, the exception made for a special case must not conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the rightholder. An example would be the use of a short quotation or the incidental inclusion of one work in another.

The three-stage test is echoed in Article 5.5 of the aforementioned Directive of 22 May 2001.[24] In this case the scope of the test extends to the entire set of rights. The test is the foundation of any exception granted to a Member State: it is a kind of instrument of harmonization intended to complete and circumscribe the list of exceptions States may permit when incorporating the Directive.[25] This widely used criteria[26] nevertheless detracts from the limited nature of the exceptions provided for under the Directive, and will be used as an interpretive criterion within the legal systems of the Member States. It introduces into Community regulatory policy the concept of economic impact used by the WTO dispute settlement bodies.[27]

33. While the criteria relating to exhaustion of rights and to exceptions are determined by economic forces, the two mechanisms differ clearly from each other in terms of their impact on the income of authors and other rightholders.

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23 "(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author". Similar criteria are provided under Article 16 of the WIPO Performances and Phonograms Treaty.

24 In an effort to conciliate (where it cannot achieve *harmonization*?), the EC Directive on the harmonization of certain aspects of copyright and related rights in the information society provides an exhaustive list of these possible exceptions, even providing under Article 5.3 (o) the possibility of an exception in respect of "use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article". How can such a broad exception have any meaning?

25. See. C. Caron "La nouvelle Directive du 9 avril 2001 sur le droit d'auteur et les droits voisins dans la société de l'information ou les ambitions limitées du législateur européen" (The new Directive of 9 April 2001 on copyright and related rights in the information society or the limited ambitions of the European lawmakers), Com.Com Electr. May 2001, chron. No. 13.

26. See decision of the WTO Panel of 15 June 2000 and my articles (Com.Com. Electr. June 2001, chron. no. 15; Propriétés intellectuelles no. 2, January 2002).

27. The TRIPS Agreement contains in Article 13 the criteria of the three-stage test ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder").

Under the mechanism of exhaustion of rights, authors are paid in proportion to the sale of copies of which they have authorized the reproduction and marketing, being fully aware of the juridical and technological setting. Exceptions, on the other hand, are imposed on authors by law. In the latter case the consent of the authors is not taken into consideration and they receive, at best and only in certain cases, no more than compensatory remuneration according to the practice, under several legal systems in the case of private copies. The loss of income for authors is much greater in the case of exceptions than under the exhaustion mechanism which prevents authors from opposing the importation of copies of works of which they have authorized the marketing.

34. Mechanisms of exhaustion and exceptions are both designed with the general interest in mind. There is in fact an overlap between exhaustion of rights and exceptions to copyright. Let us take as an example the situation in which a work marketed in one country (country B) is imported by a library in another country (country A) which then lends it to the public even though the book is not on sale in country A. The theory of exhaustion of rights could have been used to authorize such practices by libraries. Country A has had to institute an exception to copyright applicable with regard to public centres of knowledge; yet exhaustion would have led to the same outcome as the use of the exception in respect of copies of the work imported by libraries. An attempt should therefore be made to coordinate legislation internationally so that the theory of exhaustion of rights can be used to benefit the public in that manner. Cultural promotion objectives are referred to in the aforementioned Directive 92/100/CEE (Rental right and lending right), which has led to the establishment of a licensing system and equitable remuneration for authors and rightholders. Such a situation also calls for a number of guarantees which must be provided by technological measures of protection against unauthorized digital copies.

Would it then be feasible, as we mentioned earlier, to develop parallel circuits of works reserved for documentation centres, in conjunction with an international exhaustion regime which would enable libraries, belonging to a network for example, to obtain works at the lowest prices?

III. Conclusion

35. The signature of the TRIPS Agreement in 1994 was expected to be the culmination of a process establishing an effective international system for the protection of intellectual property. Despite the ambitious free trade objectives of GATT, consensus could not be reached on the issue of the exhaustion of rights and parallel importations. Thus it is not possible to seize the dispute settlement body on the basis of Article 6 which leaves States free to determine their own policy with respect to the exhaustion of rights. Meanwhile, taking the text as a whole, might it not be concluded that the general thrust of the Agreement appears to be opposed to a regional or an international exhaustion regime applicable to the right to importation, as proposed by WTO notably with regard to patents.[28] Article 28 of the TRIPS Agreement is nonetheless subject to the provisions of Article 6 of that same Agreement, which, it may be recalled, rules out using the Agreement to 'address' the issue of the exhaustion...".

This interpretation can also be used to establish certain international exceptions to copyright. Article 7 of TRIPS, which defines the overall objectives of the Agreement, calls for equitable and balanced relations among actors in the field of intellectual property. It could

[28] See para. 15 above.

therefore serve as a basis for the implementation of measures which would give public libraries and research centres access to works, including digital works, at reduced cost. [29]

Furthermore, Article 8 of the TRIPS Agreement stipulates that the mechanisms related to intellectual property rights must not confer on their holders disproportionate prerogatives which would be tantamount to "abuse". [30]

The differences between systems which may exist depending on whether they are being viewed from the perspective of copyright or industrial property (patents, trademarks, designs and models, new plant varieties) serve to remind us that legislation varies from one country to the next. The advent of the digital age has given legislators and treaty signatories more leeway in terms of how mechanisms used in an analogue environment may be adapted in order to protect rights involving electronic media. Some legal concepts will have to be reworked to take account of inconsistencies arising from the use of technology. For example, at a time when in France the holders of neighbouring rights (notably producers) are about to obtain an increase in the tax on hard discs and other storage devices such as MP3 players as remuneration for private copies, it seems questionable whether it is wise for legislators to improve the situation of rightholders merely to let individuals avail themselves of the option of copying works for their personal use.

What we are seeing today is a veritable transformation in public practice. Quite clearly, these members of the public have been turned into "consumers" owing to the recent substantial rise in the marketing of protected works. More generally speaking, the circulation of these protected works is what has increased as a result of their dematerialization and the ease of access to means of copying them.

Today the whole corpus of international regulations relating to authors' rights needs to be examined in the light of the new electronic environment. International law, with the adoption of the WIPO Treaties, and community law, with the adoption of the important Directive of 22 May 2001, which reinforce the spirit of the TRIPS Agreement, have made important steps in that direction. These agreements have demonstrated a willingness to adapt established concepts to new forms of works and to put them into practice.

It is now for States to bring their legislation into line with the major international trade agreements. The economic impact of parallel importations is a hard fact and a consistent attitude among States on copyright will, it is to be hoped, lead to more harmonious trade relations. The original equilibrium between the interests of authors and those of the public, or between the interests of rightholders and those of consumers, must survive the changes brought about by the digital era, while our acts may not always match our expectations, we can still hope that the efforts made will produce consensus in the medium term.

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29 TRIPS Article 7 (Objectives): "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

30 Article 8(2) (Principles): "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rightholders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".

DOCTRINE

THE EXHAUSTION OF COPYRIGHTS AND THE FIRST SALE DOCTRINE IN THE DIGITAL ENVIRONMENT

The Position of the Library Associations
in the Debate in the United States of America

Inquiry Regarding Sections 109 and 117 of the DMCA[1]
Docket No. 000522150-0150-01

This article is published with the kind permission of the Association of Research Libraries (ARL). The original document "Comments of the Library Associations" (http://www.arl.org/info/letters/dmca_80400.html) was submitted by the ARL on behalf of the five major library associations, the American Library Association, Association of Research Libraries, American Association of Law Libraries, Medical Library Association and Special Libraries Association (the "Libraries") on 4 August 2000, before The Library of Congress, The United States Copyright Office and The Department of Commerce, National Telecommunications and Information Administration, Washington, D.C.

[1] Digital Millennium Copyright Act of 28 October 1998 (United States of America)

The balancing of incentives to create and provide public access to ideas and content is fundamental to U.S. copyright policy. *See, e.g. Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The Constitution empowers Congress to enact copyright legislation for the specific purpose of "promot(ing) the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, ¤ 8, cl. 8. Pursuant to that public purpose, the Copyright Act grants to authors the exclusive right to distribute copies of their work, 17 U.S.C. ¤106(3), but limits that right by distinguishing between ownership of a copyright (the bundle of exclusive rights granted an author) and ownership of a copy (the tangible material in which a work is fixed), 17 U.S.C. 202, and by extinguishing the copyright owner's distribution right upon the first sale of each copy, see 17 U.S.C. ¤109. Of course, no copyright exists in government works, nor in facts or data.

The limitation of the distribution right to the first sale, as codified in Section 109 of the 1976 Act, was intended to continue the first sale doctrine established by decisions under Section 27 of the 1909 Act. The treatment of the first sale doctrine by U.S. courts has consistently reflected the belief that the public benefit derived from the alienability of creative works outweighs the increased incentive to create that would stem from granting authors perpetual control over copies of a work. *Burke & Van Heusen, Inc. v. Arrow Drug*, 233 F. Supp. 881, 884 (E.D.Penn. 1964); *Blazon, Inc. v. Deluxe Game Corp.*, 268 F. Supp. 416, 434 (S.D.N.Y 1965) (quoting Nimmer, Copyright, ¤103.31 at 385 (1963) for the proposition that "[after the first sale], the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation."); *See, e.g., C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 191 (N.D. Tex. 1973) (same). The balancing approach to the doctrine was recognized by the Supreme Court early this century. *See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). The Libraries believe that recent developments surrounding distribution practices involving digital works undermine this constitutionally crafted balance.

Questions Regarding Section 109 of the DMCA

1) The effect of enactment of prohibitions on circumvention of technological protection measures on the operation of the first sale doctrine

The DMCA's enactment of prohibitions on circumvention places criminal penalties on top of contractual restrictions, thereby increasing publishers' ability to control access to works. The public, which enjoys use and lending rights with respect to works that were subject to the first sale doctrine because they were purchased outright, now faces licensing and legal barriers to private as well as public lending and use. While content owners contend that technological measures merely control unlicensed access and prevent piracy, as the Libraries explained in comments and testimony in the Section 1201 rulemaking proceeding, many measures currently in use or development blur control over initial access with control over library lending and fair use practices such as viewing, reading, extracting, copying and printing. These measures may also allow copyright owners to control use and disposition of copies of digital works long after the copyrights have passed into the public domain. The same concern applies to those who seek to regulate access to digital versions of government works . This unlimited control is contrary to the core principle of the first sale doctrine.

America's libraries have long been among the nation's largest volume-purchasers of copyrighted works. Libraries and their staffs are also diligent law abiders. They understand and adhere to the balance that the Constitution and copyright law have struck between the rights of copyright owners and users. However, recent adoption of legislative changes in the DMCA has reinforced a view of the legal environment that makes sharing of certain digital works suspect. It must be stressed that from the Libraries' perspective, fair use, preservation and the first sale doctrine are as important in a digital environment as they are in the print world.

Technological measures, augmented by the threat of criminal sanctions for circumventing those measures, permit publishers to control uses in new and unprecedented ways. Publishers can now block a lawful licensee's access to digital content by activating a control and device embedded into the code. While the law prohibits sale of devices designed to circumvent technological protections, and certain individual practices will be prohibited commencing October 28, 2000, the mechanisms may be activated without regard to whether the conduct at issue is infringing. License restrictions on what would ordinarily be fair use, permissible dissemination under the first sale doctrine or allowable preservation, may ultimately be enforced through these measures. Moreover, one patron's misuse may be used as the pretext for foreclosing access not just to the offending individual but to all authorized users, to the public's detriment. For example, one university recently had several services turned off by the vendor because of "unusual patterns of use" (i.e., excessive searches and downloads) by one individual.

Technological measures also impact on a library's ability to implement customized systems for ensuring compliance with license terms. When works are owned outright and are subject to the first sale doctrine, a library is able to exercise managerial discretion over the lending and use of its materials. In a publishing world dominated by digitally controlled works, libraries are forced to comply with one-size-fits-all technological enforcement measures that sometimes result in delays and diminished access by patrons. For example, access controls based on shared passwords have already proven problematic for some libraries. According to one university librarian, "We have gone to great lengths to organize and maintain a myriad of passwords to give to off-campus users. Passwords are getting to be a nightmare; I have pages of them." Licenses that limit access to students registered at a university, for example, may also impede full utilization. These licenses are frequently administered according to users' domain names, which may prevent libraries from making works available to visiting professors, scholars and community members with access to the library. Distance education users who are covered by the license but who attempt to log in from distant IP addresses also face severe and often impassable technological hurdles.

Technological measures that limit the machines from which a digital work can be accessed are another common impediment to full utilization of licensed resources. A recent survey by the Libraries of the impact of technology disclosed that many databases are available on only one computer in a library, which means that only one user can dial in at any given time. For example, the *Nature* web site bundles together several journals online that are password protected. Only one individual can use the site at any given time. This means that even though all the journals were lawfully acquired, a single patron using just one of the purchased works effectively blocks use of all the other journals available on the site. In the print format, each issue could be simultaneously used by separate users. There is no copyright rationale for preventing multiple users from accessing different journals at the same time, yet

the technological measure and prohibition on circumvention of that measure enforce the restriction.

The blurring of distinctions between lawful access and use was not the intent of Congress when it passed the DMCA's anti-circumvention provisions. The DMCA and its legislative history indicate that the prohibitions were not to affect other rights, remedies and limitations in the Act. See 17. U.S.C. ¤1201(c)(1). However, any reservation of these rights is moot if it remains illegal for a library or a user to circumvent technological measures in order to use the underlying works in ways that have traditionally been permitted under the first sale doctrine, fair use and preservation. In light of these developments, the Libraries urge copyright reform to reaffirm and assure their ability to lend digital works in the public interest and to facilitate uses of those works that are consistent with traditional copyright law principles.

2) The effect of the enactment of prohibitions on falsification, alteration or removal of copyright management information on the operation of the first sale doctrine

Copyright Management Information ("CMI") technologies such as "digital watermarks," "digital signatures," and "digital object identifiers", deployed in conjunction with access controls, impose unprecedented limits on and accountability for a library's ability to lend and make fair use of lawfully acquired digital works.

Digital publishers now have the ability to manage the kind of day-to-day operational decisions that were previously within the discretion of libraries. Previously, as owner of a particular copy of a book, a library was entitled to set the terms of patron access to that copy; as licensee of a digital work subject to technological measures, the library may be denied such right. The inability to establish uniform usage procedures will become increasingly problematic as the number of licensed works proliferates. Libraries are already finding it difficult to keep track of and interpret varying contract terms. In light of the accountability imposed by CMI and the criminal sanctions associated with circumvention, many individual librarians are understandably reluctant to make the fair use judgment calls that previously were standard management decisions or expose patrons to the new sanctions. Where uncertainty about permissible use exists, liability concerns may lead librarians to forego uses that are actually permitted under license and the law. According to one university librarian, "Technological devices such as watermarking have affected interlibrary loan, class reserve, and classroom use in the application of fair use. Electronic journals are still available in print versions so interlibrary loan and reserves are still possible. But when publishers start eliminating print versions, such electronic restrictions will be a significant problem unless electronic versions are treated just as print versions where fair use applies."

The combination of technological measures and CMI systems also gives information publishers an unsettling ability to track individual intellectual inquiry in ways that would not have been permissible traditionally under the first sale doctrine. To the extent that the first sale doctrine ensures individuals' and libraries' right to share and lend lawfully owned copies of a copyrighted work, the doctrine facilitates the exchange and intellectual collaboration that is central to the First Amendment "marketplace of ideas." Mindful of the accountability imposed by CMI, libraries are asked to comply with licensing terms that effectively restrict the time, place, and duration of private intellectual engagement. Intellectual inquiry is especially threatened when CMI technologies are deployed in conjunction with access blocks.

According to one library system: "Some journals from the American Chemical Society request that they be allowed to send ‘cookies’ to users’ workstations to monitor use. When users refuse this invasion of privacy, they are denied access at their workstations even though the organization has a subscription." Even though the definition of CMI in the DMCA specifically excludes "any personally identifying information about a user of a work or of a copy," 17 U.S.C. ¤1202(c), the way CMI technologies are actually implemented chills use of a library’s digital resources for research in areas where anonymous inquiry and the absence of a digital trail are critical. Of course, this chill can affect not only scholarly researchers, but more broadly faculty, students and the general public.

America’s libraries have always had the right to allow their patrons to enter the library’s facilities, access works lawfully owned by the library, and use those works, often anonymously, as allowed by copyright laws. Copyright law has never meant that publishers can control who looks at information and whether a page can be copied for private use. Now, increasingly sophisticated technological measures and private licenses between parties with unequal bargaining power threaten to curtail the abundant access to information and private intellectual inquiry that American libraries, both public and private, were founded to facilitate. While the exact nature and extent of the detrimental effects remain unclear at this time, the need for a full understanding of the interaction between CMI and first sale, on the one hand, and privacy rights on the other, is increasingly apparent. As with other developing aspects of technology and privacy, legislative analysis and action are needed to avert adverse effects.

3) The effect of the development of electronic commerce and associated technology on the operation of the first sale doctrine

In the past decade, electronic distribution has grown into a dominant method for publishing many kinds of copyrighted works. As a general proposition, owners of copyright in digital works distribute these works by licensing usage rights rather than selling physical copies of the copyrighted work. Because the first sale doctrine codified in section 109 of the Copyright Act applies only to lawfully owned copies of a copyrighted work, some suggest this statutory limitation on a copyright owner’s right to control distribution of a copyrighted work beyond the initial sale of copies is inapplicable to licensed works. As a result, many digital licenses are able to—and do—restrict both the resale and lending of digital works and the licensee’s ability to use lawfully obtained copies in ways that have traditionally been permitted under fair use, the first sale doctrine and the rules of preservation with regard to analog works.

The Libraries have found that licensing rather than selling digital works has allowed content owners to implement a price and market discrimination business model which forces libraries to choose between second-class, but affordable products and more expensive digital versions. To the extent that "deluxe" digital versions feature content and search mechanisms not available in lower-priced formats, libraries’ limited budgets threaten to exacerbate the "digital divide" between those who have access to electronic information services and those who do not.

Where libraries are able to afford access to digital products, licensing terms routinely affect uses that were traditionally lawful under the first sale doctrine. Routine library practices permitted under copyright law, such as interlibrary lending, lending for classroom or at-home use by patrons, archiving, preservation, and duplication for fair use purposes, have all been

restricted – in some cases severely restricted and in other instances barred – by licensing agreements. Alternatively, in some instances, sharing of digital works may be made only upon payment of additional fees. Loss of access to digital works for these purposes also promises to increase the information-access gap between the rich and the poor. The Libraries' recent inquiries to members and others has determined that:

a) Interlibrary lending of digital works is threatened by restrictive practices

Because digital products are costly and library budgets are limited, few facilities can afford to acquire access to all the digital works that are likely to be sought by patrons. Interlibrary lending has traditionally enabled libraries to borrow from each other's collections on behalf of patrons seeking access to material that is unavailable in the patron's local library. The practice is often prohibited by the licenses under which digital works are acquired. Public libraries in communities with limited resources - whose patrons are among the least able independently to purchase access and among the least likely to have direct access to other publicly accessible collections, such as at public colleges and universities - have traditionally been the most dependent on interlibrary lending. Accordingly, these libraries are the most disadvantaged by the containment of interlibrary lending of digital works. Librarians around the country have provided detailed commentary on the loss of this lending right:

- "We will not be doing any ILL [interlibrary lending] to other libraries using online journals. Since we have dropped many print journals in favor of online only, libraries that have depended on us for our unique collection will have to go elsewhere."

- "Most licenses do not cover inter-library loan privileges, and must be negotiated. While we are able to ILL anything from our print collection, publishers are reluctant to extend that provision to electronic material."

- "We are not allowed, and do not practice, interlibrary loan of materials that we [license] in electronic format, which means that if we no longer hold a print copy, we are not able to provide interlibrary loan to things that we purchase rights to."

- "The terms for some products are unacceptable or cost prohibitive, and we have not licensed these products, so our users do not have access. Unlike printed books or journals, digital products are generally not available through inter-library loan and often there is no print equivalent. Since there is seldom a method for a single user to access the digital products the library does not license, these products are essentially unavailable to our users."

Restrictions on interlibrary lending can be devastating to scientific and medical interests. As one academic medical library recently reported:

- "We recently had difficulty obtaining an article from the European Journal of Surgical Oncology for one of our users on interlibrary loan. Two libraries were not able to supply the article because they only had the electronic copy of the journal and the license does not allow interlibrary loan use. We were finally able to obtain the article from the National Library of Medicine. Obviously, whoever requested the article was made to wait longer for receipt of information that may have been important for patient care or research."

Even where licenses permit some interlibrary lending, lack of staff and expertise in interpreting contract terms may make the practice impracticable. One library system recently reported:

- "The mish-mash of licensing terms has simply made inter-library loan of digital materials impractical for us to provide—to the detriment of users around the globe with whom we otherwise share scholarly material. We have hundreds of contracts with different e-journal and full-text vendors with different terms governing inter-library loan. Some of our licenses do permit us to print out the digital text and loan the printed version. However, because of the complexity of these terms, the high volume of inter-library loan that we do, and the low-paid short staffing in our interlibrary loan department, we have had to resort to the practical expedient of simply not providing any inter-library loan of digital materials."

Interlibrary lending is a vital aspect of our educational system. Acquired digital works should have the same status as their print and analog companions when it comes to library loans. The first sale doctrine should be clarified to ensure that core federal copyright principles associated with interlibrary lending are guaranteed regardless of format.

b) Licensed Digital Works are the Equivalent of "Chained Books," Often Unavailable for Classroom and Offsite Use.

Lending a lawfully purchased copy of a work for classroom and offsite use has historically been within the discretion of libraries under the first sale doctrine. As teachers and patrons increasingly seek digital works for these purposes, the impact of usage limitations imposed by licenses has become apparent. Many digital works agreements limit access to one specific computer terminal, causing one librarian to liken licensed digital works to "chained books" that can only be read at a specific table. Other librarians share frustration with such limitations:

- "There is an ongoing, unresolved problem between desire to provide access to material and technical service's concern with signing restrictive site licenses."

- "Some vendors/publishers have been very reluctant to permit access to their databases from off-campus …. Some publishers have instituted pricing policies which penalize libraries for offering access to off-campus users. This restricts what we are able to provide for distance education and what is available for students and faculty in their local residences."

- "The proportion of contemporary culture and communication in electronic format is increasing rapidly. Loss of ability to "clip" or "Xerox" bits of video, music, and electronic-only publications limits what students and faculty could take to class when most media in our collection were print or LP records."

Copyright law should provide an explicit right to use all works in a school's library in classrooms within that institution, whether the works are in digital, analog or print format. Off-campus uses by enrolled students and faculty should also be explicitly allowed as a corollary to the first sale doctrine.

c) Licensing Provisions That Preclude Rights Traditionally Available Under The First Sale Doctrine Threaten A Digital Future Without Access to History

Under Sections 107, 108 and 109 of the Copyright Act, libraries are able to archive lawfully purchased works for future use and historical preservation. They are also now explicitly authorized to convert particular copies of a work into new formats (for instance by scanning print works into microfilm and digital formats) to ensure against loss of access as technology evolves and playback equipment becomes outmoded. As libraries obtain more electronic products under license rather than purchase, they are losing control over archiving and preservation, because many licenses prohibit copying digital works for archival or any other purpose, and because the prohibitions on copying are enforced by technological measures. Where they were once the foremost guardians of America's public domain literary heritage, libraries are finding themselves increasingly at the mercy of publishers' abilities and commercial incentives to archive.

From the Libraries' perspective, works that exist only on content providers' servers may be subject to corruption, sabotage, subsequent alteration and selective preservation. If digital works are not archived in a professional manner (appropriate storage media, care and environmental maintenance, adequate indexing, etc.) the risk of loss to authors and society is enormous. There are no firm statistics on losses because the transition to digital publishing is still in the relatively early stages, but it is entirely likely that profit-motivated publishers will not invest in archiving older works that may no longer be marketable on a large commercial scale. Indeed, libraries are already finding that subscription services do not always maintain older works. The PALS network subscribed to by one college library recently dropped its 1993 full-text database, leaving the library without access to those works.

Libraries have also expressed concern that they will lose access to digital works in the event that publishers merge, cease operations, or decide not to convert existing works into new formats as technology evolves. As one librarian explained, "Under the terms of purchase we are generally not permitted to make copies, and as these media are damaged or deteriorate the information is simply lost to humanity. Often the companies are no longer in business, and when they are still in business they frequently no longer have this older material in stock. It might as well have never existed."

Mindful of the uncertainty, libraries are often forced to trade off between current and future interests. One academic medical librarian explained: "Our users are demanding electronic products and we cannot afford to maintain both print and electronic products due to cost considerations. We are unsure of the permanence of electronic products and our ability to have archival access to electronic publications. When we license an electronic journal, will we be able to access an issue 20 or 30 years from now as we can with a print journal?" Libraries around the country echoed these concerns:

- "Archiving of e-journals is generally not permitted by license. Print journals are generally available, but do not include value-added supplements (video, sound, images) …. An increasing number (of print journals) will become 'electronic only' in future years."

- "Archiving is not possible at all with our First Search and Infotrac. We are dependent on current subscription for access. Theoretically, we have archival

rights to keep EBSCO disks and some encyclopedias etc. However, as the interface and computer formats change, using the old disks becomes impractical and eventually impossible because technological and legal restrictions usually prohibit migrating the information to newer formats."

- "Changes in format for technology limits access and use. National Geographic 20 volume set is not compatible with NT network system and is no longer accessible."

- "We try to select our subscriptions carefully, with a view to a long-range subscription with long-standing, reputable companies. …This is a distinct drawback to licensing versus straight-out ownership."

- "Elsevier has granted electronic access to their journals, but tells us they will only provide access for a 9 month period, so we will lose access to those electronic issues that we once had. We cannot afford their Science Direct product at the moment, which would give us more comprehensive, stable access to their journals."

- "We have had to return tens of thousands of dollars worth of CD-ROMs to vendors like Standard and Poors when our subscriptions ran out, leaving us with no archival data for many years of business information. The price of purchasing this archival information in another format is prohibitive. The data is simply no longer available to the economists and MBA students on our campus."

- "In just [one] week … we had to withdraw and discard 75 titles that were on older computer disks because we were not sure if we had the rights to transfer them to more current media. With millions of items to keep track of and short staffing, we simply cannot devote the staff resources to researching the rights of every title in order to know if we can preserve it or not. The practical consequence is that if the publisher or the laws make it difficult for cash-strapped libraries to save this material, it simply will not be saved."

Federal copyright law should ensure that America's libraries have the full legal tools required to preserve bodies of works in digital, as well as analog and print, formats. The 1998 amendments to Section 108 initiated legal support for this effort by removing the "digital" barrier to certain copying and by allowing three, rather than one, copies to be made of covered works. It is time now to review the state of preservation of digital works in a systematic way. The Libraries believe the time is at hand to enable repository libraries around the country to be designated custodians of specific parts America's digital history and supported in that work..

d). Restrictive Licensing Terms and Pay-per-use Models May Hamper Research in the Very Areas Where it is Most Needed.

High prices and limited budgets routinely force the Libraries to acquire digital products subject to license limitations on transactions, usage hours, or the number of simultaneous users. In order to acquire certain digital products, libraries face restrictive terms that effective diminish the use of scholarly works, contrary to copyright policy applicable to print works. To the extent that high prices reflect a lack of competitive information sources,

and to the extent that scholarly research tends to build on existing information, restrictive license terms may effectively discourage research in the very areas where it is most needed.

The problem has been confronted even by relatively large and well-financed library systems. In order to schedule access to certain high-demand sources, students and faculty there are "being forced to do research late at night during off-peak hours." Visiting other schools or asking colleagues at other institutions to provide research assistance has been the only means of accessing certain other sources that the university cannot currently afford.

Scheduling disincentives have already been compounded by cost disincentives at some university libraries. As one librarian explained, "Document delivered articles, for which we pay copyright, are delivered with a technological device that prevents a second viewing or online storage. So, to get the item again, we have to pay again—a situation that doesn't exist when we purchase a periodical in print." As individuals and research institutions face increased financial burdens at every step in the research process, some projects may be discouraged. Licensed access with transactional pricing may well enable current information publishers to maintain perpetual monopolies over the information categories they currently dominate.

Licensing terms that unreasonably burden libraries' and their patrons' use of works acquired by contract rather than outright purchase should be preempted by an appropriate federal digital first sale doctrine.

e) The Lack of a Clear Digital First Sale Doctrine Eliminates Private Donations as a Long-standing source of Library Materials

Libraries have long relied on private donations to add continually to their collections. School libraries and public library children's collections have traditionally been regular recipients of books and audio materials donated by the families of children who have outgrown them. As educational CD-ROMs become more common and more in-demand by students and teachers, the libraries have found themselves confronted with licensing agreements that render them unable to use donated digital works. The result is that public funds are sometimes used to purchase digital works that might have been acquired by donation under the first sale doctrine. This is especially detrimental to Libraries and their patrons in light of the budget constraints limiting libraries' ability to afford costly digital works, and licensing terms that routinely prohibit interlibrary loan as an alternative means of providing patrons with access to digital works. According to one public elementary school librarian, "When the CD-ROM is given to me in its original case--for example, a counting or letter recognition CD-ROM that a child has outgrown--I feel I should be able to accept it if it would be a useful addition to our curriculum. . . . I feel CD-ROMs should be treated like books, and should be able to be legally used by those other than the original purchaser."

Libraries must be allowed to receive donations of digital works without fear of legal reprisal to donor or library.

4) The relationship between new technologies and the application and technological premises upon which the first sale doctrine is established

The first sale doctrine is neither media-specific nor technology-specific. The rights and privileges that are codified in the Copyright Act are intended to operate as a whole, with "checks" such as the first sale doctrine preventing the remuneration rights of authors from chilling the public access to creative works that is the goal of copyright law. *See generally Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Some argue that current law prevents application of the first sale doctrine to digital works, because the doctrine limits only the distribution right, not the reproduction right, and because use of a digital program necessitates copying it into the hard drive of a computer. The Libraries do not agree. Even though Section 109(a) states that the doctrine applies "notwithstanding the provisions of section 106(3)," (the distribution right), a proper application of Section 109 takes into account fair use and necessary activities incidental to application of doctrine (such as reproduction). See cf. 17 U.S.C. ¤117 (confirming that an owner of a copy of a computer program does not infringe the reproduction right by copying that program as an essential step in use).

Moreover, the Supreme Court has held that the Copyright Act "should not be so narrowly construed as to permit evasion because of changing habits due to new inventions and discoveries." *Id*. 158 (affirming that reception of an electronic broadcast by a retail outlet did not constitute a public performance under the 1909 Act). When technological change renders its literal terms ambiguous, the Act must be construed in light of its basic purpose. *Id*. at 157.

The numerous privileges and exemptions that libraries and their patrons enjoy under copyright law evidence the long-standing conviction that the rights accorded by the first sale doctrine are fundamental to the basic purpose of the Copyright Act. Even when the threat posed to the phonorecord and software industries by modern duplication technologies led Congress to prohibit commercial rental of those works, libraries and educational institutions retained certain lending rights that were deemed to serve a "valuable public purpose." H.R. Rep. No. 735, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6539. As explicitly recognized by Chairman Kastenmeier at the 1990 hearings on the Computer Software Rental Amendments Act of 1990:

> [A] bill to change the first sale doctrine . . . is not a modest proposal. It is . . .a major substantive proposal involving a fundamental change in one of the main tenets of copyright law."

Software Rental Amendments of 1990: Hearing Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary, 101st Cong, 2d Sess. 2 (1990) (statement of Rep. Robert Kastenmeier) (quoting Prof. David Lange).

During consideration of the 1990 amendments, Rep. Carlos Moorhead noted, "*Legislation to reform the first sale doctrine frequently arises from a collision course between intellectual property law and technological change.*" 136 Cong. Rec. H8266 (daily ed. Sept. 27, 1990) (emphasis supplied). Such reform is appropriate, as Congress noted in 1998 by

directing the Copyright Office to consider additional changes to the copyright law that might be needed.

The first sale doctrine presupposes that copyright proprietors will realize "a fair return" on their creative investments from the first sale of a copy. *See, e.g., Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F. 2d 847, 854 (2d Cir. 1963) (stating that the ultimate issue in application of the first sale doctrine is whether or not the copyright proprietor has "received his reward," quoting *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942)). When market conditions threaten to undermine incentives to creative production, a re-balancing of owner's rights and user's privileges may be warranted. However, where the author's interests and those of the public conflict, "the public interest must prevail." See Register's Report on the General Revision of the U.S. Copyright Law (1961) (explaining the purpose of public interest limitations on author's rights), reprinted in 8 Nimmer On Copyright at App. 14-17.

The piracy rationale that has warranted past modifications to the first sale doctrine may eventually be rendered obsolete by copy control technologies. Until such time as that determination can be made, the increased incentive to digital publishing that may be achieved by restrictive licenses must be balanced against the benefit that the public receives from library lending. Full application of the first sale doctrine requires extending the section 117 "essential copy" rights that currently facilitate use of computer programs to use of digital works lawfully acquired under the first sale doctrine. Certainly, the public interest in ensuring that libraries are able to carry out their mission of providing access to works – to promote the progress of knowledge – requires no less.

5) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

As our survey has shown, vital library services have been diminished by the loss of control over collections that results from restrictions on the application of the first sale doctrine to licensed digital works, so some rethinking of federal policy is urgently needed. We are in the midst of an accelerating transition to digital formats; print versions of some publications currently remain available for uses such as interlibrary and offsite lending which are banned by digital licensing terms. However, these substitutes are becoming less available as users demand the additional content and search mechanisms that are typically available only in electronic formats.

For libraries to serve the informational needs of the American public in the future as effectively as they have in the past, the binding that ties copyright policy embodied in the first sale doctrine (as well as the fair use doctrine and preservation of works) to lending and usage rights must be strengthened with respect to digital works. This Copyright Office study should recognize this fact and recommend changes to Section 109 consistent with the proposals herein. Specifically, a first sale doctrine for the "digital millennium" should include these points:

1. Interlibrary Lending: Fundamental public copyright policy should not permit distinctions in lending based on the format of the work. The Copyright Act should reaffirm and strengthen the rules on interlibrary loans of digital works.

2. Unchaining Works: All works acquired by a library should be available for use in the classroom, regardless of geographic location, and use by enrolled students and faculty, wherever they are located.
3. Preservation: As recently as 1998 when Congress modified Section 108, it reaffirmed the libraries vital role as the preservers of our nation's recorded history. The trends since passage of the DMCA require additional initiatives. One such initiative to ensure preservation of works in digital formats would be creation of a national system of digital library repositories, wherein specific libraries or institutions would be designated as custodians of specific parts of America's digital history and assisted in their efforts to serve as the preserver of these works.
4. Unreasonable Licensing Restrictions: Federal law should preempt state statutes and contractual terms which unduly restrict the access rights all to which all Americans are entitled to with regard to copyrighted works. A unitary federal policy, providing minimum standards respecting limitations on the exclusive rights of ownership (including but not limited to first sale, fair use and preservation) should be established.
5. Donations: Federal policy as expressed in copyright law should encourage donation of works to libraries irrespective of format. Donors and recipients of digital works should not face threats of litigation or reprisals for the generosity of the gift or the willingness to receive.

If the Copyright Office does not recommend and the Congress does not act, many publishers will continue to legislate digital first sale limitations in their stead—by contract—to an end that fails to effectuate the federal policy of balance between the interests of information owners and users. Restrictive licensing of digital works has become the industry standard, and as print sources become increasingly obsolete, acquiescence is the only means by which many users can gain access to the information they need.

From the Libraries' perspective, this practice deprives many libraries of vital control over their collections. Essential library services such as interlibrary lending, archiving, preservation, and lending for classroom and offsite use have been severely curtailed. Digital products are expensive; for many citizens, library and classroom access is their only access. Foreclosing that access will exacerbate the "digital divide," which, in our information-based economy, may mean lost productivity for generations to come. Perhaps even more disturbing is the risk to our nation's rich cultural heritage that is posed by the licensing away of the libraries' archiving rights. The profit motive that properly governs the publishing industry simply cannot ensure that today's digital works will remain available to tomorrow's historians, scholars, and scientific and medical researchers.

As the Supreme Court articulated in *Sony Corp. v. Universal City Studios, Inc.*, "The monopoly privileges that Congress may authorize are *neither unlimited* nor primarily designed to provide a special private benefit. Rather, the *limited* grant is a means by which an important public purpose may be achieved." 464 U.S. 417, 429 (1984) (Emphasis added.) That important public purpose – the continued flow of ideas and information – is directly served by the limitations on copyright that Congress has built into the law. However, as the debate over the proposed Uniform Computer Information Transactions Act ("UCITA') has demonstrated, unless an express federal digital policy preempts state laws, content owners will continue to turn to local laws and restrictive licensing agreements as a way of forcing members of the public to waive the very federal rights that Congress reserved for the public –

including those rights that flow from the first sale doctrine on which so many library practices depend.

6) The absence of a digital first sale doctrine under present law and the measurable (if any) effects (positive or negative) on the marketplace for works in digital form?

The Libraries believe that the current uncertainty about the application of the first sale doctrine for digital works has and will continue to have a negative impact on the marketplace for works in digital form.

Uncertainty about the extent to which the rights reserved to users by the Copyright Act apply to licensed digital works is currently chilling digital purchases by libraries. The standard licenses by which publishers market digital works prohibit many practices that have traditionally been within the libraries' discretion under the first sale doctrine. These practices, including lending for offsite use and archiving, are vital to libraries' ability to serve patrons now and in future decades.

In the absence of clear legislative guidance, many libraries have taken the "safe" route and continued to purchase print alternatives to digital where those alternatives remain available. These print works generally lack the added content and search capabilities of their digital counterparts, but libraries appreciate that the print versions may confidently be used according to provisions of the Copyright Act with which they are familiar. This is no small factor as the threat of "self-help repossession" by publishers compounds the libraries' concerns about liability for unintentional non-compliance with proliferating contract terms. For these reasons—and because they are eager to purchase more digital works as uniform usage guidelines become available—the Libraries believe that the uncertainty of a digital first sale doctrine has had a significant negative effect on the short-term market for digital works.

The Libraries also believe that the lack of a codified digital first sale doctrine will hurt the market for digital products well into the future, by exacerbating the "digital divide" between those who have access to digital technologies and those who do not. Interlibrary and classroom lending provide many low- and middle-income individuals and communities with their only access to digital works. If restrictive licenses continue to bar libraries from making digital works available through these services, many citizens simply will not develop the comfort with electronic technology that they need to compete as producers in the digital economy. Because marginalized producers are unlikely to reach their full potential as consumers of digital goods, the Libraries believe that reaffirmation of the first sale doctrine extension to digital works will positively impact the future market for such works.

A new copyright debate is raging throughout many state legislatures this year. The issues posed by attempts to pass the proposed Uniform Computer Information Transactions Act on a state-by-state basis, has led those in state governments, unaccustomed to dealing with federal copyright policy, to confront the relationship between copyright policy and contract law. The debate, which fundamentally affects the first sale doctrine and the applicability of particular terms within licensing agreements, backed by strong local laws, to impact on the federal copyright policy, should not be ignored by the Copyright Office in this inquiry. The Libraries believe that no review of the first sale doctrine and computer licensing rules should be completed without the Congress giving serious consideration to a new federal preemption provision affecting these rules.

The Libraries urge that in light of the vital need for a digital first sale doctrine policy, public hearings should be held prior to the Copyright Office sending a report to Congress.

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INTERNATIONAL CONVENTIONS: RECENT NEWS

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Accession by Ukraine

On 12 March 2002, the Instrument of accession by the Government of Ukraine to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961, was deposited with the Secretary-General of the United Nations.

In Accordance with its Article 25.2, the Convention will enter into force for Ukraine three months after the date of deposit of the instrument of accession, that is, on 12 June 2002.

Accession by Ukraine brings to sixty-eight the total number of States that have deposited an instrument of ratification or acceptance of, or accession to, the above-mentioned Convention.

Accession by Portugal

On 17 April 2002, the Instrument of accession by the Government of Portugal to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961, was deposited with the Secretary-General of the United Nations.

In Accordance with its Article 25.2, the Convention will enter into force for Portugal three months after the date of deposit of the instrument of accession, that is, on 17 July 2002.

Accession by Portugal brings to sixty-nine the total number of States that have deposited an instrument of ratification or acceptance of, or accession to, the above-mentioned Convention.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms

Accession by the Kyrgyz Republic

On 12 July 2002, the Secretary-General of the United Nations received from the Government of the Kyrgyz Republic its instrument of accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, adopted at Geneva on 29 October 1971.

In accordance with Article 11(2), the Convention will enter into force, with respect to the Kyrgyz Republic, on 12 October 2002, that is three months after the date on which the Director-General of the World Intellectual Property Organization informed the States, in accordance with Article 13(4) of the deposit of its instrument.

Accession by the Kyrgyz Republic brings to sixty-eight the total number of States that have deposited an instrument of ratification or acceptance of, or accession to, the above-mentioned Convention.

Accession by the Republic of Armenia

On 31 October 2002, the Secretary-General of the United Nations received from the Government of the Republic of Armenia its instrument of accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, adopted at Geneva on 29 October 1971.

In accordance with Article 11(2), the Convention will enter into force, with respect to the Republic of Armenia, on January 31, 2003, that is three months after the date on which the Director-General of the World Intellectual Property Organization informed the States, in accordance with Article 13(4) of the deposit of its instrument.

Accession by Armenia brings to sixty-nine the total number of States that have deposited an instrument of ratification or acceptance of, or accession to, the above-mentioned Convention.

UNESCO ACTIVITIES

WORLD FORUM OF UNESCO CHAIRS
13-15 November 2002
UNESCO Headquarters, PARIS

The world forum of UNESCO Chairs, organized by the Division of Higher Education in the Education Sector, was held at UNESCO Headquarters from 13 to 15 November 2002.

The Forum brought together 500 participants representing UNESCO chairholders, coordinators of UNITWIN networks, university chancellors, National Commissions, national authorities and partners in the economic sector and civil society involved in the UNITWIN/UNESCO Chairs Programme.

At the opening meeting, the Director-General of UNESCO said in his address that the Forum was a good opportunity to facilitate a broad exchange of experience and good practices acquired thus far by the UNESCO Chairs and the UNITWIN networks. He called on the participants to examine and make proposals on the future development of the Programme to enable it to meet the current and emerging challenges facing higher education in the service of society in general.

The Forum was held to celebrate the tenth anniversary of the UNITWIN/UNESCO Chairs Programme, at the same time providing the participants with the opportunity to evaluate the progress accomplished in the Organization's various fields of competence.

That evaluation will be used to adapt activity programmes to the new orientations and priorities established by the Member States in the Organization's Medium-Term Strategy for 2002-2007 and in the Programme and Budget for 2002-2003. It will help to identify and reward in a better manner the chairs and networks that are most effective in achieving the objectives of the UNITWIN programme, namely, building the educational capacities of higher education institutions throughout the world and the transfer and sharing of knowledge in a spirit of academic solidarity (http://portal.unesco.org/education/ev.php?URL_ID=1469&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1051612349).

Commission IV: Panels and round tables

The Forum's work was carried out by five commissions, each dealing with one of the major fields of competence of UNESCO – education, natural sciences, social and human sciences, culture, communication and information – and organized into panels and round tables. The panels assessed the contributions of the UNESCO Chairs and the UNITWIN Networks over the last decade, and the round tables discussed future orientations for the UNITWIN/UNESCO Chairs Programme which might be adopted to support the implementation of the Organization's Medium-Term Strategy and biennial programmes for 2002-2007.

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In Commission IV, which examined the contributions of the UNESCO Chairs and the UNITWIN networks in the field of culture, the participants spoke of financial difficulties, problems encountered by some Chairs in gaining recognition by universities and national bodies in their countries, the chairholders' heavy workload, and difficulties in maintaining dynamic leadership together with chair or network partners. Those difficulties did prevent them from carrying out projects, but all of the participants acknowledged the added value of UNESCO Chairs in the attainment of the Organization's objectives. The speakers also stressed the need for more elaborate interdisciplinary networking. Panel 3 of Commission IV focused on the teaching of copyright and neighbouring rights to promote the endogenous training of experts in that field. Professor Delia Lipszyc (Argentina), Professor David Dzamukashvili (Georgia), Professor Mikhail Fedotov (Russian Federation), Professor Amor Zahi (Algeria) and Professor Bassam Al-Talhouni (Jordan) reported on the activities and experience of the Chairs for which they were responsible. They welcomed developments in their countries regarding the legal protection of copyright and neighbouring rights and the satisfying progress in training local experts to meet needs. In that context, stress was placed on the importance of collective management in that it promoted the lawful exercise of rights, ensured that rights holders received remuneration, thus encouraging creativity, and afforded the public rapid and equitable access to protected works and performances.

The participants also highlighted the remarkable developments in the teaching of copyright and neighbouring rights in Latin America and other parts of the world, which have been fostered by the establishment of UNESCO Chairs and regional networks.

The third round table of Commission IV discussed international cooperation in the field of copyright and neighbouring rights. Emphasis was laid on the crucial role of copyright and neighbouring rights in the new century and on the need to enlist higher education more effectively in that field to train, both quantitatively and qualitatively, the experts needed to regulate relations between the various cultural actors and protect the lawful exchange of cultural goods and services among countries. In that regard, they stressed the advantage of associating creative artists with such training so that they might be duly informed of the legal requirements and procedures that ensure respect for their rights. The participants also emphasized the need to reinforce the trend towards the harmonization of protection provision in national law and the desirability of organizing greater international cooperation in that field.

In that framework, the UNESCO chairholders specializing in the teaching of copyright and neighbouring rights in universities unanimously proposed to UNESCO that it establish and coordinate a world network of UNESCO Chairs to promote cooperation and the transfer of knowledge in a fair and equitable context

The network, which has in fact been planned ever since the programme was launched by UNESCO, will be set up as soon as all the chairs have been established and their performance reinforced in the various regions of the world, in particular in the developing countries, French- and English-speaking Africa, Asia and the Arab region.

The General Report on the Forum adopted by the participants may be consulted at the following address:

http://portal.unesco.org/education/en/ev.php-URL_ID=13190&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO ACTIVITIES

DRAFT RECOMMENDATION ON THE PROMOTION AND USE OF MULTILINGUALISM AND UNIVERSAL ACCESS TO CYBERSPACE

The preparation of the Draft Recommendation on the promotion and use of multilingualism and universal access to cyberspace, initiated by the 30th session of the General Conference (2000/2001) and confirmed at its 31st session (2002/2003), was finalised by the Executive Board of UNESCO at its 165th session (7-17 October 2002).

The Executive Board, having examined the Draft Recommendation, decided to submit it to the 32nd Session of the General Conference (October/November 2003) for eventual adoption.

The Draft Recommendation invites Member States, professional circles, civil society and international bodies concerned, to become involved in the elaboration and promotion of the educational, cultural and scientific content of multilingual systems and to facilitate access to them through the Internet.

The Member States and international organisations are also encouraged to update national legislations on copyright and their adaptation to digital multimedia communication networks by assuring a fair balance between the interests of rights holders and the public interest.

They are invited, in particular, to define an equitable balance between limitations and exceptions to the rights of authors and other right holders and to regulate the means of technical protection, taking into account their impact on access to knowledge and information and regard for the legitimate rights of authors and other right holders. The final version of the Draft Recommendation was prepared in 2002 according to the following consultation procedures :

1. In accordance with 31 C/Resolution 33, a meeting of experts[15], responsible for providing advice on the elaboration of the revised draft recommendation, was held from 25 to 27 March 2002. The representative of the World Intellectual Property Organization (WIPO) and 52 observers representing 32 Member States and 12 non-governmental organizations also took part in the meeting.

[15] Experts proposed by the following Member States took part in the meeting in a personal capacity (category VI)
on the invitation of the Director-General: Belgium, Bolivia, Canada, Cuba, Egypt, France, India, Iraq, Japan, Jordan, Lithuania, Mexico, Mozambique, New Zealand, Poland, Republic of the Congo, South Africa and Ukraine.

2. The participants in the meeting of experts considered that the draft recommendation extensively covers the two main themes relating to access to information and promotion of multilingualism in cyberspace and that it is particularly important in view of the 2003 World Summit on the Information Society.

3. After reviewing the various aspects of the draft recommendation, the group of experts noted that a satisfactory consensus was reached on the first three parts of the text, namely: "Development and promotion of multilingual content and systems", "Access to networks and services" and "Development of public domain content". The fourth part of the document, "Reaffirming and promoting the fair balance between the interests of rights-holders and the public interest" was the subject of considerable discussion. Conflicting opinions were occasionally voiced, reflecting different circumstances. Certain experts for instance recommended the total deletion of this part of the text, considering that the issue had already been addressed elsewhere, in treaties subscribed to by a large majority of UNESCO Member States. Others considered that it would be irresponsible of the Organization not to take a stand on this important issue in the draft recommendation.

The experts also considered that the draft recommendation should explicitly emphasize the need to take international treaties and agreements on intellectual property into account while promoting universal access to information. A paragraph along these lines was inserted in the preamble of the text. Moreover, an ad hoc working group consisting of six specialists [16] in intellectual property law examined the part of the text covering this aspect, in order to ensure that the draft recommendation complies with the provisions of existing conventions in this field.

4. In accordance with Article 2(b) of 31 C/Resolution 33, the Director-General also pursued his consultations with relevant international intergovernmental and non-governmental organizations including the newly created Intergovernmental Council for the Information for All Programme.

5. Thus, after examining document IFAP-2002/COUNCIL.I/Inf.6, the Intergovernmental Council for the Information for All Programme, meeting from 15 to 17 April 2002, took note with appreciation of the significant progress made by the group of experts and the Secretariat in their efforts to acknowledge different sensitivities in relation to the issues addressed. It also recommended that national and international bodies continue to contribute to the development of basic infrastructure for the modernization of information and telecommunication networks, particularly in developing countries, in order to actively promote multilingualism and to guarantee wider access to cyberspace.

6. The decision to consult the national experts and relevant international governmental and nongovernmental organizations again was deemed particularly appropriate by the members of the Intergovernmental Council.

[16] This group consisted of experts attending in a personal capacity from Belgium, Canada, New Zealand and Japan, and representatives of the International Confederation of Music Publishers (ICMP/CIEM) and of the International Publishers Association (IPA/UIE).

7. Other comments made by the Council concerned the need to clarify the concept of "public domain" and to further highlight the fact that the text sets out principles and recommendations. These comments made by the Intergovernmental Council were taken into consideration and most of the clarifications required by its members were provided in the revised draft recommendation.

8. At the end of April 2002, the new version of the draft recommendation, which duly takes into account the proposals put forward during the meeting of experts and the comments made by the members of the Intergovernmental Council for the Information for All Programme, was sent to the Member States and Associate Members for comments. This new version was also forwarded to relevant international governmental and non-governmental organizations (Annex II – list of organizations consulted).

9. Following this new consultation, changes were introduced in the text on the basis of the comments received and the revised draft recommendation was enhanced in the light of the various suggestions made by Member States and international governmental and non-governmental organizations.

10. The comments show that this new version of the text – which, according to the views expressed, represented a clear improvement with regard to previous versions – was welcomed. Several Member States considered that, by incorporating the measures proposed, the revised draft recommendation took into account all the concerns of the various parties involved and appeared to strike a suitable balance between the different interests.

11. Certain reservations were expressed concerning the formulation of the part covering aspects of international copyright. These aspects were revised accordingly, in cooperation with WIPO, and a new version of part four, "Reaffirming and promoting the fair balance between the interests of rights-holders and the public interest", was drafted accordingly.

12. Several Member States considered that the draft recommendation, once adopted, would constitute an important contribution by UNESCO to the work of the World Summit on the Information Society (Geneva, 2003; Tunis, 2005), in view of the fact that the promotion of linguistic diversity in global information networks and universal access to cyberspace are already central to current debates and that the conclusions of these debates and their follow-up will play a determining role in the development of a fairer and more equitable information society.

ANNEX I

DRAFT RECOMMENDATION CONCERNING THE PROMOTION AND USE OF MULTILINGUALISM AND UNIVERSAL ACCESS TO CYBERSPACE

CONTENTS

PREAMBLE

The General Conference,

Committed to the full implementation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized legal instruments, and mindful of the two International Covenants of 1966 relating respectively to civil and political rights and to economic, social and cultural rights,[17]

Recognizing the "central and important role of the United Nations Educational, Scientific and Cultural Organization in the field of information and communication and in the implementation of the relevant decision in this area adopted by the General Conference of that Organization and of the relevant parts of the Assembly resolutions on the subject",[18]

Recalling that the Preamble to the Constitution of UNESCO affirms, "that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern",

Further recalling Article I of the Constitution, which assigns to UNESCO among other purposes that of recommending "such international agreements as may be necessary to promote the free flow of ideas by word and image",[19]

Affirming the principles embodied in the Universal Declaration on Cultural Diversity, adopted by the General Conference of UNESCO at its 31st session and particularly its articles 5, 6 and 8,

Referring to the Resolutions of the General Conference of UNESCO[20] with regard to the promotion of multilingualism and universal access to information in the cyberspace,

Convinced that the development of new information and communication technologies (ICT) provides opportunities to improve the free flow of ideas by word and image but also risks increasing the gap between the information-rich and the information-poor, which could hamper the participation of all in the global information society,

Noting that linguistic diversity in the global information networks and universal access to information in cyberspace are at the core of contemporary debates and can be a determining factor in the development of a knowledge-based economy,

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17 Articles 19 and 27 of the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, Article 27, and International Covenant on Economic, Social and Cultural Rights, 1966; United Nations Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (resolution 47/135 of 18 December 1992); the ACC Statement on Universal Access to Basic Communication and Information Services, issued in 1997; Article 25 of the United Nations Millennium Declaration, 2000; the Okinawa Charter on Global Information Society adopted in July 2000.

18 United Nations General Assembly resolution 35/201 (97th plenary meeting, 16 December 1980).

19 Article I, paragraph 2(a).

20 29 C/Resolution 28, paragraph 2.A(h), 29 C/Resolution 36, 30 C/Resolution 37, 30 C/Resolution 41, and 31 C/Resolution 33.

Acknowledging the need to take into account international treaties and agreements on intellectual property, in order to facilitate the promotion of universal access to information in a secure, stable and balanced manner,

Further acknowledging the need for capacity-building in acquisition and application of the new technologies for the information-poor,

Recognizing that basic education and literacy are prerequisites for universal access to cyberspace,

Considering that different levels of economic development affect prospects for access to cyberspace and that specific policies and increased solidarity are required to redress current asymmetries and create a climate of mutual trust and understanding,

Adopts the present Recommendation:

DEVELOPMENT AND PROMOTION OF MULTILINGUAL CONTENT AND SYSTEMS

1. The public and private sectors and the civil society at local, national, regional and international levels should provide the necessary resources and take the necessary measures to alleviate language barriers and promote human interaction on the Internet by encouraging the creation and processing of, and access to, educational, cultural and scientific content in digital form, so as to ensure that all cultures can express themselves and have access to cyberspace in all languages, including indigenous ones.

2. Member States and international organizations should encourage and support the promotion of local and indigenous production on the Internet.

3. Member States should formulate strong national policies on the crucial issue of language survival in cyberspace, designed to promote mother tongues and the teaching of languages in cyberspace. International support and assistance to developing countries should be strengthened and extended to facilitate the development of freely accessible materials on language education in electronic form and to the enhancement of human capital skills in this area.

4. Member States, international organizations and information and communication technology industries should encourage collaborative participatory research and development on, and local adaptation of, operating systems, search engines and web browsers with extensive multilingual capabilities, online dictionaries and terminologies. They should support international cooperative efforts with regard to automated translation services accessible to all, at no charge or at a nominal charge, as well as intelligent linguistic systems such as those performing multilingual information retrieval, summarizing/abstracting and speech understanding, while fully respecting the right of translation of authors. Such software should preferably be developed and made available in an open source environment, provided that the rights of the author of the original content are respected.

5. UNESCO, in cooperation with other international organizations, should establish a collaborative online observatory on existing policies, regulations, technical recommendations,

and best practices relating to multilingualism and multilingual resources and applications, including innovations in language computerization.

ACCESS TO NETWORKS AND SERVICES

6. Member States and international organizations should recognize and support universal access to the Internet as an instrument for promoting the realization of the human rights as defined in Articles 19 and 27 of the Universal Declaration of Human Rights.

7. Member States and international organizations should promote access to the Internet as a service of public interest through the adoption of appropriate policies in order to enhance the process of empowering citizenship and civil society, and by encouraging proper implementation of, and support to, such policies in developing countries.

8. In particular, Member States and international organizations should establish mechanisms at the local, national, regional and international levels to facilitate universal access to the Internet through affordable telecommunications and Internet costs with special consideration given to the needs of public service and educational institutions, and of disadvantaged and disabled population groups. New incentives in this area should be designed towards this end including public-private partnerships to encourage investment and the lowering of financial barriers to the use of ICT, such as taxes and customs duties on informatics equipment, software and services.

9. Member States and Internet service providers (ISPs) should consider provision of concessionary rates for Internet access in public service institutions, such as schools, academic institutions, museums, archives and public libraries, as a transitional measure towards low-cost access to cyberspace.

10. Member States should encourage the development of information strategies and models that facilitate community access and reach out to all levels of society, including the setting up of community projects and fostering the emergence of local information and communications technology leaders and mentors. Strategies should also support cooperation on ICT among public service institutions, as a means of reducing the cost of access to Internet services.

11. Through international cooperation and solidarity, interconnection on a fair cost-sharing basis should be encouraged and ensured between national Internet peering points combining the traffic of private and non-profit ISPs in developing countries and peering points in other countries whether developing or industrialized.

12. Regional organizations and forums should encourage the establishment of inter- and intra-regional networks powered by high capacity regional backbones to connect each country within a global network in which none dominates connectivity.

13. Concerted efforts within the United Nations system should promote the sharing of information about and experience on the use of ICT-based networks and services in socio-economic development, including open source technologies and equitable network governance, as well as policy formulation and capacity-building in developing countries.

14. Member States and international organizations should promote the concept of the international public good in the management of domain names, including multilingual domain names.

DEVELOPMENT OF PUBLIC DOMAIN CONTENT

15. Member States should recognize and enact the right of universal online access to public and government-held records including information relevant for citizens in a modern democratic society, giving due account to confidentiality, privacy and national security concerns, as well as to intellectual property rights to the extent that they apply to the use of such information. International organizations should recognize and promulgate the right for each State to have access to essential data relating to its social or economic situation.

16. Member States and international organizations should identify and promote repositories of information and knowledge in the public domain and make them accessible by all, by adequately funding public institutions to undertake the preservation and digitization of public domain information. In regard to knowledge and expressions of indigenous peoples and communities, the prior informed consent of these peoples and communities should be obtained before including such knowledge and expressions in such repositories.

17. Member States and international organizations should encourage cooperative arrangements which balance public and private interests in order to ensure global universal access to, and free flow of information in, the public domain without geographical, economic, social or cultural discrimination.

18. Member States and international organizations should encourage mechanisms for voluntary open access to information, including open source software. They should also ensure the formulation of technical and methodological standards for information exchange, portability and interoperability, as well as online accessibility of public domain information on global information networks.

19. Member States and international organizations should facilitate ICT literacy, including popularizing and building trust in ICT implementation and use. The development of “human capital” for the information society, including an open, integrated and intercultural education combined with skills training in ICT, is of crucial importance. ICT training should not be limited to technical competence but should also include awareness of ethical principles and values.

20. Interagency cooperation within the United Nations system should be reinforced with a view to building up a universally accessible body of knowledge, particularly for the benefit of developing countries and disadvantaged communities, from the massive amount of information produced through development projects and programmes.

21. UNESCO should create a special fund to support the efforts of the developing countries, especially the least developed countries, to facilitate the promotion and use of multilingualism and universal access to cyberspace.

22. UNESCO, in close cooperation with other intergovernmental organizations concerned, should undertake the compilation of an international inventory of legislation, regulations and policies on the generation and online dissemination of public domain information.

23. Definition and adoption of best practices and voluntary, self-regulatory, professional and ethical guidelines should be encouraged among information producers, users and service providers with due respect to freedom of expression.

REAFFIRMING AND PROMOTING THE EQUITABLE BALANCE BETWEEN THE INTERESTS OF RIGHTS-HOLDERS AND THE PUBLIC INTEREST

24. Member States and international organizations, including UNESCO, should encourage, in close cooperation with all interested parties, the updating of national copyright legislation and its adaptation to cyberspace, taking full account of international copyright conventions and ensuring a fair balance between the interests of authors, copyright and related rights-holders, and of the public.

25. Member States and international organizations should encourage rights-holders to make sure that the beneficiaries of limitations and exceptions to copyright and related rights protection may thereby benefit, provided that such limitations and exceptions are applied in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holders as provided for in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

26. Member States and international organizations should pay careful attention to the development of technological innovations and technological protection measures and their impact on access to information in the framework of agreed limitations and exceptions to copyright and related rights protection.

* * *

The General Conference recommends that Member States apply the above provisions by taking whatever legislative or other steps are required to give effect within their respective territories and jurisdictions to the norms and principles set forth in this recommendation.

The General Conference recommends that Member States bring this recommendation to the attention of the authorities and services responsible for public and private works on ICT policies, strategies and infrastructures, including promotion of multilingualism on the Internet, the development of networks and services, expansion of public domain information on the Internet and intellectual property rights issues.

The General Conference recommends that Member States should report to it, on the dates and in a manner to be determined by it, on the action they have taken to give effect to this recommendation.

The foregoing is the authentic text of the recommendation duly adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization during its 32nd session, which was held in Paris and declared closed the …. day of ..... 2003.

IN FAITH WHEREOF we have appended our signatures this …. day of ……..… 2003.

The President of the General Conference

The Director-General

APPENDIX

DEFINITIONS

For the purpose of this Recommendation:

(a) **Backbone** is a high-capacity network that links together other networks of lower capacity;

(b) **Copyright limitations and exceptions** are provisions in copyright laws restricting the exclusive right of the author or other rights-holders with regard to the exploitation of their work or object of related rights. The main forms of such limitations are free use, compulsory licenses and statutory licenses;

(c) **Cyberspace** is the virtual world for digital or electronic communication associated with the global information infrastructure;

(d) **Domain name** is the name given to an Internet address, which facilitates access to Internet resources by users (e.g. “unesco.org” in http://www.unesco.org);

(e) **Intelligent linguistic systems** combine the rapid computational, data retrieval and manipulation power of today’s computers with the more abstract and subtle reasoning skills and understanding of nuances that are implied but not necessarily explicitly stated in inter-human communication within and across languages, thus allowing the simulation of human communication to a high degree;

(f) **Internet service provider (ISP)** is a supplier of Internet access services;

(g) **Interoperability** is the ability of software and hardware on different machines from different vendors to share data;

(h) **Open source technologies** are based on the premise of open source, a certification standard issued by the Open Source Initiative (OSI) that indicates that the source code (program instructions in their original form or programming language) of a computer program is made available free of charge to the general public;

(i) **Peering** is a relationship between two or more ISPs in which the ISPs create a direct link between them and agree to forward each other’s packets directly across this link instead of using the Internet backbone. When peering involves more than two ISPs, all traffic destined for any of the ISPs is first routed to a central exchange, called a peering point, and then forwarded to the final destination;

(j) **Portability** refers to the ability of software to be used on a variety of computers without necessitating a particular machine or hardware;

(k) **Public domain information**, also known as the “information commons”, is publicly accessible information, the use of which does not infringe any legal right, or breach any other communal right (such as indigenous rights) or any obligation of confidentiality. It thus refers to the realm of all works or objects of related rights, which can be exploited by everybody without any authorization, for

instance because protection is not granted under national or international law, or because of the expiration of the term of protection, or due to the lack of an international instrument ensuring protection in the case of foreign works or objects of related rights;

(l) **Search engine** is a software application that searches documents for specified keywords and localizes or retrieves the documents where the keywords were found;

(m) **Universal access to cyberspace** is equitable and affordable access by all citizens to information infrastructure (notably to the Internet) and to information and knowledge essential to collective and individual human development;

(n) **Web browser** is a software application used to locate and display World Wide Web pages

UNESCO ACTIVITIES

EXPERT MEETING ON AUDIOVISUAL SERVICES: IMPROVING PARTICIPATION OF DEVELOPING COUNTRIES

Organized by UNCTAD in cooperation with UNESCO
13-15 November 2002 at the Palais des Nations, Geneva

UNESCO – Division of Arts and Cultural Enterprise of the Culture Sector – has collaborated in two meetings held in Geneva by UNCTAD, following a decision by the Commission on Trade in Goods and Services, and Commodities.

The two meetings were on the theme of audiovisual services: how to improve the participation of developing countries.

The first was a round table of international personalities who came together, on 12 November 2002, in the company of Mr Rubens Ricupero, Secretary-General of UNCTAD and Mr Marcio Barbosa, Deputy Director-General of UNESCO; Mr Pierre Defraigne, Deputy Director-General, DG Trade, European Commission; Mr Dos Santos, Deputy Permanent Delegate of Brazil to UNCTAD; Mr Hisanori Isomura, President of the Japan Cultural Institute in Paris and of the International Council for Film, Television and Audiovisual Communication, former Director-General of the NHK network, Japan; Mr Chris Marchich, Senior Vice-President and Managing Director, Motion Picture Association of the USA; Mr Bernard Miyet, President of the Société des auteurs, compositeurs et éditeurs de musique (SACEM), former Assistant Secretary-General of the United Nations and co-founder of the EUREKA programme; Mr Phil Stone, Director-General of the Trade and Investment Branch of Canadian Heritage; and Ms Aminata Traoré, Director of the Centre Amadou Hampaté Bâ, former Minister of Culture and Tourism, Mali. The moderator of the debates was Ms Verena Wiedemann of ARD (German television).

The second meeting, from 13 to 15 November, chaired by the Ambassador of India to UNCTAD, H.E. Mr Hardeep Puri, was attended by a number of resource-persons chosen by UNCTAD, high-level experts proposed by some 40 of its Member States, coming from diplomatic representations, the public and private sectors, university establishments, research institutions, and civil society, and also representatives from some 15 international governmental and non-governmental organizations.

The common objectives of both phases of reflection were: (i) to give specialists in audiovisual services and commercial negotiators an opportunity to examine the various aspects of this sector through a public debate held at the international level; (ii) to study international trade in audiovisual services and its effects on developing countries' development and trade policies; and (iii) to analyse the risks and benefits, and the conditions

under which developing countries might carry out a total or partial liberalization of their markets or grant other concessions in the audiovisual sector.

The debates focused on these various aspects, and led to a number of conclusions; those relating more specifically to copyright protection and the prevention of piracy will be analysed in the forthcoming issue of this *Bulletin*.

All the preparatory documents drawn up by UNCTAD may be consulted on the http://www.unctad.org website. UNESCO's working document may be consulted on the UNESCO site http://unesco.org/culture/industries, which also provides links to UNCTAD's principal texts. The conclusions will be posted shortly on both sites.

UNESCO ACTIVITIES

Preliminary Draft Convention for the Safeguarding of Intangible Cultural Heritage

Pursuant to the resolution adopted by the General Conference at its 30th session, the Director-General presented the report on the preliminary study to the 161st session of the Executive Board (May 2001) which recommended that the General Conference "continue action aimed at advancing the international regulation, through a new standard-setting instrument, of the safeguarding of the intangible cultural heritage". To this end several expert meetings have been held : an international round table in Turin (March 2001) which identified a working definition of intangible cultural heritage and the objectives for a normative instrument, followed by a second meeting in Rio de Janeiro (Brazil) in January 2002.

Meanwhile, at its 31st session the General Conference recalled the specific mandate of UNESCO for the safeguarding of intangible cultural heritage and decided that it should be regulated by means of an international convention whose preliminary draft is to be submitted to its 32nd session. The final draft of the convention is to be submitted to the 33rd session of the General Conference. The views expressed by the majority of Member States at the time of the General Conference indicated the model of the 1972 World Heritage Convention wishing a similar success for the new instrument, and underlined the need to avoid any overlapping with activities undertaken by other organizations such as WIPO. During the different expert meetings (Turin, Rio, Paris HQ) the majority of experts agreed on the principle of a "list" of intangible cultural heritage, for its driving force for States Parties as proved by the 1972 Convention experience, underlying however that adopting a list does not mean that the heritage not on the list is not to be safeguarded. They also stressed the importance for civil society and local communities to be associated with the safeguarding of intangible cultural heritage.

The legal drafting of the new instrument started with two sessions (March 20-22; June 13-15) of a small drafting group at UNESCO Headquarters One more meeting of experts was held to elaborate the glossary for the preparatory work of the new instrument (June 10-12). All these meetings were attended by representatives of Permanent Delegations to UNESCO invited as observers.

Following the decision of the Executive Board at its 164th session the Director-General convened one category II intergovernmental meeting of experts in September 2002, to define the scope and to take forward the work on the preliminary draft of an international convention for the safeguarding of intangible cultural heritage.

This meeting provided to all Member states and observers invited, the possibility of expressing their views on the preliminary draft Convention report prepared by the experts. The preliminary draft has been submitted to the 3rd Round Table of Ministers of Culture on "Intangible Cultural Heritage- a mirror of Cultural Diversity" which took place in Istanbul on 16-17 September 2002. The Final Declaration which follows, testifies to the support of the Ministers of Culture in the preparation of a new international instrument.

17 September 2002 – Original: English

3rd Round Table of Ministers of Culture

« Intangible Cultural Heritage – a Mirror of Cultural Diversity »

Istanbul, 16-17 September 2002

Final Communiqué
Istanbul Declaration

At the close of the Round Table of the Ministers of Culture on "Intangible Cultural Heritage, mirror of cultural diversity", held in Istanbul on 16 and 17 September 2002 – United Nations Year for Cultural Heritage –, we, the participating and represented Ministers of Culture, arrived, on the basis of our exchanges, at the following joint positions:

1) The multiple expressions of intangible cultural heritage constitute some of the fundamental sources of the **cultural identity** of the peoples and communities as well as a wealth common to the whole of humanity. Deeply rooted in local history and natural environment and embodied, among others by a great variety of languages that translate as many world visions, they are an essential factor in the preservation of cultural diversity, in line with the UNESCO Universal Declaration on Cultural Diversity (2001).

2) The intangible cultural heritage constitutes a set of **living and constantly recreated** practices, knowledge and representations enabling individuals and communities, at all levels, to express their world conception through systems of values and ethical standards. Intangible cultural heritage creates among communities a sense of belonging and continuity, and is therefore considered as one of the mainsprings of **creativity** and cultural creation. From this point of view, an all-encompassing approach to cultural heritage should prevail, taking into account the **dynamic link** between the tangible and intangible heritage and their close interaction.

3) The safeguarding and transmission of the intangible heritage is essentially based on the will and effective intervention of the actors involved in this heritage. In order to ensure the sustainability of this process, governments have a duty to take measures facilitating the **democratic participation of all stakeholders**.

4) The extreme **vulnerability** of the intangible cultural heritage, which is threatened by disappearance or marginalisation, as a result *inter alia* of conflicts, intolerance, excessive merchandising, uncontrolled urbanisation or rural decay, requires that governments take resolute action respecting the contexts in which the intangible cultural heritage is expressed and disseminated.

5) The process of globalisation, while presenting serious threats of uniformisation on intangible cultural heritage, may facilitate its dissemination, mainly through new information and communication technologies, thereby creating a digital heritage also worthy of safeguarding. Globalisation can therefore facilitate the emergence of a **set of references common to all humankind** and thus promote values of solidarity and tolerance resulting in a better understanding of others and respect for diversity.

6) Laying the foundations of **true sustainable development** requires the emergence of an integrated vision of development based on the enhancement of values and practices involved in the intangible

cultural heritage. Alike cultural diversity, which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace.

7) In conclusion we, the participating and represented Ministers of Culture, aware of the urgency to take action:

(i) Undertake to actively promote **the principles** set out in the UNESCO Universal Declaration on Cultural Diversity;

(ii) Agree to developing policies which aim at the identification, safeguarding, promotion and transmission of the intangible cultural heritage, particularly through information and education. Steps must be taken to ensure that the expressions of intangible heritage benefit from **recognition** within States, provided that they respect universally recognised human rights;

(iii) Seek to, within the framework of the **policies of each State, at the appropriate level**: encourage research and documentation, develop inventories and registers, establish legislations and appropriate mechanisms of protection, ensure the dissemination, through education and awareness raising, of the values and significance of intangible cultural heritage, foster the recognition and protection of custodians together with the transmission of knowledge and know-how;

(iv) Consider that it is appropriate and necessary, within this framework, in close collaboration with the practitioners and bearers of all expressions of intangible cultural heritage, to consult and involve **all the stakeholders**, namely the governments, local and regional communities, the scientific community, the educational institutions, the civil society, the public and private sector as well as the media;

(v) Appreciate and support the initiative taken by UNESCO regarding the **Proclamation** of Masterpieces of the Oral and Intangible Heritage of Humanity;

(vi) Call upon UNESCO to foster the development of **new forms of international cooperation**, for example by setting up mechanisms of recognition, inventories of best practices and the creation of networks, by mobilising resources and encouraging consultations between countries sharing expressions of intangible heritage;

(vii) Endeavour, in the spirit of **international solidarity,** to pay special attention to countries, such as Afghanistan, and to territories suffering from poverty, conflicts or crisis, and extend assistance when deemed necessary; and call on UNESCO to examine the possibility of establishing a special fund to that end;

(viii) Consider that, in the spirit of the 31C/Resolution 30 adopted by the General Conference, **an appropriate international Convention,** which should be developed in close cooperation with relevant international organisations and take into full account the complexity of defining intangible cultural heritage, could be a positive step towards pursuing our goal; and therefore, in a spirit of constructive cooperation, undertake to participate in the forthcoming debate of the Intergovernmental Experts Meeting in order to start elaboration of the preliminary draft of such a Convention;

(ix) Request UNESCO to inform the Member States on its cooperation with other relevant international organisations, such as WIPO, as such information will be useful to Member States in further developing their policies on the protection of intangible cultural heritage;

8) We request the Director General to transmit the present Istanbul Declaration to the Member States of UNESCO and to circulate it widely to the relevant regional, national and international organisations and to the organs of the press.

9) We express our deep gratitude to the Turkish authorities for their warm hospitality, and for their active contribution to the preparation of the Round Table and its successful outcome.

UNESCO ACTIVITES

The WIPO Standing Committee on Copyright and Related Rights

8th Session, Geneva, 4-8 November 2002

The World Intellectual Property Organization Standing Committee on Copyright and Related Rights was held from 4 to 8 November 2002 in Geneva. The Delegates of ninety Member States, including the European Community, nine intergovernmental organisations, as well as the representatives of different sectors concerned with copyright and neighbouring rights, participated in this session.

The discussions mainly concerned the protection of broadcasting organisations and the protection of non original data bases. The Committee also examined a list of questions likely to be studied at a later date.

- **The Protection of Broadcasting Organisations**

In their preliminary statements, the representatives of the Member States underlined the necessity to generally improve the rights of broadcasting organisations. Various delegations presented draft treaties on this subject. The proposal of the United States of America was notable for its inclusion of the protection of broadcasting organisations on the Web, while Uruguay, Honduras and the European Community granted protection to cable distributors and do not envisage the protection of broadcasting organisations on the Web. This approach was upheld by the majority of the delegations. Opinions diverged on the question of the recognition of rights linked to transmission on the internet and the decoding of encrypted broadcasts. Nevertheless, a consensus was reached on the reinforcement of the rights already accorded by the existing instruments : the right to fixation, the right of reproduction of a fixation, the right of communication to the public and re-broadcasting, and the right to rent fixations of broadcasts to the public.

The UNESCO representative underlined the interest of the proposals put forward by the Member States' Delegations and by the European Community. The great majority recognises the need to maintain a balance between the rights of broadcasting organisations, authors and performers and producers of phonograms, and the interests of the public, notably in the field of teaching, research and access to information. He also emphasized the importance of examining the means of guaranteeing this equal balance and suggested that if access to the future treaty were to be confined to States parties to the WCT and the WPPT, it should also make reference to the States parties to the Rome Convention. He also underlined the importance of achieving, in parallel, the work related to the protection of audiovisual performances.

The discussions demonstrated, in a general way, the need to identify the field of protection before discussing the extent of the particular rights granted to the various categories of beneficiary parties, as well as the necessity to guarantee a fair balance between the interests of those benefiting from the protection and those of the public.

- **Protection of non-original data bases**

The Committee's discussions on this theme were marked by (i) the presentation by the Secretariat of WIPO of an inventory of the national and regional legislations in force concerning intellectual property related to the databases and (ii) a declaration by the Delegation of the European Community on the policy to be adopted in this field. The European Community Delegation recalled that with the event of digital services in the information society, electronic databases had become indispensable instruments in the distribution of contents. She underlined that the European Directive of 1996 on the legal protection of data bases accorded to « original and creative data bases », copyright protection in so far as they were treated as literary works, while « non-original data bases » benefited, under certain conditions, from a *sui generis* protection, notably where their constitution had received substantial investment. The European Community Delegation concluded with a positive assessment of the application of this Directive: a good interpretation by courts, no obstacles to research and a prosperous and healthy market. She considered the protection of databases to be a question of world importance requiring a common line of practice at international level.

- **Questions likely to be examined at a future date by the Committee**

The discussion of questions likely to be examined at a future date dealt with : the responsibility of providers of access to the Internet, the applicable law as it concerns attacks on an international scale, voluntary recording systems of copyright, *droit de suite*, the titularity of multimedia products, implementation of the WCT and WPPT as concerns, in particular, the dispositions related to the technical measures for protection, limitations and exceptions, the economy of copyright and the collective management of copyright.

During the debate on the limitations and exceptions and the technical measures for protection, the UNESCO representative presented a draft study on the regulation of the limitations and exceptions to copyright and neighbouring rights launched by UNESCO. He underlined that the objective of this study is to reaffirm and promote an equal balance between the interests of right holders and those of the users when cultural works and performances are exploited in the digital environment in the fields of teaching, scientific research, libraries, dissemination of information and needs of the visually impaired.

The search for this balance is based on dialogue and achieving a consensus between representatives of authors and other rights holders and those of institutions representing the users. The first step is to gather information and examine the practices and difficulties linked to the implementation of limitations and exceptions in the digital environment and to assess the possibilities of putting into practice technical measures to control access and legal exploitation of works. It is on the basis of this objective evaluation that a consensus will be arrived at and will attempt to define a framework of general principles to propose to the

Member States, without any mandatory obligation; The aim will be to help them to encompass, within the structure of their national legislations a balanced practice for the limitations and exceptions in these areas, with strict respect for the three-step test foreseen by article 9.2 of the Berne Convention, Article 10 of the WCT, Article 16 of the WPPT and Article 13 of the TRIPS Agreement. The UNESCO representative informed the Committee that when this initiative was launched as a result of a strong demand by concerned groups in the field of teaching, scientific research, libraries and the visually impaired, WIPO had been approached with a view to an eventual consensus and joint action. He also stated UNESCO's satisfaction that the Standing Committee had included the study of this question in its Programme and reiterated UNESCO's willingness to work in close collaboration with WIPO and all organisations concerned.

The working documents and the Final Report of this Committee can be consulted on : http://www.wipo.int/copyright/en/index.html

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Intellectual Property in the Digital Age: Challenges for Asia. Edited by Christopher Heath & Anselm Kamperman Sanders, The Hague, Kluwer Law International, 2001. 240 pp. What exactly do policymakers and journalists mean when they refer to the "information age"? What bearing do the "problems" they describe and the solutions they offer have on current global realities? Specifically, what does the Euro-American concept of intellectual property mean in a global context? Why is the idea of electronic commerce so difficult to "export"? These questions which clearly identify issues of crucial importance for the coming decades of human history are given full weight, stripped of ideology, in this provocative book, based on the papers presented at a seminar sponsored by the Macau Institute of European Studies (IEEM) in June 2000. Although there are no clear answers, the accounts and analysis presented here provide a wealth of detail that comes as close as we can expect at this date to the facts of the case. The focus is on East Asia, Greater China in particular, an area which (most social theorists will agree) offers the most revealing social context for the examination of emerging global trends in this field. By examining the status of information technologies in East Asia, and the pressure to grant a level of legal protection to intellectual property owners that is hardly compatible with the present level of economic development in these countries, *Intellectual Property in the Digital Age: Challenges for Asia* offers invaluable insights into how the Internet and other digital technologies can be fairly and meaningfully regulated worldwide. Contents and Contributors: Preface: M. de Céu Esteves. About the Authors. Part 1: General Introduction; Chapter 1: The Information Society: Chances and Challenges: R. Burrell. Part 2: Copyright and Data Protection; Chapter 2: The legal Protection of Data and Databases: A.K. Sanders; Chapter 3: Copyright Issues of Techno-Digital Property: A. Dias-Pereira; Chapter 4: Digital Property and Digital Commons: B. Sherman. Part 3: Patents and Indigenous Knowledge; Chapter 5: Intellectual Property Protection in the North/South Divide: V. Shiva. Part 4: Trade Marks and Unfair Competition; Chapter 6: Trade Marks, E-Commerce and the Internet: C. Heath. Part 5: IP and E-Commerce in Greater China; Chapter 7: Macau's Intellectual Property System in the Digital Age: G. Cabral; Chapter 8: Electronic Commerce in Hong-Kong: G. Kennedy; Chapter 9: Electronic Commerce in China: Xue Hong. ISBN: 90-411-9847-4.
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PARIS, Thomas. *Le droit d'auteur : l'idéologie et le système* [Copyright: the ideology and the system]. Paris, Presses Universitaires de France, Collection Sciences sociales et sociétés. 236 pp. Is copyright in crisis? Whatever the case, it has for several years been constantly at the heart of conflicts widely reported in the media: transnational battles between authors' rights and copyright against the background of the GATT negotiations; the strike by dubbing artists to obtain rights over films; members questioning the management of authors' societies; the debate surrounding library lending rights; the MP3 affair followed by Napster; the outcry concerning the taxation of computers; and so on. This book sets out to provide keys to an understanding of these multiple conflicts. The problems raised by copyright today cannot be confined to the legal aspect and to the question of adapting grand principles to the novel environment of globalization and the new technologies. Copyright is a complex system, comprising legal rules, management bodies, practices, procedures and conventions, that is continually being reshaped as the result of a trade-off between the interests of the various economic stakeholders. Employing an original approach, which involves looking at author's rights in their complexity and from a practical standpoint, this book proposes a model of the overall dynamics of the system so as to bring out more clearly the challenges confronting it. ISBN: 2130524710. Price: Eur 21.

Patent, Trademark, and Copyright Laws. Edited by Jeffrey M. Samuels, Washington, D.C., BNA Books, A Division of The Bureau of National Affairs, Inc. (BNA), 2002 Edition. 792 pp. All key legislative developments through March 1, 2002 that affect U.S. intellectual property are covered in the 2002 Edition of BNA's Patent, Trademark, and Copyright Laws. The 2002 Edition covers these and other important updates:

- Codification of creation of the Intellectual Property Law Enforcement Coordination Council
- Codification of provisions in the Anticybersquatting Consumer Protection Act that relate to cyberpiracy protections for individuals
- New statutory fee schedule, effective October 2, 2001
- Text of the Patent and Trademark Office and Copyright Office appropriations for fiscal year 2002
- Changes that took effect March 6, 2002, with the entry into force of the WIPO Copyright Treaty.

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