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# Aligning U.S. Copyright Law with International Treaties: Possible Effects on Technology Companies

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While laws protecting intellectual property rights are enacted and enforced by individual sovereign nations, a number of international treaties impose requirements on the types of protection that must be enacted in the national legislation of each country. As new intellectual property treaties are adopted across the world, national legislatures must revise their existing legislation, or enact new legislation, to comply with treaty requirements. In turn, those legislative changes will affect how technology companies protect their rights in those countries.

Recently, the United States' efforts to align its laws with international copyright treaties has led to the enactment of legislation that has been the subject of significant controversy. In particular, legal challenges have recently been brought against the so-called "anti-circumvention" provisions of the Digital Millennium Copyright Act of 1998 (“DMCA”), which was enacted by Congress in part to comply with provisions of the World Intellectual Property Organization (“WIPO”) Copyright Treaty (“WCT”), and the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”), which extended the term of copyright protection in a manner comparable to that adopted by the European Union.

**The WIPO Copyright Treaty**

The WCT formally took effect on March 6, 2002. Adopted in 1996, the

treaty updates the Berne Convention for the Protection of Literary and Artistic Works, currently the primary treaty addressing international copyright protection, to cover issues presented by new digital technologies. Although the main features of the treaty are already in place in United States copyright law, the treaty internationalizes those protections to cover works in all member countries.

The WCT protects literary and artistic works, including books, computer programs, music, art and movies. It requires member countries to enact legislation to provide a basic legal framework to protect the rights of intellectual property owners when their works are disseminated over digital media. There are two prominent components to this framework. First, member states must institute legal prohibitions and effective remedies against circumvention of technological measures, such as encryption, employed by copyright owners to protect their works. Second, the treaty mandates legal prohibitions against the removal or alteration of copyright management information. In addition, the WCT contains a restored copyright provision, whereby copyright that exists under the laws of a work's home country must be recognized in all member countries, even if the work had come into the public domain under the laws of those countries. Finally, the treaty permits countries to provide for certain statutory limitations or exceptions.

The United States sought to comply with the WCT in 1998, with its enactment of the DMCA. (We have previously discussed various aspects of the DMCA in our April 11, 2000, March 13, 2001 and August 13, 2001 Internet Alerts). Some commentators have argued that the United States went well beyond the WCT requirements in enacting certain provisions of the DMCA, particularly those prohibiting the circumvention of technical measures that control access to a copyrighted work and the "trafficking in" any technology primarily designed to circumvent such technical measures. These anti-circumvention provisions have been challenged recently on

various constitutional and other grounds as unduly limiting free speech, legitimate research inquiries and other permitted activities. The success of these challenges is still being determined by the courts (see, e.g., *Universal v. Reimerdes*, which was previously discussed in our August 13, 2001 Internet Alert and *DVD-CCA v. Bunner*, which was previously discussed in our November 27, 2001 Internet Alert).

Along with the United States, Japan is the other major industrialized country to have ratified the WCT. It enacted legislation to implement the treaty in 1999. The Japanese law makes it a criminal offense to offer or transfer to the public a circumvention device (or a copy of a circumvention device) or to manufacture, import or possess such a device. The law applies to circumvention devices that are designed to defeat technical measures to prevent or deter copyright infringement by an electromagnetic means. However, the law would only apply to devices designed to defeat measures instituted by the copyright owner. This means that the anti-circumvention provisions do not apply, for example, to devices that restrict the viewing or listening of a work, such as by encryption, because simple viewing or listening is not an act covered by copyright. The act of knowingly making a reproduction, made possible by the circumvention of technological measures, is subject to civil penalties. A person who knowingly removes or alters copyright management information is subject to criminal penalty under Japanese law.

Thirty-five countries, including the United States and Japan, have now ratified the WCT. Additionally, in May 2001, the European Union adopted the EU Information Society Directive, which requires member states to enact legislation necessary to implement the WIPO treaties by December 22, 2002. Canada and Russia, however, have not acceded to the treaties. Given the controversy surrounding the U.S. implementation of the DMCA anti-circumvention provisions, it will be interesting to watch how other countries implement the WCT's anti-circumvention requirements, and

whether they follow the restrictive approach of the DMCA or the more flexible language of the WCT itself.

**Copyright Term Extension**

In addition to the DMCA, in 1998 Congress also enacted the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA"), which added 20 years to the term of copyright protection in the United States. With this extension, the term of U.S. copyright protection for works created by individuals is now the life of the author plus 70 years, and 95 years for works created for hire and owned by corporations. Congress justified its enactment of the CTEA, in part, on harmonization of U.S. copyright law with a 1993 European Council directive which regularized copyright terms within Europe (Council Directive 3/98/EEC). Interestingly, the term extension implemented by the CTEA is permitted, but not required, by the Berne Convention.

On February 19, the Supreme Court agreed to hear a challenge to the CTEA brought by Eldritch Press and others, alleging that the CTEA is unconstitutional (see *Eldred v. Ashcroft*). The copyright clause of the Constitution gives Congress the power "to promote 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." The Eldred plaintiffs argue that Congress exceeded this grant of power because the CTEA extended the copyright term not only for newly created works, but also for existing works. They argue that Congress does not have the authority to extend the term of protection for existing works because doing so does not "promote the progress of science and useful arts" and that the sheer length of copyright terms now violates the "for limited times" restriction in the Constitution. The plaintiffs also argue that the CTEA infringes their right to free speech under the First Amendment. They were not successful at trial or in a subsequent appeal to the District of Columbia Court of Appeals. Many observers are surprised that the Supreme Court

decided to hear Eldred and now think that this case may result in a halt to the recent series of copyright term extensions and allow a significant body of work to enter the public domain.

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