

Chinese Taipei Report

Chung-Hsin Chang, Section Chief

Copyright Department, Intellectual Property Office
Ministry of Economic Affairs, Chinese Taipei

*Copyright Protection
on development of
information
Technology is
important.*

Editor's note: Mr. Chang has been with ROC Copyright Office for over fifteen years. After completing his undergraduate work in Soochow University he received an L.L.M. degree from Washington College of law, American University in the U.S. He has participated in most of ROC bilateral and multilateral trade talks involving copyright over the past decade and plays a major role in the drafting of amendments to ROC Copyright Law. The following is excerpted from a presentation given to the APEC Copyright Seminar, hosted by Japanese Copyright Office in Tokyo, on March 8, 2001.

I. Copyright Protection on development of Information Technology (IT) and e-commerce

The development of information technology changes everything in our daily life. Ten years ago, we never imaged what would have happened today. It is also hard to predict what will happen in next decade. What we may certainly recognize is

that this trend will never stop and we must take some measures to address the challenge that occurs along with the changes.

Copyright Protection attracts most concern in the development of information technology (IT) and e-commerce. Following the development of information technology most categories of the works can be uploaded, transmitted, and downloaded through Internet. Those activities generate e-commerce and bring tremendous benefits. The core issue surrounded by those activities is copyright protection.

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The original spirit of Internet is "free"----means both freedom and free of charge. Information technology establishes a convenient channel for information exchange. Users can exchange information or opinions freely on the Internet. But when users exploit works without copyright owners' consent for profit in e-commerce, those exploitations lose their legitimacy. It should be noted that "the certainty in technology is not equal to legitimacy in the legal sense"---- technology enable users to freely and quickly transmit information , but does not mean users can exploit works without consent. While copyright experts try to update the copyright system, inevitably, they must struggle among copyright protection, freedom of information and the development of technology. Facing the unprecedented challenge, global or regional cooperation is necessary. That is why we work together here. However, the ideal members of the working group should consist of not only legal experts, but also technology experts.

II. Implementation of new WIPO treaties

Although Chinese Taipei is not a member of any international copyright convention, we nevertheless have been

pretty good at keeping up with international copyright developments. The current Copyright Law was amended and promulgated on 21 January 1998. It complies with TRIPS, except that the provisions on retroactive protection for works will not take effect until Chinese Taipei's accession to the WTO. It is certainly in the interests of the international intellectual property community to see Chinese Taipei's entry into WTO as soon as possible. Not only will protection for works be expanded to many works in the public domain, the works of all authors from member state' territories of the WTO will also be protected automatically upon creation.

Technological developments impose great challenges for all of us in the field of copyright and neighbouring rights protection. Chinese Taipei is determined to continue to work actively together with WIPO and its members around the world to find adequate solutions for the issues at stake.

In December 1996, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty were adopted by Diplomatic Conference. Both of the treaties want to update the existing international copyright conventions. From that time, many countries have revised or are preparing to amend their domestic copyright law in order to implement these two treaties. For example, Japan amended its Copyright Law in 1997 and 1999, the U.S. Congress passed the Digital Millenium Copyright Act of 1998, South Korea amended its Copyright Law in 2000, EU Commission released a Directive proposal in 1997, and Australian parliament passed its Digital Agenda Copyright Amendment in 2000. All those efforts are under our observation. The time Chinese Taipei began its Copyright Law reform to face the technology challenges should be dated from 1995 when the

Chinese Taipei began its Copyright Law reform at 1995, and the current Copyright Law was amended in 1998. The government is determined to continue to work actively together with WIPO and its members around the world.

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*1.Exclusive licensee's
right is clarified.
(Amendments §37)*

Competent Authority of Copyright Law, Ministry of Interior (which is the predecessor of the Copyright Office of Taiwan) retained the III (Industry Information Institute) to submit a study accompanied with the Copyright Amendment. In addition, for the purpose of grasping the international copyright development, I myself was sent to audit the 1996 WIPO Diplomatic Conference. After the III submitted its Copyright Amendment, the government released it to the public and held several hearings around the island. Also, a consultation, which consists of experts from academia, industry and IP field, has held thirteen meetings to discuss several controversial issues raised from the III's Copyright Amendment. The III's Copyright Amendment and the consultation minutes(all in Chinese) are available at IPO website (<http://www.moeaipo.gov.tw>).

Key points of the proposed amendments are as follows:

1. The right of exclusive licensee

This issue maybe is not relate to the digital information technology and Internet, but should not be ignored by copyright holders and users. Although a 1995 Supreme Court decision held that exclusive licensees have a standing to file complaint in cases of copyright infringement, there still exists some arguments as to the applicability of this decision. The proposed Amendment codifies the decision and allows exclusive licensee, within the scope of authorization, to take copyright holder's position in order to enforce rights. Unless otherwise specifically agreed, the copyright holder will be precluded from exercising his or her copyright where there is an exclusive license arrangement. Furthermore, the licensee's right, regardless of whether exclusive or non-exclusive, will not be effected by a

subsequent transfer or license(Amendments §37).

2. Reproduction right

In the practice of Internet, there are some arguments on the scope of reproduction right and its limitations. Some people assert that the WIPO Diplomatic Conference's deletion of article 7 of WCT draft means copying a work in each step during its transmission does not constitute reproduction within the copyright regime, while others contend that the real meaning of the elimination was to simply “clean up” the draft because the issue is already resolved under article 9 of Berne Convention, and additional regulation was superfluous. The proposed Amendment, taking the U.S. and Japanese approach, remains silent on this issue. It demonstrates that the current provision has resolved the reproduction right issue on the Internet

3. The right of communication to the public

Unlike the broadcast, which limits the audience to the choice of turning off or changing the channel, Internet gives users more choices. Users may access any work from a place and at a time individually chosen by them. The two WIPO treaties grant authors exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works. The Amendment takes the Japanese approach and extends existing broadcasting right into the right of communication to the public, including broadcasting right of wire or wireless transmission, right of interactive transmission and the right of making available to the public(§23bis). But copyright owners of performance work and sound recording

2.The III remains

silent on the argument on whether copying a work via internet in each step during its transmission constitute “reproduction” .

3.The III extends

existing broadcasting right into the right of communication to the public, adding right of interactive transmission and making available to the public(§23bis).

work only have broadcasting right and the right of making available to the public(§24).

4. Copyright management information

Copyright information management indicates all the copyright information of a work. It can be used to identify the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work. When any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public, in order to protect the interest of the author and the owner of any right in the work, it should be prevented from removing or altering. Following the two WIPO treaties, the Amendment will prohibit anyone from knowingly removing or altering these information, or from distributing a work or a copy of which the copyright information has been removed or altered(§87(6)). In addition to potential civil liability, those who violate the provision will receive criminal punishment of up to 1-year imprisonment and/or be imposed a fine up to fifty thousand New Taiwan Dollars(§93bis). Unlike the DMCA, which includes electronic and non-electronic copyright information management, the Amendment following the two WIPO treaties only applies to electronic copyright information management.

5. Technological protection measure

In the digital Internet environment, many copyright owners prefer to employ technological measures to protect their works from being accessed or copied without their consent. The technological measures may include such techniques as computer program, encryption code, keypro, password,

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watermarking, etc. The two WIPO treaties require Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of those effective technological measures. The Amendment adds a new provision to punish those who intend to infringe copyright and manufacture, import, and distribute device, provide service or information which is solely to be used to infringe copyright should be punished up to 1-year imprisonment and/or be imposed a fine of up to one hundred thousand New Taiwan Dollars (§92bis).

6. ISP copyright infringement liability

Whether an ISP should be liable for copyright infringement has been the subject of debate for several years in many domestic court cases. This issue was not addressed in the two WIPO treaties, but has received considerable attention in the digital Internet environment. The U.S. DMCA, German multimedia law, and EU e-commerce Directive have several provisions to establish a "safe harbor" for ISPs. Those provisions are driven by the ISPs' lobbying groups. The main purpose of those provision is not to impose copyright infringement liability on ISP but to set out a standard which ISPs may avoid a law suit once they meet certain requirements. Unlike the U.S. DMCA, which includes much complicated procedure, the Amendment takes the same approaches as German multimedia law and EU e-commerce Directive proposal. Any ISP should not be liable for its users' copyright infringement once it meets any one of the two conditions. First, ISP shall not be liable for any third-party content which they make available for use unless they have knowledge of such

5. Those who damage technological protection measures should be fined or imprisoned.

6. The III doesn't require ISPs to review all of the information posted on their sites in advance to avoid libel lawsuits and the like (§87bis).

content and are technically able to and can reasonably be expected to block the use of such content. Second, ISP shall not be liable for any third-party's content to which they only provide access services, including the automatic and temporary storage of third-party's content due to user's request (§87bis).

7. The III revises the term "broadcast" with 'public communication' in some articles in the Fair Use Chapter: §§ 47(2), 49, 50, 56bis and 61.

The arrangement means ISPs are not required to review all of the information posted on their sites in advance to avoid libel lawsuits and the like. However, some critics of the Amendment say current wording is too vague and should incorporate more specific language in order to discourage Napster-like sharing of songs among a large group of people, which the Internet makes easy.

8. Whether Chinese Taipei needs to establish legal regime to protect non-creative database has not be decided in the III.

7. Fair use in the digital Internet environment

The fair use privileges in the digital Internet environment attract the most concern from copyright holders and users. Since the Amendment says nothing on the reproduction right, it only revises the term "broadcast" with "public communication in a number of articles in the Fair Use Chapter of the Copyright Law: §§ 47(2), 49, 50, 56, 56bis and 61.

8. The protection of non-creative database

No agreement was reached during the 1996 WIPO Diplomatic Conference on the protection of non-creative databases. A database can be protected as an independent compilation work (e.g., as a "compilation" or a "compilation work") if it is formed by the creative selection and arrangement of materials. For those non-creative databases, it can not receive protection within copyright regime. We observe that EU database protection Directive requires all the members to

establish a *sui generis* system to protect non-creative database by January 1,1998. There are similar bills pending in U.S. Congress. The IPO retained academics to research and study this issue in 1998. A comprehensive report was submitted in September 1999. The IPO released it on the Website for submission and comment. To date there have not been many comments or submissions received. Whether Chinese Taipei needs to establish legal regime to protect non-creative database, or what the legal regime should be, will be discussed during the Amendment public hearings.

III. Conclusion

We fully understand that more effective copyright laws are needed to protect copyright owners in the digital Internet environment. On the other hand, the freedom of information and the development of technology can not be ignored. Balancing these three respects is very difficult. Although some provisions should be amended, it should be known that the fundamental traditional copyright principles still apply to the digital Internet environment. A work is protected once the author completes his creation. Without authorization from copyright owner, to exploit the work is in the risk of copyright infringement. The development of technology brings many problems and controversial issues. MP3 and Napster made tremendous loss to the copyright owner, but let us just recall the invention of tape recorder, photocopy machine and video recorder. They were once deemed the "devil to copyright". However, history has shown that those wonderful inventions resulted in major sources of revenue to copyright holders today. We can not allow these technologies to sacrifice the interests of right holders, yet

Conclusion:

We should try to come up with the adequate ways to get the balance of the copyright owners' profit and the freedom and development of technology.

專論 - 著作權

neither should we completely eradicate these technologies.