

ALA American Library Association

Libraries in the World of Treaties, Trade and Commerce April 2007

US library groups often work together on copyright issues, including at the international level, as the Library Copyright Alliance. www.librarycopyrightalliance.org The LCA is comprised of the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association.

World Intellectual Property Organization (WIPO)

WIPO is one of 16 specialized agencies in the United Nations system of organizations; it administers 23 treaties dealing with different aspects of intellectual property protection on behalf of its 179 member nations. Because each country grants different intellectual property rights and enforces them in various ways, intellectual property laws sometimes interfere with international trade relations. WIPO works with intergovernmental groups such as the World Trade Organization to create mechanisms for intellectual property protection and enforcement that will minimize these problems. Because of its jurisdiction over treaties dealing with copyright and related rights, WIPO is an important venue for libraries. There are many WIPO initiatives, many relating to other intellectual property aspects, but currently there are four activities that relate directly to libraries.

1. WIPO Provisional Committee on Proposals Related to a WIPO Development Agenda

In 2004, ALA joined several hundred other non-governmental organizations and individuals in signing the Geneva Declaration on the Future of the World Intellectual Property Organization. The declaration demanded changes to the United Nations' approach to intellectual property laws, saying that current rules are unfair to developing countries.

WIPO's Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) has since held several meetings to consider proposals for correcting what many perceive as imbalanced intellectual property protection regimes. In this connection, the Library Copyright Alliance developed a set of Principles that we have been using as we go to WIPO meetings and as we talk with US agencies about the proposals for development. (See the attached WIPO Library-Related Principles, www.librarycopyrightalliance.org/wipo.htm.)

The Library Copyright Alliance sent a library representative to the February 2007 meeting of WIPO's Provisional Committee on the Development Agenda. The WIPO meeting was quite positive and offered opportunities for American libraries and those of other countries to speak about issues of concern to us. The assembled representatives of more than 100 countries adopted a number of proposals to make WIPO more responsive to and assertive in addressing the needs of the developing countries.

Based on the above LCA principles, we were able to urge WIPO to adopt specific proposals for development taking into account the following:

- Libraries are founded on the balance of promoting both the rights of creators and the needs of users who require access to information.
- A robust and growing public domain provides new opportunities for creativity, research and scholarship.
- Effective library programs and services are a critical means of advancing knowledge and bringing individuals into the "knowledge economy."
- Libraries and educational institutions can and should be a vital part of the strategies of WIPO and its Member States in promoting intellectual property law.

The PCDA meets again in June 2007, this time to consider additional - and potentially more controversial proposals – to be addressed by the WIPO General Assembly in September.

2. WIPO Treaty on the Protection of Broadcasting Organizations

For several years, the World Intellectual Property Organization (WIPO) has been considering a treaty that would provide copyright-like rights (related rights) to broadcast organizations. The libraries' position is that there is no compelling public policy reason for the broadcast treaty, given the existence of a convention that already governs broadcasts as well as the absence of any evidence of harm suffered by broadcasters.

In a dramatic – and positive - turnaround in September 2006, the WIPO General Assembly decided to postpone a diplomatic conference to finalize the Broadcast Treaty until late 2007. The General Assembly then directed the WIPO copyright committee to attempt to reach agreement on a treaty that is focused on protection against theft of broadcast and cable signals, rather than protection through a copyright-like scheme. This treaty is not one that directly affects our mission: libraries make limited but not insignificant uses of broadcast materials, consistent with exceptions and limitations in the Copyright Act. However, libraries continue to be part of a coalition of non-profit organizations and industries that are working to prevent a broader treaty, because we

must be concerned about the creation of new copyright-like rights that could further diminish the availability of public domain information and compilations of data.

3. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

The WIPO Intergovernmental Committee met in Geneva in early December 2006 (its tenth session) to discuss Draft Objectives and Principles on The Protection of Traditional Cultural Expressions/Expressions of Folklore and on The Protection of Traditional Knowledge. The two lengthy draft documents set out various options for enhancing protection in these areas.

The December meeting concluded with an agreement to allow discussion on substantive issues without specifically negotiating on the draft texts on protection. An eleventh session is tentatively scheduled for July 2 to 10, 2007. After that, the WIPO General Assembly will have to decide on any future work related to the Committee's efforts.

At this time, neither ALA nor its fellow library associations has a stated position on the protection of folklore or traditional knowledge. There are practical and policy reasons why this is a complex and difficult area. For example, there is lack of agreement on what subject matter is covered by which appropriate term, not to mention trying to resolve the tension between recognizing potentially new legal rights that can affect materials that have long been considered to be in the public domain. Thus the LCA is endeavoring to bring together experts in the next few months to hone the issues and to improve our understanding of current practices.

4. WIPO's Potential Treaty on Database Protection

Under US copyright law, basic factual information is in the public domain and is not entitled to copyright protection. However, many databases – which consist of individual pieces of information that have been organized in one collection so that the data are easier to access – are protected because of the creative way that the information in them is selected, coordinated and arranged. Examples of common databases are stock prices and other financial data; realtors' multiple listing service; Lexis-Nexis (legal decisions); travel information, such as hotel directories; Web search engines; Humanities Index (abstracts of journal articles); and Medline (index of medical journal articles). Databases may also be protected from copying under other laws.

In 1996 the European Commission issued a Database Directive (Directive 96/9/EC) giving copyright protection to databases if they are sufficiently creative. This protection is known as the "sui generis" database right, i.e., a specific property right for databases that is unrelated to other forms of protection such as copyright. Libraries in the US were alarmed at the EC Directive and have thus far successfully opposed such legal protection in the US.

We have been closely following as the World Intellectual Property Organization (WIPO) has been considering a treaty on database protection for the past several years. Right now the possibility of a WIPO database protection treaty seems less threatening, in part because the EC's first-ever evaluation of the protection that EU law gives to databases concluded, in December 2005, that the economic impact of the "sui generis" right on database production is "unproven." Nevertheless, because the WIPO copyright committee continues to include database protection on its meeting agendas, we will continue to carefully monitor that committee's activity.

The Hague Convention on Choice of Court Agreements

The Convention is a multilateral agreement that creates rules for determining jurisdiction in international lawsuits and provides for recognizing and enforcing judgments by the courts of the Member States (including the US). The Hague Convention will make more readily enforceable "choice of court" provisions in contracts (including those governing copyrighted materials, such as software) and the resulting court judgments, in the event that the parties resort to the courts to settle a legal dispute. Libraries as well as many in the business community continue to be concerned about terms in non-negotiated contracts and licenses (including "shrink-wrap" and "click-on" contracts), which allow the licensor to designate in advance which court will hear the parties' disputes.

To address the concern that the Convention would make these terms more easily enforceable, some groups had pressed for an express provision that non-negotiated contracts, such as shrink-wrap and click-on agreements, would not to be covered by the convention. As concluded in a diplomatic conference on June 30, 2005, however, the convention contained no such express exclusion. Now Member Countries of The Hague Conference must ratify the convention. We are continuing to work with other interest groups and with the US State Department on ways to address our concerns.

World Trade Organization (WTO) and the General Agreement on Trade in Services (GATS)

The WTO administers a number of trade agreements including the GATS, a treaty that will remove barriers in competition in the services sector. The US Trade Representative (USTR) negotiates the American obligations and commitments under GATS; these include the sector of "recreational, cultural and sporting services" which covers libraries, archives, museums and other cultural services.

Since 2002 ALA has sought and received confirmation from the USTR that GATS obligations would not and should not apply to public library services. ALA requested the US Trade Representative and his negotiators to remain mindful of the needs of publicly

supported libraries and to protect and promote these interests as implementation and further negotiation of the GATS proceeded. We were assured that this would be done.

In 2005 ALA expressed grave concerns to USTR about the lack of communication from USTR about the status of the continuing GATS negotiations. At that time, USTR reiterated its position that "we have not in any way deviated from our longstanding policy of ensuring that trade agreements do not have any adverse effects on the supply of public services. We remain fully committed to preserving public support for public libraries, and to ensuring the efficient supply of all public services." USTR officials also stated USTR's renewed intention to consult with ALA on these and related issues of importance to libraries. However, in late July 2006 (for reasons unrelated to our issues) the GATS negotiations were suspended without an agreement about how and when to proceed. ALA will continue to monitor any developments.

Free Trade Agreements

For the past several years, US libraries weighed in on bilateral and multilateral Free Trade Agreements that the US is making with other countries and regions. Our written comments to the US Trade Representative (USTR) urge intellectual property protections that (1) will not impair libraries' ability to preserve works, share them with one another, and provide public access to them; (2) will allow libraries to keep pace with developments in information technology; and (3) will not interfere with Congress and the courts' ability to adjust copyright law to maintain the appropriate balance between the interests of the rights' holders and the public.

In February, we joined several representatives of Internet companies in meeting with the US Patent and Trademark Office, the US Copyright Office and the USTR to explain why it is important for the FTA templates to include references to fair use and to promote the introduction of flexible fair use laws by our trading partners. Such laws not only benefit libraries and educational institutions and their users, but also the providers of Internet services.

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