



WARREN'S Washington Internet Daily

Covering Legislative, Regulatory and Judicial News Affecting Internet Business. From the Publishers of **Communications Daily**.

TUESDAY, SEPTEMBER 14, 2004

VOL. 4, NO. 177

Today's News

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DATABASE PROTECTION remains on WIPO's agenda despite concerns from several quarters. (P. 2)

SAFETY CONCERNS take online prescription drug sales off the table this election year. (P. 3)

COPYRIGHT DRAFT bill has Copyright Office, fair-use advocates speaking past each other, while BSA sees progress. (P. 3)

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Consumer Groups Press WIPO to Shift Focus from IP Rights to Human Rights

GENEVA -- The World Intellectual Property Organization (WIPO) found itself on the defensive today as speakers at the Transatlantic Consumer Dialog (TACD) here debated its future. Faced with accusations that the organization -- which became part of the United Nations in 1974 -- has sided with intellectual property (IP) rights to the exclusion of human rights, several WIPO officials said they're listening to the increasing calls for a more balanced approach. And while some speakers agreed WIPO is making an effort to address their concerns, they said any changes so far amount to little.

WIPO's stated mission is to promote IP. But as a U.N. agency, its responsibility is to take appropriate action to promote intellectual creativity not IP, said Sisule Musungu, head of the Kenyan South Centre's program on international trade & development. WIPO doesn't appear to act according to its U.N. mandate, but according to its original mission to foster IP, he said.

The stated mission is both "right and good" but it has failed, said Stanford U. law prof. Lawrence Lessig. If IP promotion were a campaign and WIPO its campaign manager, he said, it would lose. IP is more contested and criticized today than at any time before, he said, because: (1) There's too much influence by IP "maximalists," special interests that push for IP term extensions, for instance, to the detriment of others' rights. (2) We're obsessed with the conception of IP as it was -- automatic and long-lived -- when technology has fundamentally changed the use of creative works. (3) Lawyers' characterization of IP as a "religion," not an economic issue. What's needed, he said, is substantial reform that would require every regulation to be tested under the principle of economic efficiency, he said. Properly balanced, IP promotes the public good, Lessig said. But, whether by WIPO's fault or not, IP doesn't do that, and is now considered a tool of the rich to impose their power on the poor.

WIPO's dossier is "dodgy," said John Sulston, founding dir. of the Wellcome Trust Sanger Institute (U.K.). Its mission statement mistakenly equates "works of the human spirit" with IP, he said. The past 25 years, the funding of discovery has been directly tied to its application, and WIPO has been required to follow the agenda of those who "perverted the course of scientific discovery." Instead, Sulston said, its mission should be as a democratic govt. balancing everyone's interests.

A European Commission (EC) official backed WIPO, saying its primary mission is as a lawmaking body in the field of copyright protection. There is “unfinished business” in WIPO’s digital agenda, including the issues of protection for broadcasters and the need for IP rights for sui generis databases, said Rogier Wezenbeek, of the Internal Market directorate-gen. Copyright & neighboring rights unit. Moreover, he said, there’s been no new copyright treaty since 1976. With a growing number of international organizations discussing copyright, it’s of “prime importance” that WIPO’s expertise remain in the lead, he said.

WIPO officials stressed they’re heeding calls for change. There’s “diversity and inclusiveness” in the activities within WIPO, said Anthony Taubman, head of the traditional knowledge div. Whatever one’s view of WIPO, he said, it’s engaged in a wider debate on IP than many believe. Taubman disputed critics who say WIPO isn’t listening, citing its 6-year effort to address issues surrounding protection of traditional knowledge. Despite activities that have created the foundation for a practical debate on the need to protect such knowledge, and its raising the political status of the issues, he said, WIPO has been accused on being too theoretical and academic and “all talk and no action.” That’s not the WIPO he knows, Taubman said.

And in a later panel on WIPO and the Information Society, Richard Owens, dir.-copyright, e-commerce, technology & management div., said much of what has been written about the TACD conference isn’t accurate. “We’re in complete receiver mode,” Owens said. Just because WIPO isn’t speaking out on issues doesn’t mean it’s not thinking about them, he said. WIPO is in the early stages of its new relationship with civil society -- consumer, human rights and other groups -- and its agenda is driven by the concerns of its member states, some of which are developing countries. “We’re open and we’re ready for change,” Owens said.

WIPO deserves an “A” for the spirit in which it worked with the TACD on this week’s conference, said James Love, Consumer Project on Technology Exec. Dir., at a news briefing. WIPO knows it has to “wean itself away” from merely protecting rights-owners, he said. To its credit, Love said, it deserves high marks for opening its doors to nongovernmental organizations, and for its willingness to engage in TACD’s issues.

But Brazil and Argentina recently threw down the gauntlet over WIPO’s mission, Love said. The countries have proposed that WIPO set a “development agenda” and has asked that member states consider it at their assemblies in 2 weeks. The big questions are whether the Secretariat will permit the proposal to be debated as a separate agenda item, and whether the U.S. and EU will oppose it, he said. “We’re in a fight about what this UN agency is all about,” Love said -- *Dugie Standeford*

‘Unfinished Business’

WIPO Urged to Give Up On Database Protection

GENEVA -- The World Intellectual Property Organization (WIPO) should rethink several items on its digital agenda, several panelists said Mon. at the Transatlantic Consumers Dialog (TACD) conference here on WIPO’s future. One is the European Union’s (EU) directive entitling nonoriginal databases to copyright protection are controversial in some quarters. That directive is making their way through WIPO’s Standing Committee on Copyright & Related Rights (SCCR), and one member of that group urged that such “unfinished business” be put to rest so WIPO can move on to other issues. Others want to see the idea disappear entirely.

At issue is whether nonoriginal databases should continue to receive copyright protection under a 1996 directive. The EC believes the item should remain on the committee’s agenda because such protection would spur availability of nonoriginal databases, Wezenbeek said. At the SCCR’s last meeting, in June, several countries urged the item be deleted, but Wezenbeek said more time is needed for discussion.

Rogier Wezenbeek, administrator-copyright & related rights in the EC’s Internal Market directorate-gen, was asked about studies indicating protection for nonoriginal databases would have no advantage over no protection. In the U.S., govt.-generated data are free, and there’s some evidence that system works better than the EU’s, an audience member said. WIPO has done 6 studies, not all supportive of the need for database protection, Wezenbeek said. The EC is now awaiting a decision in the European Court of Justice on a case concerning the U.K.’s interpretation of the EC’s database directive, he said. One element required under the directive for copyright protec-

tion for a nonoriginal database is that it involve “substantial investment,” he told us. But “substantial” has yet to be defined. The court is also expected to rule on whether such issues should be decided on the European level or left to member states’ courts, he said. The U.K.’s interpretation will be “authoritative,” he said. It’s the first consideration, at the EU level, of the sui generis database right.

The directive requires the EC to report on its effectiveness, a study that’s “a few years late,” Wezenbeek said. It will take into account all criticisms of the law as well as the court’s decision, he said. Developing countries don’t yet understand how databases can work as development tools for them, he said, but among those who represent the copyright side, there’s strong support for the directive in member states. -- *Dugie Standeford*

Frist Agrees

Bush Again Cites Safety in Opposing Online Drug Sales

Don’t expect any congressional action this fall on permitting prescription drug sales online, according to 2 GOP leaders. President Bush repeated Mon. his contention because of safety concerns other ways must be pursued to reduce the cost of prescription drugs. Bush was echoing a position stated by Senate Majority Leader Frist (R-Tenn.) last week.

“I’m interested in knowing whether or not we can make sure you’re safe,” Bush said at a “Focus on Health Care” event at the Muskegon, Mich., county airport. He said he doesn’t want drugs entering the U.S. that are supposedly from Canada but in fact manufactured elsewhere. That has been a concern of the FDA, which has testified on the Hill that drugs from countries other than Canada haven’t been as advertised (WID Aug 4 p1, July 16 p4).

“I suspect the consumers of this country, while it sounds good that these may be able to help us on price of drugs if they come in from Canada -- before I’ll allow that to happen, I’m going to make sure that you’re safe,” Bush said: “Because all you need to do is get a batch of drugs manufactured elsewhere that sounds like they’re legitimate, and get sick.” Sen. Kerry (D-Mass.) has criticized Bush for not backing Hill legislation to allow online drug purchases from Canada (WID Aug 12 p1).

Several bills addressing online prescription drug sales are pending in the Senate, including a reimportation bill that has cleared the House, and a bill by Senate Health Committee Chmn. Gregg (R-N.H.), S-2493 that would allow Canadian pharmacies to register with the FDA and state authorities to sell drugs lawfully in the U.S. (WID June 4 p1). Frist believes it’s “unlikely” that any of the bills will still be considered in the 108th Congress, his spokeswoman told us. Like Bush, Frist -- a medical doctor -- is concerned about the safety of imported drugs, she said, and doesn’t believe those concerns can be properly addressed in the short time remaining in this Congress.

“People ask me about prescription drugs a lot,” Bush said. Recently he was asked about it at a Wis. campaign event, and his answer suggested he was open to reimportation (WID Aug 20 p2); his spokesman later said Bush’s position hadn’t changed. Bush said Mon. it would help to get generics to the market quicker, “and we’ve got plans to do so,” he said. He didn’t say how that would be done, but made clear drug companies would be given time to recoup their R&D investment. He said consumers would “save \$35 billion over 10 years by speeding up the generic drugs to the marketplace -- what we’re doing.” “There’s a lot of stalling tactics sometimes in the [drug] industry,” he said, with companies extending patents to delay generic rollouts: “Well, we’re cutting through all that.” -- *Patrick Ross*

Contradictions Abound

Opinions Differ on Copyright Office Infringement Draft

The latest effort by the U.S. Copyright Office to broker a compromise over legislation targeting anyone who “induces” copyright infringement has failed to assuage fair-use advocates, while content owners remain quiet. The Copyright Office late Fri. circulated its latest draft proposal, a very short bill aimed at anyone whose business model profits from others infringing copyrights (WID Sept 13 p4). In a much lengthier explanatory memorandum, the office argues its latest draft resolves some criticisms of its previous draft. Established opponents of S-2560 by Senate Judiciary Committee Chmn. Hatch (R-Utah) and ranking Democrat Leahy (Vt.) remained opposed, while others, such as the Business Software Alliance (BSA), were taking a more cautious approach.

The new draft is “a good-faith effort to address” BSA’s concerns, the group’s Dir.-International Trade & Intellectual Property Jesse Feder told us. A former senior legal adviser at the Copyright Office, Feder said the office is moving S-2560 “in a positive direction.” BSA put out a statement endorsing S-2560 upon its introduction, but then Pres. Robert Holleyman testified that his members had concerns regarding liability and other issues (WID July 23 p1). Feder said BSA was comparing the latest draft to Holleyman’s testimony. He saw 3 causes of action in the draft: (1) Infringement. (2) Causation of infringement. (3) A business model profiting from infringement. The Copyright Office stated in its explanatory remarks that the last provision aimed to address the concerns of BSA and others by targeting intent, not technology. But Feder noted that the business model clause could lead to expensive discovery. Unlike some others, Feder didn’t directly contradict any of the arguments in the office’s explanatory remarks.

The draft “takes a wholly unprecedented approach to copyright infringement,” Computer & Communications Industry Assn. Pres. Ed Black said: “For the first time ever, someone who has no intent to facilitate infringement or has no control over the infringement can be liable for others’ infringement.” He wondered if he’d be guilty if 5% of users of his software were infringers, under the provision that one is “relying” on infringement to make a profit. But the Copyright Office, in its explanatory comments, said that the language as written -- “derives a predominant portion of its revenues from infringing public dissemination” -- means “more than 50% of revenues are derived from infringing public dissemination.”

The latest draft is “a radical departure from existing copyright law,” Public Knowledge Legal Dir. Mike Godwin said. He argued tech providers or distributors could be found guilty of infringement by users “regardless of the creator or distributor’s intentions.” However, the office explanatory remarks claim they’ve addressed this concern by providing an “objective test” to determine guilt. A company would have to (1) rely on infringement for commercial viability, (2) derive a majority of its revenue from infringement, or (3) rely on infringement capabilities to attract customers. That puts the focus on the company’s intent, not the nature of the technology, the office said. That view was rebutted by Godwin, who said “a technology creator or distributor is guilty merely for providing technology that turns out to be used by infringers -- regardless of the creator or distributor’s intentions.”

The latest draft “undermines the Betamax doctrine... while doing nothing to slow P2P companies based offshore,” Electronic Frontier Foundation attorney Fred von Lohmann said. He argued the office draft conflicts with the federal court ruling in the *Grokster* decision (WID Aug 20 p1), which found 2 P2P software companies not liable for infringement by its users; EFF was a party in that case. However, reversing that decision is a stated reason Hatch and Leahy introduced S-2560. The office explanatory text also claims that the draft’s “narrowed scope” addresses issues not covered in *Sony* -- namely dissemination rather than copying -- and that courts under the draft would still “accommodate noninfringing uses as much as practicable.” *Sony* “remains fully applicable to causes of action under the existing doctrines of secondary liability,” the Copyright Office said.

Many of the groups opposing the various office drafts opposed the original S-2560. Some have said there’s no need for legislation, but have participated in the debate once it was clear that Hatch and Leahy were moving forward anyway. In fact, CEA Pres. Gary Shapiro testified that the only legislation he could imagine drafting for the committee would be language reaffirming *Sony*. But last month CEA did introduce draft legislation, and that language has been backed by most fair-use advocates during the deliberations.

Both RIAA and MPAA said through spokesmen that they were reviewing the latest draft, and praised the Office for its continuing efforts to find a solution to copyright infringement. -- *Patrick Ross*

‘Might As Well Certify’

PayPal to Levy Fines for Gambling, Porn, Prescription Drugs

EBay’s payment company PayPal said it will start fining people up to \$500 for uses related to online gambling, pornography or other adult content and services, or buying or selling prescription drugs not certified by the National Assn. of Boards of Pharmacy (NABP). The new policy will take effect Sept. 24 and will be a first for PayPal: It hasn’t ever actively imposed fines for violations of its use policy.

The move is “another classic technique” to stifle safe and inexpensive drugs, said David McKay, Exec. Dir., Canadian International Pharmacy Assn. (CIPA), a group that safety-certifies merchants in Canada. PayPal probably was pres-

sured by the Administration, the FDA or pharmaceutical companies, McKay said, adding “there are other options available to us... for the most part we’re using them anyway.” McKay will be in Ill. at the end of the month making the case for certification of legitimate Canadian Internet pharmacies to the NABP, an organization that represents the state pharmacy boards of all the states, D.C., P.R., V.I., and 8 Canadian provinces --- though it doesn’t currently offer certification though VIPPS, its chief program, to Canadian companies. “Americans are going to order from us anyway,” McKay said, noting the fines will only push consumers down different paths, “so you might as well certify us.”

“Any online pharmacy with NABP certification can use PayPal,” said a company spokeswoman, saying she wasn’t sure whether groups such as CIPA would be subject to fines on eBay.

The Internet auction company has had problems corralling online gambling before; one industry source suggested this might have played a role in the decision to enforce fines. eBay came under investigation for violating the Patriot Act last year by providing service to online gambling sites (WID April 2 2003 p8), though eBay claims it stopped processing all gambling transactions when it bought PayPal. ISPs have been targeted by legislation that would punish them for supporting gambling, and a lawsuit has been brought in Cal. against several Internet search engines for facilitating gambling (WID Aug. 5 p5). That case, which is in discovery, will play a major role in determining how far up or down the content chain culpability lies in online gambling case. --- *Ian Martinez*

Balancing Interests

European Commission Launches Consultation on Hague Treaty

The European Commission (EC) late last week sought feedback on the latest version of a draft Hague Conference convention aimed at harmonizing jurisdictional issues in cross-border -- including e-commerce -- contract disputes. The proposed treaty on exclusive choice of court agreements is a winnowed-down incarnation of the former draft convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters. It covers choice of forum agreements in business-to-business (B2B) cases. The document is headed for adoption at a diplomatic conference in 2005.

The treaty has been under negotiation for more than a decade, and has sparked a great deal of controversy from various interests, particularly U.S. consumer and industry groups. Its recent reduction to a B2B choice of law agreement spurred progress but left several points of contention unresolved (WID March 4 p2), including: (1) Whether intellectual property (IP) rights other than copyright should be encompassed by the convention. (2) How enforceability of choice of forum should be handled when one party to a contract is a library or nongovernmental organization and the contract is shrinkwrap or clickwrap. (3) Whether a country’s courts should be allowed to deal with cases involving “incidental questions” related to trademarks of patents not issued by that country. Another question was how the European Community intends to apply the treaty and relate it to existing conventions.

The preliminary draft convention was unveiled by the Hague Conference on Private International Law last month, following a Special Commission in April. It continues to cover copyright and related rights such as rights of performers in their performances, and rights of producers of sounds recordings. It excludes “other intellectual property rights” except where a contract is involved (such as to enforce specific royalty rights). Thus, it doesn’t cover patent (industrial property) rights adjudications. In its consultation, the EC asked whether that exclusion is sufficient or too broad. It also wants to know whether the current provisions on copyright and related rights should stand, or whether the convention should take into account the position of individual creators as the weaker parties to contracts.

Another issue that has divided negotiators is when a court can decline to enforce a contract term specifying another court to hear a particular dispute. Recent drafts have contained an “escape clause” allowing courts to refuse enforcement where it would lead to a “very serious injustice” or be “manifestly contrary to fundamental principles of public policy” of the state of the court with jurisdiction. Consumer and library organizations have criticized the “very serious injustice” clause as favoring the “stronger” parties to shrinkwrap/clickwrap contracts.

The public policy article is “perhaps the most controversial” in the convention, the EC said. Most delegations agree on the need for a general public policy clause, it said, but as yet no text acceptable to all has been found. Several proposals are on the table, it said, and it called for input on which wording would best balance the various interests. Comments are due Nov. 15 -- jai.coop.jud.civil@cec.eu.int. -- *Dugie Standeford*

Govts. Friendly**Post-Enron Trends Keeping Utilities from Venturing into BPL**

The greatest challenge for broadband over power line (BPL) deployment is ambivalence by utilities, mostly investor-owned utilities, speakers said Mon. the annual conference of the United Power Line Council in Arlington, Va. Utility skittishness stems from a post-Enron environment prompting a return to the basics of electricity distribution, said Bill Graelis, pres. of Cinergy Broadband. But this nervousness to venture into new areas could be overcome if utilities realized 99% of their data network has been built out, he added.

The nascent BPL industry had widespread govt. support, Graelis said. The FCC and Chmn. Powell have shown strong support for the new technology, he said, and President Bush has endorsed the technology and the industry initiatives. Regulators like the competition BPL could provide and its potential for supporting electricity distribution, he added. Utilities should realize BPL ventures involved minimal risk because with the basic network in place it requires a small amount of capital. It will be utility management applications that move utilities to embrace the technology, with other services being add-ons, he said: "We are now deploying the technology in a conservative fashion."

Graelis warned that BPL providers were bound to face "competitive reaction" from cable and DSL, and therefore need to offer comparable or better bandwidth and better products. With DSL likely to "suffer" the most from BPL deployment, he said, "they will probably push us initially with price competition." Established market demand and the absence of regulatory impediments mean BPL should fill the role of the 3rd provider, he added.

Later, on a panel on BPL commercial case studies, executives said pricing was a major way to convert DSL and cable customers. Greg Wolf, vp of Cinergy Ventures, which has deployed commercially in Cincinnati, said his company has converted dial-up customers, DSL and cable users, and Internet newcomers. Cinergy has passed 15,000 homes with a 15% penetration rate, he said, and the company plans to deploy across Cinergy Corp.'s service territory in Ohio, Ind. and Ky. next year. The company also formed Access Broadband to market the service to municipal utilities and cooperatives. In Cincinnati, the company's offering 3 tiers of service: \$29.95 for 1 Mbps, \$34.95 for 2 Mbps and \$39.95 for 3 Mbps. Customers get the first modem free, with a \$39.95 charge for each additional modem. Wolf declined to provide subscriber numbers. The company has a "supportive relationship" with Ohio regulators -- arising partly from consumer interest in and media coverage of the technology, he added. At \$26.95-\$28.95, BPL is provided by the city of Manassas, Va., at rates lower than other broadband providers, said John Hewa, asst. dir.-electric utilities. The city has a hybrid network of fiber and BPL. Ham radio operators have made no interference complaints, said Wolf and Hewa. -- *Dinesh Kumar*

Agencies

The U.S. Patent & Trademark Office (USPTO) said Mon. that Mark Cohen, a lawyer for USPTO's office of enforcement, was appointed intellectual property attaché to the U.S. Embassy in Beijing. Cohen will work with govt. officials to "improve Chinese intellectual property laws, regulations and enforcement procedures," according to a USPTO release. This is the first time the USPTO has placed an official overseas to improve intellectual property protection in a specific country. Cohen's 2-year assignment will begin this week.

Courts

A former network administrator for consulting firm Cyber City pleaded guilty to felony computer intrusion charges stemming from his 2003 attack on the firm after he discovered he would be fired. According to the charges against him, Neal Cotton used the passwords and user codes he had obtained to erase data and render clients' computer networks useless. Cotton faces up to 10 years in prison and a \$250,000 fine.

International

The Electronic Frontier Foundation asked the U.K. govt. to support BBC's request to build "Creative Archive," which would make the entire BBC archive available online. The broadcaster's archive of material goes back to the earliest days of radio and TV. British citizens, who paid for the material through a TV tax, can distribute and reuse the material.

Industry Notes

CompTel/Ascent and the International Packet Communications Consortium (IPCC) said they signed an MOU, under which they'll "work together to accelerate the adoption of [VoIP] and packet communications technologies and services." They said they planned to develop a joint advisory group to foster the development of guidelines and solutions on deployment of VoIP and packet-based networks and services. Under the agreement, IPCC will also participate in CompTel's spring and fall conventions and other VoIP educational conferences, and members of CompTel and IPCC will be eligible for first-year membership discounts in the other organization. CompTel CEO Russell Frisby said with VoIP becoming "an ever-more important vehicle for entry in the competitive telecom market," CompTel wanted to "give [its] members opportunities to learn about the technology and how it can be used to deliver quality, innovative services to consumers and businesses alike, but also to be an active participant in defining this evolutionary change."

Applied Materials CEO Mike Splinter was made a member of the Computer Systems Policy Project (CSPP), an advocacy group made up of IT industry CEOs. Applied Material is a major supplier of product and services to the semiconductor industry, and it enters CSPP to involve itself with the organization's legislative efforts.

Internet People

John Kennedy, ex-Universal Music, replaces Jay Berman as chmn.-CEO of IFPI, effective Jan. 1... Former Irish Prime Minister John Bruton moves to D.C. as head of the European Union delegation to the U.S... Mary Arnold, ex-AT&T, to head SAP America congressional affairs office... Timothy Kurth, ex-telecom aide to House Speaker Hastert (R-Ill.), joins Lundquist Group as vp... Richard Van Hoesen, ex-XACCT Technologies, becomes NetIQ CFO... Willie Black resigns as chmn. of U.K. domain registry Nominet... Hans Peter Brondmo of the Anti-Spam Technology Group joins Goodmail Systems board of advisors... Promotions at Agency.com: Tom Lanzetta to COO and Julie Roth to pres. of Web Development Group.



(ISSN 1530-0501)

PUBLISHED BY WARREN COMMUNICATIONS NEWS, INC.

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This Newsletter is available electronically via Nexis and Dow Jones Interactive, and also may be received via e-mail.

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