

Steadman, Velica

From: Lucas, Jennifer
Sent: Monday, September 17, 2001 11:01 AM
To: Steadman, Velica
Subject: FW: Written testimony

more Hague comments

-----Original Message-----

From: rms@gnu.org [<mailto:rms@gnu.org>]
Sent: Sunday, September 16, 2001 11:16 PM
To: jennifer.lucas@uspto.gov; Kovarj@ms.state.gov
Cc: Hague-jur-commercial-law@venice.essential.org
Subject: Written testimony

Since the hearing was cancelled, I would like to submit this written testimony instead.

The danger of the Hague Treaty

by Richard Stallman, September 2001

Different countries have widely varying laws about what kinds of publication are allowed. Some countries allow patents to restrict publication; some have extended copyright law to restricting discussion of certain topics; some restrict the use of traditional knowledge or folklore. The proposed Hague treaty threatens to subject the authors of software and writings to all kinds of harmful laws from around the world. Even the censorship laws of various countries could have globalized effect.

The Hague treaty is not actually about patents, or about copyrights, or about censorship, but it affects all of them. It is a treaty about jurisdiction, and how one country should treat the court decisions of another country. The basic idea is reasonable enough: if you are French and someone hits your car in France, or breaks a contract with your French company, you can sue him in France, then bring the judgment to a court in whichever country he lives in (or has assets in) for enforcement.

The treaty becomes a problem when it is extended to distribution of information—because information now travels normally and predictably to all countries. (The Internet is one way, but not the only way.) The consequence is that you could be sued about the information you distributed under the laws of any Hague country, and the judgment would probably be enforced by your country.

For instance, if you release a software package (either free or not) in Germany, and people use it in the US, you could be sued for infringing an absurd US software patent. That part does not depend on Hague—it could happen now. But right now you could ignore the US judgment, safe in Germany, and the patent holder knows this. Under the Hague treaty, any German court would be required to enforce the US judgment against you. In effect, the software patents of any signatory country would apply to all signatory countries. It isn't enough to keep software patents out of Europe, if US or Japanese or Egyptian software patents can reach you there.

But patent law is not the only area of law that could wreak havoc if globalized by the Hague treaty. Suppose you publish a statement criticizing a public figure. If copies are read in England, that public figure could sue you under the strict UK libel law. The laws of your country may support the right to criticize a public figure, but with the Hague treaty, they won't necessarily protect you any more.

Or suppose you publish a statement comparing your prices with your competitors' prices. If this is read in Germany, where comparative advertising is illegal, you could be sued in Germany and the judgment brought back to you wherever you are.

Or suppose you have political views that a certain government prohibits. You could be sued in that country, and the judgment against you there would be enforced wherever you live.

Not long ago, Yahoo was sued in France for having links to US sites that auctioned Nazi memorabilia, which is lawful in the US. After a French court required Yahoo France to block such links, Yahoo went to court in the US, asking for a ruling that the French judgment cannot be applied to the parent company in the US.

It may come as a surprise to learn that exiled Chinese dissidents joined the case in support of Yahoo. But they knew what they were doing—their democracy movement depends on the outcome.

You see, Nazism is not the only political view whose expression is prohibited in certain places. Criticism of the Chinese government is also prohibited—in China. If a French court ruling against Nazi statements is enforceable in the US, or in your country, maybe a Chinese court ruling against anti-Chinese-government statements will be enforceable there too. (This might be why China has joined the Hague treaty negotiations.) The Chinese government can easily adapt its censorship law so that the Hague treaty would apply to it; all it has to do is give private individuals (and government agencies) the right to sue dissident publications.

China is not the only country to ban criticism of the government; as of this writing, the government of Victoria (Australia) is suing to suppress a book called *Victoria Police Corruption* on the grounds that it “scandalizes the courts”. This book is available on the Internet outside Australia. Australia is a Hague treaty participant; if the treaty applies to such cases, an Australian court judgment against the book could be used to suppress it elsewhere.

Meanwhile, works that criticize Islam have faced increasing censorship in Egypt, a Hague treaty participant; this too could be globalized by the Hague treaty.

Americans may turn to the First Amendment to protect them from foreign judgments against their speech. The draft treaty permits a court to ignore a foreign judgment that is “manifestly incompatible with public policy”. That is a stringent criterion, so you cannot count on it to protect you just because your conduct is legal where you are. Just what it does cover is up to the particular judge. It is unlikely to help you against broad foreign interpretations of copyright, trademarks or software patents, but US courts might use it to reject outright censorship judgments.

However, even that won't help you if you publish on the Internet, because your ISP either has assets in other countries or communicates to the world through larger ISPs that have them. A censorship judgment against your site, or any other kind, could be enforced against your ISP, or your ISP's ISP, in any other country where it has assets—and where there is no Bill of Rights, and freedom of speech does not enjoy the same exalted status as in the US. In response, the ISP will shut off your site. The Hague treaty would globalize pretexts for lawsuits, but not the protections for civil liberties, so any local protection could be bypassed.

Does suing your ISP seem far-fetched? It already happens. When the multinational company Danone announced plans to close factories in France, Olivier Malnuit opened a site “jeboycottedanone.com” to criticize this (the name is French for “I boycott Danone”). Danone sued not only him but his site hosting company and domain name registrar for “counterfeiting of goods”—and in April 2001 received a ruling prohibiting Malnuit from mentioning the name “Danone” either in the domain name or in the text of the site. Even more telling, the registrar removed the domain in fear before the court made a ruling.

The natural response for French dissidents is to publish their criticism of Danone outside France, just as Chinese dissidents publish their criticism of China outside China. But the Hague treaty would enable Danone to attack them everywhere. Perhaps even this article would be suppressed through its ISP or its ISP's ISP.

The potential effects of the treaty are not limited to laws that exist today. When 50 countries know that their court judgments could be enforced throughout North America, Europe and Asia, they would have plenty of temptation to pass laws just for that purpose.

Suppose, for example, that Microsoft would like to be able to impose copyright on languages and network protocols. They could approach a small, poor country and offer to spend 50 million dollars a year there for 20 years, if only that country will pass a law saying that implementing a Microsoft language or protocol constitutes copyright infringement. They can surely find some country which would take the offer. Then if you implement a compatible program, Microsoft could sue you in that country, and win. When the judge rules in their favor and bans distribution of your program, the courts in your country will enforce the judgment on you, obeying the Hague treaty.

Does this seem implausible? In 2000, Cisco pressured Liechtenstein, a small European country, to legalize software patents. And IBM's chief lobbyist threatened many European governments with a termination of investment if they did not support software patents. Meanwhile, the US trade representative pressured Jordan to allow [patents on mathematics](http://www.usjoft.com/usjoft/memopro/memopro.html).

A meeting of consumer organizations (<http://www.tacd.org>) recommended in May 2001 that patents, copyrights and trademarks (often lumped together as "intellectual property", but this term is best avoided since it encourages overgeneralization) should be excluded from the scope of the Hague treaty, since these laws vary considerably between countries.

That is a good recommendation, but it only solves part of the problem. Patents and bizarre extensions of copyright are just two of many excuses used for suppression of publication in certain countries. To solve the problem thoroughly, all cases about the legality of distributing or transmitting particular information should be excluded from globalization under the treaty, and only the country where the distributor or transmitter operates should have jurisdiction.

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