



COMPETING FOR PROTECTION

What is the status of international copyright reform in the digital age?
TED SHAPIRO contrasts efforts at the World Intellectual Property Organisation
 with ongoing reform in the EU as part of the digital single market initiative

In 1996, the international community under the auspices of the World Intellectual Property Organisation (WIPO) agreed two ground-breaking treaties for the digital age – the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (WPPT) – sometimes referred to collectively as the WIPO internet treaties. These two instruments introduced some very important concepts into the realm of international copyright law, including in particular the exclusive right of ‘making available’ (i.e. the on-demand right), and technological protection measures (TPMs – such as encryption of content).

The negotiations leading to the adoption of these instruments involved a wide range of stakeholders including rightsholders from across the content spectrum, internet service providers (ISPs), civil society groups, libraries and other user groups. Some argue that the interests of developed countries and copyright owners dominated the debate. However, the role played by ISPs and other groups was crucial to the final outcome.

Yet, while many interests opposed to advancing the protection of copyright law at the international

level were present in Geneva in 1996, the current situation at WIPO is quite different. At present, civil society groups, certain powerful developing countries and major international internet companies have more or less halted the advance of international copyright while many developed countries and rightsholder groups oppose the weakening of current norms.

NATIONAL ACTION AND PUSHBACK

Following the agreement on these international treaties in 1996, the action moved to national ratification and implementation. This sparked a new round of debate, particularly in intermediary liability and interplay between TPMs and copyright exceptions. As national legislators moved to incorporate the WIPO treaties into domestic law, ISPs, anti-copyright groups and academics began to argue that things had gone too far.

ISPs feared they would incur crippling liability for copyright infringement on their networks, which would break the internet, chill free speech and threaten democracy itself. They forcefully argued that they should be given liability privileges or

← safe harbours. These privileges were introduced in the US Digital Millennium Copyright Act (DMCA, copyright only) in 1998 and in the EU e-commerce directive in 2000.

Rightsholders argue that these privileges have enriched internet platforms at their expense. Academics and many user groups focused on the TPMs, which they saw as breaking the copyright bargain (exclusive rights in exchange for exceptions). These groups argued that rightsholders would deploy technology to ‘electrify the fences’ and thereby eliminate copyright exceptions. As a result, the US DMCA includes a triennial rule-making procedure run by the US Copyright Office, and the EU’s copyright directive introduced a complex intervention mechanism for EU member states, both of which are intended to conciliate TPMs and exceptions. Both mechanisms have their critics.

For over a decade (and the process is still ongoing in some countries), rightsholders and other stakeholders have fought over implementation of these treaties and sometimes additional measures sought by rightsholders to fight online infringement, and in certain cases over attempts to weaken copyright. In many cases, the battles came after initial implementation of the WIPO treaties.

For rightsholders, including in particular the content industries, the WIPO internet treaties provide the vital building blocks for their new business models in the digital environment. Content is licensed for distribution on the basis of the exclusive right of making available (on-demand) and other exclusive rights. The usage rules set by these licences are enforced and managed by TPMs (each content sector uses digital rights management, DRM, to varying degrees – even the music industry still uses it). Thus, exclusive rights and TPMs are the primary drivers of content financing, production and dissemination (along with contractual freedom and territorial exclusivity, of course).

To combat unauthorised use of their content online, rightsholders have deployed a wide range of strategies, some of them controversial:

- Direct action against structurally infringing websites (which is difficult as these sites tend to operate anonymously and offshore)
- Action against end-users (suing one’s former customers)
- So-called graduated responses (where recidivism gives rise to some form of a penalty)
- Legal actions against intermediaries (quite effective according to many studies but this is disputed by ISPs, which tend to revile measures such as site-blocking or de-indexing)
- Education and awareness programmes.

The situation has varied greatly from country to country (even within the EU). However, the battles over legislation underpinning certain of these strategies have generally been quite bloody. At the end of the day, most stakeholders agree that the number one way to fight copyright infringement is through the creation of attractive legal alternatives. For rightsholders, however, enforcement remains an important tool for protecting those legal alternatives from unfair competition.

THE DEVELOPMENT AGENDA

In recent years, WIPO did manage to adopt a further copyright treaty, the Beijing Treaty on Audiovisual Performances, in 2012. This treaty, which was largely agreed in 2000 but then languished for years due to a disagreement over a highly technical point relating to consolidation of rights in producers, is very similar to 1996 WPPT (with some particularities related to the audiovisual sector). However, it does bear the imprint of a changed WIPO – one where the advancement of intellectual property has largely been subordinated to a development agenda.

Many of the proponents of this agenda question the maxim that intellectual property is a driver of development. Developing countries want access to the intellectual property of developed countries and feel jilted by empty promises of technology transfer



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in the context of the World Trade Organization (WTO) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which the WTO says is so far “the most comprehensive multilateral agreement on intellectual property” and which also binds some aspects of the Berne Convention to countries that are not signatories to the convention.

Major internet companies see copyright as an impediment to their business models, which are largely about selling advertising, attracting users with free content and generating network traffic. Developing countries and stakeholders in this camp argue that development should be achieved by weakening copyright through creating mandatory copyright exceptions at the international level.

ROAD TO AND FROM MARRAKESH

A first example of this approach was the adoption of the Marrakesh treaty for the visually impaired in 2013, which established a mandatory exception for the visually impaired. While it is hoped that the treaty, which turned out to be relatively balanced, will provide real benefits for the visually impaired, the issue of the availability of accessible formats also faces economic challenges that cannot be solved by copyright. This basically represents the first time that an international treaty has established an exception which contracting parties must incorporate into their national laws.

The usual approach is that countries can implement whatever exceptions they want subject to the so-called Berne three-step test which establishes limits on the scope of permissible exceptions. This approach has proven effective since it avoids the difficulties in having to achieve consensus on the contentious issues surrounding exceptions, and provides countries with a great of flexibility. Yet, in the context of Marrakesh and ongoing debates on whether there should be further instruments, proponents seek to weaken the three-step test and argue for mandatory exceptions and limitations.

Often, the proponents of this approach also do so for domestic political reasons – they need an international obligation to get change at home.

This is in sharp contrast to the approach of many developed countries, which rarely agree to international instruments that actually require them to do anything. Their goal in making international copyright treaties tends to be about securing protection elsewhere – it usually exists at home already. The proposed broadcaster treaty (Protection of Broadcasting Organizations) is a prime example.

At present, however, it is not clear whether there is sufficient political will to achieve the necessary consensus to create further norms affecting the international copyright system.

While many developing countries would like to see further treaties on exceptions, the EU and others would prefer to see a treaty for broadcasters (though some developing countries want both). This has led to a bit of stalemate. WIPO is reportedly keen to move the broadcaster treaty forward. However, there are significant impediments and risks. It is not clear that the new US administration will favour any new international treaties on anything. Of course, the international community has adopted international copyright norms without the US in the past.

‘SECOND GENERATION’ AND THE EU

In the EU, we are in the midst of a second generation of copyright legislation – some call it copyright reform – others say it is anything but. As a reminder, the EU implemented the 1996 WIPO treaties with its 2001 copyright (‘in the information society’) directive, which was transposed into the national laws of member states (a process that ran until 2006). Although further legislation (enforcement, term extension for music, orphan works and collective management) has also been adopted in the ensuing period, the copyright directive remains the centrepiece of EU copyright legislation.

While certain aspects of the debate in Europe will resound in many other places around the world, including the US, there is a particular point that is specific to the EU. Proposed EU copyright legislation must be seen in the context of the internal market and indeed, the ongoing digital single market initiative. Thus, proposals to reform EU copyright law are also about breaking down perceived barriers to the circulation of copyright works across the borders of EU member states. This is particularly an issue for the international principle of the territoriality of copyright. It has implications for the exercise of exclusive rights, which are protected under international norms, and reach of the exceptions and other limitations on such exercise.

I will start with some background and the broader political context. In July 2014, the incoming president of European Commission, Jean-Claude Juncker, explained one of his priorities as follows:

“I believe that we must make much better use of the great opportunities offered by digital technologies, which know no borders. To do so, we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law.”

WIPO BRIEFS ON BROADCASTING PROTECTION

As WIPO says, international rules to protect television broadcasts from piracy have not been updated since the 1961 Rome treaty, drafted at a time when cable was in its infancy and the internet not invented. Signal piracy can take physical form, such as unauthorised recordings of broadcasts on video tapes, DVDs or USB sticks, or it can be virtual, such as the unauthorised redistribution of signals over the air or online.

Although there is broad agreement in principle that broadcasters should have updated international protection from theft of their signals, WIPO members have so far failed to agree on how this should be done and what further rights, if any, broadcasters should be given. Outstanding issues are:

What should be protected? Broadcasters obviously want protection for all means of transmission of their signals. But some countries and civil society groups are wary of restrictions affecting internet transmissions.

How should broadcast signals be protected? Broadcasters want to outlaw the breaking of anti-piracy locks on digital signals but critics argue that rules could also block perfectly legal uses of TV broadcasts, such as recording programmes for personal or educational uses.

What further rights should be given to broadcasters? In much of the world it is perfectly legal to retransmit a broadcast over the internet without permission.

See www.wipo.int/pressroom/en/briefs/broadcasting.html

Following this ambitious statement, the Commission published its strategy for a digital single market (DSM) on 6 May 2015 in which it defined the DSM as follows:

“A digital single market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.”



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- The DSM, which according to a press release would be worth €415 billion to the economy, is based on three pillars:
- 1** Better access for consumers and businesses to online goods and services across Europe
 - 2** Creating the right conditions for digital networks and services to flourish
 - 3** Maximising the growth potential of the European digital economy.

Copyright resides in the first pillar along with related issues and the not so related matter of cross-border parcel delivery. To achieve a modern, more European copyright framework, the Commission promised:

“The Commission will make legislative proposals before the end of 2015 to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU, including through further harmonisation measures.”

◀ On 9 December 2015, a first action plan for modernising European copyright was released together with a proposed regulation on cross-border portability.

The portability regulation, which is more or less agreed, will usher in EU portability, including for current contracts, by early 2018. In short, the regulation is aimed at enabling subscribers to online content services, such as Netflix and Sky Go, to access their services when temporarily present in another country within the EU. It seeks to achieve this by imposing on online content services a requirement to enable subscribers who are temporarily present in another EU member state than that of their residence to access the service.

To deal with the territorial nature of copyright and the licensing of content on this basis, the regulation creates a 'legal fiction' which localises all relevant copyright acts in the provision and use of an online content service in the subscriber's member state of residence when the subscriber accesses the service from another member state. To ensure that rightsholders and online content service providers do not contract around the portability obligation, the instrument establishes a broad ban on contractual overrides.

Any contractual provisions, which are contrary to the regulation, including those which prohibit cross-border portability or limit portability to a specific time period, are unenforceable. However, the limitations on contractual freedom in the regulation do not stop there. The process for determining a subscriber's member state of residence is strictly regulated through a closed list of verification means, and online content services may not impose additional charges for EU portability.

The portability regulation will represent the first major piece of copyright legislation adopted under the auspices of the digital single market initiative. As a regulation, which is a first for EU copyright, it

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represents a very powerful legislative tool that is directly applicable in the member states without the need for national implementation.

LOBBYING THE COMMISSION

In the run up to the second wave of copyright legislation, various stakeholder groups pressed their cases. The European film industry had become increasingly concerned about the Commission's war on territoriality. In the DSM strategy, the Commission had pledged to respect the value of rights in the audiovisual sector. In brief, the audiovisual sector worries that its funding model, which is based on the pre-sale of rights by territory, is at risk. Moreover, the Commission's competition directorate (DG Competition) has an ongoing investigation into the licensing practices of the Hollywood studios in the pay TV sector.

While the audiovisual sector urged the Commission, the member states and anyone else who would listen, to just leave them alone, the music industry lobbied for action on the 'value gap' – it wanted the Commission to intervene to provide them with more leverage in their negotiations with platforms like YouTube, which invoke the liability privilege in Article 14 of the e-commerce directive (hosting exemption). For publishers, on 12 November 2015, the Court of Justice of the EU (CJEU) in its *Reprobel* decision had struck down their entitlements to shares of private copy and reprography levies. The publishers were already worried about new exceptions, particularly text and data mining, as well as the value gap and the power of certain online platforms.

However, the CJEU decisions in *Reprobel* and *Svensson* (which limited the extent to which linking could be considered to implicate the exclusive right of communication to the public) made their situation even more precarious. National initiatives in Germany and Spain had fallen short. While their critics say they need new business models, some publishers might consider the value gap to be a luxury problem. Authors and performers, while grooving to the music sector's value gap, had their own more personal value gap; they wanted the Commission to propose a statutory remuneration right for 'making available' which would be subject to mandatory collective rights management. And that is just a brief look at rightsholder groups.

Other stakeholders, including anti-copyright groups, libraries, consumer organisations, researchers and other users, had been encouraged by the Commission's early statements and the adoption of the so-called Reda report on 24 June 2015 by the European Parliament. These groups were looking to the Commission to scrap the territoriality of copyright within the EU, introduce lots of new exceptions and make the existing ones mandatory while weakening contractual freedom and the legal protection of technological measures. The report, which was a non-binding resolution, was meant to examine the implementation of the copyright directive.

WHAT THE EUROPEAN COMMISSION SAYS ABOUT COPYRIGHT REFORM

The reform is predicated on:

- Better choice and access to content online and across borders. About 75% of young people access content online and one in five have tried to access services in another member state.
 - Improved copyright rules for education, research, cultural heritage and inclusion of disabled people. Almost a quarter of teachers face copyright-related restrictions in their digital teaching activities and researchers encounter difficulties in carrying out text and data mining. There is a huge amount of archival print and audio waiting to be digitised, and "the 26 million blind and visually impaired people in Europe should not be limited in their access to culture just because the formats they need are not readily available".
 - A fairer online environment for creators and the press. The proposed rules "reinforce the position of rightsholders to negotiate remuneration for their creative content" and it will be the first time that press publishers are legally recognised as rightsholders.
- See ec.europa.eu/digital-single-market/en/copyright*



However, the initial draft, penned by Julia Reda, Pirate Party member of the European Parliament, was less about implementation and much more about ‘fixing’ what she did not like about EU copyright. In the end Reda had to compromise to secure adoption of her report, which was adopted with a broad majority. The end result, however, is a typical Christmas tree legislative instrument; everyone will find something for themselves under it. While such reports can sometimes send important political messages, this one was so riven within internal inconsistencies that it is hard to derive too much substance from it.

THE NEW PACKAGE ARRIVES

Finally, on 14 September 2016, the Commission presented its much-awaited second package addressing copyright in the digital single market. During the summer, texts of the draft proposals were leaked; some further changes were made before the Commission formally approved these drafts and sent them to the European Parliament and the Council (the member states). The legislative proposals are four:

- The proposed regulation
- A proposed directive on copyright in the digital single market
- A proposed directive on visually impaired persons
- A proposed regulation on visually impaired persons.

The last two are part of the EU’s implementation of the Marrakesh Treaty.

Jean-Claude Juncker promised to tear down national copyright silos and it is clear that these proposed instruments, depending on their final form, will have a profound impact on EU copyright law. They include a proposed extension of the country of origin doctrine to broadcasters’ ancillary online services, and mandatory collective rights management for a broader range of cross-border retransmissions – not to mention the cross-border effect of an out-of-commerce mechanism and new exceptions – and so the territoriality of copyright in the EU could take a major hit.

The proposals include three new mandatory, cross-border exceptions for:

- Text and data mining
- Teaching both on the premises of an education

A century of the Berne Convention came and went back in the 1980s

establishment and via a secure electronic network for non-commercial purposes

● The preservation of cultural heritage – but nothing on the so-called freedom of panorama (although note there is already an optional exception in the copyright directive) or private copying.

For the value gap, the Commission has proposed a new tool with which rightsholders should be able to require platforms that store and provide access to large amounts of works uploaded by their users to take measures to ensure the functioning of their agreements or to prevent the availability of their services or works identified by rightsholders (and all that without touching Article 3 of the copyright directive or Articles 14 and 15 of the e-commerce directive). The proposal also confirms that press publishers should obtain the right to authorise online uses, i.e. reproduction and making available, of their content which will last for 20 years. Scientific and other publishers are excluded but a further provision will enable member states to permit all publishers to share in the proceeds of private copy and reprography levies.

Finally, the proposals would impose transparency obligations on producers and publishers vis-à-vis authors and performers who will also benefit from a so-called bestseller clause (allowing them to seek additional remuneration in the event the originally agreed remuneration turns out to be disproportionately low compared with the financial success of the particular work).

This is not exactly the package that many anti-copyright groups and user groups were contemplating – certain items fell by the wayside while others emerged. The proposals have elicited a barrage of criticism aimed at the measures to bridge the value gap and invest press publishers with a related right (which is something that producers and broadcasters already have under EU law).

The legislative battle has begun. The European Council of member states has begun its consideration of the proposals and in parallel a number of draft reports from the competent committees have been released in the European Parliament. The proposed amendments are starting to flow. The process will likely last through to the end of this Commission/Parliament in 2019 – some say longer. The end product is hard to predict but it will look different from the original proposals.

Meanwhile, back in Geneva, where does this leave WIPO? Any movement on exceptions seems extremely unlikely. The EU will not support new international norms while it is getting its own house in order. The EU may, however, be more supportive of movement on the broadcaster front but of course that depends on the approach. And as noted, the US is unlikely to be pushing for new treaties.

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