

Development in the Information Age: The Importance of Copyright

Ruth L. Okediji

The commercialisation of information communication technologies has been widely recognised as an important tool for economic growth. Not surprisingly, the associated benefits of information technology have been under-realised in most developing countries and LDCs. The persistent ‘digital divide’ reflects disproportionate access to the most fundamental tools of this new economy, which includes digital content. Two copyright treaties, negotiated shortly after the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), establish minimum terms of a global framework for access and use of creative work in the digital environment.

The Internet Treaties

The World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, together commonly referred to as the WIPO “Internet Treaties,” entered into force in 2002. The first of these extends copyright protection to authors of literary and artistic works;¹ computer programmes and;² to compilations of data.³ It specifically provides for a right of distribution, right of rental and right of communication to the public,⁴ as well as other Berne Convention rights incorporated by reference.

In addition to these traditional copyright rights, the WIPO Copyright Treaty (WCT) introduced ancillary principles to the international copyright system. Article 11 obligates members to provide protection against the circumvention of “effective technological measures” used by authors in connection with the exercise of their rights under the Berne Convention or the WCT. This provision requires members to sanction efforts to circumvent technological protections used by owners to control access or use of protected works. For example, encryption of protected digital content or password protections of such content each constitutes “effective technological measures.” Providing a user with directions to decrypt the content, or software that allows a user to bypass the password screen are examples of acts of circumvention prohibited under Article 11.

Article 12 further requires remedies against persons who tamper with rights management information (RMI) knowing or having reason to know that such tampering will induce, enable or facilitate copyright infringement. RMI is defined by the Treaty as information which identifies the work, including the author, the owner of a particular right in the work, or information concerning terms of use of the work.⁵ Such information is generally intended to facilitate identification of owners and payment/permission to use the work. In the digital environment RMI is an important tool for owners to monitor, control and enforce copyright interests. From an author’s perspective, RMI is particularly beneficial in countries where domestic laws permit use under a compulsory license regime, or recognise certain defences for users, when owners are difficult to locate.

The WIPO Performances and Phonograms Treaty (WPPT) deals with performers and producers of phonograms. Performers⁶ are accorded moral rights for live aural performances or performances fixed in phonograms; the right to authorise broadcasting and public communication of unfixed performances and to fix their unfixed performances; the right to authorise reproduction of their fixed performances; the right to authorise distribution to the public of their fixed performances; the right to authorise the commercial rental to the public of original and copies of their performances; the right to authorise making available to the public their performances fixed in phonograms by wire or wireless means. Producers⁷ of phonograms enjoy the exclusive right of authorising reproductions of their phonograms; the right of authorising distribution to the public of their phonograms; the right of commercial rental to the public of their phonograms; and the exclusive right to make phonograms available to the public by wire or wireless means. Both performers and producers of phonograms enjoy a right to remuneration for commercial broadcasting or any communication to the public.⁸ The WPPT contains the same member obligations as the WCT with respect to circumvention of technological measures and protection of RMI.⁹

The Internet Treaties and Development Policy

The WIPO Internet treaties essentially extend and upgrade the Berne Convention for the information age. The “para-copyright” provisions – the anti-circumvention and RMI clauses – have proven the most controversial, particularly as they apply to the opportunities for public access to digital works. Specifically, under the implementation model of the Digital Millennium Copyright Act (DMCA)¹⁰ adopted by the United States, traditional access mechanisms such as fair use or fair dealing exceptions have been constrained. Rather than facilitate prospects for diffusion and access to works, the copyright regime has been co-opted to consolidate social gains associated with new technologies and to transform these gains into economic opportunities for owners.

The important balance between access to copyrighted works and protection for authors is vital for developing countries and LDCs. Despite provisions for limitations and exceptions to the rights granted to authors/owners of protected works, the WIPO treaties represent minimum standards from which countries can deviate only by providing greater rights than required as the United States has done under the DMCA. The maximalist approach to interpreting the available scope of permissible limitations and exceptions is reinforced by the similarities between TRIPS Article 13, and Articles 10 and 16 of the WCT and WPPT. The similarities suggest that it is not improbable that interpretations of the Internet treaties can be influenced by the ideology of the TRIPS Agreement. Consequently, public welfare interests will require explicit limitations and exceptions that at a minimum facilitate access and use of digital works for study, research, and educational purposes.

Continued on page 16

It is ironic, however, that the majority of countries that have ratified the Internet treaties are developing countries. Political pressure through bilateral trade agreements and other foreign relations priorities may account for this anomaly. Ironically, however, most of these countries have extremely low Internet access or penetration rates; thus widespread infringement of digital content is not a viable prospect in the immediate future.

Consequently, membership of the Treaties in the absence of the technological infrastructure to access and use – much less infringe – digital works simply transforms these countries into subsidisers of the global copyright system. These countries are providing protection for works to which they have little or no opportunity of access, at least in the short term. Low Internet use and penetration already supplies a layer of access barriers for the public in developing countries; adding extra copyright obligations to existing technological challenges unjustifiably and preemptively raises the cost of access to copyrighted works. In the regional context, this expansive protection for digital works also has implications for how protected works may circulate between high income developing countries where access may be more probable, and low-income developing countries where access rates are negligible. Given the unprecedented availability of literary and artistic works on the Internet, it is highly prejudicial for developing countries and LDCs to adopt copyright laws that make access to this vast resource space more difficult or costly.

Development Opportunities and the Information Age

Strategies to utilise information technology for development priorities and prospects vary from sector to sector, and from country to country. However, the possibility of exploiting the comparative advantage of many developing countries in the creation, production and distribution of popular music has attracted significant attention. There are several important benefits information technology offers for domestic music industries, particularly with respect to penetrating the global music industry. Developing countries can adopt a staged approach, corresponding to levels of available technology, to enhance the music supply chain and to generate new markets for distribution of domestic music.

A variety of price and distribution models are available to facilitate producer to consumer sales between artists in developing countries and the global audience. Existing practices utilised by Internet auction and trading sites can be explored to determine methods of payment for digital transactions. In addition to sales and distribution, information technology also enables advertising and promotion through digital communities. In sum, the disintermediation occasioned by the Internet in the context of goods and services, also offers important opportunities for producers of cultural products to penetrate the global market.

Another important area positively affected by information technology is public education in developing countries and LDCs. Many developing countries have identified education as a development priority for the information age, and many of these countries assume that the Internet will play an important role in accomplishing this goal. Institutional alliances between developed and developing countries using distance education offers a real prospect of educating a vast number of the world's poor. Copyright legislation in many developing countries may need to be modified to legitimate policies that seek to use the Internet to access educational materials available in digital format. Traditional copyright rights that include the right to reproduce, distribute or communicate works to the public must be balanced by limitations that would make educational uses permissible. Developing countries must consider these issues in multilateral or bilateral negotiations that urge expansive copyright protection at the expense of important development goals. Specifically, developing countries must carefully evaluate negotiations for a webcasting treaty for its effect on educational uses of protected works, particularly as webcasts supplement (and eventually may replace) traditional broadcasting media.

It should be noted that the possibility of using computer networks to promote cultural industries requires copyright protection of such cultural goods, particularly music. The point of urging cautious deliberation is not that copyright is unnecessary or ill-advised as a development tool. Consider, for example, the Open Source model for software development; it is *precisely* the proprietary right that facilitates the imposition of conditions which require contributors to license their contributions on open terms. The argument is that development interests require an effective system of protection, balanced by robust limitations to encourage competition and socially beneficial uses. Copyright protection should not be offered as an instrument of private monopoly at the expense of public welfare.

Some Policy Considerations

It is vitally important that developing countries and LDCs appreciate the pervasiveness of copyright in defining the structure, terms and conditions of access to the basic tools of the information age and, consequently, the prospects for effective and successful use of information technologies to advance development goals. When considered in conjunction with other emerging proprietary models such as business method patents or database protection, copyright law is clearly a central mechanism for extending additional costs and uncertain benefits of foreign creative endeavour in developing regions. In summary, a few factors should be considered for development oriented policies:

- Exploiting the potential of the Internet to facilitate development objectives requires access to hardware (computers), software and content. Intellectual property agreements have important implications for access to software. Developing countries need to explore alternatives to proprietary regimes, the most important being the Open Source model which has proven to be a dynamic and, in some instances, more effective model of software development. For developing countries and LDCs, the Open Source model is also valuable for the opportunities it offers to facilitate training of domestic software engineers, and the relatively low cost of complementary technologies.
- International copyright agreements have a significant and unavoidable impact on access to creative works in the digital age. Developing countries must insist on the possibility of enacting domestic limitations, including the application of compulsory licenses, which encourage access and use of digital works. They should eschew interpretations of copyright treaties that extend the negotiated minimum standards, and resist incorporation of these agreements in TRIPS.

Unbalanced Copyright Regimes Diminish Public Interest Values

The information age offers new opportunities to increase productivity in all countries regardless of the level of development. As a strategic matter, the more developing countries and LDCs participate in post-TRIPS copyright regimes, the easier “TRIPS-plus” standards can be advanced as the ineluctable paradigm for copyright protection in the information age. Such a result can limit the potential of the Internet for broad diffusion of information and creative works generally. Importantly, unbalanced copyright regimes diminish the importance of a socially beneficial culture that values public interest as an important welfare function of a proprietary system for creative works. Nonetheless, copyright protection in developing countries and LDCs is important for domestic creative efforts particularly for cultural industries. Such protection should foster, protect, and promote creation and use for the mutual benefit of authors and consumers.

Ruth L. Okedji is William L. Prosser Professor of Law, University of Minnesota School of Law. The author adapted this article from her study “Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce” UNCTAD-ITCSD (2003).

ENDNOTES

¹ See TRIPS Art. 3 (requires Contracting Parties to apply Art. 2-6 of the Berne Convention). Note that the TRIPS Agreement requires Members to comply with Articles 1-21 of the Berne Convention, including the Berne Convention Appendix.

² See Art. 4.

³ See Art. 5.

⁴ See Articles 6, 7 and 8. The TRIPS Agreement makes explicit reference only rental rights (see Art. 11). WCT Art. 7 parallels this TRIPS provision, except with regard to rental of phonograms. Under the WCT, the right belongs to the author of the work embodied in a phonogram. Under the TRIPS Agreement, the right is ascribed to “producers” of phonograms, and other right holders in phonograms as determined by domestic laws of member countries. See TRIPS Art. 14 (4).

⁵ See Art. 12 (2).

⁶ See WPPT, Art. 5-10.

⁷ See WPPT, Art. 11-14.

⁸ See WPPT Art. 15(1).

⁹ See WPPT, Art. 18-19.

¹⁰ Digital Millennium Copyright Act of 1998, 17 U.S.C. §§ 1201 -1203 (2000).

China, US Engage in ‘Bra Brawl’

China has reacted with outrage to the 17 November US decision to invoke safeguards against knit fabric, brassieres and dressing gowns and robes from China following petitions filed by the US textile industry. A special provision of China’s WTO accession agreement provides WTO Members with the authority to impose temporary quotas on textile imports from China in the event those imports are found to cause ‘market disruption’. Once a Member has invoked the textile safeguard, it must pursue a negotiated resolution with the Chinese government.

Chinese officials have claimed that the US action violate “the WTO’s principles of free trade, transparency and non-discrimination” and said the country retained “the right to appeal to relevant WTO agencies to protect the rights and interests of Chinese industries.”

The China Chamber of Commerce for Import and Export of Textiles said the US textile sector had only itself to blame for slumping production. While attributing the growth of Chinese exports to “the changing nature of the industry”, it reminded Washington that China’s textile imports from the US had surged by 148 percent in the first nine months of this year compared with the same period last year.

In contrast, a US industry group estimated that since 2001 China’s exports of dressing gowns had grown by 905 percent, bras by 382 percent and knit fabrics by 28,000 percent. The goods in question make up about five percent of US textiles imports from China.

The ‘bra brawl’ is only the latest signal of powerful trading nations’ unease with China’s rising share of world trade. Visiting Beijing in late October, both EU Trade Commissioner Pascal Lamy and US Trade Representative Robert Zoellick strongly criticised China’s record on curbing counterfeit software, CDs and DVDs, as well as widespread copying of luxury trademark goods. They also tried to induce the Chinese government to raise the “unfairly low” value of the yuan, which they blamed for domestic job losses. Chinese officials countered that a key driver for booming exports to the United States was US companies’ investment in Chinese factories to serve their customers back home.

EU to Vote on GMOs

On 12 December, an EU Regulatory Committee is to vote on whether to approve imports of a variety of genetically-modified maize, which received a favourable scientific risk assessment more than five years ago. Under the EU’s weighted voting system, the vote must pass with a qualified majority of member states.

The European Commission is eager to demonstrate that the approvals process – challenged at the WTO by the US, Canada and Argentina (see page 12) – is back on track.

Approving GMOs for import but not for cultivation would allow the Commission to bypass the divisive question of ‘co-existence’, i.e. preventing contamination between GM and conventional crops. Austria and Luxembourg still insist that EU-wide rules aimed at preventing adventitious GMO presence in conventional crop seeds must be in place before resuming approvals, but current legislation leaves it up to member states to establish measures to ensure that contamination does not occur. Products with an adventitious presence above 0.9 percent must be labelled as containing GMOs.