

## **TOWARDS A POSITIVE AGENDA FOR INTERNATIONAL COPYRIGHT REFORM FROM A DEVELOPED COUNTRY'S PERSPECTIVE**

Howard Knopf<sup>1</sup>  
Macera & Jarzyna LLP  
Ottawa, Canada

*Moderation is a fatal thing. . . . Nothing succeeds like excess.*  
Oscar Wilde 1854-1900

*There is moderation even in excess.*  
Benjamin Disraeli 1804-1881

*If music be the food of love, play on;  
Give me excess of it, that, surfeiting,  
The appetite may sicken, and so die.*  
Shakespeare, Twelfth Night (I, i,1-3)

### **INTRODUCTION**

In the face of success and even successful excess, what might conceivably motivate the major copyright super powers, which consist of the USA, EU and Japan to consider a revised and more moderate strategic copyright agenda that would better address the concerns and expectations of developing countries? Altruism aside, it is in their best interests to do so - and as soon as possible. This paper does not primarily suggest far-reaching or idealistic initiatives, such as a new treaty or significant revision of existing ones - although both initiatives are very desirable and possibly achievable in the medium term. Rather, it suggests some fairly specific and hopefully feasible initiatives that hopefully may have a realistic chance of success in the shorter term.

These superpowers - especially the USA which might be called the copyright "hyper power" - have achieved great success in rapidly pushing international copyright law to very high and even "maximalist" levels that were unimaginable even in 1994 when the TRIPS agreement was signed. Two years later, in 1996, the WIPO Internet treaties - the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty ("WCT" and "WPPT") - were brought to fruition in haste in Geneva, almost literally on Christmas eve. In 1998 the USA moved to a life plus 70 year regime and passed its then and now even more controversial Digital Millennium Copyright Act ("DMCA"). Since then, the American vision of a regime based upon the DMCA, life + 70, TRIPS +, WCT+, WPPT+ has been exported to numerous countries of varying economic power and at various stages of development through bilateral trade agreements that significantly increase levels of copyright protection and limit copyright sovereignty for the other national party. A major achievement for the USA was the FTA with Australia, the 15<sup>th</sup> largest economy in the world and one of the world's most sophisticated copyright regimes in terms of expertise in practice, civil society, the judiciary and government. Given this seemingly unstoppable trend and the increasingly unnecessary recourse from the copyright superpowers' standpoint to multilateralism, why would they and particularly the USA want to change course?

This paper suggests that it is in their interests to do so - and soon. They need to adopt a more development friendly agenda that is both feasible and bona fide. In fact, they may have no other realistic choice.

From a negative standpoint, one can otherwise foresee in the near future:

- erosion of international credibility in the copyright superpower's agendas and even in the copyright system itself;
- the marginalization of WIPO as an effective multilateral norm-setting body; and,
- domestic resistance from courts and legislators in developed countries to ever increasing levels of copyright and "paracopyright" protection that are seen as economically unsound and even unconstitutional.

From a positive standpoint, the copyright superpowers would stand to gain:

- significantly more revenue returns from the presently more prosperous developing countries, on the basis that more effective but still reasonable enforcement of more moderate copyright laws would be better than token or sporadic enforcement of excessively strong copyright laws;
- increased revenues from the currently poorer developing countries as they move more rapidly into greater prosperity and are actually able to pay reasonable prices for copyrighted products;
- greater domestic productivity though increased competition, innovation, education and the avoidance of counterproductive digital lock up<sup>2</sup> of essential knowledge;
- a sustainable copyright system that can adapt to new technology in a rationally responsive manner without unnecessary market failures, rather than an irrational and historically anomalous anticipatory fashion that may create irreversible and incalculably costly policy errors; and,
- flexibility in their own agendas, and particularly in the event that there is realization of serious domestic policy error.

From a geopolitical, economic and trade standpoint, the following trends will reinforce the need for such a change of strategy by the developed countries:

- the rapidly growing technological sophistication and economic prowess of countries such as China, India, Brazil, Korea, and Singapore will challenge the conventional and largely obsolete paradigm of Group B v. Group 77 "have" and "have not" countries in respect of IP.<sup>3</sup> These countries are poised to repeat the economic successes of the USA, Japan and EU and even surpass them in key respects in the foreseeable future. However, they are becoming keenly aware that Japan and particularly the USA built their economies on low protection regimes and have only lately become "born again" believers in strong IP protection. If the dichotomy between "developed" v. "developing" is no longer viable, it becomes more obvious that a common approach that actually works for and in all interested countries is all the more urgent and preferable to one that is imposed, poorly enforced, and is dysfunctional in many respects even amongst the copyright superpowers;
- There is likely to be a resurgence of often unpredictable antitrust enforcement generally and in respect of abusive or excessively monopolistic use of and misuse of IP in particular; and,

- Growing awareness of the ambiguities, soft spots, and even the “hypocrisy” of certain countries’ positions is bound to create strain in the multilateral framework. One of this year’s two Nobel Prize winners in economics has written eloquently of the need to avoid “hypocrisy” in international agreements in the form of making commitments that cannot be kept.<sup>4</sup> There is also an increasing awareness that certain countries have numerous compulsory licenses that are called something else and allow considerable flexibility in terms of fair use, all the while discouraging such practices in smaller nations.

## ANALYSIS

### The Developed Countries Practical Perspective

The imminent dilemma for the developed countries that are still seeking to extend international intellectual property rights mechanisms is that, beyond a certain point, the effort will become counterproductive. Indeed, it may even implode. However, there are many reasons why certain developed countries are reluctant or unable to appreciate this possibility.

The intellectual property system generally - and the copyright system in particular - is indeed capable of generating great wealth for both developed and developing countries - and playing its own potentially significant role in increasing consumer welfare and maximizing free trade amongst nations. However, this will not happen - and indeed precisely the opposite may happen - if short term thinking or lack of sound legal and economic analysis is to prevail.

A system - arguably an empire - built upon maximalist intellectual property principles was constructed in the 1980's mainly by the “Quad” group of the USA, EU, Japan and Canada.<sup>5</sup> The main governance instruments of this system are, in chronological order:

- The Canada/USA Free Trade Agreement 1989
- North American Free Trade Agreement (“NAFTA”) (January 1, 1994)
- WTO/TRIPS (adopted at Marrakech, April 15, 1994)
- 1996 WIPO WCT and WPPT treaties
- Various bilateral free trade agreements concluded between the USA and countries such as Chile, Singapore, Australia, the CAFTA group, etc.

Canada presents both a potentially important anomaly and example amongst the G8 countries in the copyright context. I shall refer to Canada in certain particular respects because the Canadian experience is, for a number of reasons, becoming increasingly interesting to a wide spectrum of other countries. Canada stands as an example of the fact that the G8 countries do not move in lock step, either on IP matters or many other issues.

Canada’s support of the copyright superpowers shows signs of waning, but other allies of the maximalist group have emerged, including a small developed country such as Finland whose views on strong copyright protection<sup>6</sup> have been influential in WIPO circles. Finland’s senior copyright official, Mr. Jukka Liedes, was highly influential in the development of the 1996 WIPO treaties as Chair of the main working group and has served as Chair of recent meetings on the proposed Broadcasters’ Rights treaty. The latter proposed treaty, which in its present form will provide 50 years of protection in a signal even if the underlying work is in the public domain, somewhat inexplicably has the support of many developing countries who may not fully appreciate its potential effects.

As noted, Canada was one of the original “Quad” group that pushed for the inclusion of intellectual property as a cornerstone of what was to become the WTO/TRIPS mechanism in 1994. As the eighth member of the G8, and the fourth member of the Quad, Canada has clearly aspired at times to be part of the elite core of major powers in international trade. However, Canada has had a long history of ambivalence in its IP policies. Until former Prime Minister Mulroney and President Reagan launched the first FTA “negotiation” in 1985 at the Shamrock Summit, Canada had a compulsory licensing regime for pharmaceuticals put in place by the Trudeau government that essentially provided an automatic compulsory license at a 4% royalty rate. And Canada had no retransmission regime in copyright law. Both of these policies were conceded prior the commencement of negotiations, and the result was an increase in payments for copyright and patent royalties of hundreds of millions of dollars. This was to prove to be a telling event for Canada and the world. The closeness of Prime Minister Mulroney to the American administration under Reagan on these and many other issues was a key factor in his and his government’s subsequent downfall.<sup>7</sup>

Canada’s willingness to support and even espouse the American IP agenda continued unabated through the adoption of the 1996 WIPO Treaties. However, Canada has failed to date to ratify these treaties, and has officially done no more than to sign them. The current round of copyright revision that is focussed on Bill C-60 sees the Government as committing itself only to implementing the basic provisions of these treaties, but explicitly indicating that ratification is dependent on the future of the private copying levy regime. The Government’s carefully chosen words in its June 20, 2005 announcement accompanying the first reading of Bill C-60 were “It is still necessary to analyse whether amendments will also be necessary to amend the private copying regime to bring the Copyright Act fully into conformity with the treaties.” It is well known that Government recognises that there is an explosive issue concerning the apparently inevitable requirement to provide national treatment for these levies, which will double the cost of the scheme to Canada, unless the scheme is drastically curtailed or eliminated.<sup>8</sup> By definition, the increased costs of at least \$40 million per annum based upon the current scheme would leave the country and mostly flow to the USA. The Canadian government has promised a consultation paper that should, in principle, deal squarely with this issue. Canada has resisted strong repeated chastising in USA Section 301 reports and direct pressure from US lobbying interests following the notorious 2004 set back on the RIAA’s Canadian battlefield in the war against file sharing<sup>9</sup> to get the WIPO treaties ratified in “within seven weeks”.<sup>10</sup>

The current Canadian situation serves as evidence that the absence of DMCA-like legislation and WIPO treaty ratification has not harmed the music industry. Indeed, 18 months after the above mentioned Federal Court decision that resulted primarily from the inadequacy of the evidence presented by the record companies,<sup>11</sup> Canada’s recording industry has seen a sales increase of 1% and actually outperformed that of the USA, Japan and Australia according to IFPI’s own figures.<sup>12</sup> All of this has happened in spite of (or could it be because of?) Canada’s more moderate regime that has earned it the epithet, according to the Boston Globe, of being a “a sort of digital Sunni Triangle, a place where file swappers roam wild and free and no American musician is safe.”<sup>13</sup> Other counterfactual evidence concerning the alleged immediate need for maximalist copyright laws exists. The most rigorous and Independent econometric study to date on file sharing indicates that it has only a negligible effect on music industry revenues and may actually help the sales of superstar sound recordings.<sup>14</sup>

Canada's increasing tendency towards independence from efforts at American hegemony is also manifesting itself in other fora, for example in the recent UN Information Society Summit Preparations.<sup>15</sup> It has been reported that "According to one participating official, proposed text referencing free and open source was put forward by the Group of Latin American and Caribbean countries with the support of Canada, China, South Africa, and the Arab Group represented by Egypt. The text reflected regional agreements. The official said, "You could say we have the support of 3 billion people."<sup>16</sup> Indeed, many bets may be off as to future predictable groupings of countries in respect of IP issues. Abbott suggests that the G-20 may become the emergent group.<sup>17</sup>

### **The Perceived Need to Have Strong Copyright Protection**

Strong IP protection in the form of TRIPS and "TRIPS Plus" certainly appears to have worked well in the short term for developed countries, from a trade flow point of view. The USA appears to be benefiting in terms of patent rents to the extent of about \$19 billion a year according to the World Bank<sup>18</sup> Drahos suggests that the figure for copyright rents would be about \$21 billion.<sup>19</sup> However, this may be based in part on industry piracy estimates, which notoriously do not match actual lost sales.

To be sure, strong IP protection will clearly benefit some firms and some countries immensely in the short term. Perhaps the most dramatic example of a firm that has enjoyed rapid success based upon strong copyright protection is Microsoft, which is only about 25 years old. In 1998, its market capitalization was about USD \$535 billion based upon a share price of \$108.38. This was more than the GNP of 200 nations although its business enterprise value on an accounting basis was \$15 billion and its fixed assets were only \$1.5 billion. Of its total assets of \$22.4 billion, \$13.9 billion or more than 60% was simply cash. Thus, Microsoft's market capitalization in 1998 was almost the same as Canada's 1999 GDP figure of USD \$570 billion.<sup>20</sup> Bill Gates has always been forthright about how he believes that his copyright rights trump any antitrust concerns. So far, his beliefs have largely prevailed. The intense irony of this situation is that Microsoft was, in its early days as the upstart innovator, on the receiving end of copyright litigation launched by Apple. Microsoft ultimately benefited the most from the intense lobbying attempts of IBM, which led the fight to convince a sceptical world that copyright protection for computer programs as literary works was actually a good idea.

The business and investment community has been looking at the "market to book" ratios of companies, and noticed, not surprisingly, that many enterprises have a market capitalization several times their book value. In many cases, the discrepancy tends to be greater in high tech companies but high ratios are not restricted to high tech companies. The ratio is attributable to the fact that "intellectual assets", i.e. intellectual property, basically do not show up on corporate balance sheets.<sup>21</sup> Thus, there is likely to be inherent resistance to any perceived weakening of a value system that values intangibles so highly - even though a more precise and objective approach might have prevented many of the problems of the dot.com boom and bust and some of the spectacular share holder losses associated with undue reliance on the concept of convergence, especially of IP based companies. AOL Time Warner comes to mind.

### **Under Domestic Attack**

However, the American approach is under attack from within - not just by Lawrence Lessig et al - but by Sun, Google, the Commonwealth of Massachusetts<sup>22</sup>, and other establishment mainstays.

Google - which is forming an alliance with Sun - has fundamentally challenged established notions of fair use under American law by launching its Google Print project.<sup>23</sup> Google has already been sued by the Authors Guild.<sup>24</sup> It is tempting to speculate that Google - a very savvy and successful company with billions of dollars of recently raised share capital - must have a win/win strategy. The strategy might be fairly simple. Either they will win their litigation, likely without an intervening injunction. Or they will lose or maybe be enjoined at an early stage and public opinion will be such that Congress will amend the fair use provisions to legitimize what almost everyone thinks is a highly productive, transformative and essential use that will do for published print material what Google has done for more than eight billion internet web pages - make it locatable and accessible. Yahoo has, not surprisingly, announced that it will launch a similar project. Can Microsoft be far behind?

Even the U.S. Federal Trade Commission is strongly critical of certain aspects of U.S. IP policy, particularly the patent system and the poor quality of patents being issued by the USPTO. It has issued a blunt report.<sup>25</sup> The next instalment is expected soon.

The UK Government has recently produced a frank report that outlines very well why stronger IP regimes do not necessarily benefit developing countries and calls for many constructive suggestions. The Report notes that “The functioning of IPR systems raises genuine concerns, even in developed countries” and goes on to say, bluntly, that:

*Intellectual property systems may, if we are not careful, introduce distortions that are detrimental to the interests of developing countries. Developed countries should pay more attention to reconciling their commercial self-interest with the need to reduce poverty in developing countries, which is in everyone’s interest. Higher IP standards should not be pressed on developing countries without a serious and objective assessment of their impact on development and poor people. We need to ensure that the global IP system evolves so that the needs of developing countries are incorporated and, most importantly, so that it contributes to the reduction of poverty in developing countries by stimulating innovation and technology transfer relevant to them, while also making available the products of technology at the most competitive prices possible.*<sup>26</sup>

The UK report has some notable findings and recommendations on copyright. It suggests that India - on account of its film industry - is about the only example it could find of a developing country that has benefited from higher levels of copyright protection. It notes that developing countries are overwhelming importers of copyrighted material and the current fair use system does not work for them.

Other signs of attack on the American system from within are coming from the courts. While all sides claimed victory in the recent Supreme Court decision in **MGM v Grokster**<sup>27</sup>, it is clear that the entertainment industry failed to achieve its overwhelming goal of reversing the 1984 decision in **Universal v. Sony**<sup>28</sup>, which held that the provider of a technology that is “merely capable of substantial non-infringing use” cannot be held liable for contributory copyright infringement. The incremental evolution by the Supreme Court **MGM v. Grokster** that can result in the imposition of secondary liability for “active inducement” should still leave considerable scope for the next innovation in the nature of the iPod, though not all would agree. In any event, it seems clear the U.S. Supreme Court decision has forestalled a Congressional response that would likely have been far more favourable to the entertainment industries’ immediate wishes.

Another potential bellwether of resistance from the judiciary comes from the ever outspoken, often cited and sometimes very influential Judge Richard Posner of the 7<sup>th</sup> Circuit and the University of Chicago. In a recent guest blog for Lawrence Lessig, he suggests that “What to do about such abuses of copyright? One possibility, which I raised hypothetically in my opinion in WIREdata, pp. 11-12, is to deem copyright overclaiming a form of copyright misuse, which could result in forfeiture of the copyright.”<sup>29</sup>

A further significant sign of judicial reaction to legislation that is seen as excessively deferential to the demands of copyright owners at the expense of the public interest can be seen in the very recent decision of the High Court of Australia (counterpart to the U.S. Supreme Court) in its immensely important decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*.<sup>30</sup> The case concerned the technical protection measure (“TPM”) provisions in Australia’s legislation that implemented the provisions of the 1996 WIPO treaties, which Australia has yet to ratify. The High Court, in a complex decision based upon three concurring but different sets of reasons, declined to impose liability under the TPM provisions for the supplier of chips that would modify and circumvent the access controls imposed by Sony on its game console. Kirby, J. reminded copyright owners that copyright legislation that departs too far from copyright principles may be constitutionally vulnerable under Australian law.<sup>31</sup> The similar arguments may be possible in Canada<sup>32</sup> and the even USA, although the American Supreme Court will be very deferential to Congress in respect of such matters as the term of copyright.<sup>33</sup> Clearly, however, the U.S. Supreme Court will not allow copyright law to be used to protect works that are not “original” and this will be a major obstacle to any American attempt to enact domestic database legislation.

The TPM issue is looming large at the moment in Canada. Canada has proposed, in Bill C-60 introduced on June 20, 2005, a regime that stops short of access controls and explicitly allows users to circumvent TPMs for any purpose that would be otherwise legal, such as fair dealing - other than to make private copies of sound recordings that are TPM protected. While the latter aspect may be somewhat gratuitous and unnecessary given Canada’s extremely generous levy regime, the overall scheme has incurred the wrath of the multinational recording industry who argue that it would not be compliant with the WIPO treaties. The Australian High Court decision should put that argument quickly to rest - but it probably will not.

There is a growing recognition that the public interest requires protection from TPMs in respect of digital lock up. Otherwise, consumers will be prevented from exercising fair use or fair dealing rights and having access to the public domain, not to mention being able to enjoy the expensive products they have purchased on the hardware platform or location of their choice. There are be important antitrust implications as well.<sup>34</sup>

About two weeks after this paper was presented in Bellagio on October 26, 2005, the world was shocked by the scandal of Sony music CDs that surreptitiously install a “rootkit” spyware/malware programme called XCP on personal computers in order to prevent what Sony considers to be piracy. The programme can cause serious damage to users’ computers by rendering them vulnerable attack and hijack. The rootkit program is difficult, if not impossible, to detect and eliminate, and early indications are that only a complete reformat will solve all of the actual and potential problems that the programme created on countless computers around the world. The ultimate irony lies in the fact that attempts to do get rid of the program from the unlucky Sony CD purchasers’ computers by suppliers of antivirus and antispyware software, as well as frustrated computer owners themselves, may actually contravene the American DMCA

and similar laws with their “anticircumvention” provisions. This incident is perhaps the most obvious example to date of why protection is more needed **from** rather than **for** DRM and TPM technology.

The current initiative for a broadcasting rights treaty (which appears to have the support of a number of countries that may not fully understand its implications) and its coupling by the USA with a proposed webcasting rights treaty that nobody but the USA supports poses a further and immediate threat of digital lock up. In their present form, the treaties could effectively add an extra 50 years of protection to the underlying material in a broadcast or a webcast, even though it is already in or is about to enter the public domain at the time of transmission, if the broadcast or webcast is the only available source of the underlying material. As content owners, broadcasters, and webcasters converge in the corporate sense, there is considerable reason for anxiety even in developed countries in terms of antitrust principles - particularly the concept of copyright misuse.

The real issue is the major content owners are now determined to secure something that copyright law never intended to offer, namely complete control over how a work is used and the ability to extract payment for every single usage. There is no reason why content owners need control over the ability to read, listen, watch or even copy products for which they have already been paid. The argument that DRM and particularly micro payments will solve the problems of such an approach and lead to precisely metered payments is simply fallacious. The technology for micro payments has existed for a long time. The market refuses to adopt the concept, as well it should. Copyright law has always depended for its legitimacy on a degree of “leakage” - and the digital world should be no different than that of the world from Gutenberg until the digital age where such practices as browsing, reading, borrowing, quotation, fair use and dealing, and private copying were permitted without further payment or permission.

The issues of the knowledge gap and the digital divide so eloquently set forth in the Brazilian and Argentine statement on a development agenda are no longer simply North-South issues. They are increasingly internal issues in the world’s richest economies. A recent example concerned an attempt by a well meaning individual to provide iPod access to digitized subway maps. He was quickly threatened with copyright litigation by the subway authorities in New York and San Francisco.<sup>35</sup>

### **The Economic, Trade and Game Theory Aspects That Should Cause Concern**

Why are so many economists, including Nobel prize winners, becoming so concerned about IP law generally and copyright law in particular?<sup>36</sup> Whether characterized in the rhetoric and economic doctrines of the tragedy of the anticommons,<sup>37</sup> globalization and its discontents,<sup>38</sup> game theory,<sup>39</sup> or sustainable development and the enclosure debate,<sup>40</sup> there is considerable anecdotal and increasing economic and econometric evidence that too much intellectual property protection is not something that is in the public interest or even the interest of most firms and nations.

The developed countries might do well to analyse their IP interests with some of the disciplines and urgency that have been applied to the environmental movement. Thomas Schelling, who has just won the Nobel Prize in economics for his work on game theory, has written recently about the foreign policy implications of the U.S. approach to the Kyoto Agreement. He speaks of the “remarkable consensus among economists that nations will not make sacrifices in the interest of



global objectives unless they are bound by a regime that can impose penalties if they do not comply.”<sup>41</sup>

The developed countries could also do well to analyse their intellectual property demands on developing countries in terms of the rhetoric and indeed the rigours of sustainable development. The linking of the concept of the tragedy of the anticommons, sustainable development, the enclosure movement in both real and IP sense, and Schelling’s game theories has been notably brought together by F. Ford Runge.<sup>42</sup>

### **The Consequences of Error**

Another issue that should be of immense concern to developed countries - whose constitutions are difficult or impossible to change and who are bound to the rule of law in ways that some developing countries obviously are not - is the notion that copyright rights, once conferred, may be difficult if not impossible to take away. In U.S. law, the Fifth Amendment forbids the expropriation of property by government without “just compensation.” For example, there is good reason to believe that any attempt by the U.S. government to cut back the term and scope and nature of copyright protection for computer programs would result in litigation by Microsoft and others that would seek compensation for the value of their expropriated “property.” This could lead to incalculable compensation demands and payments. Lest anyone think that this is purely speculative, the Director of a well known right wing U.S. think tank has now inevitably made the explicit linkage between IP and the Fifth amendment in light of the recent U.S. Supreme Court decision in *Kelo*. He has turned the argument into what appears to be an assault on the doctrine of fair use.<sup>43</sup>

The same holds true for reconsideration of the length of the copyright term for works other than computer programs, especially computer programs. As long as Congress keeps extending the term on a regular basis, as it has done many times now, the U.S. will have effectively frozen the public domain at pre-1923 works. This does not augur well for research and access to knowledge. Under the current system, if Mozart (1756-1791) had lived to be a ripe old age and collaborated with much younger librettist who in turn lived a long time, his resulting operas could still be protected by copyright. That would be absurd. But that is the current system in the USA, which is virtually impossible to change even under domestic law, never mind in terms of the layered and intersecting webs of TRIPS, Berne, and bilateral agreements with MFN, non-derogation<sup>44</sup> and other sovereignty limiting features that could hurt countries even as mighty as the USA should it ever conclude that it may have erred in its IP policy. Life + 70 is a long time. Mexico has recently, inexplicably, moved to life + 100.

To put the absurdity and danger of long terms into clear perspective, especially in respect of computer software, it is interesting to note that many important programs were written in the seminal 1970’s, 1980’s and 1990’s by programmers who were very young at the time. Assuming that some of these important programs were not works for hire and will benefit from a life plus 70 years regime (or more if extended), the copyright in these programs could survive well into the 22<sup>nd</sup> century and remain a factor in all of the derivative programs that build upon them. Given the supposedly rapid pace of innovation in the software industry, it is difficult to see how such lengthy terms can be economically rationalized.

### **The MFN Time Bomb**

The TRIPS agreement contains most favoured nations provisions in Article 4. Abbott has pointed out how this can trap smaller countries.<sup>45</sup> But it also may backfire on major powers. For example, if the USA is giving many countries life + 70 years of protection in bilaterals, why should Canada and other hold outs not get this and have to give back nothing? It may be in the interests of the USA and EU to resolve this potential problem.

### **“Access” Begins at Home**

It is clear enough that developing countries need access to knowledge - especially in the STM (scientific, technical and medical) realm - in order to prosper and, indeed, survive. But it is also clear that, even within developed countries, that the proprietization and commercialization of STM information and the pressure to create new database protection regimes is having a negative effect on education and research. There are some positive signs beginning to emerge. Both the U.S. National Institute of Health and the U.K. Wellcome Trust have announced that any research funded by them must be made available to scientists and the public in a free repository. It would be reasonable for all developed country publicly funding organizations to require that work done under their auspices should normally be made available under a generous Creative Commons license that precludes any assignment or exclusive license to a expensive and restricted journals or any attempt by a reprography or other collectives to take it upon themselves to “license” such works to the public. The National Science Adviser to the Prime Minister of Canada has called for efforts “to maximize the impact of research for societies everywhere, not just the developed world.” He goes on to say:

*People in developing nations must be able to access and contribute to the vitality of the global research information and communications system. An open-access philosophy and policy are critical to the system’s success. If research findings and knowledge are to be built upon and used by other scientists, then this knowledge must be widely available on the web, not just stored in published journals that are often extremely expensive and not readily available.*<sup>46</sup>

### **The Threat to the Multilateral System and to WIPO**

The U.S. and EU have recently entered into a number of bilateral trade agreements that have been successful in ratcheting up of IP protection as a *quid pro quo* from countries seeking greater market access even than that supposedly guaranteed by the WTO agreement and other existing mechanisms. The word “supposedly” is used because Canada, the pioneer in many respects of the bilateral FTA movement, has learned that the world’s closest proximity, longest undefended border, and oldest free trading relationship with the USA still do not serve to ensure market access to the USA for billions of dollars worth softwood lumber exports - in spite of final NAFTA rulings.

If there is a desire to preserve the possibility of multilateralism, it may be essential to ensure the survival of WIPO as a possible forum. Whatever criticisms<sup>47</sup> - justifiable or otherwise - can be directed at WIPO, it is still the leading intergovernmental repository of expertise in international IP law. But its role is under threat and both developed countries and WIPO itself will need to

make adjustments to meet the criticism and ensure its ongoing credibility. Even the most outspoken critics of the status quo still put their faith in WIPO, at least to some extent, to help correct the existing problems in the international IP system.<sup>48</sup>

WIPO's only success, if it can be called that, with respect to a significant substantive multilateral treaty in recent years is with its 1996 internet treaties, the WCT and WPPT. The success is questionable because ratification is clearly less than enthusiastic in the EU and many of the G20. Canada has still refrained from any explicit public commitment to ratify. As the difficulties inherent in TPM protection and other issues sink in, future ratifications may be more problematic.

Indeed, WIPO has had some notable failures in international norm setting in recent years in respect of copyright and related issues. These include the audio-visual performances rights diplomatic<sup>49</sup> conference in 2000, the database treaty in 1996. However, the most telling failure that of the Treaty on Intellectual Property in Respect of Integrated Circuits Done at Washington, D.C., on May 26, 1989. Long after integrated circuits were a mainstay of many industries, and long after the main players in the market such as Intel and several Asian firms were very well established, the U.S. led an initiative to establish an international treaty. As a progenitor of things to come, the U.S. passed its own blatantly reciprocal legalisation<sup>50</sup> on the basis that the unseemly prospect of annual pilgrimages to Washington to seek reciprocal protection would lead to a multilateral and more elegant mechanism. At the time, countries such as Canada dreamt of achieving a major position in the integrated circuit industry, with high flying Canadian enterprises such as Nortel<sup>51</sup> pushing the initiative and hoping to travel in the company of Intel and the very fashionable treaty. The Canadian Intellectual Property Office at one point actually planned to have at least a dozen full time staff devoted to the registration of integrated circuit topographies.<sup>52</sup> The embarrassing reality of this initiative is that the treaty has never come into force, and only Egypt and Santa Lucia have respectively ratified and acceded, for reasons which are not clear given their economies.

True, the Washington Treaty was incorporated into TRIPS but that does not make it any the less a dead letter. The lesson to be learned from this is that a treaty dealing with new technology based upon a need that is more speculative than established for which there is no spontaneous multilateral demand may well come to fruition and even be signed by a few small countries who can be persuaded, for whatever reason, to do so. However, the treaty may never come into force and the existence of dead letter treaties that were meant to deal with seemingly pressing and urgent issues of the day does little credit to WIPO. This example should be borne in mind with respect to the proposed Broadcasters' and Webcasters' Rights treaties.

The recent trend of enacting unnecessary specialized treaties to deal with specific technological issues in advance of proven irreversible harm from these technologies is completely out of character with the history of IP. Such efforts may actually impede technological progress, rather than encourage it. The "Luddite"-like proclivities of certain content owners – especially in the music industry – are well known. It is time that WIPO and the superpower copyright nations stop effectively fighting against new technology and actually start to embrace it.<sup>53</sup> WIPO's recent cancellation at the insistence of the U.S. Government of a high profile meeting on collaborative methods and open source software was a regrettable step both substantively and symbolically, and one that will not quickly be forgotten in either developed or developing countries.<sup>54</sup>

WIPO and its most powerful member states may need to make some adjustments. These could include:

- The hiring of permanent staff and the use of consultants to produce credible policy analyses reflecting legal, economic and technical disciplines. The use of established academics and practitioners in these fields should be encouraged. This may need to go as far as the establishment of an independent WIPO Evaluation and Research Office (WERO) as discussed by Musungu.<sup>55</sup> Certainly, there is a void that has long needed to be filled in terms of quality, credible and independent analysis on the economic and social impact of IP rights and treaties;
- The need to recognize that senior officials in policy sensitive positions at WIPO need to have credible professional experience in their fields and preferably not have been too closely identified with industry or the agendas of their home state governments (as difficult as this may be to achieve);
- The need to provide technical assistance, advice and liaison of all kinds to developing countries that is as independent as possible and which is given in the interests of the receiving country. Such advice should outline all available alternatives and flexibilities, rather than encourage the view of more powerful members of WIPO. WIPO currently devotes extensive resources to developing countries in the form of the WIPO Worldwide Academy, Traditional Knowledge Division, Least Developed Countries Division, Small and Medium-Sized Enterprises Division, Intellectual Property and Economic Development Division and the Intellectual Property and New Technologies Division. However, it is not difficult to form the impression (whether justifiable or not) that these considerable resources are devoted more to influencing developing country officials rather than to helping developed countries to achieve their best interests in IP matters.<sup>56</sup> WIPO's efforts must not be - or even be seen to be - in the nature of "proselytizing and promotion;"<sup>57</sup> and,
- WIPO should transparently provide well thought out model law clauses showing both minimum and maximum implementation of various important treaty provisions in various languages and legal traditions, i.e. civil and common law - along with fair and advanced commentaries, open for comment by outside experts and contributors. New technology and online mechanisms such as the tools and process used for [www.en.wikipedia.org/](http://www.en.wikipedia.org/) could provide a very useful forum for collaborative and credible discussion on both existing and proposed treaty texts.

Above all, there is a pressing need for countries to honour existing multilateral commitments, if they expect other countries to embark upon new bilateral or multilateral agreements and to honour them in turn. For example, the WTO has concluded years ago that USA has been and still is in flagrant contravention of the TRIPS agreement as a result of s. 110 of its **Copyright Act** that exempts certain establishments from liability for the public performance of music.<sup>58</sup> The USA has done nothing to comply with ruling, other than to pay nominal compensation to the EU. The USA has recently flagrantly ignored final NAFTA rulings in respect of softwood lumber that favoured Canada. The very Canadian architects of the NAFTA agreement<sup>59</sup> are now claiming betrayal. They are shocked, shocked so it seems.<sup>60</sup> It is a common place that a small country can never win a trade war with a large one, but many smaller countries acting together may well be able to do so. Or, they can simply refuse to play the escalation game any longer and stop increasing levels of IP protection at the beck and call of developed countries. Or they can refuse to ratify future treaties, or sign new bilaterals, Or, they can do as certain developed countries are doing - which is to ignore the agreements that they have signed. The multilateral and even bilateral system is being severely imperiled by the refusal of certain countries to honour existing obligations.

### **Forum Shopping and Forum Retaliation – UNESCO Cultural Diversity Treaty**

On October 17, 2005 at Paris, the U.S. suffered a major – though not altogether surprising – embarrassment in UNESCO, which it had boycotted for 19 years and may now soon do so again. UNESCO has just approved a treaty on cultural diversity that has been in the works for several years. While the treaty goes to some length in Article 20 to assure that it should not be “interpreted as modifying” rights and obligations under existing treaties, it is also clear that some of the main *demandeur* countries were interested in quotas, subsidies and other forms of cultural protectionism. These countries included Canada and France. The U.S. apparently worked hard but unsuccessfully to put in defensive cross references to IP, but was blocked by Brazil. The U.S. may be right to fear this treaty, because all the copyright protection in the world is of little avail if the products sought to be exported, protected and paid for cannot be freely traded due to cultural protectionism laws. In the end, only the U.S., along with its ally Israel, voted against the treaty. This may illustrate some important lessons or at least raise key questions, such as:

- Will a large number of countries be prepared to strike back at the U.S. through retaliation in fora which the U.S. does not exert strong control, such as UNESCO?
- Is the U.S. reaping what it has sown elsewhere when it refers to aspects of this UNESCO treaty as “pieces of evil”?

In order to forestall any impact from this treaty or even more effective ones that may follow, the U.S. may wish to consider how it was that this treaty could get as far as it did and how to avoid further such events. Even if this treaty means little more than rhetoric and even if UNESCO is relatively toothless in economic impact and dispute resolution, the impact of this event has been significant and may well reflect the unilateral approach that the U.S. has sought to impose on others in fora where it exerts far more influence.

### **Opportunities for Developed Countries**

The opportunity of using multilateral fora to achieve results that are desirable but not otherwise obtainable in the purely domestic arena is a well known phenomenon. Okediji suggests that there are opportunities for developed countries to achieve public interest objectives in respect of limitations and exceptions at the international level that might not be possible domestically by means of “arbitrage between domestic and international fora.”<sup>61</sup> A very useful exercise from the public interest point of view - as well as any corporate view that is seriously concerned with innovation, research and transformative use of existing copyrighted material - would be to elaborate a list of non-exhaustive list of examples of acceptable fair use and flexibilities in the notoriously vague “three step test” first set out in Article 9(2) of the Berne Convention.<sup>62</sup> This has now worked its way into TRIPS, the 1996 WIPO Treaties and various bilaterals. Nobody knows what it means. Such massive uncertainty is not generally in anyone’s interest. The Google experiment in scanning in millions of books may result in a *de facto* and *de jure* norm that copyright owners do not like. There is much work to be done here, and soon.

### **The Developing Countries’ Perspective**

The challenge for developing countries is to force certain developed countries to confront the dilemma of moderate v. excessive IP protection. The challenge for those developed countries, in

turn, is to recognize it and to find the way to do the right thing - not simply for altruistic reasons but purely in their own economic interest measured in the medium and long term.

It is probably unrealistic on the copyright front to hope for a “TRIPS-minus”<sup>63</sup> approach in the foreseeable future. However, one thing that cries out for consideration is the need to address “users rights” with a “large and liberal interpretation”, as Canada’s Supreme Court has recently characterized the consumer side of copyright law.<sup>64</sup> This could be done through an appropriate instrument that addresses questions of fair use (or fair dealing, exceptions, etc. as dealt with in different taxonomies and systems).

### **The Bellagio 2005 Questions**

With the above background, I will attempt to conclude with very brief response to the specific Bellagio questions posed to me with a personal perspective from one citizen from the comfort of a developed country:

- *What concessions and conditions could be made in order to accommodate the harmonization demands of more powerful trading partners?*

The developing countries need, within the limits of their resources, to deliver more effective but still reasonable enforcement of copyright laws insofar as commercial piracy is concerned. On the other hand, the developing countries are entitled to expect less restrictive access to all categories of works and other subject matter without the imposition of excessive TPM control, at least insofar as personal use, research and education are concerned.

- *How can access to educational material and access to knowledge in the digital environment be integrated or reconciled with current copyright harmonization processes?*

Consideration should be given in the medium term to an “access to knowledge” (“A2K”) treaty. Peter Drahos is proposing such an A2K treaty framed in terms of human rights principles and clearly beneficial to developing countries.<sup>65</sup> Musungu is proposing that such a treaty merits and requires a UN wide approach, and cannot be left to WIPO alone.<sup>66</sup> While elegant and irresistible in terms of principles of justice, it is likely that such an A2K treaty would not be easy to achieve in the short term - at least under the auspices of WIPO or WTO and with any signatories from the copyright superpowers. Drahos also proposes a more achievable governance goal, namely that of “recommended practices”, similar to that of ICAO - which may also fit with Okediji’s suggestion for dealing with uncertainties in the ambit of “fair use” and the three step test.

A more modest and perhaps more achievable goal in the shorter term than an A2K treaty would be to clarify and expand - without limitation - certain principles of existing fair use and similar doctrines involving the three step test concept and perhaps, if necessary but only if necessary, push the envelope slightly. This might be done overall in the context of the next WTO round, and could be started in limited manner in the forthcoming lead up to a WIPO diplomatic conference on broadcasters’ and webmaster’ rights. Rather than revision of existing treaties or creating new ones, this could entail something more limited such as, for example, clarifying for greater certainty the principle that any entity engaging in research or educational activities in its normal course (including commercial entities) should be able to do anything for or on behalf of its clients, employees, students or others under its aegis or with whom it deals that such persons

could legally do by themselves. Endeavours such as the Google print index project should be recognized as legitimate. This would result in considerable increase in efficiency and access to knowledge everywhere with no significant loss in revenues to rights holders. This clarification exercise would avoid the seemingly impossible task of revising the Berne Convention (which requires unanimous consent) or entering upon some sort of new positive development treaty that would likely be boycotted by the major developed countries.

All of this is arguably within the ambit of American and other laws already, and generally recognized notions of “implied rights.” It would make sense and create goodwill for America to export its most positive copyright concept, namely its liberal “fair use” doctrine. It would seem to be consistent with Okediji’s suggestion of the adoption of an omnibus fair use provision and clarification that the three-step test should be regarded more as a guide than a limitation, consistent even with U.S. practice.<sup>67</sup>

Perhaps the appropriate tool or instrument to explore for achieving these more modest goals would be that of a “protocol” to either the 1996 WIPO treaties or the TRIPs agreement. Protocols are a midway instrument between a model law, which means next to nothing and a full fledged treaty or treaty revision, which is notoriously difficult or impossible to achieve. The 1996 WIPO treaties began as a modest “Berne Protocol” in about 1989. In 1991, WIPO stated that the proposed Berne Protocol “would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies.”<sup>68</sup> The difference between a protocol and a treaty may be semantic and symbolic in some respects. However, a protocol does not require unanimity amongst existing treaty members, and can comprise a viable subset of members of an existing treaty. The only caveat is that it not derogate from, diminish or be contrary to an existing treaty that it is meant to supplement or clarify.

Thus, a protocol might also address - without actually revising or amending any existing treaty - a common understanding as to what constitutes unacceptable antitrust behaviour involving the exercise of copyright rights. This might be quite useful, for example, for setting reasonable limits on the use of TPMs in order to ensure continued users’ rights in respect of the exercise of fair use or fair dealing, access to lawfully purchased products, and preservation and continued replenishment of the public domain. It is in every countries interest to have at least some degree of certainty as the interface of copyright and antitrust law.

- *Are the challenges of new technologies in the digital environment compatible with public interest concerns?*

Technology is capable of solving many of the copyright protections that it itself creates. However, it was recognized at an early stage that the solutions in turn can create serious problems from a public interest perspective - including denial of fair use rights, access controls that unreasonably inhibit or prevent any use of lawfully purchased products, and even the elimination of the concept of the public domain.<sup>69</sup> The public interest requires that there be adequate protection not only for TPMs but from them as well. This will inevitably involve difficult antitrust issues<sup>70</sup>, and complex multi-discipline and multi-fora approaches. But the challenge must be met.

- *How can flexibilities be preserved with respect to both traditional copyright issues and new issues in the digital environment (e.g. use of copyright exceptions and the Berne Appendix)?*

As indicated, it is timely to clarify and expand, without limitation, the concept of fair use, the three step test, etc. The provision of a few more specific exceptions and recourse to the largely unworkable Berne Appendix<sup>71</sup> is not the answer. The solution lies in a meeting of the minds between developed and developing countries on a fair conception of fair use and an elimination of the trend to absolute technological “control”.

### **Other More Radical and Fundamental Solutions**

The time may have come in which it is once again in the interests of the developed countries to think big and think generously - again not only for altruistic reasons. Most of the world is far too poor to afford developed country market prices for copyrighted products. In 1989 figures, the top 20% of the world's population ranked by wealth accounted for 82.7% of the world's GDP.<sup>72</sup> The bottom 20% accounted for 1.4%. Clearly, the major IP powers cannot expect much back by way of revenues from the poorest countries in the foreseeable future. But altruism aside, it will help the developed countries to invest in the poorest countries

Greater access to knowledge and fewer barriers to innovation will speed the growth of prosperity in the poorer nations, so that they can sooner pay closer to market prices. Perhaps we need a latter day Marshall Plan - or at least the adoption of cooperative mechanisms and lessons learned from such efforts as the Marshall Plan and NATO that could make it possible to achieve a successful and sustainable multilateral IP regime. Schelling is making just such a suggestion for the greenhouse gas problem and the failed Kyoto Protocol.<sup>73</sup>

In the meantime, the developed countries should consider mechanisms that promote the supply of copyrighted material either for free or at something approaching marginal cost (which for copyrighted material in digital form is close to zero) - in order that they be affordable and accessible to those in need. Tax benefits could be provided to donors - though hopefully not based upon developed country fair market value, since that would be an astounding windfall for the donors and loss for developed country taxpayers. Mechanisms could be developed to avoid arbitrage and corruption in distribution. Some entertainment companies have now drastically lowered the price of legitimate DVDs and release them simultaneously with theatrical releases in order to compete with the commercial pirates in China. There is little danger of Chinese language-only (for example) DVDs destroying markets in North America or Europe - and regional coding will largely prevent that possibility in any event.

There would arguably be a need to prevent massive arbitrage of low cost or free products - but it can likely be met with language segmentation. There may be a need to open up the discussion of international exhaustion in the digital age in order to balance the need for truly free trade and recourse to the grey market in the name of efficiency with the legitimate concerns of developed countries in ensuring the survival of adequate profit margins in domestic and other richer developed country markets. This may also require disentanglement of the complex web of MFN provisions<sup>74</sup> that now threaten the interests of all nations in some respects.

### **CONCLUSION**



There is a positive agenda for copyright superpowers and other developed countries - but it does not lie in an aggressive extension of their IP empire. Such a strategy would be very short sighted and would lead, eventually, to the inevitable fate of all empires<sup>75</sup> - which is collapse from without or worse still from within. It is high time for some moderation, while moderation is still possible.

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#### NOTES

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1. The author has, at various times, been a Canadian government official, head of delegation to several WIPO meetings, academic and practitioner representing clients ranging from individual artists to the largest of corporations. The views expressed herein are solely those of the author and not necessarily any of his clients or his firm.
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  9. *BMG et al v John Doe et al*, 2004 FC 488, appeal dismissed 2005 FCA 193. The author acted against the music industry on this case.
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  20. H. Knopf, *Security Interests in Intellectual Property: An International Comparative Approach*, in H. Knopf, ed., *Security Interests in Intellectual Property*, Thomson/Carswell, Toronto, 2002, p. 13.
  21. Ibid, p. 13.
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  24. <http://www.lessig.org/blog/archives/003140.shtml>
  25. <http://www.ftc.gov/opp/intellect/index.htm>
  26. Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights UK 2002  
[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm)
  27. Decided June 27, 2005.
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  29. <http://www.lessig.org/blog/archives/002119.shtml>

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33. Eldred v. Ashcroft
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45. Abbott, 2005, p. 97-98.
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47. Perhaps the most sophisticated and trenchant critique of WIPO to date is from S. Musungu, *Rethinking Innovation, Development and Intellectual Property in the UN: WIPO and Beyond*, QIAP, Ottawa, 2005, p. 15. (hereinafter Musungu, 2005).
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49. Preparatory Committee for the WIPO Diplomatic Conference on the Protection of Audiovisual Performances (12-04-2000 to 14-04-2000)
50. In 1984, the Semiconductor Chip Protection Act amended title 17 of the *United States Code* to add a new chapter 9 entitled "Protection of Semiconductor Chip Products." Pub. L. No. 98-620, 98 Stat. 3347.
51. Nortel subsequently took up headquarters in the USA and has since verged on insolvency. Its workforce and share price today is a tiny fraction the peaks in the 1990s.
52. In its first five years of operation, the Canadian registration system recorded 38 registrations. In recent years, the registrations have ranged between one and four a year. [http://strategis.gc.ca/sc\\_mrksv/cipo/corp/annual0304/report0304\\_content-e.html](http://strategis.gc.ca/sc_mrksv/cipo/corp/annual0304/report0304_content-e.html)
53. Musungu, 2005, p. 8.
54. <http://www.cptech.org/ip/wipo/openwipo.html>
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56. For example see WIPO/EDS/INF/1 Rev. September 23, 2005 *Information on WIPO's Development Cooperation Activities (January 2000 – June 2005)*. This

is a 561 page document offering data concerning WIPO's development cooperation activities for the last five years. While it is evidence of considerable activity and expenditure of resources, it also reveals some of the problems with WIPO's approach that now may require a correction. There is a lack of transparency in indicating which experts and consultants are deployed - none are mentioned - though it can be assumed that very large costs have been incurred in this process. To its credit, there is some evidence of education as to flexibilities in terms of TRIPS implementation - but it would be desirable to see more evidence of education as to pros and cons of bilateral agreements, TRIPS flexibilities, developments in case law in developed countries and education in the IP systems of major powers.

57. P. Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights*, 2005, unpublished, p. 3.
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61. R. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment*, September 2005 - unpublished - p. 35. Hereinafter Okediji 2005.
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66. S. Musungu, *Rethinking Innovation, Development and Intellectual Property in the UN: WIPO and Beyond*, QIAP, Ottawa, 2005, p. 15.
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