Prospects of Further Copyright Harmonisation?

SIMON A. FITZPATRICK
Simon A. Fitzpatrick, Associate, Fitzpatrick, Cella, Harper & Scinto, New York

Copyright is at once the most "domestic"[1] and "cosmopolitan"[2] form of property. On the one hand, with origins in grants of sovereign privileges, rights accorded to authors and creators are bound by the territorial limits of the nation state that confers them.[3] On the other hand, intangible works of authorship are able to cross national borders with ease.[4] Recognition of the need to protect the rights of copyright owners beyond the territorial limits of their home states has led to the formation of a number of international agreements to address the issue.[5] Moreover, the development of a multilateral copyright regime has seen the "internationalisation" of the rights—both in their geographic reach, and their substantive content.[6] Indeed, the trajectory from domestic statutory rights to international instruments appears, in the eyes of some authors, to point towards harmonisation of copyright law across the globe.[7] Furthermore, harmonisation is seen to be a desirable objective.[8]

A previous version of this article was written in conjunction with Professor William Fisher's seminar on International and Comparative Intellectual Property at Harvard Law School.

1 Doris Estelle Long, "Harmonisation", in *Intellectual Property Anthology 71* (Anthony D'Amato and Doris Estelle Long ed., 1996).

2 William Briggs, *The Law of International Copyright* (1906), p.162.

3 S. M. Stewart, *International Copyright and Neighbouring Rights* (2nd ed. 1989), p.35.

4 Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (1987), p.890.

5 J. A. L. Sterling, *World Copyright Law* (1998), p.5.

6 Stewart, n.3 above, at p.99.

7 See, *e.g.*, Robert M. Sherwood, "Why a Uniform Intellectual Property System Makes Sense for the World", in *Global Dimensions of Intellectual Property Rights in Science and Technology* (Mitchell B. Wallerstein *et al.* ed., 1993), p.68; G. Gregory Letterman, *Basics of International Intellectual Property Law* (2001), p.14; Briggs, n.4 above, at p.154; David Ladd, "To Cope With the World Upheaval in Copyright", in *Modern Copyright Fundamentals* (Ben H. Weil and Barbara Friedman Polansky ed., 1989), p.408.

8 See Ricketson, n.4 above, at p.917; Sterling, n.5 above, at p.698; Paul Edward Geller, "International Intellectual Property Law, Conflict of Laws, and Internet Remedies", in *Intellectual Property and Information Law* (Jan J. C. Kabel and J. H. M. Mom ed., 1998), p.37; Pamela Samuelson, "Intellectual Property Rights and the Global Information Economy" (1996) 39 *Communications of ACM* 23 at p.26 (1996); A. Mille, "Copyright in the Cyberspace Era" [1997] E.I.P.R. 570 at p.571.

The most difficult issue that the internationalisation of copyright has faced is the tension between two conceptually different models for the doctrine.[9] The first sees copyright as a social policy instrument calibrated to provide incentives for authors to produce works, while balancing consumers' interests in having access to a rich public domain (the utilitarian or incentive-based theory).[10] The second focuses on the rights of authors to receive the fruits of their intellectual effort, and accords less significance to the interests of the consuming public (the personality or authors' rights theory).[11] The clash between these paradigms has been played out on the world stage as the laws of major nations subscribe to one or the other of the two approaches.[12] Broadly speaking, countries whose legal origins are to be found in the Anglo-common law employ the utilitarian view,[13] whereas the civil law nations of continental Europe employ the personality theory.[14]

In his authoritative work on the Berne Convention,[15] Ricketson argued that the agreement was seen as a step on the path to international harmonisation or unification of copyright law, but that "universality in the absence of agreement on *the fundamental nature of authors' rights* would . . . seem unlikely, if not impossible".[16] In other words, the author contended that consensus would have to form around the personality theory of copyright in order for harmonisation to proceed: determining an international incentive-based scheme would be considerably more difficult than agreeing on specific authorial entitlements. However, it is here argued that the latest international instrument dealing with copyright, the World Intellectual Property Organization Copyright Treaty,[17] signals a substantial shift away from the personality theory. In consequence, and supporting Ricketson's argument, prospects of global copyright harmonisation are limited as a result of the way in which a trade-influenced utilitarian model of copyright is applied in the world today.

The structure of this article is as follows. The second part makes a brief overview of the early history of the internationalisation of copyright. The following part examines two moments in the history of global copyright harmonisation—the conclusion of the Berne Convention in 1886 and the signature of the WIPO

9 Paul Goldstein, *International Intellectual Property—Cases and Materials* (2001), p.142.

10 Sam Ricketson and Miranda Richardson, *Intellectual Property—Cases, Materials and Commentary* (2nd ed., 1998), p.8.

11 Sam Ricketson, *The Law of Intellectual Property* (1983), p.6.

12 For a historical account of the rise of these theories see Jane C. Ginsberg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1990) 64 Tulane L.Rev. 991.

13 Gillian Davies and Hans Hugo von Rauscher auf Weeg, *Challenges to Copyright and Related Rights in the European Community* (1983), p.10.

14 World Intellectual Property Organization, ed., *Introduction to Intellectual Property Theory and Practice* (1997), p.24.

15 Berne Convention for the Protection of Literary and Artistic Works, 1161 U.N.T.S. 3 (1971). See Marshall A. Leaffer ed., *International Treaties on Intellectual Property* (1990), p.339.

16 Ricketson, n.4 above, at p.40 (*emphasis added*).

17 WIPO Document CRNR/DC/94. See N. L. Mitra ed., *International Legal Instruments of Intellectual Property Rights Law* (1998), p.521.

Copyright Treaty in 1996. The fourth part proposes three reasons for the victory of a utilitarian model in the light of the expansion of international copyright. The final part argues that, in the light of the current application of the utilitarian theory, the economic interests of individual states, and their state of technological development, will raise substantial barriers to further copyright harmonisation in the foreseeable future.

Early Developments in International Copyright Law

Domestic origins

The first point that is often made in this sphere is that the phrase "international copyright" is "something of a misnomer"[18]—there is "no single body of international copyright law".[19] The reasons for this are historical and structural. Copyright law has its origins in privileges granted by a sovereign, which developed into rights conferred by statute.[20] The first "copyrights" were given, as licences, to printers in order to protect their investment in presses, paper and labour.[21] In England and France such privileges were the domain of the king; in Germany, they were granted by the princes of the various states.[22]

The decline of licensing in the late seventeenth century saw the first modern copyright law enacted in 1709.[23] This act, the English Statute of Anne,[24] provided monopoly rights in certain works for a limited time.[25] Other European countries followed England's example during the eighteenth century, with printing rights preceding rights of authors.[26] Denmark enacted its first copyright law in 1741[27]; copyright in France was established in 1793, and was passed on to Belgium, Holland, Italy and Switzerland under the influence of Napoleon.[28] Spain's original Copyright Act was passed in 1847[29]; and Germany's first federal copyright statute was enacted in 1871.[30] Colonies and other states of Christian tradition followed soon after, except Russia, where the first national Copyright Act was put in place in 1961.[31] On the other side of the Atlantic, 12 of the 13 American colonies quickly enacted copyright legislation after independence from Great Britain.[32] When the Constitution replaced the Articles of Confederation in 1787, copyright became a subject-matter of federal law under Article I, section 8, clause 8.[33] National copyright legislation was first passed by the United States Congress in 1790.[34]

However, despite the international spread of the notion of rights of authors, the point of conceptual significance for present purposes is that copyright remained national. Because copyright is an intangible right dependent on a grant from the sovereign or legislature, it can only be enforced within that authority's territory.[35] Each country has its own copyright law that applies only within its borders.[36] Rights created under one nation's laws "vanish abruptly and completely at the national border".[37] This legal reality raised problems as creative works made their way across jurisdictional limits.

Information wants to . . . cross national boundaries

In contrast to municipal law, the "printed word, the musical composition, and the artistic creation know no national boundaries".[38] As Wincor states:

> "The first thing to be said about works of authorship is that by their nature they elude confinement to a fixed locale. At the moment of creation they become international, floating, or having the capacity to do so, across national borders, across oceans, and potentially from one medium to another as the world's most cosmopolitan product."[39]

Moreover, unlike real property or chattels, "intellectual property rights in a single object can simultaneously exist, and be exploited, in dozens of countries".[40] Therefore, copyright holders soon realised that the readership or audience for a book, a play or a song was not confined to the country where they resided, but extended to large potential markets abroad.[41] It was also realised that the benefits of such markets could not be fully enjoyed unless the rights and interests of authors and composers were protected in foreign countries.[42] Some method of achieving cross-border protection was needed.[43]

By the middle of the nineteenth century, the industrialising countries in Europe and America had

18 Jon A. Baumgarten and Charles W. Lieb, *Trademarks and Copyrights* (1983), p.360.
19 Stephen Fishman, *Copyright Handbook* (2000), 13/3. See also Denis de Freitas, *The Copyright System* (1983), p.4.
20 Stewart, n.3 above, at p.35; WIPO, n.4 above, at p.23.
21 Goldstein, n.9 above, at p.142.
22 WIPO, n.4 above, at p.23.
23 Jayashri Srikantiah, "The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology" (1996) 71 N.Y.U. L.Rev. 1634 at 1647–1648; Robert P. Benko, *Protecting Intellectual Property Rights—Issues and Controversies* (1987), p.21.
24 8 Anne c.19, 1710.
25 Margreth Barrett, *Intellectual Property—Cases and Materials* (1995), p.354.
26 Goldstein, n.9 above, at p.142.
27 Sterling, n.5 above, at p.10.
28 Frank F. Foster and Robert L. Shook, *Patents, Copyrights and Trademarks* (2nd ed., 1993), p.14.
29 Wilheim Nordemann, "Towards a Basic International Regime of Copyright Contracts", in *Intellectual Property and Information Law*, n.8 above, at p.217.
30 Stewart, n.3 above, at p.26.
31 Nordemann, n.29 above, at p.217.
32 Alan Latman *et al.*, *Copyright for the Eighties* (1985), p.4.
33 Earl W. Kintner and Jack Lahr, *An Intellectual Property Law Primer* (1982), pp.2–3.
34 William F. Patry, *Latman's The Copyright Law* (6th ed., 1986), p.6.
35 Jon A. Baumgarten, "Principles of Intellectual Copyright", in *International Protection of Intellectual Property* (Jon A. Baumgarten and E. Gabriel Perle ed., 1988), p.3.
36 Fishman, n.19 above, at 13/3.
37 Letterman, n.7 above, at p.12.
38 Ricketson, n.4 above, at p.17.
39 Richard Wincor, *Copyrights in the World Marketplace* (1990), p.3.
40 Goldstein, n.9 above, at p.18.
41 de Freitas, n.19 above, at p.4.
42 *ibid.*
43 Sterling, n.5 above, at p.5.

adopted intellectual property legislation of a more or less similar scope.[44] However, no provision was made in these countries, with the exception of France, and later Belgium, for the protection of the rights of foreigners.[45] The unauthorised reproduction and use of foreign works were, for a long time, "established features of European cultural and social life".[46] In fact, Briggs notes that "[t]he reprinting of foreign works was for centuries regarded as an honorable business and engaged in by honest citizens without any thought of the wrong they were committing".[47]

Nevertheless, France's 1852 unilateral recognition of copyright for foreign authors, composers and dramatists was prompted by "piracy" on the continent directed against French authors.[48] Unfortunately, as an attempt to lead by example, this approach turned out to be an ineffective means of "shaming" other countries into protecting French copyright owners.[49] In consequence, the response to the problem of international piracy became contractual agreements between states in the form of bilateral treaties.[50] These early treaties were based on the principle of reciprocity: for example, France would, within its borders, protect Belgian works to the same extent that Belgium, within its borders, would protect French works; and vice versa.[51] Later, in acknowledgement of the fact that reciprocity rarely offered both sides an equally good deal,[52] countries adopted the principle of "national treatment" in their bilateral relations: each country would promise to grant the same protection to citizens of the other country as it granted to its own citizens.[53]

However, the conclusion of numerous bilateral copyright treaties between states led to a complex web of legal relationships,[54] in which, by the application of different domestic rules under the reciprocity and national treatment principles, the standard of protection varied greatly from country to country.[55] Although the network of bilateral agreements in force was extensive, the protection it offered was far from comprehensive or systematic.[56] It therefore became clear that some broader form of international co-operation was necessary for the protection of authors and their works.[57] This article turns to consider the multilateral response to this problem—the Berne Convention.

44 Assafa Endeshaw, *Intellectual Property Policy for Non-Industrial Countries* (1996), p.68.
45 Ricketson, n.4 above, at pp.18–79.
46 *ibid.*, at pp.17–18.
47 Briggs, n.2 above, at p.37.
48 Ricketson, n.4 above, at pp.18–19.
49 Paul Goldstein, *Copyright's Highway* (1994), p.182.
50 de Freitas, n.19 above, at p.4; Briggs, n.2 above, at pp.119–120.
51 Goldstein, n.49 above, at p.181.
52 *ibid.*
53 Sterling, n.5 above, at p.13.
54 For a survey of the nineteenth century treaties (and a diagrammatic representation of the network created) see Ricketson, n.4 above, at pp.25–38.
55 Sterling, n.5 above, at p.455.
56 Ricketson, n.4 above, at p.39.
57 Sterling, n.5 above, at pp.13–14.

Two Moments in the Internationalisation of Copyright

The Berne Convention

The first step in the creation of the Berne Convention was the formation of L'Association Littéraire et Artistique Internationale ("ALAI") in 1878, under the presidency of Victor Hugo.[58] A principal objective of the Association was "to achieve international consensus on the rights to be granted to authors",[59] and in 1882 it took up the project of an "International Copyright Union".[60] After the writing of a draft treaty by ALAI, international conferences were held under the auspices of the Swiss Government at Berne in 1884 and 1885, and in 1886 an agreement was signed by Belgium, France, Germany, Great Britain, Haiti, Liberia, Spain, Switzerland and Tunis.[61] Although seven of the nine signatories of the Berne Convention were European, six (Belgium, France, Germany, Great Britain, Italy and Spain) were colonial powers, and extended copyright protection to their colonies. Thus, the Convention was immediately "potentially global in scope".[62]

Given the relatively short time frame within which the Convention was drafted and agreed on, one might guess that the process was straightforward. However, there was one significant obstacle which needed to be overcome before the "Berne Union" could be formed. Despite some similarities between national copyright regimes of the signatory countries, they were founded on different philosophical premises.[63] Copyright in the United Kingdom displayed a "sturdy utilitarian thread"[64]—statutory protection was needed "as an encouragement to the labours of learned men".[65] The Statute of Anne, for example, was entitled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned".[66] In contrast, the French concept of the *droit d'auteur* focused on the personal right of the author to profits from the use of his or her works (as do the German *Urheberrecht* and the Italian *diritto d'autore*).[67]

One of the great successes of Berne was that it "built a bridge between the [common and civil law] systems".[68] Although the Preamble to the Convention stated that its purpose was "to protect, in as effective and uniform a manner as possible, *the rights of authors* in their literary and artistic works",[69] the provisions of the Treaty only required each state to extend national treatment to authors of other members of the Berne Union, subject to the establishment of some minimum standards.[70] Therefore, each nation was allowed to retain

58 Briggs, n.2 above, at p.235.
59 Sterling, n.5 above, at p.455.
60 Briggs, n.2 above, at p.235.
61 Stewart, n.3 above, at p.100.
62 Vincent Porter, *Beyond the Berne Convention* (1991), p.2.
63 Sterling, n.5 above, at pp.15–16.
64 Goldstein, n.9 above, at p.142.
65 Adam Smith, *Lectures on Jurisprudence* (1762), p.83.
66 See Barrett, n.25 above, at p.354.
67 Goldstein, n.9 above, at p.142.
68 Stewart, n.3 above, at p.26.
69 Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, Preamble (*emphasis added*).
70 Porter, n.62 above, at p.3.

many of the idiosyncrasies of its national law, while being part of an international framework for copyright protection. In particular, Britain was able to sign on to a treaty framed in terms of personal rights while maintaining the utilitarian rationale for its copyright law.

The objectives of the Berne Convention were to promote international relations in the field of copyright by dealing with international situations, and further uniformity in the level of protection.[71] Despite its emphasis on national treatment, Berne did have a harmonising influence by setting certain minimum standards such as a comprehensive definition of copyright subject-matter and the length of the copyright term. Signatory countries had to comply with these standards in order to join the Convention, thus ensuring greater similarity across legal systems.[72] Nevertheless, the Convention was limited in the extent to which it could achieve uniformity because the clash between the copyright models of the Anglo and French traditions had not been resolved. Rather, the issue had been side-stepped to allow for an international copyright system without international consensus on specific rules.[73]

Nevertheless, a number of delegates at the Berne Conferences of 1884–1886 saw the agreement as only a first step towards ultimate universal codification of copyright, as ALAI had originally desired.[74] History has not so far realised that aspiration.[75] Moreover, the influence of the two copyright models has continued to spread across, and in a sense divided, the world. The utilitarian tradition had been followed in such countries as the United States, Australia, India, Ireland, New Zealand and much of the developing world[76]; whereas the authors' rights view prevails in most civil law countries,[77] and their former colonies in Latin America, Africa and Asia.[78] This article now moves forward 110 years in the history of international copyright to the most recent document in this area, the WIPO Copyright Treaty of 1996.

The WIPO Copyright Treaty

In the time since its formation, "the Berne Union has increasingly become the focal point for discussion of new technologies and cross-border exploitation of copyrighted works".[79] In 1996, the members of Berne (their number increased over the previous century, and in particular as a result of the conclusion of the Agreement on Trade-related Aspects of Intellectual Property,[80] two years earlier) gathered in Geneva to address probably the greatest challenge that international copyright had faced since 1886: the rise of copyright infringement via digital telecommunications media and the internet.

The digitisation of intellectual property amounted to a quantum shift in the use of copyrighted works. Digital material can be used in many different media, manipulated and distorted, copied at the same quality as the original, and distributed throughout the world cheaply, easily and speedily.[81] Therefore, copyright owners faced unprecedented and uncompensated use and misuse of their works.[82] Moreover, the problem of locating an infringing party was magnified in cyberspace.[83] As with finding an infringing public performer of copyrighted plays or music, identifying parties who place copyrighted photographs, files or documents on the internet is extremely difficult.[84] That is, the breadth and anonymity of the internet raise barriers to effective "policing" by copyright owners.[85] Furthermore, and most importantly for this discussion, since material can so easily be transmitted electronically across national boundaries, municipal law can be rendered irrelevant.[86]

The WIPO Copyright Treaty was heralded as having the "potential to become the most significant development of the next decade" in copyright law.[87] The Treaty contained five principal norms applying copyright law to cyberspace. The first was a clear statement that the reproduction right, as set out in Art.9 of Berne, applied in the digital environment.[88] The second norm adapted familiar broadcast and diffusion rights into a single right appropriate to a convergent media environment.[89] The third norm allowed states to carry forward and extend in the digital environment limitations and exceptions in their national laws which had been considered acceptable under Berne.[90] The fourth norm required adequate and effective legal remedies be put in place to prevent circumvention of technological protections used by copyright owners.[91] The fifth norm mandated the provision of adequate and effective legal remedies against knowingly attempting to remove rights management information, or dealing in copies of works which have had their electronic rights management information removed or altered.[92]

When the WIPO Treaty was concluded there was some confidence that this was "an important step forward", and it was hoped that although it left much to be resolved by nation states, the advantages of a uniform

71 Stewart, n.3 above, at p.99.
72 Goldstein, n.49 above, at p.183.
73 Long, n.1 above; at p.71.
74 Ricketson, n.4 above, at p.917.
75 *cf.* J. A. L. Sterling, "The International Copyright Code and E-Justice: Basic Proposals for Global Solutions to Global Problems" [2001] E.I.P.R. 528.
76 Davies and von Rauscher auf Weeg, n.13 above, at p.10.
77 WIPO, n.14 above, at p.24.
78 Goldstein, n.9 above, at p.142.
79 Jon A. Baumgarten and Christopher A. Meyer, "Effects of U.S. Adherence to the Berne Convention" in *The U.S. Copyright Office Speaks* (1989), p.5.
80 (1994) 33 I.L.M. 1197. See John H. Jackson, William J. Davey and Alan O. Sykes, *Legal Problems of International Economic Relations* (4th ed., 2002), p.961.
81 T. C. Vinje, "A Brave New World of Technical Protection Systems: Will There Still be Room for Copyright?" [1996] E.I.P.R. 431.
82 A. Bowne, "Trade Marks and Copyright on the Internet" (1997) 2 Media & Arts L.Rev. 135.
83 Jonathan I. Edelstein, "Anonymity and International Law Enforcement in Cyberspace" (1996) 7 Fordham Intell. Prop. Media & Ent. L.J. 231 at p.294.
84 *ibid.*
85 Barbara Cohen, "A Proposed Regime for Copyright Protection on the Internet" (1996) 22 Brooklyn J. Int'l L. 401.
86 J. Bannister, "Is Copyright Coping with the Electronic Age?" (1996) 4 Aust. Law Lib. 11.
87 A. N. Dixon and M. F. Hansen, "The Berne Convention Enters the Digital Age", [1997] E.I.P.R. 604 at p.607.
88 Agreed Statement Concerning Art.1(4) at *www.wipo.org/eng/dipconf/distrib/96dc.htm.*
89 Arts 6 and 8, at *www.wipo.org/eng/dipconf/distrib/96dc.htm.*
90 Art.10, at *www.wipo.org/eng/dipconf/distrib/96dc.htm.*
91 Art.11, at *www.wipo.org/eng/dipconf/distrib/96dc.htm.*
92 Art.12, at *www.wipo.org/eng/dipconf/distrib/96dc.htm.*

approach would not be overlooked.[93] Although the Treaty did make strides in prescribing areas for national reform, there are two bases on which it can be argued that its harmonising effect is limited. First, the vagueness of some of the norms outlined (for example, provision of "adequate and effective legal remedies") allows nation states to make their own decisions as to what rules and penalties to impose. Secondly, the Treaty expressly gave individual countries considerable latitude in regard to the final form of their domestic laws. Specifically, the key implementation provision states: "Contracting Parties undertake to adopt, *in accordance with their legal systems*, the measures necessary to ensure the application of the treaty".[94]

However, in contrast to the situation at Berne, it is argued that the reason for the Treaty's failure to bind nations to more precise legal rules was no longer the clash between utilitarian and personality theories of copyright. Despite the continuing tension between the conception of copyright favoured in Europe and the Anglo-American model, it would appear that a utilitarian view prevailed at the WIPO Conference in Geneva in 1996. Unlike the Berne Convention's focus on the rights of authors, the Preamble to the WIPO Copyright Treaty states that the Convention is framed "[r]ecognizing the need to maintain *a balance between the rights of authors and the larger public interest*, particularly education, research, and access to information".[95] It should be noted that balancing the interests of such groups is a hallmark of the incentive-based conception of copyright.[96]

Therefore, the signatory nations to the WIPO Treaty have adopted the view of copyright as a policy instrument. In addition to what is reflected in the final document, Sir Anthony Mason observed that the WIPO conference was expressly conducted on the basis of attempting to maintain a copyright balance.[97] Furthermore, international academic debate since the conference, among both European and American scholars, has been conducted implicitly and explicitly on a basis which accepts the incentive-based approach.[98] Before turning to the implications of this conceptual change to the prospects of global copyright harmonisation, three reasons are proposed for the apparent shift from the dominance of authors' rights in the Berne Convention to the expression of a utilitarian approach in the WIPO Copyright Treaty.

93 Anthony Mason, "Developments in the Law of Copyright and Public Access to Information" [1997] E.I.P.R. 636 at p.643.

94 Art.14(1), at *www.wipo.org/eng/dipconf/distrib/96dc.htm* (*emphasis added*).

95 WIPO Copyright Treaty, at *www.wipo.org.int/eng/dipconf/distrib/96dc.htm* (*emphasis added*).

96 See Jane C. Ginsburg, "Copyright and Control Over New Technologies of Dissemination" (2001) 101 Colum. L.J. 1613 at p.1613; Jessica Litman, *Digital Copyright* (2001), pp.77–88; William Landes and Richard Posner, "An Economic Analysis of Copyright Law" (1989) 18/2 J. Legal Stud. 325 and 326; Thomas Vinje, "Copyright Imperilled?" [1999] E.I.P.R. 192 at p.194; Samuelson, n.8 above, at p.15.

97 Mason, n.92 above, at p.636.

98 See, *e.g.*, T. C. Vinje, "The New WIPO Copyright Treaty: A Happy Result in Geneva" [1997] E.I.P.R. 230; Samuelson, n.8 above.

The Victory of Utilitarianism?

From Berne to Geneva via Brazzaville

In 1986, Ricketson identified three principal stages in the Berne Union's first century of development: an initial period where the Euro-centric doctrine of authors' rights advanced in leaps and bounds; a middle period where this advance was impeded by technological change and the emergence of new interest groups; and a later period where the interests of users, particularly of developing countries, radically changed the terms of the debate.[99] From a conceptual perspective, the importance of this third phase should be clear: once the interests of users are being given weight, the rights of authors are being compromised in a manner inconsistent with a strict personality approach.

Following numerous accessions to the Brussels text of the Convention, adopted in 1951, one-third of the Berne Union's membership fell into the category of "developing countries".[1] Moreover, these countries were recognising "imperialist" aspects of international intellectual property conventions, which imposed a high price on the transfer of knowledge from richer countries to poorer countries.[2] In particular, nations newly independent of European colonial rule "chafed at being held to standards to which their former masters had committed them".[3] Pressure for concessions began in the early 1960s, and crystallised at the African Study Meeting on Copyright at Brazzaville in 1963.[4] This Meeting recommended reductions in the term of protection, free use of protected works for educational and scholastic purposes, and the protection of folklore of non-industrialised countries.[5] The preamble to the recommendations stated:

> "[I]nternational copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works. These conventions, if they are to be generally and universally applied, require review and re-examination in the light of the specific needs of the African continent."[6]

In response to these demands, substantial concessions were made by the Berne Union to developing countries at both the Stockholm and Paris conferences (in 1967 and 1971 respectively).[7] A Protocol Regarding Developing Countries was proposed at Stockholm which would have reduced such states' obligations to comply with certain minimum standards (including allowing a shorter copyright term of 25 years, and the payment of "equitable remuneration" for uses of works for "educational or cultural purposes").[8] However, the

99 Ricketson, n.4 above, at p.125.

1 *ibid.* at p.114.

2 Porter, n.62 above, at p.10.

3 Goldstein, n.49 above, at p.187.

4 Ricketson, n.4 above, at p.117.

5 *ibid.*

6 See Royce Frederick Whale, *Protocol Regarding the Developing Countries* (1968), p.10.

7 Stewart, n.3 (1st ser.) above, at p.101.

8 Nora Tocups, "The Development of Special Provisions in International Copyright for the Benefit of Developing Countries". (1970) 29 J. of Copyright Society 402 at pp.406–407; A. Olian, "International Copyright and the Needs of Developing Countries" (1974) Cornell Int. L.J. 81 at p.95.

developing countries were unsuccessful in attaining sufficient ratifications for the Protocol to come into force.[9] The later Paris text, which remains the most recent revision of the Convention, does include a Protocol allowing developing countries some leeway in terms of the implementation of the Berne principles.[10] Most notably, less developed countries were allowed to impose compulsory licences on works which were out of print, or for which translations were not available in their own language.[11]

Although neither the Stockholm nor the Paris conferences directly addressed the question of whether a utilitarian or personality theory of copyright held sway in the Berne Union, in substance it can be seen that the changes made reflect a balancing of interests between authors and users, and the First and Third Worlds. In this respect, it is unquestionable that the move to placate the poorer countries of the world signalled a development in international copyright law, and a shift away from the personality theory. Ironically, a desire to add the richest country in the world to the multilateral copyright framework was another source of change. This article now turns to consider the importance of the United States' entry into the Berne Union.

From Berne to Geneva via Washington

The second major factor influencing international copyright since the establishment of Berne was the United States' accession to the Convention in 1989, bringing the world's largest producer of intellectual property into the "club".[12] Despite attending the conferences in the 1880s, the United States had not signed the Convention.[13] Reasons for this were said to include that, pragmatically, the United States saw greater benefits for itself in not according protection to foreign authors, whose works were freely distributed within the country.[14] Moreover, the United States was resistant to changing its domestic law to include moral rights (which while essential to the personality theory were anathema to the American approach to copyright).[15] In addition, since notice, registration and deposit were required in the United States "on the utilitarian premise" that compliance with formalities was a good litmus test of an author's intention to claim the protection of the law, the prohibition on formalities in the 1908 Berne revision long stood as an obstacle to the accession of the United States.[16]

For much of the twentieth century, "the relationship between the United States and the Berne Union was that between reluctant lover and increasingly demanding suitor".[17] A low point in relations came following the Second World War, when the United States led the movement proposing an alternative international instrument—the Universal Copyright Convention ("UCC"), signed by a number of countries in 1952.[18] In comparison with Berne, obligations under the UCC were expressed in much more general terms, and the Convention did not require national law to comply with specific provisions.[19] In contrast, over the course of the twentieth century, each successive draft of Berne was imposed higher minimum standards. Also importantly, the United States' position changed from being that of an importer to an exporter of copyright material. By the 1980s, "Americans began to realize that the United States was a copyright outcast, and that its failure to join Berne was undermining its efforts to negotiate trade agreements that protected American intellectual property in other countries."[20]

In 1976, the way became clearer for the United States to join Berne when domestic revision of the Copyright Act removed several obstacles; however, certain issues remained (specifically: formalities, the retroactivity principle, moral rights, the manufacturing clause and compulsory licensing).[21] Nevertheless, in the 1980s the Union was very keen to have the United States as a member, and the American Government recognised major policy objectives in enhancing the United States' "credibility" in international copyright relations, and strengthening its "stature and influence" in world copyright deliberations.[22] The Berne Convention Implementation Act of 1988, enacted to enable the United States to adhere to the agreement, represents a compromise, with America not adopting every right "specially granted" by the Convention, most notably non-economic moral rights.[23]

The inclusion of the United States was seen as a "real extension" of the Union, as Berne could now claim coverage of all the major producers of copyright material.[24] Having jointed the Convention, the United States was now able to wield influence as both an economic and an intellectual property power. In particular, the United States' commitment to a utilitarian conception of copyright has been significant in developments regarding the application of the Treaty since 1989. For example, Porter argued in 1991 that "the fundamental principle of the author's right on which [Berne] is constructed is becoming less relevant to the economic needs of the international film, record and broadcasting industries".[25] It is no coincidence that these are industries dominated by American corporations. Similarly, in relation to the 1996 Treaty, it should not be surprising that a convention dealing with the internet, a medium dominated by American content providers, would also reflect the United State's conception of copyright law.

The preceding two sections have examined the influence on contemporary international copyright law of the expansion of the membership of the Berne Convention. In both cases the new members' positions in the

9 Porter, n.62 above, at p.10.
10 Sterling, n.5 (1st ser.) above, at p.456.
11 Porter, n.62 above, at p.10.
12 Goldstein, n.9 (1st ser.) above, at p.144.
13 Ricketson, n.4 (1st ser.) above, at p.56.
14 Goldstein, n.49 above, at p.189.
15 Melville B. Nimmer, *Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works* (2nd ed., 1979), p.499.
16 Goldstein, n.49 above, at p.184; Patry, n.34 above, at p.306.
17 Goldstein, n.49 above, at p.185.
18 See Mitra, n.17 (1st ser.) above, at p.521.
19 de Freitas, n.19 (1st ser.) above, at p.6.
20 Goldstein, n.49 above, at p.186.
21 Patry, n.34 above, at p.306.
22 Baumgarten and Meyer, n.79 above, at p.5.
23 Harry G. Henn, *Henn on Copyright Law* (3rd ed., 1991), p.15.
24 Stewart, n.3 (1st ser.) above, at p.101.
25 Porter, n.62 above, at p.14.

international economic order were relevant to the changes to the international copyright system. This article now turns directly to the broader economic theme of the significance of trade regulation of intellectual property.

From Berne to Geneva via Montevideo

The third part of the explanation for the shift in focus in international copyright is the change in emphasis more broadly to the economic consequences of trade in intangibles. Copyright law "has inevitably become entwined with matters of international trade in copyrightable 'objects' ".[26] Furthermore, questions of copyright regulation are seen as trade issues because "[l]ike the absence of any rights, inadequate enforcement came to be seen as a trade barrier, as exports [are] 'displaced' by local 'piracy' production".[27] The significance of this is not unrelated to the earlier points: recent reaction to international piracy has been led by the United States (as a member of Berne), predominantly against developing countries (many of which are members of Berne but whose enforcement of copyright is insufficient).[28]

The United States' interest in this area is understandable: a 1988 study by the United States International Trade Commission estimated the annual loss to the domestic economy due to "inadequate" intellectual property protection abroad at $24 billion.[29] Although some commentators have queried the accuracy of that figure, which was based on industry estimates, there is no question that the amount lost to US copyright owners was considerable.[30] International pressure applied by the United States to bring intellectual property into the sphere of trade regulation culminated in the Agreement on Trade-related Aspects of Intellectual Property ("TRIPs") in 1994.[31]

TRIPs is said to have been "probably the most significant development in international intellectual property law [in the 20th century]".[32] As a product of the Uruguay Round of negotiations on the General Agreement on Tariffs and Trade ("GATT"), TRIPs includes intellectual property under the supervision of the World Trade Organization ("WTO").[33] Although there was resistance among developing countries to the notion that GATT could include the field of intellectual property,[34] TRIPs aimed to provide "adequate standards" and "effective and appropriate means for . . . enforcement" worldwide, while "taking into account differences in national legal systems".[35] Like Berne, TRIPs contains a minimum level of standards that member countries must comply with (but may add to and elevate if they so wish).[36] Indeed, TRIPs incorporates the national treatment provision of Berne by reference, and countries who sign on to TRIPs become members of the Berne Union.[37]

The significance of bringing intellectual property into a trade regulation regime is twofold. First, enforcement mechanisms under the WTO are far more effective than the previous route of bringing a case in the International Court of Justice.[38] Secondly, TRIPs has increased the number of countries that are part of the Berne Union, since "[j]oining the WTO automatically involves accession to the TRIPs agreement".[39] Previously, a weakness of the Berne regime was that many of the newly industrialising and larger developing countries were not parties.[40] However, the benefits of free trade which membership of the WTO brings has forced many countries to sign on to intellectual property obligations as well.[41]

A by-product of the influence of TRIPs is that a new conception of copyright has been introduced into the world arena—"copyright as trade". As Ladd predicted, the shadow of international trade led to an inevitable re-examination of not only conventional legal norms and familiar commercial practices, "but also of the theoretical and doctrinal underpinnings of copyright as well".[42] Similarly, Goldstein foresaw that this process would make the tension between the "two cultures of copyright" less important:

> "The recent introduction of copyright into the general trade process, in which new rights can be facilely traded for subsidies to rice and rapeseed oil, promises to complicate both domestic and international copyright, and possibly diminish the power of their competing symbols."[43]

Despite the wording of the WIPO Treaty examined earlier, the copyright theory that won the day in 1996 was not utilitarianism as the common law nations saw it up to at least the middle of the twentieth century. Rather, a model has emerged which encompasses a national economic interest component in the striking of the copyright balance between authors and users.[44] However, although nations of the world now share commitments to the protection of intellectual property, they do not share the same national interests in the international market for copyright material. The question to

26 Ladd, n.7 (1st ser.) above, at p.408.
27 M. C. E. J. Bronckers, D. W. F. Verkade and N. M. McNeils, *TRIPs Agreement* (2000), p.10.
28 Jackson *et al.*, n. 80 above, at p.962.
29 United States International Trade Commission, *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade* (1988), 4–2.
30 Jackson *et al.*, n.80 above at p.926.
31 Bronckers *et al.*, n.27 (2nd ser.) above, at p.10.
32 M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (1996), p.v.
33 Christopher May, *A Global Political Economy of Intellectual Property Rights* (2000), p.67.
34 Ulrich Joos and Rainer Moufang, "Report on the Second Ringberg-Symposium" in Friedrich-Karl Beier and Gerhard Schricker, ed., *Gatt or WIPO? New Ways in the International Protection of Intellectual Property* (1989), p.22.
35 Agreement on Trade-related Aspects of Intellectual Property, Preamble.
36 Endeshaw, n.44 above, at p.86.
37 GATT, *Focus Newsletter* (1993), p.12.
38 See Goldstein, n.49 above, at p.187.
39 Christopher May, *A Global Political Economy of Intellectual Property Rights* (2000), p.68.
40 Jackson *et al.*, n.80 above, at p.961.
41 Peter Drahos, "Global Property Rights in Information: The Story of TRIPs at the GATT" (1995) 13 *Prometheus* 6 at p.8 (1995); John Browning, "Africa I Hollywood 0" in *Wired* at *www.wired.com/wired/5.03/netizen_pr.html* at p.12.
42 Ladd, n.7 (1st ser.) above, at p.408.
43 Goldstein, n.49 above, at p.196.
44 Simon Fitzpatrick, "Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty" [2000] E.I.P.R. 214 at pp.226–228.

which this article now turns is whether, given that the nations of the world appear to subscribe to the same copyright framework, this will lead to greater harmonisation in the near future.

Implications for Global Harmonisation

Variation not harmonisation

In 1996, the challenges of the internet were (1) new; (2) international; and (3) fundamental. If ever there were to have been a situation in which precise agreement was possible around certain key points, it was this. The countries that produced the WIPO Copyright Treaty had the opportunity to deal with a novel problem in a globally consistent manner. However, despite hopes of a uniform approach, differences will exist across national boundaries as a result of the vagueness of some of the Treaty's terms, and the latitude provided to the contracting states by the implementation provision.

These observations are borne out in domestic implementations of the Treaty. For example, the United States' Digital Millennium Copyright Act ("DMCA"), the Australian Copyright Amendment (Digital Agenda) Act, and the European Union Copyright Directive (to be enacted in individual member countries) differ in many respects. First, these reforms did not occur simultaneously: the DMCA was passed in 1997; the Australian amendment was made in 2000; and the EU Directive was adopted in 2001. Furthermore, there are differences between the substantive rules which have resulted from the implementation of the Treaty's provisions. For example, Boyle's comment on the EU Directive is that at least "[a] few of the absurdities of the US's Digital Millennium Copyright Act have been avoided".[45] A specific instance of difference can be seen in respect of the United States and Australian legislation: the maximum financial penalty imposable for a first offence of commercial anti-circumvention under Australian law is A$60,500 (approximately US$32,000),[46] whereas it is US$500,000 under the DMCA.[47]

At its broadest, the explanation for these variations is a familiar one: with the shift of copyright into the sphere of trade, nations of the world are adopting laws that suit their position in the global market for copyright material—importers of copyright material will impose more lenient rules, whereas exporters of copyright will accord copyright owners stronger rights. However, the difference from earlier times is that trade position is being incorporated into the domestic copyright rules themselves, rather than simply forming a basis on which to determine appropriate international copyright relations, and how zealously to pursue enforcement.[48]

Within an internationally agreed framework, the consequence of this will be more subtle, yet strongly held, national variations in copyright law. The consensus of the world community around a trade-influenced balancing approach to copyright will in fact compel national differences in copyright policy, rather than bring the laws of different countries into greater harmony. This would appear to support Ricketson's contention with which this article began.[49] It is likely that greater harmonisation or unification of copyright law would have been possible if the personality theory had retained its position of dominance, and extended its influence to countries which subscribed to utilitarianism.

However, it should be noted that it is not here argued that a global utilitarian approach would have been unable to achieve a more consistent result. In a world before TRIPs, it would not have been impossible to imagine international agreement on the level of protection that would stimulate the greatest amount of intellectual production across the world. The principal point made here is that the influence of trade regulation in the sphere of intellectual property will prevent pure copyright policy decisions being made which could have brought about such a result.

In order to achieve greater harmonisation in national copyright laws under the current model there must be greater commonality of interests between states. This article moves on to make some brief comments regarding the unlikelihood of further harmonisation because of the continuing divergence of national interests at a global level.

Economic and information development

As has been noted, a connection between copyright law and economic development is found in the need of many poorer countries to make use of scientific, educational and cultural knowledge developed in industrialised countries, while being unable to afford to pay royalties for the privilege. In addition to highlighting that countries are unlikely to bring their copyright law into greater harmony unless their interests are more closely aligned, the further point here is that rich nations are likely to get richer as they exploit the advantages of the use of intellectual property, as well as the economic benefits of payments from poorer countries.

A third dimension to this problem at the dawn of the twenty-first century is that developed countries may advance even further ahead because of their capacity to make the most use of Information Communication Technology ("ICT"). The United Nations Educational Scientific and Cultural Organization ("UNESCO") recently published a report emphasising the global shift to an "Information Society", in which intellectual products will overtake the primary and secondary sectors as the most important aspects of the world economy.[50] However, this shift from an "Industrial" to an "Information Society" is dependent on penetration and use of ICT, which facilitates the movement of information.[51] In this regard, it is significant that there is presently an enormous disparity in the distribution of ICT across the

45 James Boyle, "Whigs and Hackers in Cyberspace", *Financial Times*, February 12, 2001.

46 Copyright Act 1968 (Cth), s.132(6A).

47 17 U.S.C. §1204. For a detailed comparison of the US and Australian legislation see Fitzpatrick, n.44 (2nd ser.) above, at pp.222–226.

48 *cf.* Briggs, n.2 (1st ser.) above, at p.163; Goldstein, n.49 (1st ser.) above, at p.195.

49 Ricketson, n.4 (1st ser.) above, at p.40.

50 UNESCO, *World Communication and Information Report 1999–2000* (2000).

51 UNESCO, *An Information Society for All* (1996), p.1.

world.[52] For example, in 1996 the United States, Europe and Japan accounted for 68 per cent of the world's telephone lines and 79 per cent of the world's personal computers; the African continent had 1.8 per cent and 1.3 per cent respectively.[53]

Even more troubling is the fact that this "digital divide" is perceived to be widening as the tech-haves leave the have-nots behind.[54] The fear is that this will exacerbate the existing social and economic inequalities between countries.[55] Not only is the digital divide "a reflection of existing broader socio-economic inequalities",[56] but ICT is seen as having the potential to play a Janus-faced role. Such technology has the power to increase the gap between rich and poor worldwide through enhancing efficiency of production, and developing new sources of economic value which can be exploited by developed countries, but not their poorer cousins.[57] In particular, by dramatically improving communication and exchange of information, ICT can create powerful social and economic networks, which in turn provide the basis for major economic advances.[58]

The implications of these observations for intellectual property law should be evident. If such predictions are proved correct, the developed world will have an advantage not only in the creation of intellectual content, but also in the technological infrastructure that will continue to encourage its production and use. The widening ICT divide will be a major obstacle to the integration of all countries into a global Information Society.[59] If only for these reasons, it would seem that the economic divide between the First and Third Worlds will persist, if not become further entrenched.

The impact of this on copyright harmonisation, it is argued, will be continuing heterogeneity. As poorer countries consider their municipal copyright regimes, they will (within the constraints of international conventions to which they are party) be more likely to set their rules to avoid paying for use of expensive foreign information. Despite efforts at harmonisation through the establishment of minimum standards in international agreements, the shift to a trade-based copyright model inevitably requires that states look beyond the benefits to authors of uniform laws in all jurisdictions, and focus on their domestic national interest.

52 UNESCO, n.50 (2nd ser.) above, at p.15.
53 *ibid.* at p.33.
54 J. M. Spectar, "Bridging the Global Digital Divide: Frameworks For Access and the World Wireless Web" (2000) 26 N.C.J. Int'l L. & Com. Reg. 57.
55 Digital Opportunity Task Force, Digital Opportunities for All: Meeting the Challenge (2001), p.4.
56 *ibid.* at p.9.
57 *cf.* Client Perspectives, "Champion of Change", at *www.ifc.org/ifc/publications/pubs/impact/impsp99/s9clientibm/s9clientibm.html.*
58 Digital Opportunity Task Force, n.55 (2nd ser.) above, at p.5.
59 UNESCO, n.50 (2nd ser.) above, at p.32.

Conclusions

The hope that the adoption of its rules in the greatest number of states would eventually lead to uniformity in copyright law was "precisely the philosophy which . . . inspired the Berne Convention".[60] This was understandable in the light of the historical background of bilateral treaties which produced "a mosaic of differing relationships leading away from harmony instead of towards it".[61] However, "[t]he future is uncertain . . . because the once-shared vision and aspiration for a world community of authorship and author's interests has faded".[62]

Nevertheless, although differences in copyright theory appear to have diminished in importance, the result is not a greater prospect of harmonisation. In 1989, Ladd asserted that "the development of international law for new technologies requires us to search for solutions which permit variations at the state level, while moving steadily towards a substantial degree of international harmonization".[63] It is submitted that the way things have turned out, global copyright harmonisation is not only incomplete, it is in fact more incomplete than it might appear on the surface.[64]

Agreement on a conception of copyright as a policy instrument calibrated to serve the national economic interest, as opposed to providing fundamental rights to authors or the appropriate incentives for creation of works, points necessarily to a state-by-state determination of the appropriate rules, rather than the development of internationally agreed standards. Moreover, as the interests of different countries of the world diverge, rather than converge, in the light of the impact of the digital divide, harmonisation will become an even more difficult goal to achieve. The copyright model which appears to have won the day accentuates national difference, thus raising practical barriers to copyright consensus, unless and until there is greater parity of interest among the states of the world.

60 Stewart, n.3 (1st ser.) above, at p.32.
61 *ibid.* at p.36.
62 Ladd, n.7 (1st ser.) above, at p.408.
63 *ibid.*
64 Letterman, n.7 (1st ser.) above, at p.15.