

International Copyright Developments: From the Marrakesh Treaty to Trade Agreements

Krista Cox, Director of Public Policy Initiatives, ARL

With all of the recent domestic copyright activity relating to libraries—important fair use cases such as the Authors Guild’s litigation against HathiTrust and the review of copyright law by the US House of Representatives, the US Patent and Trademark Office, and the Copyright Office—it could be easy to overlook the important copyright policy developments occurring internationally. Many of these developments are taking place at the World Intellectual Property Organization (WIPO), including the Marrakesh Treaty for the Blind, Visually Impaired, or Otherwise Print Disabled and several ongoing discussions on the topics of libraries, education, and traditional knowledge and traditional cultural expressions. In addition to the discussions at WIPO, copyright policy is being shaped through ongoing negotiations of large regional trade agreements that contain, or are expected to contain, obligations regarding copyright. This article focuses on these recent international developments.

World Intellectual Property Organization

WIPO’s Standing Committee on Copyright and Related Rights (SCCR) is a specialized committee set up in 1998 with the intention of examining substantive areas of copyright and related rights¹ and addressing harmonization of these rights. SCCR is expected to issue recommendations, developed on a consensus basis by all member states of WIPO, for consideration by the WIPO General Assembly. After the adoption in 2013 of the Marrakesh Treaty, which was led by SCCR, the committee has focused its attention on a broadcasting treaty and instruments related to limitations and exceptions for libraries and education.

Marrakesh Treaty for the Blind, Visually Impaired, or Otherwise Print Disabled

Perhaps the most significant recent international copyright development occurred in June 2013 when WIPO adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“Marrakesh Treaty”). After several years of negotiations, WIPO member states called for a diplomatic conference in Marrakesh, Morocco, to create a treaty that would provide minimum standards for limitations and exceptions regarding the making and distribution of accessible-format works and allow for cross-border sharing of these formats.² Significantly, this treaty represents the first WIPO treaty directed at addressing the needs of the users rather than focusing on rights for rightsholders.

The successful outcome of the diplomatic conference demonstrates the strong international will to address the lack of accessible-format works for persons who are blind or print disabled, also known as a “book famine.” Estimates place the number of accessible-format works at approximately five percent of published works in developed countries, and significantly lower in developing countries. A 2006 WIPO study found that fewer than 60 countries—less than one-third of countries worldwide—had copyright

limitations and exceptions to benefit persons who are visually impaired (e.g., an exception that permitted the conversion of a work into an accessible format).

On June 28, 2013, at the Marrakesh Treaty signing and adoption ceremony, 51 countries signed the treaty, a record number of signatories for a WIPO-administered treaty. Today, 80 parties have signed the Marrakesh Treaty, though 20 ratifications are necessary before the treaty will enter into force. India became the first country to ratify the Marrakesh Treaty on June 24, 2014, representing another WIPO record—no other WIPO treaty received ratification within a year of its adoption. The large number of signatories and quick ratification by India highlight the importance of this issue in the international community. As of this writing, El Salvador, the United Arab Emirates, and the Eastern Republic of Uruguay, Mali, and Paraguay have also deposited their instruments of ratification or accession with WIPO and only 14 more ratifications are needed for the treaty to enter into force.

While the Marrakesh Treaty will greatly benefit those countries that do not have existing limitations and exceptions in their laws to address access by persons who are print disabled or do not have large numbers of accessible-format works, developed countries will also benefit from ratification and implementation. Broad implementation of the treaty will make it easier for entities working on behalf of the print-disabled in developed countries to import accessible-format works. The United States, for example, already has the Chafee Amendment (which permits the creation of accessible-format works), the fair use doctrine, and exceptions to the rules governing import and export.³ However, if a print-disabled person in the United States seeks an accessible-format copy produced in another country, the copyright law in that country might prevent the export of the accessible copy to the United States. The Marrakesh Treaty would solve this problem by permitting authorized entities to import and export accessible format works for beneficiary persons, allowing entities to share resources. The United States could receive accessible formats from other English-speaking countries such as Canada, the United Kingdom, Ireland, Australia, and New Zealand.

In addition to allowing for the sharing of books between countries with a common language, the Marrakesh Treaty would benefit the print-disabled in the United States who speak other languages. In the US, approximately 13 percent of the population speaks Spanish. The United States also has a significant number of persons who speak Chinese, Tagalog, French, Vietnamese, German, Korean, Russian, Arabic, Italian, and Portuguese. Native speakers of these languages would benefit from the cross-border exchange provisions of the Marrakesh Treaty, as would English speakers learning a second language. The United States played a key role in the Marrakesh Treaty and, while the US signed the agreement in October 2013, it must still be ratified.

Negotiations for an Instrument on Libraries

In 2008, WIPO released a study on copyright limitations and exceptions for libraries and archives, prepared by Kenneth Crews.⁴ His study evaluated statutes from 149 countries and found that 128 had at least one statutory library exception, with the majority having more than one exception addressing library issues. This study revealed that the statutes differed greatly across countries, particularly with respect

to the reproduction right. Crews updated the study and presented it at WIPO in December 2014. The updated study evaluated 186 countries, finding that 153 had one or more “library exceptions.” Crews also identified some changes to national laws, including in the United Kingdom and Russia, both of which amended their copyright laws in 2014.

Following the 2008 study, a number of countries expressed interest in an international instrument to specifically address limitations and exceptions for libraries. Some developing countries, particularly the African Group, advocated for a single instrument for limitations and exceptions that would broadly address persons who are visually impaired, libraries, and education. In 2011, the African Group tabled a comprehensive proposal addressing these three topics. Ultimately, WIPO member states agreed to separate the issues and moved forward first with negotiations for persons who are visually impaired.

With the conclusion of the Marrakesh Treaty, attention at WIPO has turned to libraries. However, significant divergence exists among WIPO member states regarding not only the substantive provisions in the text, but also the nature of the instrument. While a number of countries, primarily developing countries, advocate for a binding treaty, other countries support a “soft” instrument instead, which could, for example, take the form of recommendations, principles, or a model law that would not be binding. There have been proposals reflecting the differences on the nature of an instrument. As noted above, prior to the success of the Marrakesh Treaty, the African Group proposed a comprehensive treaty on limitations and exceptions for the print-disabled, educational and research institutions, and libraries and archives. Brazil, Ecuador, and Uruguay tabled a proposal labeled by WIPO as “An Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitations for Libraries and Archives,” thus avoiding any prejudgment on the nature of the instrument.⁵ The US tabled a “soft law” document called “Objectives and Principles for Exceptions and Limitations for Libraries and Archives,” encouraging adoption of exceptions at the national level.

The topics under discussion for an instrument for libraries include: preservation of library and archival materials; the right of reproduction; distribution and safeguarding of copies; legal deposit systems; library lending; exhaustion of rights and parallel importation; cross-border sharing; orphan works; limitations on liability for libraries and archives; technological protection measures; relationship between limitations and exceptions of the instrument and contracts; and the right of translation.

The first two 2014 meetings of WIPO’s SCCR, which took place in May and July, were highly contentious, with the European Union (EU) refusing to agree to proceed with text-based work on limitations and exceptions for libraries, including a non-binding soft-law instrument.⁶ The EU essentially blocked consensus at the first two meetings of 2014, resulting in the lack of conclusions to the meetings, a highly unusual development for SCCR.⁷ While the most recent meeting of SCCR in December 2014 was reportedly more constructive and included sessions for Crews’s update on library limitations and exceptions,⁸ the meeting ended only with a summary of the chairman’s conclusions. The previous practice of the SCCR to approve of the chairman’s conclusions has, apparently, not been reinstated after the May and July meetings ended so poorly. Some countries, including the US, have noted that the failure to advance conclusions from the meetings could call into question the usefulness of the committee.

Negotiations for an Instrument on Education

The negotiations on an international instrument regarding limitations and exceptions for education are not as well advanced as for libraries. Few countries have made textual proposals and less time has been devoted to this topic. Additionally, similar to the negotiations for an instrument on libraries, there is substantial disagreement as to whether a binding treaty is necessary or whether a soft-law instrument should be pursued instead.

The topics for discussion regarding education include the scope of beneficiaries (uses by educational institutions or research organizations or other beneficiaries); exhaustion of rights and parallel importation; limitation on remedies; uses for in-classroom and out-of-classroom teaching; distance learning; uses for research; uses for persons with disabilities; orphan works; technological protection measures; ISP liability; and relationship with contracts.

As with the discussion on an instrument for libraries, the US tabled a document on “Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions.” Like its document on libraries, the US encourages the adoption of national limitations and exceptions. The US also specifically supports limitations and exceptions for “technologically evolving learning environments.” In its objectives and principles for education, the US notes that, “An appropriate balance of rights and exceptions and limitations, consistent with international law, sustains the missions and activities of educational, teaching and research institutions.”

The recent blocking of consensus conclusions at SCCR, particularly the EU’s heavy resistance to working on the agenda for limitations and exceptions, raises questions as to when or whether this issue will advance at WIPO and what form any instrument might take.

Negotiations for an Instrument on Traditional Knowledge, Traditional Cultural Expression, and Genetic Resources

WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) has been meeting three times each year with a directed objective of reaching an agreement on texts for a legal instrument to protect traditional knowledge, traditional cultural expressions, and genetic resources. Like the other topics under discussion at WIPO, there does not appear to be agreement as to the nature of the instrument, with developing countries calling for a binding treaty and developed countries remaining non-committal.

Traditional knowledge (TK) involves knowledge or practices passed between generations in a traditional context, such as the use of traditional medicines or knowledge about migration patterns. Traditional cultural expressions (TCEs) refer to expressions of folklore that form the identity or heritage of a community and are passed between generations, such as dances, songs, designs, or stories. Under standard intellectual property principles, TK and TCE are considered to exist in the public domain and are therefore free to use. However, indigenous peoples and local communities often argue that TK and TCE are subject to misappropriation or misuse, then later patented or copyrighted by a third party that

has appropriated or adapted the knowledge or work. Some WIPO member states argue that TK and TCE should be protected by the intellectual property system to prevent unauthorized use.

From the perspective of providing access to information, the draft texts on TK and TCE reveal a number of concerning provisions that could negatively affect the public domain. However, much of the language is bracketed, reflecting a lack of consensus among WIPO member states. Some of the concerns revolve around the following issues:

- **Subject matter of protection.** The draft text would apply to tangible as well as intangible forms of expression and includes protection for traditionally non-copyrightable expressions such as rituals, words, signs, names, symbols, games, and sports. Allowing for exclusive rights over these subject matters could seriously damage the public domain, removing existing materials from the public domain and allowing beneficiaries to hold exclusive rights over such expressions.
- **Definition of beneficiaries.** The text broadly provides that beneficiaries are indigenous peoples and local communities that create, express, maintain, use and/or develop TK and TCE, potentially subjecting huge numbers folktales that are currently in the public domain to protection.
- **Scope of protection.** Some formulations of the texts would allow beneficiaries to deny access to and use of the subject matter and prohibit modification that is deemed offensive or derogatory, essentially removing much subject matter from the public domain, preventing criticism or creation of many derivative works, and harming free speech. Additionally, unlike traditional copyright protection, some of the proposed text does not specify a period of time of protection; instead such protection may last as long as the subject matter continues to satisfy the criteria of eligibility, essentially making a time period of protection potentially unlimited. One option specifically provides that protection should “last indefinitely.”

The most recent IGC meeting took place July 7–9, 2014, and did not result in an agreement regarding whether to recommend that the General Assembly convene a diplomatic conference. A number of developing countries advocated for a 2015 conference. The US released a proposal suggesting that such a decision be delayed for the 2015 General Assembly, in which case a diplomatic conference would occur in 2016 at the earliest. The lack of consensus resulted in no official IGC recommendation. Instead, the chairman of IGC released a document with a proposed timeline, that included a suggestion that the WIPO General Assembly “take stock of and consider the text(s), progress made, and decide on convening a Diplomatic Conference.” Delegates at the WIPO General Assembly, which took place September 22–30, 2014, were unable to come to a decision point and the future of the IGC, which unlike the SCCR is not a permanent committee, is unclear. Because the General Assembly did not come to a decision on the work program for IGC, WIPO has not listed any IGC sessions on its 2015 calendar.

Trade Agreements

In addition to the multilateral forum of WIPO, numerous trade agreements contain comprehensive chapters governing intellectual property rights. While trade agreements are often developed bilaterally

and some cover only select subjects related to trade, such as tariffs, others involve large regions with multiple trading partners and cover subject areas seemingly unrelated to trade. Two prominent regional trade agreements include the Trans-Pacific Partnership Agreement (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). Unfortunately, these trade agreements are negotiated behind closed doors and, unlike at WIPO, the negotiating texts are kept secret, making it difficult to comment on the proposed agreements. Only through leaks of the texts has the public been able to gain access to and understand the proposals.

Some members of the US Congress have criticized the secrecy of these trade agreement negotiations. For example, Senator Bernie Sanders (I-VT) wrote a letter to the US Trade Representative (USTR), the lead agency negotiating trade agreements, concluding, “the public has a right to monitor and express informed views on proposals of such magnitude as the TPP...Without access to the actual texts being discussed, in my view the effective input and informed participation of the public is severely curtailed.”⁹ The lack of transparency has also been criticized by library organizations and civil society.

Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership Agreement (TPP) has been under negotiation since 2010. New negotiating parties have been added since the first round of negotiations and the agreement now has 12 negotiating parties. In addition to the US and Canada, the following countries are currently involved in the negotiations: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. This trading area comprises 40 percent of the world’s GDP and is intended to eventually cover the Asia Pacific Economic Cooperation (APEC) region.

Through several leaks of the negotiating text of the intellectual property chapter—one of the most controversial chapters of the agreement—the public is able to see what topics are being negotiated and which countries support or oppose particular proposals. The first leak of the comprehensive, consolidated intellectual property chapter, including country positions, occurred in November 2013, reflecting the state of negotiations as of August 2013. After this leak, US Representative Zoe Lofgren (D-CA) criticized the copyright provisions, noting in a press statement that the agreement “is something that is backdoor-ing through a trade agreement, that which could not be obtained in Congress.”¹⁰ The most recent leak occurred in October 2014 and reflected the state of negotiations as of May 2014.¹¹

One of the most controversial issues regarding copyright in the TPP centers on copyright term. The United States proposed its current term of life of the author plus 70 years, or 95 years for published works for hire and 120 years for unpublished corporate works. The term of life plus 70 is supported by Australia, Chile, Peru, and Singapore, the four negotiating parties in the TPP that have already signed a bilateral free trade agreement with the US and previously agreed to this term. Mexico has proposed its domestic term of life plus 100 years. The remaining countries support the international standard of life of the author plus 50 years.

The danger of including the copyright term of life plus 70 in the TPP, aside from the harm that lengthy copyright terms have on the public domain and access to knowledge, is the difficulty in changing this

term in the future. Many in the US acknowledge that the present term is too long and Maria Pallante, Register of Copyrights, has suggested reintroduction of formalities for the last 20 years of copyright protection. However, changing the term of protection in US copyright law would violate the TPP if parties agree to a period of life plus 70 years in the final text. The US would also face difficulty in requiring formalities for the last 20 years of protection because the latest TPP leak shows a new provision that parties have agreed to prohibiting formalities.

Another controversial US proposal involved highly prescriptive provisions on technological protection measures (TPMs) that could prevent reform on this issue. The US proposal would have made the act of circumvention of a TPM an independent cause of action with no nexus to copyright infringement and used a narrow and closed set of limitations and exceptions to the circumvention prohibition. The US proposal also included a three-year rulemaking procedure for additional limitations and exceptions, modeled after Section 1201 of the Digital Millennium Copyright Act (DMCA). The new limitations and exceptions are valid only for a three-year period, then must be renewed. Under this formulation, permanent limitations and exceptions could not be added without violating the TPP or forcing renegotiation of these rules with all TPP parties. Thus, as with proposals or efforts to address the lengthy copyright terms in the US, Congress could not enact a permanent cell-phone unlocking exemption¹² or other permanent exceptions, such as to permit the visually impaired to overcome TPMs designed to limit access on e-readers, without disregarding its obligations to the other TPP parties.

However, in the most recent leak of draft TPP text, it appears that the US has dropped its proposed text on anti-circumvention measures and parties have agreed to language that does not require a three-year rulemaking process. The October 2014 leaked text would allow new permanent limitations and exceptions allowing for circumvention of TPMs, though it may still be difficult to create a general permanent exception allowing for circumvention of any non-infringing use due to language that seems to permit new limitations and exceptions only on a case-by-case basis.

While some of the proposals in the TPP could negatively affect the public domain and access to information, a significant and positive development occurred in July 2012 when the US introduced language on copyright limitations and exceptions. Prior free trade agreements generally included specific rights and protections for rightsholders, but failed to address limitations and exceptions. Based on the most recent leaked text, it appears that all TPP parties have agreed to language directing parties to “endeavor to achieve an appropriate balance” through limitations and exceptions, “including those for the digital environment, giving due consideration to legitimate purposes such as, but limited to, criticism, comment, news reporting, teaching, scholarship [or] research.” This language is derived from the US’s fair use statute. Additionally, the most recent leaked text reveals that parties have now agreed to language applying limitations and exceptions for persons who are blind, visually impaired, or otherwise print disabled and also contains a footnote referencing the Marrakesh Treaty. The language on limitations and exceptions is a welcome inclusion that ensures that the TPP will not undermine fair use, a critical “safety valve” in copyright law, and shows support for the Marrakesh Treaty.

Trans-Atlantic Trade and Investment Partnership

The US has also started negotiating a trade agreement with the EU known as the Trans-Atlantic Trade and Investment Partnership (TTIP). Like the TPP, this agreement is expected to include a chapter on intellectual property. However, this chapter is not expected to be as comprehensive as its analog in the TPP and negotiators have stated that the TTIP will not create upwards harmonization of intellectual property rights. Both the US and the EU already have high levels of intellectual property protection and enforcement, though their systems differ in many respects.

Currently, neither party has put forward text on the intellectual property chapter but, instead, the negotiators have discussed principles, objectives, and a framework for the chapter. It is expected, however, that the agreement will include a list of treaties that both parties must ratify or accede to. Although the Marrakesh Treaty has not yet been ratified, both the US and the EU—along with seven individual member states of the EU—are signatories and the inclusion of a reference to the Marrakesh Treaty in TTIP remains a possibility. Hopefully, any specific obligations that are proposed with respect to copyright in the TTIP reflect a balance and include limitations and exceptions.

Endnotes

- 1 In many non-US jurisdictions, the rights of performers are considered “related rights” rather than copyrights.
- 2 For a detailed explanation of the provisions of the Marrakesh Treaty, see Jonathan Band, “A User Guide to the Marrakesh Treaty,” Library Copyright Alliance, October 10, 2013, <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-1013final.pdf>.
- 3 In the United States, the current set of statutes permitting the creation and distribution of accessible-format works indicates that US copyright law is already in compliance with the Marrakesh Treaty and would not require any changes.
- 4 Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO SCCR/17/2, August 26, 2008, http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf.
- 5 Several proposals have been merged and at the most recent SCCR meeting the proposed text by the African Group, Brazil, Uruguay, and India was consolidated into one document.
- 6 Some speculate that the EU fears that discussion of a non-binding instrument would evolve into negotiations over a binding one.
- 7 See, for example, Catherine Saez, “Hopes Dampened for Copyright Exceptions For Libraries/ Archives at WIPO,” *Intellectual Property Watch*, May 5, 2014, <http://www.ip-watch.org/2014/05/05/hopes-dampened-for-copyright-exceptions-for-librariesarchives-at-wipo/>; Catherine Saez, “WIPO Copyright Committee in Disarray Again; Development Dimension Questioned,” *Intellectual Property Watch*, July 7, 2014, <http://www.ip-watch.org/2014/07/07/>

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- 8 Catherine Saez, “WIPO Members Conclude Year Positively with Copyright Committee, Despite No Changes to Text,” *Intellectual Property Watch*, Dec. 14, 2014, <http://www.ip-watch.org/2014/12/14/wipo-members-conclude-year-positively-with-copyright-committee-despite-no-changes-to-text/>.
 - 9 Senator Bernard Sanders (I-VT) to Ambassador Ron Kirk, expressing concerns regarding the Trans-Pacific Partnership Agreement, Dec. 1, 2011, http://keionline.org/sites/default/files/Sen_Sanders_letter_to_USTR_TPP_negotiations_12-1-2011.pdf.
 - 10 Rep. Zoe Lofgren (D-CA), “Rep. Zoe Lofgren on Emerging & Controversial Trans Pacific Partnership (TPP) Trade Treaty,” press release, Dec. 5, 2013, <http://lofgren.house.gov/news/documentsingle.aspx?DocumentID=365675>.
 - 11 Krista Cox, “New WikiLeaks of the Trans-Pacific Partnership Agreement Intellectual Property Chapter—Analysis of Copyright Provisions,” *ARL Policy Notes* (blog), Oct. 16, 2014, <http://policynotes.arl.org/?p=15>.
 - 12 See Jonathan Band, “The End of the Cell Phone Unlocking Saga?,” *InfoJustice*, July 29, 2014, <http://infojustice.org/wp-content/uploads/2014/07/band-end-of-cell-phone-saga.pdf>.

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Association of Research Libraries
21 Dupont Circle, NW, Suite 800
Washington, DC 20036
P: 202-296-2296
F: 202-872-0884

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