

Session II: The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms*

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Let me begin by saying thank you Pippa, and thank you to my friends Jane Ginsburg and June Besek for inviting me here. It is always an honor to be back at the Kernochan Center. I had the pleasure of knowing Jack Kernochan and working and learning from him, so it is a personal pleasure as well to be here.

Pippa and others posed a few questions to us, and the other speakers on the first panel who have addressed some of these issues. I am going to put my own gloss on the questions. The first was, “How do the copyright treaties and trade agreements affect national IP laws in the U.S. and elsewhere?” And I guess the real question is: are norms even being set by the treaties and trade agreements?

Let me just start with the basics for the students in the room who may be unfamiliar with international copyright law. First, there is no such thing as international copyright law. I always put “international” in quotes. International copyright is an interlocking set of national laws for which the treaties set norms—often floors (minimum levels of protection). That is what happens when you get lots of countries in one room trying to agree on what the levels of protection and enforcement—and whatever else—should be – minimum sets of norms.¹ The most difficult part of putting the treaties into force is not the treaty language; it is the implementation of the treaties in the national laws. If you look at the history of the treaties—as Karyn has provided, and Steven Metalitz and Probir Mehta have talked about—there is a long lag time between the treaties being completed and being enacted into national laws.²

Another basic point: I spent my formative years at the U.S. Copyright Office negotiating trade agreements, both bilaterals and multilateral agreements. One constant I found is that no country agrees to anything unless they want to. That is just a basic observation, for example, it was part of the U.S.-Soviet Trade Agreement that granted the Soviets “most favoured nation” trade status in exchange for an IP chapter; that agreement was signed by President Bush and Gorbachev.³ The idea is

* These remarks are adapted from the transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. *Copyright Basics*, USPTO, <https://perma.cc/ZFM5-E4X5> (last accessed Feb. 4, 2017).

2. Karyn Temple Claggett, *Session II: The Impact of Int'l Copyright Treaties*, 40 COLUM. J.L. & ARTS 345 (2017); Steven Metalitz, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 319 (2017); Probir Mehta, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 311 (2017).

3. Lana C. Fleishman, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189 (1993).

that countries in the give and take of a negotiation will have a variety of issues that they want to “take” from the other party, but they are going to have to “give” of themselves. Whether it is copyright for copyright, or in a trade agreement, the intellectual property chapter—in which patents, trademarks and all other forms of IP are part of that give and take—or in a larger trade agreement, if the give and take is about intellectual property rights for agriculture or anything else, that is important to the other negotiating country.⁴

It is fair to say that the period of substantial norm setting by the copyright treaties, and trade agreements, is done at least for now. That norm setting occurred, as you heard on the first panel (discussing the history), at a pretty heady pace in the 1980s to the 1990s. The peak of that activity was the WIPO digital treaties in the multilateral sphere.⁵ The digital treaties were completed in December of 1996, so twenty years ago this December.⁶ So, that is where the norm setting for digital copyright issues was undertaken, at least for now. So, that is why the bilaterals are always so important to sort of pick up where the multilaterals leave off. In this way, likeminded countries—either in bilaterals or via regional multilaterals—can decide “These are our new norms.” Again, often as the floor (minimum levels of protection).

These norms are not only for the benefit of the United States; many other countries want them as well. Steve Metalitz made mention of it, but it is worth repeating. Look at Korea. In 1993, the estimated trade losses by the copyright industries in Korea alone was \$423 million.⁷ Since Korea joined the WTO and the TRIPS Agreement, since Korea agreed to the U.S.-Korea Free Trade Agreement (KORUS) in 2008 and implemented it in 2012, you look at a country that has flipped from a very high piracy rate to a major exporter of intellectual property and everything else strong IP brings.⁸ What did they want in the bilateral and multilateral trade agreements? The Koreans wanted access to the U.S. markets. Why? Because they wanted to trade with the U.S. for cars, for appliances (for example, LG), and for electronics (for example, Samsung).

Now let me step back a little bit from the gloss of the general history of the treaties and look at the U.S. history. It was important in the ‘80s for the U.S. to join Berne, but that was merely to establish copyright relations—just to have protections—for U.S. works abroad.⁹ That was the priority for Congress. When the U.S. joined Berne, the U.S. was the 89th Berne member. Now, there are 172 members.¹⁰ So

4. David Marsh et al., *Intellectual Property Rights: The Key Issues*, PRACTICAL LAW PRACTICE NOTE.

5. Julie S. Sheinblatt, *The WIPO Copyright Treaty*, 13 BERKELEY TECH. L.J. 535 (1998).

6. *Id.* at 536.

7. See IIPA Special 301 Report (1993) on Korea and reported losses from piracy there (at \$423 million), <https://perma.cc/3JAP-DHDE>,

8. *South Korea*, INT’L TRADE ADMIN. <https://perma.cc/9X3L-DC4Y> (last accessed Feb. 19, 2017).

9. Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT’L L.J. 171 (1989).

10. *WIPO-Administered Treaties*, WIPO, <https://perma.cc/BFN4-QBGE> (last accessed Feb. 5, 2017).

mission accomplished—for the purpose of at least establishing copyright relationships and basic protections in other countries; that was important. The goal was to both have the relationships and then, later to improve the relationships and protections.

Staying on the history of the United States. Some suggest that the U.S. “norm setting” is for the U.S. to trot around the world and say, “Adopt our law.” But, you saw Karyn’s slides and that is not what happened. What the United States did by enactment of the 1976 Copyright Act and the Berne Implementation Act of 1988 (the year I arrived at the Copyright Office) was completely overhauling U.S. copyright law to comply with the standards of the 200-year-old French copyright law.¹¹ That is, basically just adopting a formality-free law, so we could join Berne and have these relations with Berne countries like France. Why did the U.S. do this in the 1980s? Because trade in copyright was accelerating in the ‘80s and ‘90s. The U.S. being a major exporter of copyrighted materials, merely wanted to have a basic level of engagement in other countries; namely, a point of attachment, so that U.S. works would be protected in these countries at all, and then at some (Berne) minimal levels of protection.¹²

Simply put, there are three steps to setting copyright relations. One is treaty accessions and ratifications. Two is revising domestic laws, so incorporating the treaty norms into national laws—the copyright law; civil and criminal codes and civil and criminal procedure codes; the custom codes and the administrative codes in each country. And then the last step—the one that always lags decades behind is achieving enforcement—on the ground enforcement—after getting the laws and treaties implemented. The fact that you have the treaties done doesn’t mean that the norms have been set in these other countries, or that these norms are up to what are the international standards, nor that any of this is being actually enforced in practice.

Take the TRIPS Agreement as an example. The copyright provisions were completed in December of 1991—the so-called Dunkel Text. This was on the copyright side done in 1991, although there were later a couple of little nits and changes. The TRIPS Agreement was then put into force in 1995.¹³ So, the text of the copyright agreements is now twenty-five years old. That is the “latest” level of copyright protection and enforcement before there was anything called the Internet. Then, in 1996, came the digital treaties (WCT and WPPT) to set some norms for digital rights.¹⁴ Those are now twenty-year-old norms.

There is a reason the treaties only set “floors” of obligations. It is because the bilaterals or some regional multilateral agreements give willing countries the ability to say, “That was then, this is now.” So, you look at the “this is now,” and you know,

11. Hatch, *supra* note 9, at 172.

12. Marshall A. Leaffer, *International Copyright from an American Perspective*, 43 ARK. L. REV. 373 (1990).

13. MATTHIJS GEUZE, SOME MEMORIES OF THE UNIQUE TRIPS NEGOTIATIONS, in *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 123, 124 (Jayashree Watal & Antony Taubman eds., 2015).

14. THE ADVANTAGES OF ADHERENCE TO THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT), INTERNATIONAL BUREAU OF WIPO 2 (2002), <https://perma.cc/MUF4-9U42>.

there has been some discussion of the norms. Some of the slides have covered it, but what TRIPS did differently, for the first time, was to bring enforcement into play at all.

There are no enforcement provisions in Berne.¹⁵ With TRIPS, Articles 41 to 61 simply set enforcement norms, that is, obligations, for WTO countries. Most importantly, there is Article 41—adequate and effective protection—and in Article 61, criminal obligations. The entire set of provisions, Articles 41 through 61 provide a “this is now” obligation for what countries were doing that was effective against analog and—the somewhat burgeoning at the time—digital piracy, but much more analog at the time.¹⁶ Then, the purpose of the free trade agreements is to add additional obligations and specificity is what is’ effective “now” (at that time) at least to some degree with more minimum norms about what can be effective.

Steve referred to the high water mark of bilaterals, that is, the free trade agreements, which is the Korea FTA.¹⁷ Look in that FTA at duration; at TPMs, at civil and criminal remedies, and then particular enforcement issues that specifically were not clearly covered in the TRIPS Agreement: on signal theft, on camcording of movies—where you have digital uploading of material that is copied and it is not only the sale of hard copy disks. It is the uploading of this material on the Internet, and the prerelease copyright piracy, which is devastating to the motion picture industry, for example. That FTA also has compensatory and statutory damages, so that in civil cases you have some effective enforcement. Absent that, without some pre-established damages, it is very difficult and costly to prove what your losses are.¹⁸ And, then the FTA also has criminal remedies; the most basic kinds – seizure, destruction, and forfeiture.¹⁹ Last, there is OSP liability, and then recently, the Trans-Pacific Partnership (TPP) adding both penalties—as Steve mentioned—for aiding and abetting (also in the exceptions area, the Marrakesh Treaty obligations, as well).²⁰

So, where are the controversies with these “norms”? First, it is all of the domestic controversies, as well as the foreign ones—regarding third party liability, red flag tests, repeat infringer policies, safe harbors from liability, exceptions for anti-circumvention—which by the way are a not requirement of the digital treaties (countries “may” not shall is the treaty language there)—and, exceptions for copyright infringement—with implementation of the three-step test, which is, the already-talked about flexibility.²¹ The three-step test in TRIPS is from Berne Article

15. See generally BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, Sept. 9, 1886, *as revised* at Paris on July 24, 1971 and *as amended* in 1979, S. Treaty Doc. No. 99-27 (1986), <https://perma.cc/A8MA-9CGV>.

16. *Id.* at 338-45.

17. United States-Korea Free Trade Agreement, U.S.-S. Korea, art. 18, June 30, 2007, T.I.A.S. 12-315, <https://perma.cc/HKY9-3S6Y>.

18. 17 U.S.C. § 504 (explaining remedies for infringement).

19. 17 U.S.C. § 506 (explaining criminal offenses).

20. 17 U.S.C. § 512 (explaining limitations on liability relating to material online); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994).

21. 17 U.S.C. § 512.

9. But in Berne it was only applied to the reproduction right.²² The reproduction right is so yesterday, right? Today, who cares about making copies—it's all about dissemination and distribution and streaming—and that right is what the digital treaties added from Berne. Today, there are also discussions of text and datamining exceptions, but they are not even clearly defined in the U.S., much less in other countries. And, there is notice and takedown.²³ And last, dare I mention, web blocking—which many countries are doing against predatory foreign websites—and, finally, orphan works treatment. These are all important and certainly worth noting.

But what is also worth noting is the lag time to treat “new” and developing issues. Let's take a country, a TPP member—should TPP ever come to force—like Mexico. What are Mexico's obligations in the TPP? Well, what are Mexico's obligations currently? They have not implemented the digital treaties. That is, the copyright treaties of 1996, not yet.²⁴ The Mexican law provides no technical protection measures (with the exception of a provision applying only to computer works but not other works and not sound recordings). Also in Mexico, the motion picture industry had forty feature films camcordered, that is, sourced, out of Mexico and uploaded on the Internet.²⁵ And the Mexican laws have no camcording sanctions. These are major and basic provisions that are necessary today.

Let me just take two minutes to just address something that Krista said about copyright term.²⁶ Let me try to set the historical record straight. . . . I held at the Copyright Office the first hearing on copyright term extension in the early 1990s. The motion picture industry was mostly absent from that hearing. The interest in extending copyright term did not come from the motion picture industry, but from music composers and publishers. And, the reason the U.S. Congress adopted term extension when it did in 1998 was because of the reciprocity in the European Union term directive in the early nineties.²⁷

What the European Union directive said was “If you (another country) do not give a longer term to our works, we won't give it to your works”—that is known as reciprocity. And a lot of older American musical material was being broadcast by European broadcast networks, so, not having protection for those older works meant lost royalties. So, for members of Congress, all you had to explain to them, which you could do on a one sheet was, if you pass term extension, royalties will come into the U.S. economy, which means money into the Treasury in the form of taxes.

So, that was the rationale why term extension was passed. Also, the U.S. Congress adopted an exception to term extension, which I drafted, which was § 108(h). To the question asked earlier, about the New York Public Library—and libraries and archives in general, they can, in the last twenty years of term under U.S. law, make

22. See *supra* note 15.

23. See 17 U.S.C. § 512(f).

24. *Id.*

25. Michael White, *Hollywood: Organized Crime Goes to the Movies*, BLOOMBERG, (Apr. 7, 2011, 5:00 PM), <https://perma.cc/6MKP-E6N2>.

26. Krista Cox, *Rigidity in Global Intellectual Property Norms*, 40 COLUM. J.L. & ARTS 327 (2017).

27. S. REP. NO. 104-315, at 6 (1996).

materials available to the public that are in their collections if the rights holders are not doing so.²⁸ Is there a different problem for orphan works? Absolutely. Will it be resolved by these multilateral and bilateral treaties? Absolutely not. It is something that—like all of these things discussed today—will first become norms and best practices in a couple of like-minded countries, then adopted into these agreements because they are already in the national laws of a few countries, and then probably spread as the norms in other countries via treaties or trade agreements.

Thank you.

28. 17 U.S.C. § 108(h).