

1. Copyright in the Digital Environment

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From the “Gutenberg galaxy” to cyberspace, from the invention of printing to the digital environment, from the development of reproduction techniques to technological convergence, the evolution of copyright has always been closely linked to technological development.

The rapid evolution of the information society has provided and continues to provide new means for achieving progress in all sectors of work and life through the increasing use of information and communication technologies (ICTs) such as computers and networks. However, while ICTs have greatly facilitated the movement and communication of information and data, the process of generating knowledge and works of the mind remains essentially one of human creativity, for which copyright protection is of vital importance.

The impact of new technology on research, teaching, culture and access to information - all key elements of the UNESCO mandate - is unprecedented. Similarly, scientific and technical progress has had a great impact on the evolution of copyright protection and given rise to many questions:

Who owns content travelling in cyberspace? What rights does it give rise to? To what extent could copyright owners control the use of their works in the information society? What access do users have concerning content in cyberspace? What is the role of copyright in the digital environment: traditional copyright or copyright adapted to the challenges posed by technological advancements? Is there a relationship between copyright and cultural diversity?

UNESCO, along with other intergovernmental organizations, such as the World Intellectual Property Organization (WIPO) and the International Labour Organization (ILO), endeavours to contribute to the debate on evolution of copyright in the information society and in finding the best answers to these queries.

UNESCO & Copyright

One of UNESCO’s aims, as stated in its constitution, is to promote the free flow of ideas by word and image and to facilitate the access of all people to the printed and published materials

produced by all. It sets out to do this by encouraging cooperation between nations in all spheres of intellectual activity and by recommending the necessary international conventions to the nations concerned. Importantly, it encourages governments to adopt measures towards promoting creativity and increasing the production of national literary, scientific, musical and artistic works.

Copyright protection, as an important means for encouraging creativity and innovation and for development of culture, has been included in UNESCO’s mandate ever since the organization was created.

After World War II, when many countries were unable, for different reasons, to adhere to the high protection standards of the Berne Convention for the protection of literary and artistic works, the oldest international instrument in the copyright field, UNESCO was asked to elaborate a convention with a universal character, suitable to allow states with different legal systems and degrees of protection, to enjoy international protection of intellectual works. In 1952 the Universal Copyright Convention (UCC) was adopted under UNESCO’s aegis as a ‘bridge’ to the Berne Convention. Subsequently revised in 1971, the Universal Copyright Convention made it possible to extend copyright protection worldwide by creating a legal common denominator, promoting both respect for the rights of creators as well as the international circulation of works, especially for educative and teaching purposes.

Challenges of the digital environment

Today, information and communication technologies have radically changed the way works and services circulate, and have also changed the way protected works are accessed and used. They have made it possible for information to be communicated at high speed over wired or wireless networks practically everywhere and have allowed for the opportunity of simultaneous access by an unlimited number of individuals. Digitization and circulation of works over networks such as the Internet means that low-cost, high-quality copies can be made quickly, and these copies can also be sent to many other people around the world, irrespective of borders. Furthermore, digital works are easily altered, or even falsified, which means

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that there are many potential threats to the moral rights of authors. The relationship between creators, society and the users of protected works has also changed considerably.

Given these facts, it is not surprising that copyright is one of the first areas to have attracted the attention of the international community. As a matter of fact, copyright, historically confined to reduced circles of specialists and experts, has jumped to public notoriety mainly because of the new information technologies and, most of all, because of the rapid development of the Internet. If, traditionally, one were to regulate the interrelation of the rights of the classic creative chain: (a) authors and creative artists – (b) producers and distributors, generally referred to as “cultural industries” - and (c) public, now, in the new digital environment, new and powerful actors have appeared. The economic interests of these actors are often contradictory to those of the owners of copyright and therefore they tend to consider ‘copyright’ a very old- fashioned concept for their businesses.

In addition to that, the dematerialization of the physical support containing the protected work and the intellectual difficulty of people to understand why they have to pay in order to accede the contents, in addition to the amount they have already paid to their Internet service providers, represents another challenge. Certainly, it is not easy for people to understand why they have to pay in order to legally acquire the right to use intangible goods which lack a material support (carrier) – explaining this requires a lot of pedagogical efforts that few of us are doing. All professions, including those of teacher and librarian, are affected by the technological revolution and forced to seriously reframe the nature of their activities to the multitude of new opportunities and challenges brought about by the digital environment. The alliance of many interests of different nature - economic, institutional and academic - but of convergent character, seem to favour the gratuity of the contents on the Internet and the absolute freedom to handle this contents at the user’s own discretion.

Further, the traditional creative chain has been extended: service providers, telecommunication companies, with or without cable, suppliers of broadband, memory suppliers, libraries, etc. appear on the scene. Authors and producers appear confusedly mixed in the new concept of "content suppliers", carefully stripped of any and all reference to the culture. Many are those who, in the technological area, plead that the respect for

authors’ rights should be reduced. If this happens, which would be the guarantees of authenticity, paternity and integrity of the contents on the Internet? Clearly, none: bad for the author and even worse for the user.

But all what is technically possible, ends up happening. In the book universe, for example, technologies have made it possible for each one of us to simultaneously be author, publisher, printer, distributor, librarian, reader, and "pirate" of a work, with a simple click of the mouse! And surely we have not yet seen everything ... Could we have imagined a couple of years ago that we would take photos during our holidays with our pocket mobile phones and send them to all our friends with the single pressing of a key, without films rolls, exposure, paper, and without mail! We have still to wait and see what else the platforms of mobile technology will bring...

While not only the creative chain and the one involved in transmission of knowledge but practically all professions and businesses are forced to reframe in depth their activity, another important element to consider is the new behaviour of the public which is now often referred to as consumers and users. Ever more diverse in its consuming tastes and more demanding in quality, comfort, accessibility and price of the services, the new public does not feel like wasting time in finding out whether what they would like to obtain exists in supply, nor whether and how they could obtain it. The new public wants to obtain it immediately, free-of-charge, wants it served in their house or workplace, in their own language. During this process, the user/consumer prefers to hide himself in anonymity.

What perspectives exist in this context for the protection of creativity, the transmission of knowledge, the access to information, for the construction of knowledge societies that, therefore, will have either to be global or will not exist? There are many powerful political and economic interests in the globalization arena, and, to make matters worse, millions of human beings live with less than one US dollar daily in this ever growing global village. If we were to reinforce the legal measures and technological protection of copyright, we would justly be accused to condemn them for ever to material poverty and intellectual ignorance. The arguments for free access to all educative, cultural and informative content for this poor part of humanity are justified from an ethical perspective.

The paradox, however, is that even if copyright owners decided to be so generous, it would not be those same poor human beings who would benefit from such generosity on, because there are intermediaries, service providers, telephone companies etc. which will continue to stand between the authors and users in poor parts of the world.

In other words, the net result until now is that, although much has been done at the international level to adapt the global principles of application of copyright to the digital era, there is still a lot which needs to be resolved at the national level and in the relations between States: the concept of copyright itself needs to be adapted to the philosophy of the Web: the responsibility of service providers and of users; the security of the network; the scope of limitations and exceptions to copyright protection, i.e. the traditional mechanism for the search of a balance between the interests of the holders and those of the public, main instrument for the application of the famous article 27 1) and 2) of the Universal Declaration of Human rights; the individual or collective management of digital rights; the applicable legislation in case of infringement of rights. There are still so many pending issues in order to ensure the circulation of protected works protected on the Internet and the equitable access to all to these works.

The thorny subject of copyright in the digital universe will certainly continue to be the topic of hot debates.

Legal framework and copyright enforcement

One of the essential challenges of the digital environment is that of building a balanced and coherent legal framework that takes account of the change in the economic and socio-cultural model, while at the same time safeguarding fundamental rights and freedoms in the digital world.

Both national and international legislative and technological initiatives have been designed to reinforce copyright protection in this new environment. As early as 1996 two new international treaties were signed under the aegis of WIPO, whose goal was to deal with the primary concerns of authors. The major achievement of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) was the introduction of the right, for authors and owners of related rights, to authorise the making of their works available to the public by networks such as the Internet. The treaties also provided for the protection of technological measures used by

right owners for preventing unauthorised access to their works or for the purposes of rights management systems. The Treaties entered into force on March 6, 2002 for the WIPO Copyright Treaty and on May 20, 2002 for the WIPO Performances and Phonograms Treaty.

National and regional legislators also passed laws to this effect but, of course, there is more to be done. Authors, performers, cultural industries, collecting societies, service providers, librarians, scientists, consumers, governments, legislators and international organizations still have a long way to go before an efficient legal framework for knowledge societies is achieved in a spirit of mutual understanding. This huge and urgent task must necessarily be accompanied by a major effort towards educating consumers, particularly the younger generation, to respect those who put their creative talents to work for the scientific and cultural benefit of the community as a whole.

Further, creating a new and modern legislation is only the first part of the solution to the problem. Effective copyright enforcement is the second part, and is equally complex. The absence of a physical support opens up countless possibilities to download and copy protected works and modify them within a few seconds. Thus Internet piracy is more abusive than ever for owners of copyright and neighbouring rights with more traditional reproductions techniques.

UNESCO's Approach

Before proceeding to outline some aspects of UNESCO's approach to addressing these concerns, I would like to stress two fundamentals which govern our action.

First, in UNESCO's view, the concept of "knowledge societies" is preferable to that of "the information society" because it better captures the complexity and dynamism of the changes taking place. The knowledge in question is important not only for economic growth but also for empowering and developing all parts of society. Thus, the role of new ICTs extends to human development more generally.

Second, most developing countries have thus far been unable to take full advantage of the advances offered by new ICTs in terms of access to scientific and technological information and learning opportunities, at least relative to the situation in the industrialized countries – I am referring to, of course, the so-called "digital divide".

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If knowledge societies capable of generating new knowledge in a cumulative, cooperative and inclusive process are to be created, they need to be based on a foundation of shared principles. In this sense national policies, supported by international frameworks, can be the tool to encourage creativity and to facilitate access to essential information for all.

A key component of such frameworks and policies is the work of the United Nations system, under the leadership of the World Intellectual Property Organization (WIPO), to continue to develop balanced and consistent international standards for copyright and neighbouring rights as exemplified by the aforementioned WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

It is important to underline that copyright relies on balancing the interests of protecting created works and their creators and guaranteeing public interest and fundamental freedoms. This balance derives precisely from one of the basic principles of copyright, which is to promote progress in the arts and sciences and to spread culture. In this context UNESCO's policy is to encourage the Member States, on one hand, to formulate efficient copyright policies, keeping in mind the necessity of rigorous conformity with international conventions on intellectual property, and on the other hand, to promote lawful access to information and knowledge for the progress of science and the promotion of education.

It is in this spirit that the General Conference of UNESCO adopted in 2003 the Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace. Two of the four main sections of the Recommendation – “development of public domain content” and “reaffirming the equitable balance between the interests of rights-holders and the public interest” bear directly on the theme of copyright protection.

Let me allude briefly to some of the major points of the Recommendation.

Public domain information is “publicly accessible information, the use of which does not infringe any legal right, or any obligation of confidentiality. It thus refers to the realm of all works or objects of related rights, which can be exploited by everybody without any authorization.”

While many people associate the public domain mainly with classical and traditional literature, an

equally important store of public domain information for development, and undoubtedly most important for science, is public data and official information produced and voluntarily made available by governments or international organizations.

A paradox arises here. Public domain information, which is free of copyright, is often not sufficiently well-known to potential contributors and users, and in some countries there are restrictions on the availability and use of public information and data. In fact the electronic public domain forms an international virtual public library that is vast and growing. This electronic public domain, furthermore, is both a world heritage and an invaluable support for productive, commercial and creative sector activities in developing and industrialized countries.

Thus, the UNESCO Recommendation encourages Member States to “recognize and enact the right of universal online access to public and government held records” and to “identify and promote repositories of information and knowledge in the public domain and make them available to all”.

Another quite distinct matter concerns provisions for a fair balance of interests in the use of copyrighted works in the digital environment. This refers to the limitations and exceptions to copyright and related rights protection which are authorized in national legislation - as required by the two WIPO treaties mentioned earlier - provided that they are applied only in certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of rights-holders. Such provisions for equitable use in the public interest, which vary from country to country, typically provide for exceptional free reproduction of copyrighted information for such uses as education, research, library services, journalism and access for disabled persons.

These equitable use provisions, which in the pre-digital world made the public library possible, are potentially of even greater importance in the digital world. However, they also present greater risks to the legitimate interests of rights-holders given the ease with which digital information can be redistributed once released.

UNESCO recognizes the importance of a fair balance between the interests of rights-holders and those of users when cultural works and performances are exploited in the digital environment in the fields of teaching, scientific

research, libraries, dissemination of information and the needs of the visually impaired.

Along with the above activities, UNESCO is actively engaged in public awareness initiatives about the need to respect copyright and related rights in the digital environment, in actively promoting copyright teaching at university level by promoting the creation of UNESCO Copyright chairs, and in contributing to efficient copyright enforcement and fight against piracy of intellectual works, which is also one of the pillars of UNESCO's Global Alliance for Cultural Diversity.

Conclusion

Culture is called to become an authentic motor of sustainable development in the XXI century. The creation and consolidation of really competitive cultural industries in all countries become therefore an indispensable requirement. So far, there has not been a better model for this development than the one based on effective management of copyright, regardless of the many technological developments that have challenged the copyright management systems and provoked their adaptation so that they continue to serve the interests of authors and the public.

Perhaps one day there will be a better mechanism to protect creativity; but, meanwhile, we have the obligation to approach seriously, with generosity, without demagogy, the way to make possible, also in the digital environment, the fair balance between the rights in presence: this is imperative for the cultural, social and economic development of the global society of the XXI century.

It is urgent to invest in information and education on copyright. This should go beyond the calculation of the economic damages – the effect of that, by the way, is almost counter-productive in the perception of the young users of Internet. A 'culture of respect of copyright' should be built and it should address the problems of reliability, integrity, transparency and responsibility. This should be done also from the perspective of the necessity to respect the rights of the users/consumers. And, of course, the responsibilities of each one of the actors of the digital chain and the scope and nature of the exceptions to copyright protection should be defined so that the balance reached in the analogical environment be preserved and reaffirmed in the cyberspace.

Support for creativity as an engine for cultural and economic development is inconceivable nowadays without a clear commitment in favour of creators

and cultural industries. Currently the best instrument for boosting cultural diversity is the creation, production and worldwide circulation of as many varieties of cultural goods as possible so as to ensure a pluralistic cultural offer. The ultimate goal is, however, to build a better world for all, where technologies are at the service of human beings and where our creative diversity is protected, respected and recognized.

Questions from participants to Ms. TOTCHAROVA

Q. I was very interested to hear your thoughts about the consequences of piracy. Are there other sources such as downloads from the UNESCO website?

A. I was originally asked to talk about "challenges to copyright protection under the digital environment," but I decided at the last minute to also address the "piracy" issue as well. UNESCO has published a report on its website about the negative impact of piracy, which is published in volume No.3 / 2005 of the UNESCO *e-Copyright Bulletin*. This study was commissioned by UNESCO and is available in six language versions, also in Chinese.

Q. In a networked environment, how are digital rights protected? Can you give an overview of experience overseas in this area?

A. I agree with the view that your question implies: protection of copyright in the digital environment is very important. I would emphasize in particular the balance of interests.

In 1996 the World Intellectual Property Organization (WIPO) adopted the so-called Internet Treaties (WCT and WPPT) which provided for protection against circumvention of technological protection measures used by rightowners to protect their works from unlawful access. Many countries are currently formulating or adjusting their own national laws and regulations on the basis of the WIPO treaties. In reality it is not easy to truly protect copyright in a digital environment using technological protection measures, providing at the same time access to the protected works for acts that are permitted by law (e.g. to beneficiaries of exceptions and limitations). In this sense, it is difficult to strike a balance between the interests of right holders and the public and the point of equilibrium is very hard to agree

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on. Individual countries therefore seek their own solutions. Thus far, however, no unique or perfect solution has yet been found. It is important to mention that different countries do not all interpret the problem in quite the same way, and switches are especially frequent in case-law, with some precedents of court judgements in favour of right holders and others in favour of the public. These require more thorough discussion. For example, the 2001 EU Copyright Directive contains provisions that specifically seek to strike a balance between the interests of right holders and the public (Art.6). Different EU member countries are currently implementing the Directive in their own legislation by adopting measures, assessing the effect of legal provisions, and making improvements. On the international level, we are faced with the issue of how to assess and resolve the balance of interests and find a point of equilibrium

Q. As nations work to coordinate the interests of right holders, how should they balance the interests of developing and developed nations? I personally feel that developing nations tend to be more concerned about the public interest, while developed nations are more concerned about protecting the interests of right holders. Is the UN capable of establishing an international convention to address this?

A. Is there any difference between developed and developing nations with regard to copyright protection? If there were, the UN would hope to be able to strike a balance between developed and developing nations. The fact is that the public, in developed and developing countries alike, needs to have access to information and knowledge, as defined by the human rights international instruments. Of course, developed nations may show a stronger tendency to protect private interests and to call for stronger protection, but they also need to take into account the general public interest for access to knowledge. On the other side, I think that developing nations, while promoting universal access to knowledge, need also an appropriate copyright protection because such protection contributes to protect each nation's capacity for creation, national capacity for innovation, and cultural diversity. Failure to guarantee this can easily have an adverse impact on the development of a nation's cultural industries. For this reason, it is very important to seek a point of equilibrium between proprietary interests and the general public interest in both developed and developing nations, in the framework of the existing international norm.

The WCT and WPPT treaties mainly protect copyrights and various neighboring rights relating to performances, sound recordings and broadcasting and news treaties are currently under discussion. These treaties include safeguard provisions concerning access to knowledge and I believe that the fair balance between interests should be sought and improved, if needed, within the IPR legal framework rather than establishing a new separate treaty.

Q. How is the equilibrium you seek supposed to be achieved? Do right holders have to relinquish certain rights? How is protection to be provided in actual conditions? In the digital environment, is it necessary to reformulate new rules? Or do we continue using traditional copyright protection rules?

A. How to achieve equilibrium is indeed a problem. Every nation has its own national policy, traditions and concrete measures, but no one believes that right holders have to give up their rights. Each nation has its own traditions and culture, and there are thus differences in the limitations and exceptions adopted by each law with respect to copyright. These differences are reflective of different traditions and cultures. It ought to be said that TRIPs and WIPO provisions are all applicable to copyright protection in both the sphere of traditional (analogue) culture and in the digital environment.

Of course, the digital environment presents different challenges compared to the traditional environment. For this reason, in order to adapt to the digital environment and the development of new technologies, it is necessary to continually adjust and improve the respective legal provisions. Adjustments must be made with an eye to actual circumstances as well as the individual conditions of different countries. And we must also keep in mind that digital technologies and network technologies are continually changing, so related laws must also be continually revised.