

**Copyright Protection and the ‘Balance’ Question in the Digital Age – An
analysis of member states’ compliance with universally-agreed standards
in international copyright treaties**

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Abstract

This master's thesis considers the legislative approaches adopted by member states in incorporating the universally-agreed copyright standards set out in the TRIPS and WCT. Its purpose is to determine whether these approaches successfully maintained copyright balance in the digital age. Using a comparative approach, I intend to answer this question by classifying six countries into two categories based on their ratification of the TRIPS and WCT prior to revising their existing copyright legislation to address digital issues.

This thesis is divided into 5 chapters discussing the history of copyright in the digital age, its benefits and challenges to the existence of copyright, the international copyright protection framework (pre and post digital age), the legislative approaches adopted by Category A and B countries and a conclusive analysis of whether these approaches maintain copyright balance. I will argue that while most countries in the study found the implementation of the TRIPS Agreement pretty straightforward, their challenge was with the implementation of the WCT especially the anti-circumvention provisions in Article 11 and 12. Member states needed to strike a balance between the private rights of the authors and users' rights to use copyrighted works for permitted purposes.

After analyzing the approaches of these sample countries' to the balance dilemma, three distinct approaches became visible – the first approach was to put in a strict anti-circumvention provision leaving no room for the exclusion of fair use exceptions, the second approach was to make the wording of the provisions flexible enough to accommodate fair use defences and the third approach was to expressly exclude the use of copyrighted works by certain persons for specific purposes from the scope of the anti-circumvention provisions. In my conclusion, I give recommendations on how member states should approach the balance question when incorporating the WCT into their domestic legislation. Hopefully, these recommendations will, in the future, guide member countries in the creation of a balanced copyright regime in the digital age.

Abstrait

La thèse de ce maître considère les approches législatives adoptées par les États membres à intégrer les normes du droit d'auteur universellement convenues énoncées dans les ADPIC et WCT. Son but est de déterminer si ces approches maintenus avec succès l'équilibre du droit d'auteur à l'ère numérique. Son but est de déterminer si ces approches maintenus avec succès l'équilibre du droit d'auteur à l'ère numérique. En utilisant une approche comparative, je ai l'intention de répondre à cette question en classant six pays en deux catégories en fonction de leur ratification de l'Accord sur les ADPIC et WCT avant la révision de leur législation du droit d'auteur existants pour aborder les questions numériques.

Il est divisé en cinq chapitres qui envisagent l'histoire du droit d'auteur à l'ère numérique, ses avantages et les défis de l'existence du droit d'auteur, le cadre de la protection internationale du droit d'auteur (d'âge pré et post numérique), les approches législatives adoptées par la catégorie A et les pays B et une analyse concluante de savoir si ces approches maintenu l'équilibre du droit d'auteur. Je soutiens que si la plupart des pays de l'étude ont trouvé la mise en œuvre de l'Accord sur les ADPIC assez simple, leur défi était la mise en œuvre du WCT en particulier les dispositions anti-contournement dans l'article 11 et 12. Les Etats membres avaient besoin de trouver un équilibre entre la droits privés des auteurs et les droits des utilisateurs à l'utilisation des œuvres à des fins autorisées droits d'auteur.

Après avoir analysé les approches de ces pays de l'échantillon »au dilemme de l'équilibre, trois approches distinctes sont devenus visibles - la première approche était de mettre dans une disposition anti-contournement stricte ne laissant aucune place pour l'exclusion de l'utilisation des exceptions justes, la seconde approche était de faire le libellé des dispositions suffisamment souples pour se adapter défenses d'utilisation équitable et la troisième approche était d'exclure expressément l'utilisation d'œuvres protégées par certaines personnes à des fins spécifiques du champ d'application des dispositions anti-contournement. Dans ma conclusion, je donne des recommandations sur la

façon dont les Etats membres devraient aborder la question de l'équilibre lors de l'incorporation du WCT dans sa législation interne. Nous espérons que ces recommandations aideront à créer un régime équilibré du droit d'auteur dans les Etats membres à l'ère numérique.

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John F. Kennedy*

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Chapter One

Introduction

The advent of digital technology in today's society has been regarded as both a welcome and terrifying development¹ for copyright users and owners in the digital age. By digital technology, I mean digital devices such as photocopiers, scanners, Bluetooth devices, CD-ROMs, flash drives etc. as well as the worldwide web and/or the Internet. These new technologies were treated as a welcome development by copyright users and owners alike because of how they changed the way information was stored from analogue to digital and also, the transformation of access and use of information by the society. A few years into the digital age, copyright owners began to view these new technologies as a threat to the existence of the exclusive rights granted to them under copyright laws.² The avenues through which information were now accessed and used by the public made it easier for copyright to be infringed and it soon became obvious that copyright owners needed to find alternative ways to protect their rights.

At first, copyright owners used technical measures to ensure that their works were not easily copied. These measures were short-lived as a group of technology-savvy people (also called hackers) sprung up - these hackers could circumvent any technical measures placed by an author on his work.³ It soon became clear to copyright owners that they needed to find another way to ensure the protection of their rights outside the use of technical measures. It was at this juncture that copyright owners turned to the law for help. This thesis will examine the minimum standards of copyright protection established by the World Intellectual Property Organisation (WIPO) and the World Trade

¹ Jeff Sharp, 'COMING SOON TO PAY-PER-VIEW: HOW THE DIGITAL MILLENNIUM COPYRIGHT ACT ENABLES DIGITAL CONTENT OWNERS TO CIRCUMVENT EDUCATIONAL FAIR USE', *American Business Law Journal*, 40 (2002), 1-81 <<http://dx.doi.org/10.1111/j.1744-1714.2002.tb00910.x>>.

² *Supra*, note 1, pg 1-81

³ See Janelle Brown, "Crack SDMI? No thanks!" *Salon* (14 September 2000, www.salon.com/technology/log/2000/09/14/hack_sdmi/index.html)

Organisation (WTO) in response to this demand. Particular attention will be placed on the legislative approaches of domestic legislature of countries that have incorporated these treaties into their laws. I will consider the question: Have domestic legislatures effectively incorporated the minimum standards set out in the TRIPS and WCT in a manner that maintains a balanced copyright framework in their countries?”. If the answer is Yes, How did they achieve the balance? If the answer is No, How can they achieve balance?. My objective is to determine whether the minimum standards set out in the TRIPS and WIPO Copyright Treaty properly maintained copyright balance, and, whether in the ratification of these treaties, the minimum standards were properly articulated by domestic legislatures.

The clamour for the intervention of the law in copyright protection was led mainly by developed countries who were the leaders in the knowledge economy, and their aim was to prevent the foreseeable economic losses that copyright owners could suffer in the digital age.⁴ According to Okediji, many arguments were made by developed countries in support of the drive for the reform of copyright legislation. One of such arguments was that developed countries had no choice than to defend their intellectual advantage in respect of high-tech goods. They needed to do this to make up for the social costs to developed economies caused by the loss of jobs in the manufacturing sector as a result of cheaper labour in developing countries. There was also the ideology of liberalized or “free” trade being disrupted by weak intellectual property protection system in trading partners.⁵ Another argument in support of the call for the reform of copyright legislation was the potential collapse of the well-organised international copyright framework existing under the Berne Convention. The rationale behind this argument was that the use of digital devices, in conjunction

⁴ Ruth Okediji, ‘Copyright and Public Welfare in Global Perspective’, *Indiana Journal of Global Legal Studies*, 7 (1999), 116–89.

⁵ *Supra*, note 4, pg 118-120. It was this reason that informed the inclusion, by the WTO, of the Agreement on the Trade-Related Intellectual Property Rights into the General Agreement on Tariffs and Trade, negotiated in 1994.

with the Internet, broadened the potential scope of acts of copyright infringement beyond national borders, thereby requiring international action.⁶

The pressure for the reform of international copyright framework crystallised into the negotiation of two principal treaties by two different international organisations – The Agreement on the Trade-Related Intellectual Property Rights (TRIPS) negotiated by the World Trade Organisation (WTO) and the WIPO Copyright Treaty negotiated by the World Intellectual Property Organisation (WIPO). The intention of drafters of these treaties was to ensure that the same level of protection which copyrighted works enjoyed under the Berne Convention was maintained in the digital age. Before the digital revolution, the Berne Convention had granted exclusive economic and moral rights to copyright owners to authorize the use, reproduction, communication and broadcasting of their works by third parties. In exchange for these rights, creators were expected to make available their works to the public at the end of the exclusivity period. This exchange was commonly referred to as the “copyright bargain”. These new treaties sought to maintain the ‘copyright bargain’ that had been put in place by the Berne Convention in the face of the digital threat.

Prior to the introduction of these treaties, the international copyright community attempted to provide recommendations, guiding principles and model provisions to governments on how best to respond to the digital threat to copyright. This period was referred to as the “guided development” period. The guidance offered here was based on the interpretation of existing international norms and, although they were not binding on member countries, these guiding principles had a major impact on the framing of national legislation during this period.⁷ According to Ficsor, by the end of the 1980s, the non-binding standards

⁶ Rick Boucher “The Future of Intellectual Property in the Information Age”, in Adam D Thierer and W. Crews Clyde, *Copy Fights: The Future of Intellectual Property in the Information Age* (Washington D.C.: Cato Institute, 2002) 95 at 97.

⁷ Mihaly Ficsor, *The Law of Copyright and the Internet - The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford; New York: Oxford University Press, 2002) pg 5. Some of the recommendations were made regarding reprographic works; storage of works in, and retrieval from, computer memories i.e. computer-

provided under the ‘guided development’ period became insufficient to handle the ever-growing rate of piracy in the society.⁸ This led to the formation of committees in the WTO and WIPO to negotiate a treaty that adequately protected copyright against the digital threat. I will be discussing the background to these treaties in the subsequent chapter.

One major goal of the committee set up to negotiate the TRIPS was “to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.....”⁹. The WIPO committees also had a similar mandate set out in its 1990-1991 programme which was adopted by the member states of WIPO and the Berne Union. The mandate was to “examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and – if so- with what content, with a view to submitting for adoption the draft of such a protocol to a diplomatic conference after 1991. The protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne convention, doubts may exist as to the extent to which that Convention applies”. The 1990-91 programme went on to explain the need for the formation of such a committee arose from the lack of a uniform interpretation of the obligations of parties under the Berne Convention among member states.

At the conclusion of negotiations in these Committees, the TRIPS and WIPO Internet Treaties (i.e. the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty) were adopted. I will be discussing the substantive

created works; cable television; computer programs; rental and lending, private copying and direct broadcasting by satellites.

⁸ Supra, note 7, page 14

⁹ GATT, ‘Ebola: The Failures of The’, 1986 <<http://www.msf.org/article/ebola-failures-international-outbreak-response>> [accessed 29 November 2014]. The Ministerial Conference in Punta del Este, Uruguay had included “trade-related aspects of intellectual property rights, including trade in counterfeit goods” in the list of subjects for negotiation.

provisions of the TRIPS Agreement and the WCT treaties in the subsequent chapter. It should be noted here that although the TRIPS and WCT were initially negotiated simultaneously by the parallel WTO and WIPO committees, WIPO member states agreed to put on hold the negotiations of the WIPO Internet Treaties pending the conclusion of the TRIPS Agreement so that the TRIPS would not have a direct influence on the provisions of the WCT.¹⁰ This decision turned out to be a fortuitous one because, by the time the final text of the TRIPS was finalized in December 1992, the Internet had started its rapid worldwide expansion so much so that new urgent international copyright issues had arisen from the combined use of digital technology and the Internet.¹¹ The WIPO Internet Treaties thus became the vehicle through which the international community addressed these new issues which were regarded as the “digital agenda”.

As I stated earlier, my objective in this thesis is to examine the minimum standards set out by the TRIPS and the WCT to determine, first, whether these treaties successfully maintained copyright balance in the digital age. This is an important issue in international copyright legislation because the minimum standards are a guide for domestic legislators to follow while revising their domestic copyright laws to properly respond to the digital threat. These treaties ensure that national legislature is given the autonomy to decide on how best to incorporate these minimum standards into their domestic laws. As a result, it is the duty of domestic legislators to ensure that while incorporating these minimum standards, there is a balance between the protection of the rights of the copyright owners and the public interest.

I will be considering the substantive provisions of the TRIPS (as relates to copyright) as well as the WCT in the subsequent chapters of this thesis. However, because the WCT was drafted in direct response to the issues arising from the use of digital technology and the Internet, I will focus more on its anti-

¹⁰ Ficsor, *The Law of Copyright and the Internet - The 1996 WIPO Treaties, Their Interpretation and Implementation*.

¹¹ Supra, note 10

circumvention provisions set out in Article 11 and 12 of the WCT. After considering these treaties, I will examine the legislative efforts of sample member states to the WCT and TRIPS to determine whether they successfully maintained copyright balance as intended by the drafters of the treaty. In choosing these sample countries, I considered the following factors: (i) whether or not the country had ratified the WIPO Internet Treaties and the TRIPS at the time it revised its most recent Copyright Act; (ii) how did its legislature approach the incorporation of the minimum standards into their own laws?; (iii) Did the legislative approach adopted successfully maintain balance in copyright? If yes, how? If not, what went wrong?. Based on these criterion, I selected six countries, placing them in two distinct categories. Category A countries are the countries whose legislative approach appear to create some semblance of a balanced copyright regime; while Category B countries are the opposite.

I will begin by arguing that the minimum standards set out in the TRIPS and WCT made a reasonable attempt to maintain ‘balance’ in the international copyright framework. However, it is the responsibility of domestic legislatures to ensure that these minimum standards are properly incorporated into their local laws in a manner that maintains copyright balance. This is because both treaties have built-in flexibilities that grants freedom to member states to incorporate these minimum standards in a manner that positively enriches their own socio-economic status. In fact, it was primarily in recognition of the existence of these flexibilities that countries such as the USA entered into bilateral treaties with other trading countries to guarantee stronger copyright protection for their copyrighted works. In exchange for technological know-how and financial aid, the United States ensured that these countries implemented standards of protection that went beyond what was provided for by the TRIPS Agreement. This approach has been referred to as the “TRIPS-PLUS approach”.¹² Maskus & Reichman said the following about this development: “*Those few developing*

¹² Keith Maskus and Jerome Reichman, *The Globalization of Private Knowledge Goods and the Global Public Goods*, ed. by Keith Maskus and Jerome Reichman (United Kingdom: Cambridge Press, 2005) 3 at 19.

countries that have built some capacity to participate in standard-setting exercises may run into coercive pressures from governments and corporations whose interest they challenge. Increasingly, such pressures are exerted in bilateral, unequal bargaining situations in which ever-higher IPRs are demanded without regard to the legal or political consequences of undermining the basic MFN principles of the GATT itself.”

This thesis is set out in 5 chapters. Chapter 2 provides a brief background to the digital age. The purpose of this background is to give the reader proper understanding of the beginnings of the digital threat to copyright. After giving a brief background, I will discuss some of the benefits and challenges posed by these technologies to copyright. It is important that we understand the effects, both positively and negatively, of digital technology on copyright. This will help us understand the rationale behind the movement for the revision of the existing international copyright framework. I will conclude Chapter 2 by giving an analysis of the ‘balance’ problem in copyright in the face of newer digital technology. I will be considering the concept of ‘balance’ and its significance to drafters of domestic and international copyright legislation. I will identify the difference in the ‘balance’ mandate of domestic and international legislature in the creation of a strong copyright framework. My argument is that the mandate of drafters of international copyright legislation is restricted to setting out minimum standards that can be used by domestic legislatures as guidelines to drafting their own domestic laws. As a result, drafters of international copyright treaties try to ensure that the treaties are worded in a flexible manner that strikes a balance between universal norms and national autonomy. The mandate of drafters of domestic copyright laws, on the other hand, is the maintenance of balance between private rights and public interests. I will conclude Chapter 2 by looking at some provisions in the Berne Convention that clearly sets out how drafters of the treaty fulfilled their own part of the ‘balance’ issue by ensuring flexibility in the wording of the treaties.

Chapter 3 will give an overview of the major international copyright treaties starting from the Berne Convention and the Universal Copyright Convention. After examining the substantive provisions of these two treaties, I will consider the substantive provisions of the TRIPS Agreement and the WCT, the two treaties which were adopted by the international copyright community as binding guidelines for domestic legislatures in the digital age. I will be looking at how these treaties handled the issues arising from the digital threat to copyright and the obligations that are expected from member states.

Chapter 4 will consider the relevant provisions of sample countries who are members to the TRIPS and the WCT. I will examine the substantive provisions in the copyright legislation of these countries, wherein the minimum standards set out in the TRIPS and WCT were incorporated to determine whether there was sufficient compliance with the treaties. I will be placing particular emphasis on how domestic legislature incorporated the anti-circumvention provisions set out in Article 11 and 12 of the WCT. I intend to determine whether domestic legislatures properly interpreted and implemented these provisions in a manner that effectively and adequately protected the rights of the authors and public interest.

Chapter 5 is the conclusive chapter of this thesis. Here, I will attempt to compare and contrast the approaches of domestic legislatures in these sample countries to try to identify which approach best interprets the provisions of the TRIPS and WCT. I will then consider the anti-circumvention provisions in itself to determine whether they were an adequate response to the digital threat to copyright. I will attempt to answer the questions which I have raised in this thesis by analysing the efforts of sample domestic legislatures. I will conclude by giving recommendations to other member countries to the TRIPS and especially the WCT who are yet to ratify and incorporate these provisions into their domestic laws. Hopefully, these recommendations will be a guide to ensuring that they properly incorporate the minimum standards into their own laws in a manner that maintains a balanced copyright system.

Chapter Two

Copyright and the History of the Digital Age

The inception of the digital (or information) age began¹³ with the invention of the transistor (aptly described as the “nerve cell” of the Information Age)¹⁴ at the Bell Telephone Laboratories program of basic research on the physics of solids in December 1947.¹⁵ Bill Gates, the CEO of the Microsoft Corporation was quoted as saying that “my first stop on this time-travel expedition would be the Bell Labs in December 1947 to witness the invention of the transistor... it was a key transitional event in the advent of the Information Age.”¹⁶

Since that time, diverse digital communication devices such as the pagers, cellular telephones, computers and “personal digital assistants” have been invented, manufactured and introduced into society, allowing members of the public to “store, manipulate and transmit data in ways that greatly transcend our previous techniques of storage, replication and dissemination of

¹³There are diverse views on when the Information Age actually commenced by historians in this field. While some have argued that it started with the invention of the transistor, others have claimed that it started from the beginning of modern civilisation (as we know it). Bob Metcalfe in “ISDN is the Information Age Infrastructure,” INFO WORLD, December 7, 1992 said, “November 16, 1992 – the day the Information Age began in America.... Most computer folks would place the beginning of the Information Age well before this year- maybe 10, 25 or even 50 years ago. Daniel R. Headrick, ‘When Information Came of Age Technologies of Knowledge in the Age of Reason and Revolution, 1700-1850’, 2000 <<http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=121435>>.) at 8. “When, in fact, did the Information Age really begin? The short answer is: the Information Age has no beginning, for it is as old as humankind. Nonetheless, in the course of history, there have been periods of sharp *acceleration* (revolutions, if you prefer) in the amount of information that people had access to and in the creation of information systems to deal with it. The appearance of writing, the alphabet, double-entry bookkeeping, the printing press, the telegraph, the transistor, and the computer- each has contributed mightily to the acceleration of information in their time. In short, there have been many information revolutions.”

¹⁴ Michael Riordan, Hoddeson, Lillian., Riordan, *Crystal Fire : The Birth of the Information Age* (New York: Norton, 1997), /z-wcorg/.

¹⁵ Michael Riordan, Lillian Hoddeson and Conyers Herring, *The Invention of the Transistor*, Reviews of Modern Physics, 1999,71: 2 Reviews of Modern Physics S336 (<http://nanoelectronics.unibas.ch/education/ModernPhysics/InventTransistor.pdf>)

¹⁶ See Smithsonian (August 1996) page 25

information.”¹⁷ With the introduction of the personal computer in the 1980s came newer multimedia and database technologies that advanced the computer animation tasks as well as enabled the creation of database management systems (DBMS).¹⁸ By the end of the 1990s, a global information systems network had been created with the introduction of the Internet, the worldwide web (www) and other related electronic technologies. Its impact was felt in all national economies as it succeeded in changing the entire structure of traditional business models existing at the time with the introduction of swifter and easily accessible means of communications to concerned stakeholders.

Although the creation of the global information systems network was seen as a welcome development,¹⁹ it was not long before knowledge-exporting countries began to agitate for the revision of copyright legislation. This was because it soon became obvious that the existing legal framework governing copyright activities was ill-equipped to handle the challenges stemming from the use of these digital technologies.²⁰ Samuelson identified six characteristics that digital media possessed which made it difficult for existing categories of intellectual property law to adjust to the protection of works in digital form. These characteristics are: (1) the ease with which works in digital form can be replicated; (2) the ease with which they can be transmitted; (3) the ease with which they can be modified and manipulated; (4) the equivalence of works in digital form; (5) the compactness of works in digital form; and (6) the capacity they have for creating new methods of searching digital space and linking works together.²¹

2.1 Benefits and Challenges of Digital Technology to Copyright

¹⁷ Supra, note 19, Riordan & Hoddeson, page 6

¹⁸ Database Management System (DBMS) as defined by Webopedia is “a collection of programs that enables you to store, modify and extract information from a database. Examples of database applications include computerised library systems, automated teller machines, flight reservation systems and computerized parts inventory systems. (http://www.webopedia.com/TERM/D/database_management_system_DBMS.ht)

¹⁹ Dr YiJun Tian, *Rethinking Intellectual Property: The political economy of copyright protection in the digital era* (Oxon, New York: Routledge-Cavendish, 2009)

²⁰ Pamela Samuelson in “Digital Media and the Changing Face of Intellectual Property Law” *Rutgers Computer and Technology Law Journal*, Volume 16, No. 2 (1990)

²¹ Supra, note 19.

As I said in Chapter 1, digital technology was regarded as a welcome and terrifying development for users and owners of copyright. The term “digital technology” as used in this work encompasses all technological developments from the late 1970s and 1980s which includes, amongst others, compact discs (CDs), the transistor, digital computers, mobile phones, the worldwide web and the Internet. Digital technologies can be best described as a “double-edged sword” as they possess many benefits and burdens for users and owners of copyright. In this section, I will be discussing some of the benefits of digital technology to users and owners of copyright before analysing the challenges of digital technology to copyright and how it fueled the demand for the review of international copyright legislation.

One of the main benefits of digital technology was its potential to be a leveller between the developing and developed economies by making it possible for millions of people to access information resources which hitherto they were prevented from accessing. It also had the potential to be a stratifier, deepening the division between the information “haves” and “have-nots”.²² Not only does digital technology make hitherto time-consuming and difficult tasks easier and faster, it has broken down the communication barriers between people in related fields all over the world thereby aiding research and contributing to economic development.

Digital technology also benefitted users of intellectual works by improving social networking with the introduction of sites such as Facebook²³, Twitter²⁴, Tumblr²⁵, Instagram etc. thereby opening up previously uncharted frontiers/markets for people all over the world. This hugely benefitted writers as

²² National Research Council Staff, *Digital Dilemma: Intellectual Property in the Information Age*; National Academies Press. p. 28

²³ Sarah Phillips, “A brief history of Facebook”, *The Guardian* (25 July 2007) online: <<http://www.theguardian.com/technology/2007/jul/25/media.newmedia>>

²⁴ Andrea Picard, “The history of Twitter, 140 characters at a time”, *The Globe and Mail* (20 March 2011) online: <<http://www.theglobeandmail.com/technology/digital-culture/the-history-of-twitter-140-characters-at-a-time/article573416/>>

²⁵

they were able to share their creative works on blogs - open spaces on the Internet which encouraged amateur and professional writers/commentators to air their opinions and let their voices be heard. This helped develop their literary skills while making information available to all. The use of social networking sites was also of tremendous benefit to many popular singers such as Justin Bieber²⁶, Alexa Goddard²⁷ and Alexis Jordan²⁸ who started out or boosted their careers by posting videos of themselves singing covers of popular songs on YouTube. They steadily gathered a fan base until they were popular enough to attract the big recording companies. All three artists got signed up by record labels as a direct result of their YouTube popularity.

For users, digital technology was a welcome development as it made it possible for rare volumes of books kept in select libraries to be accessible to them. By using the Internet and other digital tools, two-dimensional (2D) and three-dimensional (3D) works can now be 'digitized' (i.e. translated into a digital code or binary format that can be read by machines) and stored in a universal format. This has greatly benefited authors, performers and the entire entertainment industry as it opened a worldwide marketplace to them, allowing them to trade in their works, gain popularity and relevance in their diverse fields.

Digital technology has broken down previously existing barriers in music marketing with the introduction of online music sharing²⁹. Before now, the promotion of a newly released album of an artiste by music recording companies required a lot of time, effort and money. There has been a marked reduction in the time, effort and money spent by artistes and recording companies alike with

²⁶ Desiree Adib, "Pop Star Justin Bieber is on the Brink of Superstardom", *ABC News* (14 November 2009) online: <http://abcnews.go.com/GMA/Weekend/teen-pop-star-justin-bieber-discovered-youtube/story?id=9068403>;

²⁷ See her interview at LIMF Festival published August 26, 2014 by Tom Dootson <http://www.baytv.liverpool.com/vod/index.php?vid=HBV53fc8538efb6b>

²⁸ Joseph Patterson, "Alexis Jordan: The Interview", *MTV News* (September 30 2010) online: <http://www.mtv.co.uk/music/urban/238897-alexis-jordan-the-interview>

²⁹ Jesse Bockstedt, Robert Kauffman & Frederick Riggins, "The Move to Artist-Led Online Music Distribution: Explaining Structural Changes In The Digital Music Market" Last Revised September 12, 2004 (Accepted to the 2005 Hawaii International Conference on System Sciences, Big Island, Hawaii; online <http://misrc.umn.edu/workshops/2004/fall/jesse.pdf>

the introduction of digital technology. Albums (and singles) as albums are now promoted using social media such as Facebook, Twitter, Instagram, YouTube and so on by both the artistes and the recording companies. This partly explains why, for example, “Oliver Twist” a very popular song by a Nigerian-based musician, D’banj was played at the 2012 London New Year’s Eve Fireworks³⁰. Another good example of the way digital technology has helped bridge the gap in music between continents is the “Run the World” music video by Beyonce Knowles which featured the Mozambique-based Tofo Tofo Dance Group, a previously unknown African-based dance group which she discovered from watching their YouTube video online.³¹ According to her choreographer, Frank Gatson Jr. *“It was hard finding them. They were really in a remote area; we had to get the embassy people involved. That was a process that took about two months or more. Beyonce really loved them and I’m pretty sure we’ll see them again. It was magical.”*³²

For many music lovers, the ability to modify and manipulate intellectual works in digital form at will without degrading the original work³³ was a great benefit of technology. Users of appropriate digital tools could merge multiple digital files into one another to form a single file or may choose to cut and paste sections of many digitised works in such a way that it forms a totally new work. A good example of such works are movie/video ‘mash-ups’ which were usually a

³⁰ Dan Hancox, “The Rise of Afrobeats” *The Guardian* (19 January 2012) online: <http://www.theguardian.com/music/2012/jan/19/the-rise-of-afrobeats>; Also see the video of the 2012 London fireworks here: <https://www.youtube.com/watch?v=xs9-nKveiFA>.

³¹ Beyonce Knowles spoke about how watching the Tofu Tofu dance group on YouTube inspired the dance moves in her Run the World Video and how she had to find the Group to feature in her video here: <https://www.youtube.com/watch?v=3vXXiku0580>

³² Jocelyn Vena, “Beyonce ‘Nailed It’ in ‘Girls’ Video, Choreographer Says” MTV News (19 May 2011); online <http://www.mtv.com/news/1664223/beyonce-run-the-world-girls/>

³³ Supra, note 19, pg 6 Once a work has been digitized, software programs enable us to isolate and modify any aspect of the work we wish to manipulate. Consider, for example, an image captured by a digital camera. Because the image is digitized, one may select particular colours, contrasts or shapes from the image and separate these elements from the overall image.

combination of 2 or more original videos into a single video and then uploaded on online music sites like YouTube.³⁴

Movie and music lovers were also delighted with the creation of digital media with large storage capacities – CDs, DVDs and iPods which allowed copyright owners to record large quantities of data on a single storage device using newer compression techniques.³⁵ This made it easier for viewers/listeners to watch or listen to full episodes of their favorite movies series or full albums of their favorite artists.

In summary, the benefits of digital technology to copyright are as follows: (i) it has the potential to be a ‘leveller’ between developed and developing countries; (ii) it has improved social networking; (iii) it has made it possible for written works to be easily accessible to the public especially with ‘digitization’; (iv) it has broken down previously existing barriers in music marketing; (v) it allows users to modify and manipulate data easily; (vi) it gives users the ability to store a large quantity of data on a single storage device using newer compression techniques.

As beneficial as digital technology was to copyright holders, it soon became apparent that some of its ‘benefits’ also challenged the existence of the exclusive rights of copyright owners. The first major challenge of digital technology was “control”. How could copyright owners control access and use of digital copies of their works? The control sought here was two-fold – one, control of third-party access to view digitised works, and two, control of the replication of digitised works by third parties. It should be noted here, however, that the primary right granted to copyright owners in the pre-digital age was the right to control copy of the works. Users still had the right to access creative works as long as they either used those works for legitimate purposes (fair dealing or fair use) or did not reproduce them.

³⁴ You can find examples of mashups here:

https://www.youtube.com/watch?v=97_CTxNI2vk&list=PL2ku-lw3T31hzu5SQk33Ky0HpXIHJyhbD ;
<https://www.youtube.com/watch?v=HJMapA8WgYw&list=PL2ku-lw3T31hzu5SQk33Ky0HpXIHJyhbD>

³⁵ Supra, note 22, pg. 16

Before the digital age, copyright owners could easily control replication of creative works as it was practically impossible for unauthorised third parties to make a copy of a creative work that was comparable in quality to the original works. This in effect helped creators identify unauthorised copies of their original works. Also, before the creation of the mimeograph machine, the photocopy machine, audio and video tape recorders and more recently, computers and digital audio tape machines, the process of copying creative works itself was laborious and expensive.³⁶ Coupled with the protection available to copyright holders under the Copyright Act of that time, authors were able to battle piracy from its source by conducting raids on suspected counterfeiting centers and prosecuting as many suspected pirates as possible.

The advent of digital technology suddenly made it difficult to correctly identify an unauthorised copy of a work from the original as well as control the way unauthorised third-party users could access a digital work once the work was uploaded on the internet. Copyright owners were at a loss on how best to regain control and obtain compensation for unauthorized access and reproduction of their digitized works. This challenge was particularly daunting as authors and composers who had been used to receiving financial rewards from the sale of copies of their works. A good example of the use of digital technology to bypass the need for author's consent before accessing and distributing a work was seen in the Napster case³⁷. In 1999, Shawn Fanning had developed a file-sharing program called Napster which allowed computer users to share and swap music files through a centralized file server. For copyright owners, this was a huge threat to their revenue generation from sales of their albums as a single copy of

³⁶ Pamela Samuelson, "Digital Media and the Changing Face of Intellectual Property Law" (1990) volume 16 No. 2 Rutgers Computer and Technology LJ 325 "As this technology has improved, it has become ever more difficult for copyright owners to exercise control over replication of their works and to obtain compensation for unauthorized replication". "Copying by means of these new technologies has, as a consequence, become more difficult to trace."

³⁷ Beth Thomas, 'Solutions Are on Track: Digital File Sharing Spun in a Positive Light Internet & Technology', *Vanderbilt Journal of Entertainment Law & Practice*, 6 (2003), 129–44. In the case of *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit held that the majority of Napster's users shared copyrighted files and those users were thus direct infringers of the plaintiff's copyrights.

their works, uploaded on the Napster server could be shared by millions of users – users who would have had to purchase their albums if Napster had not been in existence. After several law suits were brought against Napster by copyright owners, Napster was shut down but many more Napster-like sites sprung up in the wake of its demise.

In the face of this threat, copyright owners began to think about devising ways to control access and use of their digitized works. This led to the development of technical measures which they placed on every single copy of their works. These technical measures aimed to restrict third-party users' access to digitized works (or allow them access to their works for a fee) thus reducing the rate of piracy of digital works within the digital environment. The effectiveness of these technical measures were however short-lived as ingenious users developed counter-measures to circumvent the technical measures placed on these works. These hackers threatened the existence of the exclusive rights of copyright owners and, out of frustration, copyright owners turned to the law for help. Copyright law at that time did not have any provisions allowing copyright owners to control access and use of their works and this new development was totally alien to traditional copyright law. As I stated earlier, traditional copyright law was concerned with controlling reproduction and not access to creative works. According to Pamela Samuelson,³⁸ the farther one moves away from the printing presses and the kind of control that medium permits over copying, the less useful is the traditional copyright paradigm.

Apart from making it difficult for copyright owners to control access and use of their works, digital technology made it easier for digitised works to be transmitted between multiple users at the same time. As I stated above, before this period, copyright owners could control the number of copies of their works which were being sold via authorised distribution channels, making it easier to identify pirated copies sold through unauthorised channels. This was largely because copyright owners knew their distribution channels and could control

³⁸ Supra, note 36, page 326

the number of copies that was placed on the market. With the introduction of digital technology such as the internet, emails, fax machines, Bluetooth devices, DVDs and CD-ROMs, USB drives, External Hard Drives, it has become easier for works, not just music files as seen in the Napster case, to be distributed between people from all over the world. Thus, making it harder for copyright owners to track the number of copies of their works that was being accessed, used or sold over a period of time. While this nature of digital technology has been applauded by ‘open access’ advocates, it has become a source of concern for authors who want to receive financial benefits for the fruits of their labour.³⁹ According to Thomas, instead of realising that downloading digital files takes revenue away from artists, much of the Internet community view illegal file downloading as “sharing” rather than stealing.⁴⁰ While it has been suggested that the problem of file sharing and downloading as seen in the Napster cases can be resolved by using “digital rights management technology”, copyright owners believe that there is a need for the law to protect digital rights management technology if it was ever going to be effective against piracy.⁴¹

The ease with which users modify and manipulate digitised copyrighted works using digital technology was a source of major concern to copyright owners in the digital age. Use of copyrighted works in this manner impacted negatively on the moral rights of paternity and integrity⁴² granted exclusively to copyright owners under existing copyright legislation. With traditional copyrighted works, there was a textual “fixity” characteristic which made it almost impossible for users of the works to modify or change the contents of a work; they could only

³⁹ Thomas, pg 129-137.

⁴⁰ Thomas, pg 129.

⁴¹ Thomas,. Also, see Supra, note 36, 327 “Early efforts to exercise such control in the computer software market, through “shrink-wrap licenses” and through technological means, such as copy-protect schemes, have met with mixed success.”

⁴² Moral rights are granted to authors under various domestic and international copyright legislation. Basically, these rights allow creators of intellectual works to control how their works are distorted, mutilated or otherwise modified, ensuring that such acts do not prejudice its honor or reputation. They can also decide whether their names should be associated with an intellectual work or not.

make additional exact copies of the work or use protected expressions from the first work copiously to create another work.⁴³ This textual “fixity” characteristic, while largely beneficial, also had its ill-effects. Errors and revisions in a work could not be easily corrected, modified or updated immediately the changes occurred. Writers usually waited until there were enough errors and revisions that would justify the economic costs of publishing a newer edition before making the changes. This meant that at some point between the discovery of the first error and revisions, up to the point where the newer edition is published, parts of the original work would have become obsolete and irresponsive to changes in the society. The introduction of digital technology allowed us to “correct errors, add commentary, alter it, delete what we do not want, update information, and so on, thereby overpowering one of the major disadvantages of the print medium”⁴⁴. It was also a huge challenge to the moral rights of copyright holders who now had to worry about the potential ways through which third-party users could alter their works and how such alteration might affect their reputation adversely.

Digital technology created the notion that copyright owners could no longer control the way their creative works were used by third parties. There was always the possibility that a user could customize an author’s work, make a few changes to differentiate his own work from the original and resell it to the public, or modify a creative work in such a way that the message which the author intended to pass across through the works is distorted. It was also very possible that in the process of modifying computer programs, a user inadvertently changes the software such that it endangers life or property contrary to the intention of the manufacturer.⁴⁵ In the music industry, for example, third-party users discovered

⁴³ Supra, note 36, 329

⁴⁴ Supra, note 36, 329

⁴⁵ Copyright law, as a general rule, did not protect authors from misrepresentations or liability resulting from modification of copyrighted works. Even though some countries had laws that protected the moral rights of creators, such laws did not extend to the physical harm problem. A purchaser of copyrighted work has the freedom under traditional copyright to exercise personal property rights in the work under the “first sale” rule. See Pamela Samuelson, pg. 331

that, using digital sampling techniques, they could create a ‘mash-up’ of a variety of musical works by “chopping” sound recordings into “sound bites” that can be re-mixed and combined with other sound bites from other recordings to create a new work different and distinct from the original recordings.⁴⁶

The use of digital technology challenged traditional copyright’s categorisation of works. Once a work is digitized and supplied in electronic digital format through a communications network, it will no longer be practical to categorize that subject matter using one of the traditional copyright categorisations. The fact that any work can now be represented in digital form means that there will be less differentiation of copyrighted works by type as they can now be fixed in the same medium. This equivalence of works in digital form will make it easier to combine previously separate categories of works to create a new type of work that may be difficult to classify under traditional copyright - for example, the fixation of a literary work (such as a poem), a musical work (such as a song) and a dramatic work (such as a mimeograph or a movie) into a single CD-ROM makes it difficult to classify that CD-ROM as a creative work under one of the currently existing categories.

In summary, the challenges posed by digital technology to copyright are: (i) the inability of copyright owners to control access and use of its works by unauthorized third parties; (ii) the difficulty of regulating how digitised works were transmitted between multiple users at the same time; (iii) the ease with which users could modify and manipulate digitised copyrighted works using digital technology; and (iv) the challenge of digitised works to traditional categorization of works.

Looking at the challenges discussed in the earlier paragraphs, existing copyright legislation was ill-equipped to handle the problems that came with the introduction of digital technology.⁴⁷ Although copyright owners tried to protect

⁴⁶ Supra, note 36, pg. 330

⁴⁷ Lovoi, Jeanmarie, “Note: Competing Interests: Anti-Piracy Efforts Triumph under TRIPS But New Copying Technology Undermines The Success” (1999) 25 Brooklyn Journal of International Law, 454

their rights using measures like digital rights management (digital watermarking and digital fences or containers⁴⁸) and through the incorporation of digital locks or technological protection measures, these measures had their own failings. As I pointed out earlier, hackers continuously tried to hack the technical measures put in place by copyright owners to protect their works⁴⁹ and the reaction of the public to the use of these technical measures on intellectual works was not encouraging at all. According to Thomas,

“... the public is vocal in its aversion to digital rights management, and the music industry cannot continue to make money by alienating its own customers. people are dissatisfied when their CD does not play in their Linux machine, or when they cannot transfer the music they legitimately purchased in CD-form to their MP3 player because of digital rights management....”.

Thus, there was a need to create a system of protection that balanced the private rights of the copyright owner while considering the public’s interests. The grant of legal protection to TPMs has generated a lot of controversy both at the international and state levels particularly because of the perceived threat to ‘access’ rights of users. As I stated earlier, under traditional copyright law, it was easier to control how and who accessed copyrighted works. Users of copyrighted works could pick up a book in the bookstore and browse through it before deciding whether or not to buy it. In a bid to control the unauthorised distribution of digital copyrighted works, TPMs restricts users from accessing works whether or not access is lawfully permitted. Critics of legal protection for TPMs fear that copyright holders would be given a new class of rights – rights to control access even for legitimate purposes – not recognised under traditional copyright. According to Craig, because “TPMs do not – and generally cannot – distinguish between lawful and unlawful uses and users,”⁵⁰ acts which were

⁴⁸ Thomas, pg 132.

⁴⁹ Thomas, pg 133.

⁵⁰ Supra note 159

previously permitted to users of copyrighted works under the traditional copyright legal framework were now prevented by the use of technical controls.

On the other hand, supporters of TPMs argued that the fears raised by critics are unfounded. Mihaly Ficsor⁵¹ argues that no new ‘access rights’ were created as a result of the creation and implementation of TPM tools. According to him: “Access to works by users have always been controlled; without it, the copyright system simply could not have existed”. He states that the process of accessing copyright work that was obtainable prior to the digital age has now been replaced by a single click on the keyboard. As a result, the use of TPMs by copyright owners “makes access conditional to the payment of a reasonable price or some other arrangement”.

Craig argues that copyright reform ought to aim to achieve “prescriptive parallelism” to the greatest extent possible, that is, it must ensure that the traditional copyright balance that existed previously must be preserved in the digital environment.⁵² The legalisation of TPMs without the provision of exceptions for fair dealing by users appears to have crossed the line, swinging copyright protection in favour of the owner. Whether international legislation has been able to achieve “prescriptive parallelism” in the digital age with the introduction of legal protection for TPMs is an issue I will consider in the next chapter.

2.2 The “Balance” Problem and Copyright Protection in the Digital Age

The concept of ‘balance’ in copyright is not as simple as the average reader assumes it is. The ‘balance’ concept can be viewed in two distinct categories as

⁵¹ At the sub-regional seminar on the protection of computer software and databases organized by the World Intellectual Property Organisation (WIPO), the Romanian Copyright Office (ORDA) and the State Office for Inventions and Trademarks (OSIM) held in Mangalia, Romania on August 25-27, 2010 (www.wipo.int/edocs/mdocs/mdocs/.../wipo_ip_mng_10_ref_t12.pptx)

⁵² See Carys Craig, “Digital Locks and the Fate of Fair Dealing: In Pursuit of ‘Prescriptive Parallelism’ (2010) 13:4 Journal of World Intellectual Property 503, www.interscience.wiley.com/journal/117991912/home; earlier draft available at <http://ssrn.com/abstract=1599610>.

it applies to international and domestic legislation - the universal norms v. national autonomy concept of 'balance' and the private rights v. public interests concept of 'balance'.⁵³

The 'universal norms v. national autonomy' concept of balance applies in the international copyright system. Drafters of intellectual property treaties were primarily concerned with ensuring that, in establishing the universally agreed minimum standards of protection, the national autonomy of member states to the treaties is recognised and protected by its provisions. What this meant was that minimum standards in international treaties were drafted as obligatory guidelines for member states, who were given the right to incorporate these standards into their domestic legislation as they deemed fit.⁵⁴

According to Dinwoodie, member states were allowed to retain significant freedom in the implementation of the minimum standards contained in the Berne Convention "the license for national autonomy flowed in part from the decision to employ truly minimum standards, allowing different states to provide varying levels of higher protection, but it was also reflected in the deference shown member states' own interpretation of what was required to comply with the Convention....". Drafters of international copyright treaties ensured that the wording of the provisions of these treaties were obligatory but not compelling/mandatory on member states. In other words, member states were not forced to implement the provisions of the treaties 'as is' so as not to violate

⁵³ What I mean by viewing 'balance' from the universal norms versus national autonomy perspective is best explained by Graeme B. Dinwoodie in "The International Intellectual Property System: Treaties, norms, National courts, And Private Ordering" pg 62. He stated that the classical international intellectual property system which was formed around treaties that were concluded by nation states effectively preserved substantial autonomy for states crafting domestic intellectual property policy. Dinwoodie went on to state that the international intellectual property system clearly understood that the creation of international norms to regulate copyright affected not only the balance of rights between owners and users but also the balance of national and international regulation, the latter balance being a concern of public international law generally.

⁵⁴ Graeme B. Dinwoodie, 'The Development and Incorporation of International Norms in the Formation of Copyright Law', *Ohio State Law Journal*, 62 (2001)
<<http://moritzlaw.osu.edu/students/groups/oslj/files/2012/03/62.2.dinwoodie.pdf>>
[accessed 2 November 2014].

the principles of national autonomy. Instead, they ensured that the treaty language specified the acceptable universal minimum standards that member states were expected to put in force.

The second concept of ‘balance’ is the more popular view of private rights versus public interest.⁵⁵ Although drafters of international treaties also considered this form of the ‘balance’ concept during the negotiation process, it lay much more within the scope of the domestic legislature in member states.⁵⁶ The aim of drafters of national copyright legislation when incorporating the minimum standards provided in the international treaties was mainly to ensure a balance between private rights and public interests.

Article 10 of the Berne Convention, for example, highlights the fair use standards expected from member states. A close reading of the provisions of the Article shows that the drafters of the treaty left the fine-tuning of the fair use provisions in the hands of the domestic legislatures of member states. Article 10(2) of the Berne Convention states thus: “(2) *It shall be **a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them**, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publication, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.*” (emphasis mine). Thus, Article 10(2) left the determination of what constituted fair use in the hands of the domestic legislatures and/or individual states entering into bilateral treaties dealing with copyright. Various countries all over the world have one form of the fair use/dealing provisions embedded in their copyright legislation as those provisions are a necessary component of ‘balanced’ copyright legislation.

A look at the Berne Convention and its subsequent revisions highlights this point as the drafters of the Berne Convention concerned themselves

⁵⁵ See Graeme B. Dinwoodie, “Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring”, 160 J. INST. AND THEORETICAL ECN.161 (2004)

⁵⁶ Ruth Okediji, ‘The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries’, *International Center for Trade and sustainable Development*.

primarily with the negotiation and drafting of universal minimum standards. Thus, there was a 'balance' between the universal norms/standards (created by international IP policy makers) and the national autonomy of the various member states. The importance of 'balance' in the "universal minimum standards v. national autonomy" concept in international treaty stems from the recognition of the different social and economic values of each individual state. The level of social and economic development of member states vary and as such a one-size-fits-all rule cannot be applied if 'balance' is to be maintained.⁵⁷ Thus, the general consensus was that copyright law should not be articulated under international law, rather, parameters should be established within which national law makers are expected to create a copyright framework which is appropriate to the circumstances of its society.⁵⁸

In the next chapter, I will consider two questions: Did the drafters of the TRIPS and WCT consider the 'balance'⁵⁹ problem during the drafting process? If they did, were they able to translate their intention to maintain existing copyright balance into the text of the TRIPS and WCT?

⁵⁷ Graeme Dinwoodie, "A New Copyright Order: Why National Courts Should Create Global Norms" (2000) 149:2 U Pa L Rev pp 469-580. He analysed three other truisms of contemporary copyright thoughts and how these thoughts could ensure the development of international copyright solutions. The three truisms are: "First, copyright law must accommodate and respond to technological developments; second, copyright law is an essential instrument of national cultural and information policy, and third, copyright law affects an ever larger and more diverse set of societal interests." According to him, these three truisms require in turn that copyright law making be receptive to dynamic, prospective adaptation, that its results permit some room for national variation, and that it accommodates pluralistic perspectives.

⁵⁸ Supra note 2

⁵⁹ In 1785, Lord Mansfield described the 'copyright balance' as follows: "We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." (Sayre v. Moore)

Chapter Three

International Copyright Protection Framework – Pre and Post Digital Age

As I discussed in chapter 2, the numerous benefits of digital technology brought with it many challenges to the ownership of copyright. It soon became clear to the international copyright community that the existing Berne Convention fell short of protecting copyright effectively in the digital age. As a result, efforts were made by the international copyright community led by the USA to negotiate and adopt treaties which, in addition to the other technical measures, would adequately protect copyright in the digital age.

In this chapter, I will start by discussing the existing copyright framework prior to the digital age i.e. the Berne Convention and the Universal Copyright Convention. I will take a look at how these treaties helped maintain balance in copyright and why they were deemed inadequate to handle the challenges of the digital age. I will then examine the newly adopted international treaties i.e. the WIPO Internet Treaties and the TRIPS Agreement which were negotiated to address the challenges of digital technology to copyright. I will be examining the provisions of these new treaties to see whether they adequately protected copyright in the digital age without upsetting the existing balance between private rights and public interests.

3.1 General Overview of Pre-Digital Age International Copyright Legislation

(i) The Berne Convention, its revisions & the Universal Copyright Convention

The Berne Convention⁶⁰ was the first attempt by the international community to create a uniform copyright protection framework. It was negotiated and

⁶⁰ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30

concluded in 1886⁶¹ due to the demand by developed countries for the unification of copyright protection standards. This demand was an indirect result of the Industrial Revolution which had led to major improvements in the way goods were manufactured leading to a growth in transnational trade.⁶² According to WIPO⁶³, the Berne Convention was adopted in order to help nationals of its member states obtain protection internationally while giving them the right to control and receive payment for the use of their creative works.

The Berne Convention was a product of over 25 years of studies by interested parties and their representatives, made to replace the increasing number of bilateral copyright treaties. Concerned parties believed it was better to have one universally acceptable treaty which stipulated the formalities to be complied with as well as the conditions of copyright protection. Between 1884 and 1886, three sessions of a diplomatic conference were convened by the Swiss Federal Council to develop an acceptable international treaty for the protection of literary and artistic works. Five main objectives were promoted by the original Berne Convention: (i) the development of copyright laws for authors in all civilised countries; (ii) the elimination over time of basing rights on reciprocal treatment; (iii) the end of discrimination in rights between domestic and foreign authors in all countries; (iv) the abolition of formalities for the recognition and protection of copyright in foreign works; and (v) the promotion of uniform international legislation for copyright protection.⁶⁴

⁶¹ Linda W. Tai, “Music Piracy in the Pacific Rim: Applying a Regional Approach towards the Enforcement Problem of International Conventions” (1995) 16 Loyola Los Angeles Entertainment Law Journal 159, 168

⁶² Professor Yu, in his paper “Current and Crosscurrents in the International Intellectual Property Regime”, 38 Loyola of Los Angeles Law Review 333-339, “[a]s cross-border markets developed and expanded, countries became concerned about the limited national protection and the virtually nonexistent international protection for foreign authors and inventors...”

⁶³ See WIPO- WIPO Treaties- General Information: Major Events 1883 to 2002, online: WIPO <[http:// www.wipo.int/treaties/en/general/](http://www.wipo.int/treaties/en/general/)>

⁶⁴ Mr. Kastenmeier, *The House Report on the Berne Convention Implementation Act* (United State Congress, 6 May 1988)

<http://www.ipmall.info/hosted_resources/lipa/copyrights/The%20House%20Report%20on%20the%20Berne%20Convention%20Implemenation%20Act.pdf> [accessed 8 November 2014]; pg 4.

The Berne Convention was based on three basic principles⁶⁵ - (i) the Principle of National Treatment - member states were required to offer nationals of member states the same level of protection it offered to its own nationals; (ii) the Principle of Automatic Protection (copyright protection in member states must not be conditional upon compliance with any formality); and (iii) the Principle of Independence of Protection - the protection granted by member states should be independent of the existence of protection in the country of origin of the work. Member states regarded the Berne Convention as a reflection of their agreed standards as relates to copyright protection. These agreed standards were based on the existing state practices of the member states.

From the provisions of the treaty, it was clear that national autonomy was preserved by the drafters of the treaty. They made sure that member states had the right to develop the central concepts of copyright protection (such as the definitions of “author”, “literary work”) to suit their national policies and values.⁶⁶ Thus, the Berne Convention set out the minimum standards of protection, subject to certain reservations, limitations or exceptions, which were expected from member states. In this way, the Berne Convention effectively maintained the balance between universal standards and national autonomy. Also, the Berne Convention clearly enumerated the type of works which member states were expected to protect, the exclusive rights to be granted to authors and the duration of copyright protection some of which I will be discussing subsequently.

According to the Berne Convention, the type of works to be protected were “every production in the literary, scientific and artistic domain, whatever the mode or form of its expression.” However, Article 2 went on to give examples of

⁶⁵ Supra, note 57, Article 5

⁶⁶ See Graeme B. Dinwoodie, “The Architecture of the International Intellectual Property System” in Peter K. Yu, ed, *Intellectual Property and Information Wealth- Issues and Practices in the Digital Age* (Westport, Connecticut, London: Praeger, 2007) v.4. Also see Art. 2bis (1) (limitation of protection for political speeches and speeches delivered in the course of legal proceedings); Art 2bis (2) (conditions under which lectures, addresses and other works of the same nature can be reproduced, broadcast or communicated to the public); Article 7 (term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works). These are some of the examples of provisions in the Berne Convention that was left to the discretion of lawmakers in member states.

the types of works that qualify as literary and artistic works. Countries were free to prescribe, however, whether fixation was a necessary requirement for copyright protection. The Paris revision of the Berne Convention provided authors of literary and artistic works with the exclusive rights to authorize (i) translation (Art. 8); (ii) reproduction (Art. 9); (iii) broadcasting and related rights (Art. 11^{bis}) (iv) public recitation of their works and communication to the public of these recitations (Art. 11^{ter}); (v) adaptations, arrangements and other alteration of works; (vi). In respect to dramatic and musical works, the Act gave authors the exclusive rights to authorize (i) public performance (Art 11 (i)); (ii) communication to the public of their performances (Art 11(ii)).⁶⁷ As I stated in chapter 2, the inception of digital technology made it increasingly harder for copyright owners to protect these rights from infringement by unauthorized users.

The Berne Convention also provided for “moral rights”⁶⁸ which included the rights to claim authorship of a work (the right of paternity) and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author’s honour or reputation (the right of integrity). The duration of protection granted to authors under the Berne Convention, which applied to both economic and moral rights⁶⁹, was the author’s life and 50 years after the death of the author. Thus,

⁶⁷ The minimum standards set out in the Berne Convention can be found in Art. 2 (*Protected Works*), 3 (*Criteria of Eligibility for Protection*), 4 (*Cinematographic Works, Works of Architecture and other Artistic Works*), 5 (*Rights Guaranteed*), 6 (*Possible Restriction of Protection for Works of Nationals of countries outside the Union*), 7 (*Term of Protection*), 8 (*Right of Translation*), 9 (*Right of Reproduction*), 10 (*Fair Use*); 11 (*Dramatic and Musical Works- Rights of public performance and communication*) 11^{bis}(*Broadcasting and Related Rights*), 11^{ter} (*Certain Rights in Literary Works*), 12(*Right of Adaptation, Arrangement and Other Alteration*), 14 (*Cinematographic and Related Rights*), 15 (*Rights to enforce infringing copies*).

⁶⁸ Moral rights is a translation of “droit moral”, the French term that refers to the ability of authors to control the eventual fate of their works. It protects the personality and reputation of the creator of the work and not the monetary value of the work. The monetary value of a work is protected by the economic rights granted to the authors under the Copyright laws. The origin of moral rights can be traced to French law which recognises perpetual moral rights. Other European countries also had variations of moral rights recognised in their copyright legislation.

⁶⁹ See Article 6^{bis} (2) of the Berne Convention as revised by the Paris Act, 1971

under the Berne Convention, members were only obliged to protect moral rights for at least 50 years after the death of the author and not in perpetuity.

The 1886 Berne Convention has been revised several times⁷⁰ in response to changes in technology, effectively protecting the utilization of authors' works from infringement and in recognition of new exclusive rights granted to authors. The last two revisions – the Stockholm and Paris Acts – focused on the rapid technological developments, the needs of newly independent developing countries and the need to introduce administrative and structural changes in international copyright protection. These issues inspired the drive for the creation of the World Intellectual Property Organisation (WIPO) which was designated as the sole organ responsible for the administration of the Berne Convention and other multilateral intellectual property treaties.

I will be considering the provisions introduced by the latest revision of the Berne Convention - the 1971 Paris Act – subsequently. The 1971 Paris revision of the Berne Convention dealt with the unique problems faced by newly independent countries in respect to access to technology and education. The 1971 Paris Act sought to create exceptions for developing countries in relation to the minimum standards set out in the Berne Convention especially in respect of access to education and technology.⁷¹ The Paris Act of the Berne Convention was able to resolve this by including flexible minimum standards which helped developing countries modify and adapt the minimum standards to suit their own domestic needs.⁷²

⁷⁰ The first major revision of the Berne Convention was in Berlin (1908) then Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971).

⁷¹ See WIPO, International Treaties and Conventions on Intellectual Property, 265 <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf#berne> >

⁷² Lauren Loew, "Creative Industries in Developing Countries and Intellectual Property Protection" (2006-2007) 9 Vand. J. Ent. & Tech. L. 171 at 176 - "The appendix from the Paris Revisions, however, was "generally acknowledged as a failure in terms of its utility to and by developing countries". See also, Ruth Okediji, "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System, (2003) 7 SING. J. INT'L & COMP. L. 315 at 328. "The Revisions adopted a complex Appendix, much less radical than the Stockholm Protocol, designed to facilitate access by developing countries to copyrighted works through a compulsory license system."

What triggered the need to negotiate and adopt new international copyright treaties when the Berne Convention appeared to give adequate protection to copyright? The availability of newer technologies brought into question the effectiveness of the Berne Convention in the digital age. The scope of protection which the Berne Convention offered was too limited to adequately protect intellectual works from infringement in the digital age. Also, there was no way the minimum standards set in the Berne Convention could be interpreted flexibly to include the potential uses of intellectual works in the digital age. For instance, copyright owners found it difficult to argue that Art 2 of the Berne Convention's definition of literary and artistic works covered sound recordings, computer programs and software. Thus, these works were ineligible for copyright protection under the Berne Convention. The last reason was that the Berne Convention had failed to make enforcement procedures and legal remedies available to copyright owners. Thus, where incidents of infringements occurred, there were no universal minimum standards specifying what the copyright owner should do to protect his rights under the Berne Convention.

In summary, the Berne Convention was a well-drafted international copyright treaty that ensured that adequate protection was given to the copyright owners by Union members. However, the introduction of newer technology led to the demand for the negotiation and adoption of newer international copyright treaties and this led to the adoption of the WIPO Internet Treaties and the TRIPS. Before I discuss the new treaties, I will examine another international copyright treaty which existed after the Berne Convention but prior to the inception of the digital age – the Universal Copyright Convention.

(ii) The Universal Copyright Convention (UCC) of 1952

The Universal Copyright Convention came into existence primarily because of the desire of the international community to make a treaty that would be binding on some countries that had refused to adopt the Berne Convention. By the end of the Second World War, the USA, particularly, had refused to join the Berne Union even though it was one of the leading exporters of copyrighted

works.⁷³ This development did not go down well with other member states of the Union as it meant that their own works would not be eligible for copyright protection in the USA even though they gave the works of USA citizens the same level of copyright protection enjoyed by their own citizens. The USA's reason for refusing to adopt the Berne Convention was the existence of certain provisions contained in the Berne Convention that were contrary to what the USA believed. The Berne Union members were however unwilling to reduce or remove these provisions just to make sure the USA adopted the treaty.

As a result of this deadlock, the general consensus of the international community was the adoption of a new “common denominator” treaty that would be acceptable to both the USA and other Berne Union members. This treaty would establish acceptable minimum standards applicable worldwide without rendering the Berne Convention obsolete. Thus, the Universal Copyright Convention (UCC) (as revised at Paris on July 24, 1971) was sponsored by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 1952. The UCC did not create any new rules of copyright but instead, helped to harmonise existing national systems for countries in the Pan-American area and European countries.⁷⁴ The UCC was a product of more than five years of preparatory work, from the First General Session of the General Conference of UNESCO held in 1946 to its adoption at Geneva on September 6, 1952.⁷⁵ The UCC was initially signed by the United States and thirty-five other countries but currently has a total of 100 contracting parties.⁷⁶ From its preamble, its main objective was the development of a universal copyright protection system to facilitate a wider dissemination of creative works. I will be giving a brief analysis of some key provisions in the UCC in the subsequent paragraphs.

⁷³ Barbara A. Ringer, 'The Role of the United States in International Copyright - Past, Present and Future', *The Georgetown Law Journal*, Volume 56 (1967), 1060.

⁷⁴ Joseph S. Dubin, 'The Universal Copyright Convention', *California Law Review*, 42 (1954), 89-119 <<http://dx.doi.org/10.2307/3478227>>.

⁷⁵ *Supra*, note 71, pg. 89

⁷⁶ See World Intellectual Property Organisation's website here: http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=208&group_id=22. Accessed October 24, 2014

Article I of the UCC placed an obligation on contracting states to provide for the adequate and effective protection of the rights of authors and other copyright proprietors. Article II provided for the observance of the principle of national treatment among treaty members. Member states were required to accord the same level of protection granted to their own nationals to published works of nationals of any Contracting State and works first published in another Contracting State. Article III provided for the requirement of formality before a work is eligible for copyright protection. This was a great breakthrough in the negotiation of the Convention because the issue of the grant of copyright protection with or without formalities was one of the reasons for the refusal of the USA to sign the Berne Convention. Article IV stipulated the minimum term of protection to be granted under the UCC to be either 25 years from the death of the author or from the date of first publication. Article V provided for the grant of exclusive translation rights to foreign UCC authors for at least seven years after which a compulsory licensing system will be established. In many ways, the text of the UCC was very similar to the original text of the Berne Convention.⁷⁷

The major differences between the UCC and the Berne Convention was, first, the treatment of copyright by the UCC as a licence granted by state instead of an inherent or natural right of the author as stated in the Berne Convention; second, the term of protection granted to authors by the UCC is the life of the author plus 25 years contrary to the Berne Convention and third, the absence of certain concepts that were foreign to the USA concept of copyright e.g. copyright without formalities, moral rights and retroactive clauses.⁷⁸ Since the passage of the Berne Convention Implementation Act of 1988 by the USA which incorporated the Berne Convention into USA copyright laws and the recent negotiation and adoption of the TRIPS & WIPO Copyright Treaty by Berne Union members, the UCC has lost nearly all legal significance in copyright regulation. In the next section, I will be discussing the new international treaties that were

⁷⁷ Supra, note 70, 1060

⁷⁸ Irwin A. Olian, "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris", (1974) 7 Cornell Int'l L.J. 81, 103

negotiated and adopted in response to the technological developments in the digital age.

3.2 Overview of the Post- Digital Age International Copyright Legislation

Thomas Jefferson was quoted on the inscription at the Jefferson Memorial in Washington, DC as stating:

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy.... .

Although the Berne Convention was revised periodically in response to new technological developments such as mechanical reproduction (1908 revision), photography & cinematography (1928 revision) and television (1967 revision). However, it soon became apparent that a major overhaul of the international copyright framework was needed. This was due to the waves of newer technology which were introduced in the society between 1970-1980. The international community realised that the ‘guided development’ strategy which it had implemented to revise existing copyright treaties was inadequate to address the copyright protection issues in the digital age. It needed to establish new international copyright norms and standards.⁷⁹

The “guided development” strategy involved various WIPO bodies who made recommendations, guiding principles and model provisions for domestic legislatures to implement into their national laws.⁸⁰ This need for international

⁷⁹ Mihaly Ficsor, ‘Copyright for the Digital Era: The WIPO “Internet” Treaties’, *Columbia-VLA Journal of Law & The Arts*, 21, 197–224.

⁸⁰ Supra, note 76, pg 198. “the guidance thus offered in the said “guided development” period had quite an important impact on national legislation and contributed to the development of copyright all over the world”. Ficsor gave an example of copyright protection of computer programs. According to him, the guidelines for the copyright protection of computer programs came about at the 1985 meeting of the WIPO Group of Experts on the Copyright Aspects of the Protection of Computer Software. At the time the meeting was held, only Australia, Hungary, India, the Philippines and the USA had explicit legislation protecting computer programs. After the meeting, however, more countries incorporated computer programs into the scope of eligible works for copyright protection.

norms and standards led to the inclusion of intellectual property protection as part of the issues set out for discussion in the General Agreement on Tariffs and Trade (GATT) organised by the World Trade Organisation (WTO). The WIPO also formed two separate committees around the same period to negotiate the provisions of a viable treaty to address the issues raised by the advent of digital technology. However, there was a halt in the preparatory work of the WIPO committees because at that time, the GATT negotiations were going on simultaneously and the international community wanted to ensure both negotiations did not influence each other. This decision turned out to be a fortuitous one as the WIPO Internet Treaties, which were adopted later, was able to address some issues arising from the introduction of newer technology, from the time the TRIPS Agreement was completed and adopted by parties. Upon the completion of negotiations at the GATT and the formulation of the TRIPS Agreement, the WIPO negotiations were accelerated, leading to the convening of the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva in 1996.⁸¹

Supporters and critics of these treaties have agreed that the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the WIPO Copyright Treaty (WCT), were responsible for “changing the face of international copyright legislation”⁸². I will be examining the provisions of these treaties in the subsequent paragraphs.

(i) The TRIPS Agreement⁸³

The TRIPS Agreement was completed in 1994 at Marrakesh, Morocco. It was a result of negotiations led by developed countries who had demanded for the inclusion of Intellectual Property Rights (IPRs) in international trade

⁸¹ Supra, note 76, page 199

⁸² Graeme B. Dinwoodie “The WIPO Copyright Treaty: A Transition to the future of International Copyright Lawmaking?” (2007) 57: 4 Case W Res L Rev 751; Graeme B. Dinwoodie, “The Institutions of International Intellectual Property Law: New Actors, New Institutions and New Sources” (2006) 10 Marq L Rev 187

⁸³ World Trade Organisation, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 UNTS 299; 33 ILM 1197 (1994) .

negotiations. Since its completion, the TRIPS Agreement has been described as the most comprehensive and revolutionary⁸⁴ agreement to be concluded in the field of IPRs. This is because, for the first time in the history of intellectual property legislation, the international community considered IPRs worthy of inclusion in trade discussions.

The TRIPS Agreement contained provisions that set out universal minimum standards for the protection of each branch of IPRs i.e. copyrights, patents, trademarks, geographical indications, layout-designs, trade secrets and unfair competition and also set out enforcement provisions.⁸⁵ The TRIPS Agreement “ma[d]e compliance with IP laws an economic imperative for developing countries” and served to “upgrade, update and reshape the laws of th[o]se countries.”⁸⁶ It set out the so-called “Berne-plus” standard of substantive copyright protection.⁸⁷ As a result, many provisions of the Berne Convention were incorporated by reference into the TRIPS agreement.⁸⁸ Article 13 of the TRIPS Agreement also re-established the three-step test previously existing under the Berne Convention. According to Article 13, member states were required to restrict the limitations or exceptions to exclusive rights to (i) certain special cases; (ii) which do not conflict with a normal exploitation of the work; and (iii) do not unreasonably prejudice the legitimate interests of the right holder.

The first major change made was the inclusion of computer programs and compilations of data in the literary works category. It also granted protection to compilations of data or other material, whether in machine readable or other form as long as the selection or arrangement of their contents constitute

⁸⁴ See J. H. Reichman, “From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement, (1996-97) 29 N.Y.U. J. INT’L L. & POL 11, 13-16, 26-86.

⁸⁵ Mohammed El-Said, ‘The Road from Trips-Minus, to Trips, to Trips-Plus’, *The Journal of World Intellectual Property*, 8 (2005), 53-65 <<http://dx.doi.org/10.1111/j.1747-1796.2005.tb00237.x>>.

⁸⁶ Akalema Ngenda, ‘The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism’, *I & Comm T L*, 14 (2005), 59.

⁸⁷ “Copyright Enforcement Under the TRIPS Agreement” (A paper prepared by the International Intellectual Property Alliance pg 1

⁸⁸ Supra, note 80, Article 9. Most of the substantive provisions of the Berne Convention were incorporated into the TRIPS Agreement by virtue of this provision.

intellectual creations (Article 10 TRIPS). Authors and successor-in-title of computer programs and cinematographic works were thus to be granted the exclusive right to authorize or prohibit commercial rental of original and/or copies of their works to members of the public (Article 11).⁸⁹ The second major change made was the provision of a minimum term of copyright protection set at 50 years after the death of the author or after the date of first publication. (Article 12). The third major change was the grant to performers, producers of phonograms and broadcasting organisations of the exclusive rights of authorization of (i) fixation, (ii) reproduction of such fixation, (iii) broadcasting by wireless means, (iv) communication to the public of their live performances, and (v) rental rights.⁹⁰

What distinguished the TRIPS Agreement from the Berne Convention, apart from the introduction of new works into the literary works category and the attendant creation of new exclusive rights, was the establishment of a strong dispute resolution mechanism to be implemented under the WTO. These enforcement provisions are found in Article 41-61 and they are the yardstick with which the WTO measures the compliance of a member state's copyright legislation with the minimum standards set out in the TRIPS.⁹¹

Member states are obliged to provide **enforcement procedures as well as criminal penalties** that permit effective action against any act of copyright infringement (including acts of copyright infringement that occur in the online environment) and which act as a deterrent to further infringement.⁹² The TRIPS Agreement required member states to put in place fair and equitable procedures⁹³ which effectively protected works from infringement, remedies that were both

⁸⁹ Dr. Mihaly J. Ficsor, "The Three-step test under the TRIPS Agreement and the specific exceptions and limitations permitted by the Berne Convention – Its role under the WIPO Copyright Treaty (WCT) and in the draft text of an instrument/treaty on exceptions or limitations for the visually impaired – "It is worthwhile pointing out that the right of rental is the only newly introduced exclusive right in the copyright provisions of the Agreement.

⁹⁰ Supra, note 80, Article 14

⁹¹ Supra, note 84, page 2

⁹² Supra, note 80, Article 41(1)

⁹³ Supra, note 80, Article 41(2) and 42

expeditious to prevent and deter infringement, adequate civil or administrative and criminal procedures and remedies (civil injunctions⁹⁴, damages,⁹⁵ expenses,⁹⁶ disposal or destruction of infringing goods or materials⁹⁷) and adequate border measure. The TRIPS Agreement also gave the member states the option of including a “right of information”⁹⁸ in their domestic laws i.e. depending on the seriousness of the infringement, ordering the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution. Article 48 (Indemnification of the Defendant) provided for the adequate compensation of a party wrongfully enjoined or restrained by the plaintiff, at whose request measures were taken or who has abused enforcement procedures. Drafters of the TRIPS Agreement were concerned about the maintenance of balance in copyright, thus, in drafting the minimum standards set out in the Agreement, they inserted some flexibilities in the provisions of the treaty.

According to a paper prepared by the International Intellectual Property Alliance, Matthijs Geuze who was the former Secretary to the TRIPS Council at the World Trade Organisation (WTO) had suggested that the general enforcement obligations stipulated in Article 41 should be summarized into six “performance standards”⁹⁹ (i) enforcement procedures to permit effective action against infringement; (ii) expeditious remedies to prevent infringements; (iii) deterrence to further infringements; (iv) enforcement procedures that are not unreasonably complicated; (v) enforcement procedures that are not unreasonably costly; (vi) time limits that do not cause unwarranted delays or are not unreasonably fast.¹⁰⁰

⁹⁴ Supra, note 80, Article 44(1)

⁹⁵ Supra, note 80, Article 45(1) - the infringer may be ordered to pay the right holder damages to compensate for the injury suffered as a result of the infringement.

⁹⁶ Supra, note 80, Article 45(2). The expenses may include appropriate attorney’s fees.

⁹⁷ Supra, note 80, Article 46

⁹⁸ Supra, note 80, Article 47

⁹⁹ Supra, note 84, page 6

¹⁰⁰ Matthijs Geuze, ‘Patent Rights in the Pharmaceutical Area and Their Enforcement: Experience in the WTO Framework with the Implementation of the TRIPS Agreement’, *The Journal of World Intellectual Property*, 1 (1998) <<http://www.grain.org/fr/article/entries/1941-implementation-of-trips?print=true>> [accessed 8 November 2014].

I will be using the first three standards as a yardstick for measuring the compliance of sample countries set out in Chapter 4 with the provisions of the TRIPS Agreement. My reason for picking the first three is because (iv) to (vi) are subjective standards which are affected by external influences other than the domestic legislature in these countries.

(ii) THE WIPO COPYRIGHT TREATY (WCT)¹⁰¹

The Preamble of the WCT set out five main objectives¹⁰² which contracting states aim to achieve in the negotiation of the treaty. These objectives focused on i. the development and maintenance of uniform protection for copyright owners; ii. The creation of new minimum copyright standards and the re-interpretation of some existing rules to ensure an adequate response to the challenges posed by the new economic, social, cultural and technological developments¹⁰³; iii. The recognition of the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works; iv. The significance of copyright protection as an incentive for literary and artistic creation; and v. the recognition of the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.

The WCT was defined as a special agreement within the meaning of Article 20 of the Berne Convention. Article 20 of the Berne Convention gave contracting

¹⁰¹ World Intellectual Property Organisation, *WIPO Copyright Treaty*, 36 ILM 65 (1997).

¹⁰² Mihaly Ficsor, "The Law of Copyright and the Internet- the 1996 WIPO Treaties, their Interpretation and Implementation" (New York: Oxford University Press, 2002) pg. 411 According to Ficsor, the Preamble was adopted after the adoption of the substantive provisions of the WCT. There were no formal discussions of the Preamble during formal sessions and during the informal consultation sessions, it was treated as a secondary issue and was only addressed at the end. That being said, it will be wrong to suggest that the Preamble reflected the agreed objectives of the WCT delegations which they arrived at early on in the negotiations and used as a guide for their discussions.

¹⁰³ Supra, note 99, pg. 411. Ficsor also noted here that even though all the discussions held in preparation of the WCT and WPPT focused largely on the impact of new technology, particularly digital technology and the Internet, this part of the Preamble seemed to focus not on the technology itself but on the economic, social and cultural effects which the new technology would have on Contracting States.

states the right to enter into special agreements if these agreements provided authors with more extensive rights or totally new rights other than those granted under the Berne Convention. Article 1 of the WCT incorporated all the substantive provisions (i.e. Articles 1-21) of the 1971 Paris Act of the Berne Convention. Thus, member states who were yet to sign the Berne Convention were, by implication, required to observe the minimum standards set out in the Berne Convention.

Aside from the inclusion of computer programs within the definition of literary works (as defined by the Berne Convention)¹⁰⁴ and the inclusion of compilation of data as intellectual works¹⁰⁵, the WCT also provided authors of literary and artistic works with the rights of (a) distribution¹⁰⁶, (b) rental¹⁰⁷; and (c) communication to the public¹⁰⁸. Contracting Parties were given the freedom in their national legislation to provide for limitations of and exceptions to the rights granted under the WCT as long as the legislature adhered to the three-step test.¹⁰⁹

Article 10 of the WCT grants contracting parties the right to extend limitations and exceptions currently existing under copyright legislation, where the situation arises, in the digital environment. From the Agreed Statement,¹¹⁰ it was clear that one of the major considerations of drafters of the WCT was the maintenance of a balanced copyright regime.

According to the Agreed Statement,

¹⁰⁴ Supra, note 98, Article 4

¹⁰⁵ Supra, note 98, Article 5. Two agreed statements adopted by the Diplomatic Conference in respect of Articles 4 and 5 of the WCT stated that the clauses were “consistent with Article 2 of the Berne Convention and on par with the relevant TRIPS provisions (i.e. Article 10).”

¹⁰⁶ Supra, note 98, Article 6

¹⁰⁷ Supra, note 98, Article 7

¹⁰⁸ Supra, note 98, Article 8

¹⁰⁹ Supra, note 98, Article 10

¹¹⁰ See the Agreed Statements Concerning the WCT, adopted by the Diplomatic Conference on December 20, 1996, WIPO Doc. CRNR/DC/96 at 2. According to Pamela Samuelson, “this agreed statement was in striking contrast to the proposed treaty language and proposed comments on exceptions and limitations to copyright in the draft treaty considered at the WIPO diplomatic conference. See Pamela Samuelson, *The US Digital Agenda at WIPO*, 37 VA.J. INT’L L. 369 (1997)

“it is understood that the provisions of Article 10 permits Contracting Parties to carry forward and appropriately extend into the digital environment, limitations and exceptions in their national laws, which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment.

Articles 11 and 12 of the WCT can be referred to as the most controversial provisions in the treaty. Article 11 of the WCT provides as follows: “*Contracting Parties shall provide **adequate protection** and **effective legal remedies** against the circumvention of effective technological measures that are used by authors in connection with **the exercise of their rights** under this Treaty or the Berne Convention and that restricts acts, in respect of their works, which are **not authorized by the authors** concerned or **permitted by law**.*” (emphasis mine).

Article 12 also provides thus:

“ Contracting Parties shall provide **adequate** and **effective legal remedies** against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.” (emphasis mine)

These two articles deal with the grant of legal protection to the use of technological protection measures (TPMs) and rights management information (RMIs). This was the first time any international copyright legislation would provide for this kind of protection for copyrighted works. The rationale for the inclusion of these provisions into the WCT is best understood from the comments

in Chapter IX of the draft Model Provisions prepared by the International Bureau of the WIPO. According to the comments,

“the ever newer waves of technological development in many cases undermine the appropriate enjoyment and exercise of author’s rights. It is justified that wherever the same new technologies can offer an appropriate solution to eliminate or, at least, mitigate the prejudice caused by them to the legitimate interests of authors – without unreasonably prejudicing the legitimate interests of others – the application of such solutions should be made obligatory.”¹¹¹

The current anti-circumvention provisions in the WIPO Internet Treaties originated from a 1995 US government White Paper. It proposed, among other things, that technologies and services whose primary use were for the circumvention of TPMs should be prohibited. According to the White Paper, this prohibition would help copyright owners adequately protect their works from piracy using technical measures. In the US White Paper, a summary of the debate on the introduction of legislation guiding the circumvention of technological protection measures and copyright management information was discussed.¹¹²

The final text of the WIPO Internet Treaties anti-circumvention provisions however reflected the agreement of member states on the inclusion of anti-circumvention provisions as a universal minimum standard. A compromise was

¹¹¹ See also the US Green Paper, Chapter IV where the Working Group had stated; “ the ease of infringement and the difficulty of detection and enforcement will cause copyright owners to look to technology, as well as the law, for protection of their works. However, it is clear that technology can be used to defeat any protection technology provides. The Working Group finds that legal protection alone may not be adequate to provide incentive to authors to create and to disseminate works to the public, unless the law also provides some protection for technological processes and systems used to prevent unauthorized uses of copyrighted works....Therefore, the Working Group recommends that the Copyright Act be amended to prohibit the importation, manufacture and distribution of devices as well as the provision of services, that defeat anti-copying systems.” See also, Mihaly Ficsor, “The Law of Copyright and the Internet- the 1996 WIPO Treaties, their Interpretation and Implementation” (New York: Oxford University Press, 2002) at 374

¹¹² Three issues were raised in the White Paper relating to the proposed amendments on technological measures set out in the Green Paper. First, certain suggestions that the prohibition was incompatible with fair use; the ability to defeat technological protection for copies of works no longer protected by copyright law; and that the provision will place an unwarranted burden on manufacturers.

reached between the position of the USA-led team and the South-African led team on the flexibility of the wording of the anti-circumvention provisions. The drafters of the WCT were concerned (and rightly so) about the maintenance of the existing balance in copyright during the digital age.

Background of the inclusion of Article 11 and 12 into the WCT – The National Information Infrastructure Report and the American influence

The genesis of the inclusion of these two provisions into the WCT could be traced to the report from the United States' National Information Infrastructure (NII) Intellectual Property Working Group chaired by ex-copyright lobbyist and US Commissioner of Patents and Trademarks, Bruce Lehman. The report, also referred to as a "White Paper" was published in 1995. In the White Paper, suggestions were made on how to control access to and use of copyrighted works in the digital environment. In its findings, the White Paper stated that content providers in the digital environment look out for two levels of protection before making their protected works accessible through a server. The first level was control over access to a server and the second level was control of access to the electronic file containing the work.¹¹³

From its findings, the Working Group posited that legal protection alone was inadequate to protect copyrighted works and similarly, technological protection alone will be ineffective unless the law provides certain protection for the technological processes used to prevent or restrict unauthorised use of copyrighted works. It therefore recommended that a new Chapter 12 be included in the United States' Copyright Act which would provide for anti-circumvention provisions. It should be noted that the Working Group considered some of the criticisms that had been raised against the anti-circumvention provisions in the White Paper. For instance, in response to the argument raised by critics on the incompatibility of the provisions with fair use, the Working Group stated first, that the fair use doctrine did not require authors to allow or facilitate

¹¹³ Bruce Lehman, Patent and Trademark Office, 'Report of the Intellectual Property Working Group on the National Information Infrastructure' (Sept. 1995), available at <<http://www.uspto.gov/web/offices/com/doc/ipnii/>>.

unauthorized access or use of their works; and second, that if the circumvention devices were primarily intended and used for fair use purposes, there will be no violation of the provisions, because a device with such purposes and effects will be captured under the “authorized by law” exemption. Another argument considered by the Working Group was the effect of anti-circumvention provisions on technologically-protected works whose term of copyright has expired and which were now in the public domain. The Working Group agreed that devices whose primary purposes were to defeat the technical protection in such works in the public domain will be not be covered by the anti-circumvention provisions since it exempts all devices, products and services which were meant to be used for lawful purposes.¹¹⁴ The Report also proposed the “prohibition of the falsification, alteration or removal of any copyright management information - - not just that which is included in or digitally linked to the copyrighted work.”

At about the same time the White Paper was presented to the Clinton Administration, the USA was proposing the inclusion of an identical anti-circumvention provision in the draft WIPO treaties that were being discussed at Geneva in December 1996. Due to the strong resistance with the proposed amendments was met with in the United States, efforts to incorporate the provisions into the draft WIPO treaty was toned down to a more neutral anti-circumvention stance by the USA delegation. At the WIPO negotiations, the USA delegation set out its arguments in support of the creation of minimum standard of protection for technical measures used on copyrighted works and pushed that an explicit proposal be made in relation to this issue at the Diplomatic Conference. Other delegations were not as enthusiastic. Many other countries supported the protection of technical measures only where such measures do not prevent the normal exploitation of the copyrighted work. In the final negotiations leading to the drafting of the current Article 11 and 12 of the WCT, delegations from both the developed and developing/less-developed countries discussed the wording of Article 11 and 12 into the WCT. The delegations from

¹¹⁴ Supra, note 96, page 233-234

Ivory Coast, Ghana, Nigeria, Senegal and South Africa insisted that the scope of the anti-circumvention should not extend to acts that are permitted by law i.e. fair use exceptions.¹¹⁵ As noted by the South African delegate, the representative of the African Group, the wording of Article 11 of the WCT which was initially introduced by the US-led Group focused more on the act of circumvention rather than on the device that facilitates the circumvention.¹¹⁶

Critics have argued that the current wording of Articles 11 and 12 has given room for domestic legislatures of member states to extend the scope of protection granted to copyright owners beyond that which was intended by the drafters of the Treaty.¹¹⁷ They suggest that Article 11 should not give authors additional rights (specially, the right to control legitimate access by users) that extend beyond the rights granted under copyright legislation, thereby upsetting the delicate balance between private rights and public interests in the digital age.¹¹⁸ Thus, some critics have suggested that Article 11 be reviewed to clearly specify that member states, in providing “**adequate protection and effective legal remedies**” against the circumvention of technological protection measures, should make exceptions for unauthorized uses of works permitted by law (fair use exceptions).¹¹⁹ Supporters of the current wording of Articles 11 and 12 however argue that the provisions have already been drafted in a manner that is interpreted as excluding acts that are authorised by the author and by law from the scope of the anti-circumvention provisions. They believe that the current

¹¹⁵ Supra, note 99, 403. These African delegates later came together to present a unified proposal which was submitted on December 11. Their position was that “the obligation should simply be that Contracting Parties must provide adequate legal protection and effective remedies against the circumvention of certain technological measures, which should have three characteristics; first, they should be effective technological measures; second, they should be used by rights holders in connection with the exercise of their rights under the treaties; and third, they should restrict acts which were not authorized by the right holders not permitted by law.”

¹¹⁶ T Pistorius, ‘Developing Countries and Copyright in the Information Age - The Functional Equivalent Implementation of the WCT’, *PER/PELJ*, 9 (2006).

¹¹⁷ Ian Brown, ‘The Evolution of Anti-Circumvention Law’, *International Review of Law, Computers and Technology*, 2006.

¹¹⁸ Michael Geist, ‘Looking at the Future of Canadian Copyright N Th Rear View Mirror’, *Lex Electronica*, 10 (2006).

drafting of the anti-circumvention clauses properly created an avenue for domestic legislatures of member states to draft their copyright legislation in a manner that maintains a balanced copyright regime. In assessing the legislative approaches of treaty states to the incorporation of the minimum standards of the WCT, I will be examining whether (i) adequate & effective legal remedies were put in place and (ii) whether these protection and remedies expressly or impliedly excluded fair use exceptions and limitations to owners' rights. This is the standard against which I shall be assessing the legislative approaches used by member states in respect of the WCT. In the next chapter, I shall be discussing these legislative approaches of sample countries.

Chapter Four

Legislative efforts of sample member states and the struggle to maintain copyright balance in the face of digital technology

In this chapter, I will be discussing the various approaches used by domestic legislatures in sample treaty states while incorporating the universally agreed minimum standards in the TRIPS and WCT. My objective is to examine which of the approaches adopted by domestic legislature have been able to properly incorporate the universal standards in a manner that effectively protects both private rights and public interests equally. As I have tried to establish in the previous chapter, drafters of international treaties have created a conducive environment for the establishment of a balanced copyright framework. The duty of ensuring that copyright balance is maintained in national systems lies in the hands of the domestic legislature in these countries. An overview of the sample countries that have adopted the TRIPs and WCT will show that domestic legislature need to pay more attention to copyright balance when incorporating the minimum standards into their own laws. While most countries that have incorporated the TRIPS and WCT provisions have failed to properly protect balance in copyright, there are some examples of countries whose approach to the minimum standards strikes a balance between the protection of private rights and public interests. I will be comparing these two categories of countries in this chapter.

To enable us properly compare the legislative approaches used in the sample countries that I have chosen for this study, I have put them in 2 categories: Category A deals with countries that (i) have ratified and incorporated one or both treaties; or (ii) are yet to ratify any of the treaties, but seem to have a workable approach to the maintenance of a ‘balanced’ copyright regime. Category B, on the other hand, deals with countries that have ratified and incorporated the provisions of one or both treaties but whose legislative approach does not appear to maintain the existence of a ‘balanced’ copyright regime.

CATEGORY A : USA, SENEGAL AND MOROCCO

The United States of America (USA)

The most recent amendment made to the US copyright framework is the Digital Millennium Copyright Act (DMCA)¹²⁰ which was signed into law on October 28, 1998. The DMCA ratified and incorporated the minimum protection standards set out in the WIPO Internet Treaties i.e. the WCT and the WIPO Performances and Phonograms Treaty (WPPT).¹²¹ With the introduction of the DMCA, the USA could proudly claim to have an updated copyright legislation which properly responded to the challenges of the digital age. **The TRIPS Agreement was also incorporated into the United States law with the passage of various Acts in respect of specific aspects of the treaty.**¹²²

The DMCA was a product of many attempts by stakeholders in the American copyright industry to revise the previously existing copyright laws so that it remained relevant in the digital environment. In 1994, the Working Group on Intellectual Property Rights led by Bruce Lehman started to solicit input from stakeholders in the copyright industry on copyright matters and the National Information Infrastructure (NII). At the end of the public hearings, a draft NII Report was circulated for comment and review (the Green Paper). The review process took quite some time including three hearings hosted by the Working Group. Stakeholders were able to present their comments and reactions to the recommendations in the Green Paper. At the end of all these discussions, the Working Group released the White Paper in September 1995 recommending that the current Copyright Act of 1976 be amended to reflect changes in the digital age. These legislative amendments and recommendations were introduced in Congress as the NII Copyright Protection Act of 1995. These recommendations included the inclusion of legal prohibition of sale or manufacture of technologies that are capable of being used to circumvent technical measures on copyrighted

¹²⁰ 105th Congress of the United States of America, *Digital Millennium Copyright Act* <<<https://www.govtrack.us/congress/bills/105/hr2281>>> [accessed 27 October 2014].

¹²¹ See the U.S Copyright Office Summary of the Digital Millennium Copyright Act of 1998, pg 1 online <<http://www.copyright.gov/legislation/dmca.pdf>>

¹²²

works. Efforts to amend the Copyright Act based on these recommendations failed largely because of the resistance from service providers such as telephone companies, internet service providers, etc. against the imposition of liability on them for providing services that was conducive for the exchange of infringing works on their networks by unauthorized users.

With the successful negotiation and adoption of the TRIPS and the WIPO treaties by the USA, the revision of domestic copyright legislation became inevitable. In December 1994, President Clinton signed the Uruguay Round Agreements Act (URAA) which implemented the General Agreement on Tariffs and Trade (GATT). The GATT contained the TRIPS Agreement and as a result, provisions in the URAA amended US copyright laws. During the Diplomatic Conference convened by the WIPO in December 1996, two treaties on international copyright law were considered. At the end of the conference, the delegates, including the USA, adopted the treaties leading to an obligation to develop a new approach to the copyright issues in the digital age. The Agreed Statement of the Conference clearly stated however that the new treaties were to “permit the application of fair use in the digital environment. As I stated in the last chapter, the treaties also emphasised the “need to maintain a balance between the rights of authors and the larger public interest.”

The USA needed to fulfil its obligation under the WIPO treaties to review and incorporate the minimum protection standards, which I have discussed at length in the previous chapter, into its domestic legislation. Of particular importance was the obligation to include adequate and effective protection to prevent the circumvention of TPMS and RMIs when these technical measures are used to protect copyrighted works.¹²³ The WIPO Internet Treaties also required member countries to provide civil remedies and criminal penalties to copyright owners and infringers respectively.

In order to properly adopt these provisions into the US copyright law, discussions began in the US which culminated in the signing of the Digital

¹²³ Title 1, The Digital Millennium Copyright Act (1998)

Millennium Copyright Act (DMCA) by President Clinton on October 28, 1998. The process of negotiating the DMCA was fraught with heated debates as interested parties such as the telephone companies and online service providers resisted the legalisation of TPMs and RMIs.¹²⁴ At the end of the negotiations, the final version of the DMCA which was signed into law was divided into five titles – Title I: WIPO Treaties Implementation; Title II: Online Copyright Infringement Liability Limitation; Title III: Computer Maintenance or Repair Copyright Exemption; Title IV: Miscellaneous Provisions; and Protection of Certain Original Designs. These five titles established safe harbours for online service providers; exempted the temporary copying of programs during computer maintenance, amended the Copyright Act to facilitate Internet broadcasting and created sui generis protection for boat hull designs.

One of the most controversial provisions set out in the DMCA can be found in Section 1201 and 1202 of the DMCA. Section 1201 set out prohibition against the circumvention of technological protection measures. It also prohibited the manufacture, sale, rental or transfer of any technology that could be used to circumvent TPMS.¹²⁵ The prohibition was set to take effect two years after the date of the enactment of the DMCA. The delay in its effective date was intended to allow the relevant agencies conduct a study on the potential impact of the prohibition on non-infringing uses of copyrighted works. The DMCA however provided an exemption from the prohibition stated in Section 1201(a)(1)(A) in the sub-paragraph (B). It exempted users of a particular class of works where it is proven that the prohibition will adversely affect the non-infringing uses of works in that particular class. The determination of the particular classes of works eligible for the exemption is determined by the rule-making proceeding set out in subparagraph (C). Other exemptions to the Section 1201(a)(1)(A) prohibition

¹²⁴ Pamela Samuelson, 'Towards More Sensible Anti-Circumvention Regulations', in *Financial Cryptography*, ed. by Yair Frankel, Lecture Notes in Computer Science (Springer Berlin Heidelberg, 2001), MCMLXII, 33–41 <http://dx.doi.org/10.1007/3-540-45472-1_3>. According to Samuelson, it was the inclusion of four “safe harbour” provisions in the DMCA that made it possible for major copyright industry groups and telco-OSP groups to agree to the enactment of the DMCA.

¹²⁵ Supra, note 118, Section 1201(a)(1)

are listed in Section 1201(d)-(j). Under these provisions, the following persons/acts were exempted : (i) Non-profit libraries, archives and educational institutions as long as it gained the unauthorized access in order to determine whether or not to acquire a legitimate copy of the work; (ii) legitimate law enforcement and national security activities by governmental actors; (iii) computer interoperability; (iv) legitimate encryption research; (v) parental control of access to harmful materials by children; (vi) information privacy protection; (vii) computer security testing.

The other two DMCA prohibitions are the “anti-device” provisions set out in Section 1201(a)(2) and 1201(b)(1) of the Act. Section 1201(a) (2) regulated the manufacture, sale, importation and distribution of devices that circumvent a technological measure that effectively controls access to a work (access controls). It expressly prohibits the manufacture, importation, marketing and distribution of any technologies that are primarily designed for circumventing TPMs or which have limited commercially significant purposes other than for the circumvention of TPMs. Section 1201(b)(1), on the other hand, relates to devices that circumvent the “protection afforded by a technological measure that effectively protects the rights of a copyright owner.... in a work or a portion thereof” (copy controls). The U.S. Copyright Office in its summary of the DMCA¹²⁶, explained the rationale behind the two different categories of protection i.e. access controls and copy controls. According to the US Copyright Office, it was necessary to make this distinction in order to preserve the effectiveness of the fair use provisions existing in the Copyright Act. The summary stated that “Since copying of a work may be a fair use under appropriate circumstances, Section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.”¹²⁷

¹²⁶ U.S. Copyright Office, *The Digital Millenium Copyright Act of 1998- U.S. Copyright Office Summary*.

¹²⁷ Supra, note 94, pg 4

Section 1202, on the other hand, regulated the removal or alteration of copyright management information placed by copyright owners on their works to prevent unauthorized use or copying. According to Section 1202(a), the intentional provision, distribution and importation of works with false copyright management information constitutes an infringement of copyright. Section 1202(b) prohibits the intentional removal or alteration of copyright management information without the authority of the copyright owner or the law. Distribution or importation for distribution of copies of works whose copyright management information have been removed or altered without the authority of the copyright owner or the law is also prohibited.

Some of the problems associated with the anti-circumvention provisions contained in the DMCA includes the narrow and ambiguous scope of Section 1201 exceptions, the absence of a general purpose exception that allows courts to use their discretion when deciding cases involving acts of circumvention or the manufacture of circumvention tools that are justifiable under the law and the fact that the focus of the anti-circumvention provisions was too centered on copyright owners without expressly considering users' rights too. It is noteworthy that although the DMCA did not expressly exclude fair use exceptions from the S.1201(a)(1)(A) prohibition, the introduction of the rule-making proceedings ensured that fair use of works belonging to certain classes which were adversely affected by the prohibition were exempted. Subparagraph (C) outlines the rule-making proceeding through which the Librarian of Congress and the Register of Copyright would hold consultations with the Assistant Secretary for Communications and Information of the Department of Commerce and give a report stating their views and making such recommendation as they deem fit.

The aim of the rule-making proceedings is to determine for the purposes of paragraph (B), whether users of a copyrighted work were likely to be adversely affected by the prohibitions in subparagraph (A) when trying to make non-infringing uses of a particular class of copyrighted works. In conducting the rule-making procedure, the DMCA set out certain factors that were to be examined by the Librarian such as: (i) the availability for use of copyrighted works; (ii) the

availability for use of works for non-profit archival, preservation and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comments, news reporting, teaching, scholarship or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate. According to Section 1201(a)(1)(D), once the Librarian has determined the class of copyrighted works, whose non-infringing uses will be affected by the prohibition in Section 1201(a)(1)(A), he is required to publish the list of those classes of works. The Section 1201(a)(1)(A) prohibition will thus not apply to users of these class of copyrighted works for the ensuing 3 year period up until the next rule-making proceeding.

The rule-making proceedings are conducted by the Register of Copyright in conjunction with the Librarian of Congress. Their primary responsibility is “to assess whether the implementation of access control measures is diminishing the ability of individuals to use copyrighted works in ways that are not infringing and to designate any classes of works with respect to which users have been adversely affected in their ability to make such non-infringing uses”¹²⁸. Using the factors set out in Section 1201(a)(1)(C) as a guideline, the Register and the Librarian are required to maintain a balance between the availability of copyrighted works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works.¹²⁹

Each rule-making proceeding is unique as the Register and Librarian are required to review the proposed classes of works *de novo*. It does not matter that the previous rule-making proceedings had designated a class as qualifying for the exemption; in some cases, earlier legal analysis may be relevant in analyzing the proposed exemption but as a general rule, proponents of the class of works must show evidence that the class of works be designated as eligible for

¹²⁸ Copyright Office Library of Congress, *Federal Register/ Rules and Regulations*, 37 CFR Part 201 [Docket No. 2011-7], 2012 <<http://www.copyright.gov/fedreg/2012/77fr65260.pdf>> [accessed 10 November 2014].

¹²⁹ Library of Congress pg. 65261

exemption. The burden of proof lies on the proponents of the class(es). They must show that (i) uses affected by the prohibition on circumvention are or are likely to be non-infringing; (ii) as a result of technological measure controlling access to a copyright work, the prohibition is causing, or in the next three years is likely to cause, a substantial adverse impact on those uses.¹³⁰

From the text of the final document signed by the Librarian after the fifth rule-making proceeding on October 26, 2012, the Register and the Librarian had the duty, upon receiving proof from the proponent of the class in support of his claim for exemption, to consider whether there are alternative options available through which users could achieve their objectives without circumventing technical measures. In determining the existence of alternatives, the issue of ‘convenience’ was insufficient to support an exemption.

Since the passing of the DMCA into law in 1998, there have been five¹³¹ rule-making proceedings organised to review the list of exempted classes of works. In 2000, the Librarian of Congress announced the exemption of two narrow classes of works, that is, (i) compilations of lists of websites blocked by filtering software applications; and (ii) literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence. Four classes of works were exempted under the 2003 rule-making proceeding including literary works distributed in e-book format when all existing e-book editions of the work contains access controls that prevent the rendering of text into specialized formats. Under the 2006 rule-making proceeding, six classes of works were exempted. These included audio-visual works used for educational purposes at a college or university, computer programs in the form of firmware that enables wireless telephone handsets to connect to a wireless telephone communication network, sound recordings and audiovisual works associated with those sound recordings distributed in compact disc format and protected by TPMs for the

¹³⁰ Supra, note 124

¹³¹ The first rule making proceeding was in 2000, followed by 2003, 2006, 2010 and finally 2012.

purpose of good faith testing or correcting of such security flaws or vulnerabilities. Under the 2010 rule-making proceeding, six classes of works were also exempted. These included computer programs preventing the rendering of a text into a specialized format, computer programs allowing interoperability between wireless telephone and software applications and motion pictures on DVD for educational uses, documentary filmmaking or non-commercial videos.

The 2012 rule-making proceedings is the most recent rule-making proceeding and it was initiated on September 29, 2011 with the publication of a Notice of Inquiry (“NOI”) issued by the Register of Copyright. The NOI invited comments from the general public on non-infringing uses of copyrighted materials. After receiving and analysing these comments, ten proposed classes of works were proposed by the Register. Each class was summarized into a Notice of Proposed Rule-Making (“NPRM”) which was published on December 20, 2011. Interested parties were asked to present their comments and reply comments on the NPRMs. After receiving all the comments, the Register conducted a public hearing at the University of California, UCLA School of Law and the Library of Congress, Washington DC to consider the proposed exemptions. Follow-up questions were sent to witnesses who had testified at the hearings. The purpose of these written inquiries was to clarify certain statements made during the hearings as well as elicit further responses to questions raised at the hearings. The Register also sought the input of the Assistant Secretary for Communications and Information Administration who oversees the National Telecommunications and Information Administration (‘NTIA’). After receiving comments from the NTIA, the Register of Copyright made recommendations to the Librarian of Congress.

Based on the recommendations received, the Librarian exempted eight classes of works. The exempted classes include: (i) literary works distributed electronically and TPM-protected which prevent the enabling of read-aloud functionality or interferes with the screen readers or other assistive technologies for physically challenged persons; (ii) use of computer programs that enable

wireless telephone handsets to execute lawfully obtained software applications where circumvention was for the sole purpose of enabling interoperability of the software applications with computer programs on the telephone; (iii) use of computer programs in the form of firmware or software, allowing owners of wireless telephone handsets which it legally acquired from a wireless communications network or retailer to unlock the wireless handset no later than ninety days after the effective date of this exemption in order to connect to a different wireless telecommunications network; (iv) short portions of motion pictures on DVDs for purposes of non-commercial videos, documentary films and educational purposes. For purposes of this exemption, “non-commercial videos” includes videos created pursuant to a paid commission, provided that the commissioning entity’s use is non-commercial; (v) motion pictures via online distribution services for use of short portions for the purposes listed in (iv); motion pictures on DVDs where circumvention is used for screen capture technology for the purposes listed in (iv); and (vi) motion pictures via online distribution services where circumvention is used for screen capture technology for the purposes listed in (vi).

The initial resistance mounted the public against the DMCA stemmed from the strict wording of the Section 1201(a)(1)(A) prohibition without express exemption of fair use of copyrighted works. The implementation of the rule-making proceedings, however, to a large extent seemed to have resolved this issue as members of the public are now permitted under the proceedings to suggest classes of works that should be exempted from the Section 1201 prohibitions. Herman and Ghandy, however argue that *“the appearance and evolution of the statutory provision for the hearings, as well as the reasoning behind each maneuver, helps illustrate that most members of Congress were far more concerned with protecting the interests of copyright holders than with protecting fair use in the digital millennium”*. Although critics have argued that

this remained an insufficient approach¹³² to maintaining balance in copyright, so far, this had proven effective in ensuring that only deserving classes of works are exempted from the Section 1201 prohibition. Also, there were some controversies surrounding the selection of classes of works eligible for exemption by the Librarian of Congress in the 2012 rule-making proceeding. One of such controversies was in respect of the “cellphone unlocking” exemption that was phased out by the Librarian of Congress at the end of the 2012 rule-making proceeding. As a result of this action, a petition was made to the White House which gained over 114,000 signatures.¹³³ In response to the petition, the White House agreed to support legislation which made the exemption of cell-phone unlocking a permanent exemption from the Section 1201 prohibition.¹³⁴

The use of the rule-making process seems to have brought the DMCA in compliance with the intent of the WIPO Internet Treaties. Using the standards I set out in chapter 3 for assessing domestic legislatures’ compliance with the WIPO Internet Treaties, the USA appears to have installed adequate protection for technological protection measures and effective legal remedies against infringers of these measures. Using the standards set out by Geuze, the USA legislature sufficiently provided enforcement procedures, expeditious remedies and deterrence to further infringements.

¹³² Bill D. Herman and Oscar Gandy, ‘Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings’, *Cardozo Arts & Entertainment Law Journal*, 24 (2006), 121–90.

¹³³ Jonathan Band, ‘Cell Phone Unlocking: A Legal Primer’, *Association of Research Libraries* <<http://www.arl.org/storage/documents/publications/band-cell-phone-unlocking-08mar13.pdf>> [accessed 15 November 2014].

¹³⁴ *Supra*, note 127, pg. 6. R. David Edelman, the White House Senior Advisor for Internet, Innovation & Privacy had responded on the White House website saying, “The White House agrees with the 114,000+ of you who believe that consumers should be able to unlock their cell phones without risking criminal or other penalties. In fact, we believe the same principle should also apply to tablets, which are increasingly similar to smartphones. And if you have paid for your mobile device, and aren’t bound by a service agreement or other obligation, you should be able to use it on another network. It’s common sense, crucial for protecting consumer choice, and important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers’ needs.....”.

Senegal

The Republic of Senegal is a former French colony in West Africa which became independent on June 20, 1960. Its first contact with copyright was the adoption of the Copyright Law of 1957 by France on behalf of all its colonies in Africa.¹³⁵ After its independence in 1960, Senegal acceded to the Berne Convention in 1962 but its first national copyright legislation was passed in 1973 and further amended in 1986. Senegal¹³⁶ signed the WIPO Internet Treaties in 1997 and brought them into force in 2002. The TRIPS Agreement were also signed in 1995 but because Senegal was categorised as a Least Developed Country (LDC), it had until July 1, 2013 to incorporate the standards set out in the TRIPS agreement into its domestic legislation.

Senegal has a fairly substantial domestic intellectual property legal framework¹³⁷ and is also a party to several international, regional and multilateral agreements and treaties on intellectual property. The most recent copyright legislation is the 2008 Copyright Act which repealed the 1986 amendment of the Copyright Law. I will be considering the approach of the Senegalese legislature to the implementation of the minimum standards in the TRIPS and WCT under the 2008 Copyright Act. The Explanatory Statement of the 2008 Copyright Act highlights the rationale behind the amendment of the existing copyright legislation in a bid to incorporate the provisions of the various international

¹³⁵ Access to Knowledge in Africa, pg 202

¹³⁶ See ACA2K Report on Senegal by Assane Faye, Nogaye Ndour and Mamadou Seye online at <http://www.aca2k.org/attachments/281_ACA2K-2010-Ch7-Senegal.pdf> pg. 205. Senegal signed the WCT in 1997 but ratified it on February 2002 by depositing WCT Notification No. 34 at the WIPO Office online at <http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_34.html>

¹³⁷ See World Trade Organization (WTO) Council for Trade-Related Aspects of Intellectual Property Rights IP/C/W/555 June 27, 2011 “Priority Needs for Technical and Financial Cooperation-Communication from Senegal” page 5. The domestic copyright legal framework of Senegal comprises of Law No. 2008-09 of 25 January 2008 on Copyright and Related Rights, Act No. 2008-12 on the Protection of Personal Data, Law No. 2008-11 on Cybercrime, Guidance Law on Information Society, Senegalese Customs Code, Basic Law No. 65-60 of July 1965 (Penal Code of the Republic of Senegal) and Decree No. 2004-733 of 21 June 2004 establishing a Public Registry of Cinematography and Audiovisual works.

copyright treaties which Senegal had entered into – mainly the TRIPS Agreement and the WIPO Internet Treaties. With this goal in mind, it is interesting to consider the legislative efforts made by Senegal to see how they attempted to achieve their copyright balance.

In line with the TRIPS and WCT provisions, the Act included computer programs and audio-visual works as literary works eligible for copyright protection.¹³⁸ Four distinct rights were granted to authors under the Senegalese Act in compliance with the TRIPS Agreement - communication to the public, reproduction, distribution and rental.¹³⁹ The Senegalese legislature extended the duration of an author's economic right from 50 years after his lifetime to 70 years.¹⁴⁰ This is a "TRIPS-Plus" provision as it extends beyond the minimum standards prescribed under the TRIPS. Thus, to a large extent, the Senegalese legislature successfully incorporated the minimum standards set out in the TRIPS Agreement into its Copyright law without upsetting balance.

I will be focusing on the approaches of the Senegalese legislature to the fulfillment of the obligations placed on it by the WCT, particularly in respect of the anti-circumvention provisions. The approach adopted by the legislature was the insertion of an almost-verbatim wording of the provisions of Article 11 and 12 of the WCT. Article 125(1) of the 2008 Senegalese Act provides –

“(1) Owners of copyright and neighbouring rights may, in the exercise of their rights, use technological measures with a view to preventing or limiting acts, in respect of their works, performances, phonograms, videograms or programs, **which they have not authorised and which are not permitted by law.**” (emphasis mine).

When this provision is compared with the WCT provision, it appears that the Senegalese legislature favoured the position of the drafters of the WCT. In

¹³⁸ See Article 6 and 8 of the 2008 Copyright Act of Senegal

¹³⁹ See Chapter 2, Articles 33-37 of the 2008 Copyright Act of Senegal

¹⁴⁰ Article 51-54 of the 2008 Copyright Act of Senegal

our previous discussion of Article 11 of the WCT, I had stated that its wording was intentionally drafted to enable member states' legislature to include exemptions for fair use of copyrighted works. According to Geist,¹⁴¹ the current wording of the WCT was adopted from the South African delegation's alternate proposal on the drafting of Article 11. This proposal dropped all references to devices and services, targeting only acts of circumvention. Geist went on to discuss how parties had denounced the adoption of the Basic Proposal tendered by the USA delegation and requested that the scope of the anti-circumvention provision be limited. Article 11 of the WCT is a result of the compromise reached by delegations at the Diplomatic Conference. The intent of the negotiating delegations was to give state legislatures the flexibility required to maintain copyright balance in their legislation. Thus, users can argue that the Senegalese copyright legislation allows them to circumvent TPMs when carrying out acts falling within the permitted uses set out within the Act.

Article 126 went on to grant protection to electronic right management information used by an author or performer to protect his work, performance, phonogram, videogram or program from infringement. "Electronic information" was defined as "any information provided by a rights owner that identifies a work, performance, phonogram, videogram, program or rights owner, any information about the terms and conditions of use of a work, performance, phonogram, videogram or program, and any number or code that represents all or part of such information." Article 126 thus prohibited the removal or alteration of electronic information and the distribution, importation or communication to the public of a work, performance, phonogram, videogram or program where an item of electronic information has been altered or removed.

¹⁴¹ Michael Geist, 'The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements', *Irwin Law*, page 16.

In line with the provisions of the WCT and the TRIPS, the Senegalese legislature provided both criminal and civil penalties¹⁴² against infringers of technological protection measures as well as the removal/alteration of electronic information.¹⁴³ Chapter III (Penalties) (Article 142-152) has two sections on criminal and civil penalties respectively. Article 145 sets out the penalties attached to the circumvention of TPMs and RMIs as punishable by a prison term and a fine. The provisions of Article 147 are noteworthy, special penalties apply to repeat offenders. Where an offender is convicted as a repeat offender, he is liable to suffer double the penalties. The court was also given the right to order the destruction of equipment used mainly for the purposes of making infringing copies (Article 147).

Enforcement procedures were also set out in Articles 127-141 of the Senegalese Copyright Act in compliance with the provisions of the TRIPS. The enforcement procedures were divided into 3 sections – Section 1 regulated the general rules for instituting an action in court against an infringer¹⁴⁴, Section 2 regulated the provisional and precautionary measures applicable i.e. infringement seizure and ordinary law proceedings (Articles 131-137), and Section 3 regulates the Border Measures (Article 138-141). It appears that the drafters of the Senegalese Copyright Act attempted to reflect the spirit and letter of the TRIPS as the enforcement procedures not only allowed copyright owners to initiate action against infringement but provided for remedies such as the search and seizure remedy and tried to deter repeat offenders from committing infringing acts by doubling their penalties when convicted.

Using the first three performance standards set out by Geuze as our yardstick for measuring the compliance of the Senegalese legislature with the

¹⁴² There are also civil penalties available to copyright owners as set out in Articles 151-152 of the 2008 Copyright Act. The court could order the cessation of the unlawful act by the infringer and order compensation for damages and costs to be paid to the copyright owner.

¹⁴³ See Article 145 2008 Copyright Act of Senegal

¹⁴⁴ Article 127-130 sets out the person(s) qualified to institute an action against an infringer under the Act and grants the Court the power to grant a seizure order where the President of the Regional Court feels such order is necessary based on the circumstances of the case.

requirements of the TRIPS, the Senegalese Copyright Act appears to be in compliance as it has provisions regulating enforcement, expeditious remedies and deterring further infringements. Measuring the provisions of the Senegalese Copyright Act against the “adequate protection and effective remedies” WCT standard, it is difficult to determine whether the Senegalese legislature has succeeded in meeting this standard until the provision is put into practice. Although the wording of its anti-circumvention provisions was very close to the provisions of the WCT, there was no express exclusion of permitted acts from the scope of the anti-circumvention provisions. When a dispute arises in respect of the circumvention of TPMs and RMIs, the courts would be left to interpret what this provision meant to users of copyrighted works for permitted purposes.

Morocco

The first copyright legislation in Morocco was passed in 1916 and it guaranteed, for the first time, the right of the author to his or her work in Morocco. This law was revised in 1926 and 1927 respectively before both revisions were repealed and replaced by the 1970 Law. Its latest amendment of the copyright law was on February 14, 2006 with the adoption of Law 34-05 to revise Law 2-00 of February 15, 2000. Morocco¹⁴⁵ is a member of many international intellectual property treaties and conventions including the Berne Convention (1917), the WIPO Internet Treaties (2011), and the TRIPS Agreement (1995). It also entered into a Free Trade Agreement (FTA) with the United States on June 15, 2004 which entered into force in 2006. Morocco ratified the TRIPS Agreement in the 2000 revision of its copyright law and ratified the FTA provisions in 2006. At the time the 2006 revision was made, Morocco had not yet adopted the WIPO Internet Treaties. Since its adoption of the WIPO Internet Treaties in 2011, Morocco has not made any further revisions to its laws to expressly incorporate the minimum standards set out in the WIPO Internet

¹⁴⁵ Morocco ratified the WCT on April 20, 2011 and the treaty came into force on July 20, 2011. See WCT Notification No. 77, WIPO (April 2011) online a whct <
http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_77.html>

Treaties. This may be because substantial revisions have been made by the Moroccan legislature to its copyright legislation since the 2006 FTA. The 2006 FTA modeled provisions similar to the minimum standards set out in the WCT. Thus, the current Moroccan Copyright Law appears to be up to date with the changes required under the WCT.

The FTA required signatories to ratify certain IP agreements including the WIPO Internet Treaties. Chapter 15 of the FTA set out provisions dealing with Intellectual Property Rights as a complement for the already existing minimum standards in the TRIPS which were already incorporated into the Copyright Law. These provisions included the right to reproduce temporary copies of copyrighted works in the digital environment, the extension of term of protection from 50 years to 70 years, the grant to authors of a right of communication to the public, anti-circumvention provisions, obligations of Internet service providers and the protection of encrypted program-carrying satellite signals. I will be discussing these provisions and how the Moroccan legislature implemented them into its domestic legislation in the subsequent paragraph.

The amended Copyright Law¹⁴⁶ classified computer programs, lectures, addresses, sermons and other works consisting of words or expressed orally as literary and artistic works. Protection was given to translations, adaptations, musical arrangements and other transformation of original works.¹⁴⁷ Collection of works, folklore expressions and factual data such as encyclopaedias, anthologies and databases were protected regardless of how they were produced. The amended Copyright law set out the moral and economic rights of authors.¹⁴⁸ The moral rights included the right of paternity, the right of anonymity and the right to oppose distortion of his work in a manner prejudicial to an author's reputation. The economic rights, on the other hand, included the right of reproduction of a work (in any way or form whatsoever, whether permanent or

¹⁴⁶ See Article 3 of the 2000 Moroccan Copyright Law (as amended)

¹⁴⁷ Ibid, Article 5

¹⁴⁸ Article 9 and 10

temporary, including temporary storage in electronic form), the right of translation, the right of adaptation, the right of rental, the right of distribution, performance rights, broadcasting rights, right to communicate to the public. These rights captured the essence of the WCT as incorporated into Moroccan law via the FTA.

There were also exceptions to the rights set out in Chapter IV of the 2000 Law (as amended) i.e. the fair use exceptions. Individuals were granted the freedom to reproduce copyrighted works for their private use.¹⁴⁹ Certain classes of works were exempted from being reproduced; this included architectural works, books or musical works, the whole or parts of a database in digital form, computer programs and any other use that is likely to hamper the normal use of a work or unjustifiably prejudice the author's legitimate interests. The Law also permitted temporary reproduction of a work if it was done (i) in the course of digital transmission of a work; (ii) to make a digital work perceptible; (iii) by a natural person or legal entity authorised to do so. Copyrighted works could be used as illustrations in publications, broadcasts, sound or visual recording intended for educational purposes as long as the source and author's name are indicated. Users were also permitted to reproduce short extracts of a copyrighted work for educational purposes or examinations for non-profit purposes. Libraries and archives were also allowed to make copies of a literary work (other than computer programs) to be published in a collection of works or journal or periodical or in response to the request of a natural person. They could also make copies where the copy is needed to preserve the work or to replace a permanent collection of another library or archive or to replace lost, destroyed or unusable copies. The duration of protection granted to authors of copyright also increased from 50 years after the death of the author to 70 years.¹⁵⁰ Part II of the Act provided for the rights of performers, producers of phonograms and

¹⁴⁹ Article 12

¹⁵⁰ Article 25-29 of the 2000 Copyright Law of Morocco

broadcasting organizations (related right). These rights included the right to broadcast, communicate to the public, fixation, reproduction, distribution, rental and making available to the public.¹⁵¹

Anti-circumvention provisions were introduced into the 2000 Law by Article 65. The circumvention of any effective technological means, the removal or alteration of any information on the rights regime without authority, as well as the manufacture, sale and importation of devices specially designed or adapted to do any of these acts were prohibited. The approach of the Moroccan legislature in handling the anti-circumvention provision differed from USA and Senegal in one way – the express exclusion of non-profit entities from the scope of the anti-circumvention provisions stipulated in Article 65.1. This suggests that where these organisations circumvented these technological measures or altered electronic right management information, such acts would not be considered infringement of author’s copyright if they can show proof that they were not aware or had no reason to think that their acts were prohibited activity. This exemption, however, did not extend to individuals. Under the Law, service providers were defined as “a provider or operator of facilities for online services or for access to networks, including a provider of transmission, routing or connection for digital communications online, with no alteration of the content, between the point specified by the user and of his choice”. (Article 65.3-65.15) The “notice and take down” measure was to be taken by a service provider under the Moroccan Copyright Act to deal with allegations of copyright infringement brought to its notice by copyright owners.¹⁵²

In assessing the compliance of the Moroccan legislature with the TRIPS Agreement based Geuze’s standards of enforcement procedure, expeditious remedies and deterrence to further infringements, it is clear that the Moroccan legislature put these standards into consideration while drafting the 2000 law and its amendment. When considered against the background of the WCT, the

¹⁵¹ Article 50-52 of the 2000 Copyright Law of Morocco

¹⁵² Article 65.8, Copyright Act, Morocco

Moroccan legislature appears to fall within the “adequate and effective protection” scope stipulated in the treaty. Its express exclusion of fair use by not-for-profit entities also falls within the “permitted by law” stipulation in the WCT. While this approach may be criticised because it excludes private use of copyrighted works by individuals, which is one of the fair use exceptions in the Copyright law, it is a step in the right direction.

Category B: CANADA, GHANA AND KENYA

Canada

The Canadian Copyright Act¹⁵³ was amended with the passage of Bill C-11 (also known as the Copyright Modernization Act) in 2012. The objectives of the Copyright Modernization Act (“CMA”) was to (i) update the rights and protection of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards; (ii) clarify Internet service providers’ liability and make the enabling of online copyright infringement itself an infringement of copyright; (iii) permit businesses, educators and libraries to make greater use of copyright material in digital form; (d) allow educators and students to make greater use of copyright material; (v) permit certain uses of copyright material by consumers; (vi) give photographers the same rights as other creators; (vii) ensure that it remains technologically neutral; and (viii) mandate its review by Parliament every five years.

From the objectives set out in the summary to the CMA, it was clear that the intentions of the drafters of the CMA was to bring Canadian copyright legislation up to date with the minimum standards set out in the WIPO Internet Treaties¹⁵⁴. To achieve these objectives, the Canadian legislature expanded the scope of the fair dealing provisions¹⁵⁵ and included other user-friendly limitations

¹⁵³ *Copyright Act*, R.S.C., 1985. C. C-42 as amended by the Copyright Modernization Act in 2012

¹⁵⁴ According to the Preamble of the CMA, the Copyright Act was made to address issues such as digital piracy, ISPs responsibilities and the use of and circumvention of technological protection measures- issues that had previously challenged the existence of traditional copyright in Canadian law.

¹⁵⁵ The new section 29 of the Copyright Act (as amended by the CMA) now includes research, private study, education, parody or satire as part of the fair dealing exceptions.

and exceptions¹⁵⁶ while granting owners the legal right to prosecute third parties who circumvented¹⁵⁷ the technological measures put in place to protect copyrighted works. These new rights encouraged the creativity and innovation of users and gave creators the freedom to disseminate intellectual works into the digital environment.

There were many arguments supporting and opposing the amendment of the Canadian Copyright Act. Most of these arguments revolved around the effects of the anti-circumvention provisions on copyright in the digital age. Proponents argued that a balanced copyright regime in the digital age is not achievable without some form of legal recognition of Technological Protection Measures (TPMs) and Right Management Information (RMI).¹⁵⁸ The legalisation of the use of TPMs and RMI is regarded as one of the effective ways of restricting unauthorized third-party access to creative works. As I discussed in the earlier chapters, copyright owners realised that it was not enough to put in place technical protection measures in their works as hackers kept on devising ways to circumvent these measures. They realised that they needed the support of the law to keep out hackers.

Critics, on the other hand, argued that the inclusion of legal backing for TPMS and RMI would render both the new and existing users' rights obsolete.¹⁵⁹

¹⁵⁶ See the new Section 29.21 (non-commercial user-generated content); 29.22 (Reproduction for Private Purposes); 29.23 (Fixing Signals and Recording Programs for later listening or viewing); 29.24 (Backup copies); 29.4 (Reproduction for instruction); 30.01(3) (communication of lesson by telecommunication), 30.01(5) (reproduction of lessons for private use of student); 30.6 (computer programs)

¹⁵⁷ "circumvent" according to the Act, means "(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measures", to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner."

¹⁵⁸

¹⁵⁹ Honourable James More, Minister of Canadian Heritage and Official Languages said on announcing the introduction of Bill C-32 that "today we are introducing a copyright bill that offers a common-sense balance between consumers and the rights of the creative community...." "Balanced Copyright, News Release, Government of Canada Introduces Proposals to Modernize the Copyright Act, 2 June 2010. http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01149.html

Their argument rests on the hypothesis that legal backing for TPMs and RMIs would make it easier for creators to prevent use of their works by third parties, including non-infringing uses covered under the fair use exceptions and limitations. The wording of the anti-circumvention provisions in the Copyright Act does not exclude fair use exceptions expressly.¹⁶⁰ According to Carys Craig, *“... there is a larger problem looming than the definitional boundaries of fair dealing: the proposed protection of technological protection measures (TPMs) or “digital locks” threatens to undermine the significance of fair dealing and other exceptions by making them ineffectual in the face of technical controls”*¹⁶¹.

Canadian copyright legislation has never undermined the importance of putting users’ rights into its copyright laws to act as a check to the exclusive rights of copyright owners. In recent cases¹⁶², the Supreme Court of Canada gave an in-depth interpretation of users’ rights and its purpose under Canadian copyright law. In the *Theberge* case, the Supreme Court identified the purpose of copyright as *“a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”* The summary of the Supreme Court decisions was that a balanced copyright regime could not exist without equal representation of users and creators’ rights¹⁶³ therefore, it was the duty of the legislature to ensure that the rights of both sides of the divide- creators and users- are adequately represented under its copyright legislation.

¹⁶⁰ Carys Craig, “Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32” in Michael Geist, eds, *From “radical extremism” to “balanced copyright”: Canadian Copyright and the digital agenda.* (Toronto: Irwin Law, 2010) 177 at 179.

¹⁶¹ *Supra*, note 109 at page 178

¹⁶² *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13

¹⁶³ *Supra*, note 110. In the *CCH Canadian* case, the court stated that “[48]... the fair dealing exception, like other exceptions in the Copyright Act, is a users’ rights. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver [D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000)], has explained at p. 171: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.” This decision was made prior to the passage of Bill C-11 and reflects the view of the Supreme Court of Canada on how users’ rights should be treated under the law.

I will be considering some of the key provisions introduced by the CMA into Canadian copyright law. First compilation of works and computer programs were recognised as works eligible for copyright¹⁶⁴. This was an incorporation of the provisions of the WCT (also contained in the TRIPS Agreement). The CMA granted exclusive economic¹⁶⁵ and moral rights¹⁶⁶ to performers and makers of sound recordings in respect of their performances in line with the provisions of the WPPT. Broadcasters were also granted exclusive rights under the revised Copyright Act. The term of protection for all copyrighted works is 50 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs.

One major provision introduced by the CMA into the Copyright Act was the regulation of services provided by Internet Service Providers (ISPs) and digital networks providers to the public. According to Section 27(2.3), an ISP or digital network provider will be guilty of infringement where it provides a service which is primarily used for enabling acts of copyright infringement upon the occurrence of actual infringement through the use of its service by a third party. Certain factors were set out in Section 27(2.4) which would help the court determine whether infringement had occurred. The approach of the Canadian legislature to the liability of ISP and digital networks provider in the digital age was different from the USA legislative approach which used the “notice and take down” approach. Thus, while an ISP or digital networks provider may be held liable for an infringing act if the court judges the primary purpose of its services as enabling infringement, in the US law, once the ISP or digital networks provider successfully shuts down the infringing user upon receipt of notice from the copyright owner, it may no longer be held liable for the infringement.

¹⁶⁴ See Section 2.1 and 3.1(h) of the Canadian Copyright Act

¹⁶⁵ The specific economic rights granted to performers and makers of sound recordings can be found in the new Part II of the Copyright Act. It included the rights to do or authorize the doing of (i) communication to the public by telecommunication; (ii) performance in public; (iii) fixation; (iv) reproduction of fixation; (v) rental; (vi) making available to the public by telecommunication; (v) sale or transfer of ownership of fixed work.

¹⁶⁶ See Section 17.1 of the revised Copyright Act. Performers were granted the right to the integrity, right of association and right of anonymity.

Another major change to the Copyright Act was the extension of the scope of the fair dealing exceptions. Users could now rely on defenses of research, parody, satire, private study and education when using copyrighted works. The new limitations and exceptions to the exclusive rights of the author were made in line with the provisions of Article 10 of the WCT. Article 10 of the WCT granted member states the autonomy to provide limitations and exceptions to the exclusive rights granted to authors under the Act. The conditions for granting these limitations and exceptions included (i) it must be a ‘special’ case; (ii) it must not conflict with the normal exploitation of the work; (iii) it must not unreasonably prejudice the legitimate interests of the author.¹⁶⁷ One of such new exceptions is the use of non-commercial user-generated content¹⁶⁸. Users were permitted to combine two or more legitimately¹⁶⁹ acquired intellectual works to generate “non-commercial user-generated content” without the prior authorization of the creators. This provision within the amended Act (also referred to as the “YouTube Clause”) helped regulate the use of these non-commercial user-generated contents (also known as mash-ups) on online video sites such as YouTube, MapYourBuddies, Twitvision etc., therefore encouraging individual creativity among its citizens. The inclusion of the non-commercial user-generated content exception into the Act ensured, according to Craig, *“that in our digital environment, facilitated by new technologies and their accessibility, the transformative use of cultural content- mixing, mashing, (re)making and disseminating- is increasingly fundamental to the processes of cultural engagement and democratic participation. The creation of this exception goes some distance towards acknowledging and making space to this new reality”*.

¹⁶⁷ See Article 10, WCT

¹⁶⁸ See Section 29.21 Copyright Act (C-42)

¹⁶⁹ Supra, note 104, s 41. Creative work used here must be legitimately owned by the user: he must have bought it and not borrowed or rented it for the purposes of generating his own creative works. The new work he creates must also be used strictly for a non-commercial purpose and cannot have a substantial adverse effect on the original work. He must also clearly state the source from which he derived his own creative work.

Another exception or limitation to exclusive rights are the new private copying rights¹⁷⁰ under the amended Act which allow users of creative works to reproduce or make copies of creative works,¹⁷¹ legally fix signals and record programs for later listening or viewing¹⁷² as well as make backup copies¹⁷³ of creative works, subject to the observance of specific rules. The rules guiding the reliance on this exception state that the copies must be made from a legally obtained original source material i.e. it must not have been a rental or a borrowed copy, any recording of programs for future viewing must not be kept for a period longer than necessary and the user must ensure that he makes only one copy of the work and neither gives away, sells or rents that copy to another person. These rules were made to ensure that users, in applying these rights, still respect the exclusive right of the copyright owner by ensuring he gets maximum rewards for his work.

Other exemptions and limitations to the exclusive rights of copyright owners were in respect of the use of works by or of (i) an educational institution or a person acting under its authority¹⁷⁴; (ii) library, archives and museums or person acting under their authority¹⁷⁵; (iii) computer programs¹⁷⁶; (iv) temporary reproductions for technological processes¹⁷⁷. Note that in specifying the limitations of and exceptions to the exclusive rights of the copyright owners, the scope of the acts permitted by these limitations and exceptions were limited to compliance with the anti-circumvention provisions.¹⁷⁸

¹⁷⁰ Supra, note 104, s. 29.22- 29.24

¹⁷¹ Supra, note 104, s.29.22; users could under this clause reproduce a creative work from one format into another format (e.g. converting a video file into an audio file or converting an MPS file onto a CD-ROM) (also known as format shifting)

¹⁷² Supra, note 104, s. 29.23; Also known as ‘time-shifting’, this allows users to record, for instance, their favourite TV daytime programme while at work for viewing in the evening).

¹⁷³ See Section 29.24 Copyright Act (C-42)

¹⁷⁴ See Section 29.4 – 30.04 Copyright Act (C-42)

¹⁷⁵ See Section 30.1-

¹⁷⁶ See Section 30.6 Copyright Act (C-42) – compatibility of computer program with a particular computer; only for personal use; destroyed immediately after cessation of title to original program;

¹⁷⁷ See Section 30.71 Copyright Act (C-42)

¹⁷⁸ See Section 29.22(c), 29.23(b), 29.24(c), 30.04(3) of the Canadian Copyright Act, 2012

For creators, the introduction of the anti-circumvention provisions¹⁷⁹ legally permitted the restriction of third party use of creative works as well as the restriction of their ability to make copies of creative works through the use of technological protection measures (TPMs)¹⁸⁰. This provision effectively prohibited users from circumventing access control TPMs¹⁸¹ or from offering services to the public or manufacturing, importing, distributing, offering for sale or rental any technology or devices where such services, technology or devices were primarily for the circumvention of TPMs¹⁸². It has been pointed out that the inclusion of anti-circumvention provisions in the Act has given intellectual works an extra layer of legal protection which, while assuaging the fear of piracy and infringement faced by creators in the digital environment, threatens the very existence of copyright balance. In the next paragraphs, I will be looking at the current state of 'balance' under Canadian copyright law. What has been the Canadian legislative approach to the maintenance of balance in the digital age?

Just like the DMCA of the USA, most of the debates on the 'balance' in copyright stems from the inclusion of anti-circumvention provisions into the revised Copyright Act. You will recall that, while discussing the USA's legislative approach to the balance question, we traced the inclusion of the anti-circumvention provisions from the White Paper to Article 11 and 12 of the WCT (and Article 18 of the WPPT). For ease of reference, I have set out Article 10 and 11 of the WCT here: Article 11:

*“Contracting Parties shall provide **adequate legal protection** and **effective legal remedies** against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne*

¹⁷⁹ Supra, note 104, s.41

¹⁸⁰ Supra, note 104, s.41 (a) defines “technological protection measures” as any effective technology, device or component that in the ordinary course of its operation, (a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or (b) restricts the doing- with respect to a work, to a performer's performance fixed in a sound recording of any act referred to in section 3, 15 or 18 and any acts for which remuneration is payable under section 19.

¹⁸¹ Supra, note 104, s.41

¹⁸² Supra, note 104, s.41.1 (1) (b), (c)

Convention and **that restricts acts**, in respect of their works, **which are not authorised by the authors concerned or permitted by law**”[emphasis mine].

Article 12:

“Contracting Parties shall provide **adequate and effective legal remedies** against any person knowingly performing any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority. (2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”

Technological protection measure have been defined as “any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; (b) restricts the doing – with respect to a work, to a performer’s performance fixed in a sound recording- of any acts referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.”¹⁸³

Article 11 has been interpreted as creating an obligation on members to, by domestic legislation, prevent the occurrence of acts circumventing TPMs within its country. Article 11 stated two instances where the ‘adequate protection and effective legal remedies’ will not be required to restrict acts in respect of copyrighted works. These instances were (i) where the acts are authorised or licensed by the authors; and (ii) where the acts are permitted by law. It can be argued that this meant that acts which fell within the scope of permitted uses i.e. fair dealing and other user exceptions and limitations set out in the Copyright

¹⁸³ See Section 41, Copyright Act, C.42

Act are not caught by the web of the anti-circumvention provisions.¹⁸⁴ This interpretation of Article 11 is supported by the inclusion of the phrase “permitted by law” which suggests that the drafters of the WCT had intended that acts that are permitted by law (for instance fair dealing exceptions and other user rights) should not be restricted by TPMs¹⁸⁵. Also, by reading through the summary of the proceedings of the Diplomatic Conference that culminated in the drafting of the WCT and WPPT, it is clear that it was never the intention of the drafters of these treaties to put a strain on users’ rights for the benefit of upholding creators’ rights in the digital environment.

The Canadian legislative approach to the balance question in the digital age was to expand the scope of users’ rights and create new exceptions and limitations while granting copyright owners legal protection for the use of their technological protection measures. The issues arising from this approach stem from the non-exclusion of the fair dealing exceptions and the limitations and exceptions expressly from the scope of the anti-circumvention provisions. A joint reading of Sections 29.22(c) (*Reproduction for Private Purposes*), 29.23(1)(b) (*Fixing Signals and Recording Programs for Later Listening or Viewing*) and 29.24(1)(c) (*Backup copies*) collectively states that a person will be able to use a copyrighted work for the above-listed purposes if, in order to make the reproduction, such person did not circumvent or cause a TPM to be circumvented. Critics have argued that this is a wrong approach to the ‘balance’ question. According to them, “TPMs do not- and generally cannot distinguish between lawful and unlawful uses & users...”¹⁸⁶. Thus, the non-exclusion of the

¹⁸⁴ The adequacy and effectiveness standard is a subjective standard which gives Member States the flexibility to determine what is required of their laws in order to meet the standard. According to Pamela Samuelson, the WCT does not actually make inclusion of the anti-circumvention provisions into domestic copyright legislation compulsory as long as ‘adequate’ protection and remedies are available through other legal routes. See Samuelson, P. (1996) ‘Regulating Technologies to Protect Copyrighted Works’, *Communications of the ACM*, 39(7), 17-22.

¹⁸⁵ According to Wiese, the treaties are concerned specifically with circumvention activities that facilitate copyright infringements. Wiese H. (2002) “Anti-Circumvention Laws: A ‘Circumvention’ of the Copyright Balance in the Digital Age?”, *Tolley’s Communications Law*, 7(5), 146-154. This interpretation of Article 11 suggests that the scope of protection which the Treaty requires does not extend to circumvention of TPMS for lawfully permitted purposes.

¹⁸⁶ Craig, note 109, page 192

fair dealing exceptions and the limitations and exceptions from the scope of the anti-circumvention provisions gave too much protection to copyright owners.

Critics tried to distinguish between what TPMs ought to protect and what copyright protects by looking at two issues in the balance question- the power to control access and the power over the public domain. In respect of gaining power over access to content, critics argue that TPMs will give owners more protection than is provided under the law. The use of TPMs can restrict users from making use of previously accessible intellectual works. Prior to the digital age, and by association, TPMs, you could play a record or watch a movie that you purchased as many times as you pleased. From the moment you purchased that record or movie, total ownership in the copy of that work rests in you and you had absolute control over what happens to it.¹⁸⁷ With TPMs, however, copyright owners could place a limit on the number of views which a user could get out of a licensed content. This raised concerns about the implications of moving from a free use culture to a “pay-per-use” culture.¹⁸⁸ Craig argued that the grant of anti-circumvention laws effectively establishes a legal right to control access which is alien to traditional copyright law. She says anti-circumvention laws therefore establish a “new rights structure”, legally restricting public uses that have long been viewed as both acceptable and desirable¹⁸⁹.

The power over the public domain¹⁹⁰ argument simply states that the use of TPMs put even IP-free information resources at risk - intellectual property rights are limited exclusive rights granted to owners for a period of time after which

¹⁸⁷ In the *Theberge* case, the Supreme Court had stated that “once an authorised copy of a work is sold to a member of the public, it is generally for the purchaser, not the author to determine what happens to it.” According to deBeer and Geist, TPMs thoroughly disrupted this premise. See deBeer, J. and Geist, M (2008) ‘Developing Canada’s IP Agenda’, in J. Daudelin and Daniel Schwanen (eds), *Canada Among Nations 2007: What Room for Manoeuvre?* McGill-Queen’s University Press, Montreal p. 173

¹⁸⁸ See Secor, G. (1997) ‘Fair Use in a Pay-Per-Use World’, *Practice and Theory*, 21(1), 53-59

¹⁸⁹ Heide, T. (2001) ‘Copyright in the EU and U.S.: What Access Right?’, *Journal of the Copyright Society of the USA*, 48(3), 363-382 [online]. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=270861 [Accessed April 19, 2014]

¹⁹⁰ “The public domain should be understood not as the realm of materials that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use” – Litman, J. (1990) ‘The Public Domain’, *Emory Law Journal*, 39(4), 965-1023.

time the creative works enters into the public domain but the use of TPMs now challenges the value of intellectual works that enter into the public domain at the end of the copyright period. Craig argues that TPMs can continue to erect a barrier around creative works long after their legal entrance into the public domain thus undermining a crucial aspect of copyright policy which is the limited duration of private rights. Craig argues that if anti-circumvention provisions are included into copyright legislation, the rights given to creators will go over and above what the Act provided for and would mean an inadvertent extension of copyright protection in Canada.

Some scholars have argued that the inclusion of anti-circumvention measures into the Copyright Act amounts to mixing up technology and intellectual property. For them, traditional copyright law should not be concerned with the application of additional protection of creative works such as TPMs developed by creators, rather, it should be concerned with maintain a balance between creator and user rights. According to them, it should be the duty of a creator to ensure that the technological measures which he employed are effective enough to prevent unauthorised access to his works.

Critics of the anti-circumvention provisions in Canadian law have promoted a 'prescriptive parallelism' principle wherein technological protection measures do not alter the existing balance under traditional copyright laws as provided by the exceptions and limitations contained therein. They have also suggested that the balance in copyright regime may be maintained in the digital environment by leaving the law as it is because history has shown that laws become dated and full of loopholes when legislature makes them in order to keep up with changes in society.¹⁹¹

However, there may be a need to revise the current Copyright Act to exclude users' rights and fair dealing from the scope of the anti-circumvention provisions

¹⁹¹ Supra, note 125, page 513; Litman J. (2001) Digital Copyright. Prometheus Books, New York pg. 30; Murray L. (2005b) 'Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourse', in N. Geist (ed.), In the Public Interest: The Future of Canadian Copyright Law. Irwin Law, Toronto, page 15-40

so that users are allowed to circumvent TPMs where necessary, to carry out the permitted purposes under the Act. A user will only be deemed guilty of infringement when he circumvents TPMs in an intellectual work in order to do something outside the scope of the fair dealing and users rights exceptions. While the recently amended Copyright Act is a major step for Canadian copyright legislation, we cannot back up the 'balance' claims made by its proponents until the anti-circumvention provisions are revisited.

GHANA

Ghana¹⁹² is a signatory to most of the major international intellectual property treaties - the Berne Convention (1991), the Universal Copyright Convention (1962), the TRIPS Agreement (1995) and the WIPO Copyright Treaty (2006)¹⁹³. The most recent copyright legislation is the Copyright Act 690 of 2005 (as amended by the Copyright (Amendment) Act, 2009) which replaced the Copyright Law of 1985. At the time the Copyright Act 690 of 2005 was passed into law, Ghana was yet to sign the WIPO Copyright Treaty but was already a signatory to the TRIPS Agreement. Thus, the Copyright Act 690 of 2005¹⁹⁴ ratified the TRIPS Agreement thus incorporating the universal minimum copyright standards set out in the TRIPS Agreement into its law.

Some of the minimum standards in the TRIPS which were incorporated into the 2005 Act includes the protection of computer programs¹⁹⁵; the extension of the general term of protection of works from the life of the author plus 50 years

¹⁹² Ghana by depositing the WCT Notification No. 62 on August 18, 2006, ratified the WCT which came into force on November 18, 2006. See < http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_62.html> .

¹⁹³ It was not until February 16, 2013 that Ghana signed the WIPO Performances and Phonograms Treaty (WPPT). Also, the current version of the Copyright Act was already passed into law before Ghana signed the WCT.

¹⁹⁴ Ghana Copyright Act, 2005 (Act 290) of 2005

¹⁹⁵ Supra, note 160, section 4

after the author's death to life plus 70 years after death¹⁹⁶; the inclusion of stricter penalties for copyright infringement by giving copyright owners the option of requesting for a search and seizure order from the High Court as part of the civil remedies¹⁹⁷ against infringers in addition to the criminal penalties¹⁹⁸ already attached to copyright infringement. In some aspects, such as the term of protection for copyrighted works, Ghana exceeded the minimum standards set out in the TRIPS Agreement, adopting the "TRIPS-plus" approach.¹⁹⁹

Some general changes were also made to the 2005 Act to ensure that it could effectively protect copyrighted works in the digital age. Audio-visual works and computer software or programmes were included in the definition of 'works'²⁰⁰; the 'written-down, recorded or otherwise reduced to material form' requirement present in the 1985 Copyright Act was modified into 'fixation in a definite medium'²⁰¹; expansion of exclusive rights of authors with the inclusion of distribution and rental rights²⁰² and the deletion of moral rights of authors; exceptions to the exclusive right of reproduction²⁰³; the prescription of the mandatory attachment of a security device on copyrighted works by owners²⁰⁴; mandatory levy payable on any device capable of being used to copy a work at the time of importation or production of the device²⁰⁵.

Section 42 of the Copyright Act introduced the anti-circumvention provision into Ghanaian copyright legislation. At the time the 2005 Copyright Act was negotiated and drafted, Ghana was not yet a signatory to the WIPO Internet Treaties. Thus, the inclusion of the anti-circumvention provisions was

¹⁹⁶ See Sections 12-17 of the Ghana Copyright Act, 2005 (Act 290) of 2005 which provides for the term of protection granted to individuals under the Copyright Act.

¹⁹⁷ See Section 47 of the Ghana Copyright Act

¹⁹⁸ See Section 43 of the Ghana Copyright Act

¹⁹⁹ C.Armstrong et al, eds, "Access to Knowledge in Africa: The Role of Copyright" (South Africa: Print Communications Services (Pty) Ltd, 2010) at 62.

²⁰⁰ See Section 2(1) of the Ghana Copyright Act

²⁰¹ See Section 2(2) of the Ghana Copyright Act

²⁰² See Section 5 of the Ghana Copyright Act

²⁰³ See Section 19(6); 20; 21 of the Ghana Copyright Act

²⁰⁴ See Section 25 of the Ghana Copyright Act

²⁰⁵ See Section 27 Ghana Copyright Act, 2005

a pre-emptive effort on the part of the Ghanaian legislature to address some of the challenges of the digital age. Section 42(d)-(j) made the doing or causing to do any of the following acts an infringing offence under the Copyright Act – (i) public exhibition of works; (ii) **removal or alteration of electronic rights management information**; (iii) **distribution, broadcast, communication or making available to the public knowingly, works whose electronic rights management information has been altered or removed**; (iv) **the making, importation/distribution, sale or rental of any device designed or adapted to remove, alter or add electronic rights management information**; (v) **circumvention of technological protection measures applied by right holder to the protected work**; (vi) **making, importation/distribution, sale or rental of devices, components, services or other means designed, adapted or promoted to circumvent TPMs**, or (vii) **rent or lend any work to the public**.

The legislative approach to the inclusion of anti-circumvention provisions into Ghanaian copyright law, although a good attempt, was merely the prohibition of circumvention of RMIs and TPMs. The provisions lacked depth as it did not provide for any exceptions to the blanket prohibition, not even for fair use exceptions stated in the Act. It is likely that the anti-circumvention provisions in the Act would have been better drafted if Ghana had signed the WIPO Internet Treaties at the time the 2005 Copyright Act was reviewed. Incorporation of Article 11 of the WCT would have prompted the legislature to discuss possible exemption of acts authorized by the authors or acts permitted by law, from the scope of the anti-circumvention provisions.

In measuring the level of compliance of the Ghanaian legislature with the TRIPS provisions, Geuze's performance standards²⁰⁶ show that the inclusion of Section 25-27 (Enforcement provisions), 57 (Rules of procedure of the Copyright Tribunal), 47 (civil remedies) and 43 (penalties) effectively satisfies the first three performance standard sets out by Geuze.

²⁰⁶ Supra, note 97.

Kenya

The current 2001 Kenyan Copyright Act was revised to incorporate the TRIPS Agreement – at the revisions were made, Kenya had not yet ratified the WIPO Copyright Treaty²⁰⁷. The 2001 Copyright Act came into force in 2003²⁰⁸. The revisions made to the Act included the inclusion of audio-visual works, sound recordings and broadcast works as literary works²⁰⁹, grant of exclusive rights such as broadcasting, communication to the public, fixation, reproduction and rental of works to performers,²¹⁰ inclusion of fair dealing exceptions²¹¹, the authentication requirement and the inclusion of anti-circumvention provisions. These revisions reflected the minimum standards set out in the TRIPS Agreement as well as the WCT, even though Kenya was yet to ratify the WCT at the time the Act was negotiated.

The Copyright Act²¹² provided copyright owners with adequate remedies against infringement by unauthorized third parties in line with the TRIPS requirements. These remedies included damages, injunction, delivery up of articles used by the defendant to infringe rights, accounts or other reliefs available to owners of proprietary rights and, in lieu of damages, an award of an amount calculated on the basis of reasonable royalty that would have accrued to the owner if the infringer had properly obtained licence. The Act also provided for the Anton Pillar order which was a civil remedy that copyright owners found very useful when enforcing their rights against infringers. The copyright owner was certain that where a breach of its rights occurred in the digital age, he was certain to receive adequate compensation for any losses suffered directly or indirectly. Apart from the civil remedies available, the Act also introduced

²⁰⁷ See ACA2K's Report on Kenya (http://www.aca2k.org/attachments/281_ACA2K-2010-Ch4-Kenya.pdf)

²⁰⁸ Since the passage of the Act, there has been a revision of its provisions by Parliament in 2009.

²⁰⁹ See Section 22 of the 2001 Kenyan Copyright Act

²¹⁰ See Section 30 of the 2001 Kenyan Copyright Act

²¹¹ Section 26(1) of the 2001 Kenyan Copyright Act; *supra*, note 208. The ACA2K Group had argued that the “exceptions and limitations as drafted under the current law are vague and, at the same time, quite narrowly construed. This gives the rights-holder more control over the use of their works and at the same time limits the dissemination of information without the rights-holder’s authority”

²¹² See Section 35(4) of the Kenyan Copyright Act

criminal penalties in Section 38. The inclusion of enforcement procedures, civil and criminal remedies and effective penalties into the Act meant that the Kenyan legislature complied with the three TRIPS performance standards set out by Geuze.

Although Kenya was not yet a party to the WCT at the time these revisions were made, Section 35(3) contained anti-circumvention provisions. Section 35(3) provides that,

“ Copyright and related rights shall be infringed by a person who - (a) circumvents any effective technical measure designed to protect works; or (b) manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works protected under this Act; or (c) removes or alters any electronic rights management information; or (d) distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the rights holder.

Just like the approach adopted by Canada, the anti-circumvention provision did not provide for any exceptions. Instead, what we have is a blanket provision restricting total use of copyrighted works where a TPM or RMI has been placed on it by the author. This meant that the existence of fair use exceptions under the current Copyright Act is threatened as the owners of copyright only needed to put in place TPMs and RMIs to totally restrict unauthorised access to their works. This contradicts the purpose of copyright and goes against the spirit and letter of the WCT. It appeared that the Kenyan legislature was more concerned with the imposition of stricter copyright protection than for the maintenance of balance in copyright. For instance, Section 36 introduced the authentication requirement. Manufacturers of sound and audio-visual works were required to authenticate their works by submitting an application to the Copyright Board. Upon approval, a certificate in the prescribed form will be

issued to the applicant to enable it purchase an authentication device from the Kenya Revenue Authority. The authentication device is then attached to each copy of the copyrighted work made or published by the applicant. The aim of this process is to make it easier to identify pirated copies of a work in the marketplace. Strict penalties were enforced against persons found to be selling or offering for sale, works that have not been authenticated. These authentication devices were extra measures introduced by the government aside from the use of TPMs and RMIs. Yet, in the face of all these extra protection measures, the legislature did not consider giving fair use any special consideration especially in light of the anti-circumvention provisions. This is contrary to the spirit and letter of the WCT which was geared towards maintaining the same level of balance between public rights and private rights.

In respect of liability of ISP and digital networks providers, the 2001 Copyright Act (as amended) does not have any notice and take down procedures, there is no 'safe harbour' or similar provisions limiting their liability, neither does the Copyright Act impose any specific penalties on service providers for failing to block or remove infringing content. Thus, if we assess the legislative efforts in respect to the "adequate protection and effective remedies" standards of the WCT, we will find that the approach of the Kenyan legislature fell short of this standard.

In conclusion, the approach adopted by the Kenyan legislature in incorporating the TRIPS appears to meet up with the internationally recognised standards. However, its approach with the incorporation of the WCT into its domestic laws needs to be revised to ensure compliance with the WCT standards of "adequate and effective protection" in respect of the anti-circumvention provisions.

Chapter Five

Conclusions and Recommendations

In Chapter 4, I looked at the legislative approaches adopted by the six countries I selected for my case study - placing them in two categories – to determine how they had approached the revision of their domestic laws to reflect the copyright issues arising in the digital age. In this chapter, I will be considering my initial question – Have domestic legislatures effectively incorporated the minimum standards set out in the TRIPS and WCT in a manner that maintains a balanced copyright framework in their countries? I will be comparing the legislative approaches adopted by these domestic legislatures in bid to answer this question. To do so, I will identify first, the similarities and differences in the approaches of these countries, which countries' approach appears to maintain balance in copyright, if any, and how these approaches can be modified to help maintain copyright balance in member states to the treaties.

I will begin by looking at the legislative approaches of Category A countries - USA, Senegal and Morocco in implementing the TRIPS and WCT. As a general rule, all three countries successfully implemented the TRIPS minimum standards into their domestic legislation. In analyzing the approaches to the TRIPS, it appears these countries found it easier to put in place enforcement procedures as well as adequate civil and criminal remedies as required under the TRIPS. This was not so in the case of the WCT primarily because of the anti-circumvention provisions. It was difficult to incorporate these provisions into domestic laws in a manner that properly reflected the intentions of the drafters of the WCT. Thus, I will be focusing more on how these countries have tried to implement the WCT provisions without upsetting balance.

Regardless of the disparity in the economic status of these countries – the USA is a developed country and an exporter of copyrighted works; Senegal is classified as a least developed country and Morocco is classified as a developing country - their legislative approaches to the copyright balance question share

many similarities. These three countries tried to put in place some flexibility in its anti-circumvention provisions sufficient enough to accommodate exceptions. In the USA, this was achieved by the introduction of the rule-making procedure; in Senegal's case, by the incorporation of the exact wording of Article 11 WCT into its copyright legislation; and in Morocco's case, by the express exclusion of not-for-profit organisations from the scope of the anti-circumvention provisions. Thus, the approach adopted by Category A countries was aimed at ensuring that users' rights were adequately protected in the face of the introduction of legal protection for the use of TPMs and RMIs by copyright owners. One could suggest that the similarities in the legislative approaches of these three countries stems mainly from the legislature's determination of what was important for its economic growth in the face of digital technology.

From the negotiation process of the DMCA, it is clear that the USA legislature had fully considered the effects of the anti-circumvention provisions on fair use and concluded that the threat against the existence of fair use would be properly addressed by the rule-making proceedings. While this conclusion has been criticised as creating an uncertain copyright environment, the USA legislative approach does have its advantages. The flexibility which this approach gives to the Register of Copyright and the Librarian of Congress by allowing them to assess the effects of the anti-circumvention provisions on fair use within a three-year interval is very important, especially in today's society, where newer technologies are constantly introduced. This flexibility ensures that the law changes promptly in direct response to changes in technology because the rule-making proceedings allows designated authorities to exempt permitted uses of copyrighted works from the scope of anti-circumvention provisions as soon as technology evolves.

The Senegalese legislative approach to the exemption of permitted uses from the scope of anti-circumvention prohibition can be regarded as, perhaps, the most flexible approach. The wording of its Article 125 and 126 are almost-identical to the wording of Article 11 and 12 of the WCT, thereby allowing users

of permitted works to argue that circumvention of TPMs and RMIs were permissible under the Act. As long as the circumvention was carried out in the performance of permitted acts under the Act, such circumvention will fall within the exemption stipulated in Article 125 of the Senegalese Copyright Act. Thus, while the Senegalese legislative approach does not expressly exclude fair use exceptions from the scope of the anti-circumvention provisions, the wording of Article 125 and 126 of the Senegalese Copyright Act gives room for permitted users to ask for a case-by-case interpretation of the provisions by the courts where cases of circumvention are brought before them.

The Moroccan legislature's approach, on the other hand, is perhaps the most straightforward though not necessarily the best approach. The Moroccan legislature expressly exempted certain not-for-profit institutions from the scope of its anti-circumvention prohibitions. While these exemptions did not extend to private use of copyrighted works by private individuals for fair use purposes, Article 65.1 of the Moroccan Copyright Act granted educational institutions, libraries, public broadcasting services and archives the right to use copyrighted works for fair use purposes even if use would require the circumvention of TPMs or RMIs. Many critics of both the USA and Senegalese legislative approach have requested for the express exclusion of fair use exceptions and limitations from the scope of these provisions. While the Moroccan approach did not properly exclude all fair use exceptions and limitations, it was regarded as a step in the right direction.

Conclusively, I will say that Category A countries, to a large extent, attempted to create a balanced copyright regime whilst incorporating the provisions of the TRIPS and especially the WCT. While there may be a need to tweak around some of these approaches, the underlying intention of the domestic legislature was clearly to provide a balanced copyright framework in the digital age.

Category B countries - Canada, Ghana and Kenya – on the other hand, were countries that had ratified the TRIPS but not the WCT at the time the most recent amendments to their copyright legislation had been made. Just like Category A countries, the implementation of the minimum standards in the TRIPS was easier than the implementation of the minimum standards of the WCT. Although all three countries were yet to ratify the WCT, they had incorporated strict anti-circumvention prohibitions in their Copyright Act. These strict prohibitions however did not exclude, either expressly or impliedly, permitted uses from the scope of the anti-circumvention provisions set out in their Copyright Act. It would have been expected that legislatures of developing countries such as Kenya and Ghana would be prone to incorporating flexible anti-circumvention provisions because of their need to import knowledge from the developed countries. If we argue that the legislative approach adopted by a member state should be selected after due consideration of the economic status of the member states. Knowledge-importing countries will be expected to adopt a flexible legislative approach which would aid their economic development, and not an approach that further restricts access to information and education in the society.

In Canada's case, the legislative approach adopted in respect of the anti-circumvention provisions was a strict approach favouring the copyright owners more than users of copyrighted work. shows that the introduction of strict anti-circumvention provisions without impliedly or expressly excluding permitted uses appears to negate the effectiveness of the fair use exceptions and limitations to the exclusive rights of the copyright owners. Rather than expressly or impliedly excluding permitted uses, the Canadian legislature expressly included permitted uses within the scope of the anti-circumvention provisions. Sections 29.22(c), 29.23(1) (b) and 29.24(1) (c) of the Canadian Copyright Act provides that users could only rely on the exceptions and limitations to exclusive rights set out in the Act where such users did not circumvent or cause a TPM to be circumvented. In reality, what this meant was that users of copyrighted works

had to rely on the good graces of copyright owners not to place TPMs on their works, so that they are able to make use of the works under the fair use exceptions and limitations. These provisions created a real threat to the existence of fair use exceptions and limitations under the Canadian Copyright Act. Thus, the Canadian legislative approach to the incorporation of anti-circumvention provisions and permitted uses did not sufficiently recognise the need for balance between private rights and public interests. In the case of Ghana and Kenya, both countries' legislatures adopted a similar approach to the incorporation of anti-circumvention provisions into their copyright legislations as stated in Section 42 of the Ghanaian Act and Section 35(3) of the Kenyan Act. Both countries did not stipulate any exceptions to the anti-circumvention provisions, whether impliedly or expressly, which could allow permitted uses of copyrighted works by third parties. Thus, under their legislations, users of copyrighted works could not rely on permitted uses exceptions and limitations as their defence for circumventing TPMs and RMIs placed on copyrighted works in these countries.

While I have highlighted the similarities in the approach of Category A countries to the 'balance' question and anti-circumvention provisions, there are also some differences in the way these countries approached the problem. The USA, for example, placed the obligation of determining which specific permitted uses qualified for exemption on the Register of Copyright and the Librarian of Congress while the Senegalese legislature inserted a blanket provision very similar in wording to the WIPO Internet Treaties without specifying which uses fall under the "permitted by law" exception. The Moroccan legislature, on the other hand, took a more direct approach to the question. It expressly stipulated the institutions that could circumvent TPMS and RMIs in the course of carrying out their legitimate works. The Moroccan approach was even more direct than the USA approach. In fact, this approach is one that many critics of the USA's legislative approach have clamoured for since the beginning of the negotiations of the copyright reform.

For Category B countries, however, the Canadian legislative approach appears to be a little different from the approaches of the remaining two countries, Ghana and Kenya. While Canada has elaborate fair use and anti-circumvention provisions set out in its Act, this is not the case in Ghana and Kenya. Ghana and Kenya simply classified the acts of circumventing or removing TPMs and RMIs as infringing offences under the Copyright Act. The anti-circumvention provisions under the Kenyan and Ghanaian Acts lacked sufficient depth to qualify as “adequate protection and effective remedies” as specified in the WIPO Internet Treaties.

Looking at these different approaches to the resolution of the ‘balance’ problem in copyright, there is no disputing the fact that the efforts of Category A countries in attempting to maintain a balanced copyright framework in their countries. Although there have been criticisms against each of these legislative approaches in these countries, to a large extent, the general consensus of critics have been for the express exclusion of fair use exceptions and limitations from the prohibition of anti-circumvention provisions. This general consensus closely resembles the approach adopted by the Moroccan legislature. Even though the exceptions granted under the Moroccan copyright laws were really restricted to certain institutions and did not cover use of copyrighted works by private individuals, it was a step in the right direction in the maintenance of copyright balance in the face of the inclusion of the anti-circumvention provisions in the Copyright Act. With a little fine-tuning of this approach, it is clear that domestic legislatures of member states will be able to establish a much more balanced copyright system where there are express exceptions to the anti-circumvention prohibitions.

For member countries to the TRIPS and WIPO Internet Treaties who are yet to ratify the minimum standards into their own domestic laws, it is recommended that they adopt a cross-blend of the legislative approach adopted by the USA and Morocco i.e. the express stipulation of permitted uses exemptions to the anti-circumvention provisions in its Act as well as provision

for a procedure similar to the rule-making proceedings set out in the DMCA which allows for a periodic review of the exempted classes of works/institutions at regular intervals. This hybrid solution would ensure that balance in copyright is maintained in the face of the anti-circumvention provisions and that regular revisions to the laws were made in response to changes in technological innovations. Hopefully, when this hybrid solution is implemented in practice, it is able to address all the issues arising from the inclusion of anti-circumvention into the copyright legislation.

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