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# EXCEPTIONS & LIMITATIONS TO COPYRIGHT

Towards a Balanced Harmonization of Copyright Law  
for Innovation & Development



Eddan Katz

International Affairs Director, Electronic Frontier Foundation

*The Panos Institute-West Africa and Open Society Institute of West Africa*

**Legal and Policy Frameworks for the Information Society  
in West Africa: Issues and Stakeholders' Role**

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# Outline Summary

- \* International Harmonization - TRIPs agreement
- \* History of Intellectual Property & Trade
- \* Development Agenda at WIPO
- \* Exceptions & Limitations to Copyright
- \* Digital Education
- \* Access to Knowledge
- \* Anti-Counterfeiting Trade Agreement

# Berne Convention - Literary & Artistic Works

- \* books, pamphlets and other writings;
- \* lectures, addresses, sermons and other works of the same nature;
- \* dramatic or dramatico-musical works;
- \* choreographic works and entertainments in dumb show;
- \* musical compositions with or without words;
- \* cinematographic works to which are assimilated works expressed by a process analogous to cinematography;
- \* works of drawing, painting, architecture, sculpture, engraving and lithography;
- \* photographic works to which are assimilated works expressed by a process analogous to photography;
- \* works of applied art;
- \* illustrations, maps, plans, sketches and

# Berne Convention - Rights Conferred

- \* Art. 8: Right of Translation
- \* Art. 9: Right of Reproduction
- \* Art. 11: Right of Performance
- \* Art. 11 *bis*: Right of Broadcast
- \* Art. 11 *ter*: Right of Public Recitation
- \* Art. 12: Right of Adaptation
- \* Art. 13: Sound Recordings
- \* Art. 14: Cinematographic Rights

# Berne Convention (1886)

## ECOWAS Region Signatories

- \* Benin
- \* Burkina Faso
- \* Cape Verde
- \* Cote d'Ivoire
- \* Gambia
- \* Ghana
- \* Guinea
- \* Guinea-Bissau
- \* Liberia
- \* Mali
- \* Niger
- \* Nigeria
- \* Senegal
- \* Togo
- \* NOT a signatory -- Sierra Leone

# History of Intellectual Property & International Trade

- \* What is similar between designer handbags, hollywood movies, and genetically modified food?
- \* IP alliance formed between agri-biotech, pharmaceutical industry, copyright alliance, and anti-counterfeiting.
- \* Agenda to shift IP as the domain of international trade and set out harmonized global regime
- \* Exploit anxieties about US trade deficit - claim about maximizing IP protection as key to maintaining hegemony in knowledge economy.

# Regime-Shifting & Public Choice Theory

- \* Small multi-national corporate alliance first drafting of IP regime wish list.
- \* Frustrated by WIPO, alliance moves to WTO. Passes TRIPs.
- \* Trade negotiations with developing countries. TRIPs-Plus Agenda
- \* Harmonization & Resistance. Special 301 - USTR

# TRIPs Art. 13: Limitations on & Exceptions to Copyright

- \* Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.
- \* *Where is the justification for the public interest in copyright?*

# United States Constitution, Intellectual Property Clause

- \* To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

# Trade Related Aspects of Intellectual Property (TRIPs)

- \* Copyright and Related Rights
- \* Trademarks
- \* Geographical Indications
- \* Industrial Designs
- \* Patents
- \* Layout-Designs (Topographies) of Integrated Circuits
- \* Protection of Undisclosed Information
- \* Control of Anti-Competitive Practices in Contractual Licences

# Geneva Declaration on the Future of WIPO

- \* ... Humanity stands at a crossroads - a fork in our moral code and a test of our ability to adapt and grow. Will we evaluate, learn and profit from the best of these new ideas and opportunities, or will we respond to the most unimaginative pleas to suppress all of this in favor of intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient policies? Much will depend upon the future direction of the World Intellectual Property Organization (WIPO), a global body setting standards that regulate the production, distribution and use of knowledge. ...

# Development Agenda at WIPO

- \* Brazil & Argentina proposal - Oct. 2004
  - \* Supported by Friends of Development (12 countries)
- \* The Development Dimension of Intellectual Property
  - \* United Nation's Millennium Development Goals
  - \* WIPO Mandate - *not* the promotion of intellectual property itself (1967)
  - \* Knowledge Gap & Digital Divide
- \* Peer Production Business Models
  - \* Open Source and the Human Genome Project

# 45 Recommendations (2007)

- \* Cluster A: Technical Assistance and Capacity Building
- \* Cluster B: Norm-setting, flexibilities, public policy & public domain
- \* Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge
- \* Cluster D: Assessment, Evaluation and Impact Studies
- \* Cluster E: Institutional Matters including Mandate and Governance
- \* Cluster F: Other Issues

# Exceptions & Limitations to Copyright

- \* balance the interests of creators of intellectual works and the users' rights to use protected works to further creative endeavour, learning and research.
- \* link with fundamental human rights: equality, the right to education, freedom of expression and the right to access culture and share in scientific advancement.
- \* legal instrument harmonizing minimum standards of exceptions and limitations

# Harmonizing Treaty on Minimum Standards for E&L

- \* Visually impaired and other disabilities
- \* Libraries and archives
- \* Educational Purposes
- \* [User-Generated Content]

# World Blind Union Proposal for the Visually Impaired

- \* make an accessible format of the work
- \* exceptions extended to for-profit institutions
- \* circumvention of technological measures
- \* importation and exportation of works
- \* database on availability of works
- \* orphaned works

# Innovation in Digital Education

- [ 1. Bridging the physical and temporal gaps between students and centers of learning.
- [ 2. Provide new materials to the classroom that previously were unavailable or impractical.
- [ 3. Providing teachers and students new ways of learning information and interacting with educational objects
- [ 4. Transforming the way in which student work is evaluated, both in the classroom and outside.

# Training Knowledge Workers

- [ Digital Natives
- [ Information Manipulation
- [ Peer Production
- [ Collaborative Editing
- [ Creative Class Redistribution

# Taxonomy of Education Exceptions & Limitations

## Standards vs. Rules

Rule-based approach: bright-line divides between unauthorized acts of infringements and permitted uses

Standards-based approach: adopt a balancing test approach

## Constraint Clauses

Actor

Purpose

Context

Action

# 1. Actor

- [ limits who may take advantage of the exception
- [ students, teachers, educational institutions
  - St. Vincent: “a person giving or receiving instruction”
  - Paraguay: “teaching staff”
  - *educational establishment/institution*

# 2. Purpose

— [ control the breadth of exception without the type of content that it covers or actions that can be done with it

- personal use
- non-profit status
- teaching
- educational
- examinations

# 3. Context

- contexts within which exceptions can take place
  - geographical (i.e., classroom-setting)
  - non-geographic (i.e., educational institution)

# 4. Action

- [ Quantity of copying
  - i.e., not more than 1% of work
- [ Type of copy, examples:
  - reprographic copying; handwritten or typewritten copy
  - single, personal copies
  - up to 1,000 words

# What is Access to Knowledge (A2K)?

- \* Theoretical Framework for understanding the knowledge economy
  - \* Access to Knowledge is key to the attainment of human development and human rights.
  - \* Open infrastructures are the key to maximizing the human benefits at the intersection of innovation and development
- \* Social Movement of technology, access to medicines, farmers' rights, and open source activists from developed and developing countries.
- \* Draft Treaty and Development Agenda at the World Intellectual Property Organization (WIPO)

# The Development Dimension

- \* Human Development - essential needs: food security, medicine, education, participation in culture
- \* Social Justice - distributive. Not opportunities in the form of rights.
- \* Technology & Competition Policy - dependent on economic development & cultural context
- \* Spurring information & knowledge production in these areas (information, knowledge, knowledge-embedded goods, and knowledge-embedded tools) will improve people's lives.

# Open Knowledge Infrastructure

- \* Open Infrastructures are better for efficiency and production. (e.g., open source, wikipedia, p2p (vs. drm)
- \* Open infrastructure enable greater freedom and individual participation. Modifiability; tailoring to local needs
- \* Peer Production - non-market voluntarism. Modularity, Granularity, Integration.

# Anti-Counterfeiting Trade Agreement (ACTA)

- \* Pluri-lateral Agreement: Australia, Canada, EU, Japan, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates, and the US
- \* Brief History behind ACTA
  - \* Anti-Counterfeiting Congress. Australia. 2004; World Customs Organization SECURE Working Group
  - \* US STOP! Initiative (Strategy on Targeting Organised Piracy) (2004); EU-US Strategy on the Enforcement of IPR
- \* Multi-front lobbying effort
  - \* OECD Recommendation on Counterfeiting & Piracy; Phase II: Piracy of Digital Content
  - \* APEC 3 Model Guidelines on Anti-Counterfeiting and Piracy
  - \* WCO Council replacement for SECURE Working Group

# Counterfeiting and Piracy

- \* Anti-Counterfeiting Trade (and Piracy) Agreement
  - \* *Why is this aspect being hidden?*
  - \* Meme-shifting. (in addition to Forum shifting and regime shifting).
- \* Historical repetition of coordination between 'IP' industries.
- \* Rhetoric: "the fight against fakes"; threaten health & safety

# Secrecy & Accountability

- \* Why is it so secret? Bush Administration origins.
- \* Moving from multi-lateral & bi-lateral to pluri-lateral
- \* Lacking accountability. Executive Order. US. Europe. Art. 133 group.
- \* EFF & Public Knowledge. Freedom of Information Act litigation

# What's in ACTA?

- \* First, it was 3 main areas. Now expanded to 4. controversy over Internet issues.
- \* International Cooperation: capacity building & technical assistance. enforcement coordination.
- \* Enforcement Practices: specialized IP expertise within law enforcement; public/private advisory groups; raising consumer awareness.
- \* Legal framework: criminal enforcement, border measures, civil enforcement, optical disc piracy, and Internet Distribution
- \* Internet Issues = treated separately.

# Information Customs

- \* World Customs Organization (WCO) Standards Employed by Customs for Unified Rights Enforcement (SECURE). \*DISBANDED\*
- \* WCO Policy Commission meeting June 2009 (Members: France, Japan, Nigeria, Norway, Russian Federation, Rwanda, Saudi Arabia, Slovenia, United Kingdom, United States, Canada, China, Germany, Malaysia, Mexico, Spain and Thailand)
- \* SG Kunio Mikuriya: New body set up under the Permanent Technical Committee or the Enforcement Committee
- \* Training to distinguish between legal & counterfeit goods.
- \* Ex-officio authority: privatization of enforcement. no complaint of rights-holders.

# Criminal Provisions

- \* Criminal sanctions for IPR infringement on commercial scale.
  - \* for purposes of commercial advantage or private financial gain.
  - \* significant willful infringements **without motivation for financial gain** to such an extent as to prejudicially affect the copyright owner (e.g., Internet piracy).
- \* Ex Officio Authority for border measures.
- \* establishment of deterrent-level penalties and/or measures to promote deterrence (e.g. non-binding guidelines).
- \* footnote 14 in TRIPs: counterfeiting & piracy defined.
- \* ACTA - all unauthorized uses, rather than permitted uses.

# Internet Issues

- \* In-transit provisions
  - \* information customs
  - \* reduced standard for criminal enforcement & making available right
- \* Increase ISP Liability
  - \* Require ISPs to take technical approaches to online piracy;
  - \* Engage in filtering communications of copyright infringing works.

# Electronic Frontier Foundation

\* Free Speech

\* Innovation

\* Intellectual Property

\* Privacy

\* Transparency

\* [eddan@eff.org](mailto:eddan@eff.org)