Copyright & Technology:  
Legal, Political and Market Challenges  
A View from WIPO

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Introducing WIPO

• United Nations specialized agency
• members - 184 Member States
• observers - 222 non-governmental organizations, 66 international organizations
• over 900 staff members
• headquarters in Geneva (offices in Singapore, New York, Brussels, Tokyo)
WIPO’s main activities

- Normsetting
  - treaty-making processes

- Providing international IP services to private sector
  - registration services for patents, trademarks & designs
  - dispute resolution (WIPO Arbitration & Mediation Center)

- Enhancing access to the IP system
  - assist developing country members, as well as SMEs to use IP as a tool for economic, cultural & social development
  - distance learning programs (WIPO Worldwide Academy)
  - seminars, conferences, studies and documents
IP in the information society

- ‘knowledge economy’
- growing importance & value of IP
  - 80% of value of S&P 500 companies is IP
- World Summit on the Information Society
  - Two phases: Geneva 2003, Tunis 2005
  - Declaration of Principles, Plan of Action, Agenda for the Information Society
  - Follow up: Internet Governance Forum (Rio, 11/07)

The international copyright framework

- WIPO Copyright Treaty (WCT) (1996)
  - In force March 6, 2002 (64 States party)
  - In force May 20, 2002 (62 States party)
- Membership mostly developing countries, but also Japan, Singapore, United States of America and Belgium; 2007 accessions – China, Australia and Liechtenstein
- Complex interplay among legal, political and market factors
- WTO/TRIPS (1994)
Legal challenges

- Implementation of 1996 Treaties:
  - General framework for the dissemination of content online
  - “Making available” right, limitations and exceptions
  - DMCA and European Directive as “prototype” laws
  - Public policy flexibilities in sensitive areas

- DRM: Technical Protection Measures (TPMs) and Rights Management Information (RMI)
  - Legal remedies against circumvention of access and copy controls, misuse of RMI
  - A variety of approaches, circumvention + trafficking in devices, civil and criminal sanctions
  - Laws attempt to balance TPMs with specific exceptions, consumer expectations
Legal challenges ...

- Intermediary Liability
  - “internet intermediaries” include ISPs, peer-to-peer (P2P) file sharing services, portals, search engines (Google), auction sites (eBay), UGC sites
  - Different rules, direct vs. secondary liability, existence/effect of notice-and-takedown procedures
  - self-regulatory approaches (eg, User-Generated Content Principles (10/07), EU Film Online Charter) are in their infancy
  - lack of harmonized international rules impedes development of legitimate digital commerce

- Implementing Free Trade Agreements (FTAs)
  - More than 300 FTAs worldwide concluded or under negotiation, similar but not identical IPR provisions
  - Trilaterals, bilaterals and harmonization talks
  - Provisions on DRM, notice-and-takedown, limitations/exceptions
Legal challenges: the proposed WIPO broadcast treaty

**Purpose:**
- to provide remedies against piracy of broadcast signals
- Would cover cable and satellite transmissions

**Issues:**
- what transmissions should be protected, and what rights granted?
- duration or term of protection?
- who should be protected (traditional broadcasters, cablecasters, webcasters?)
- protection of pre-broadcast signals
- how to include principles of access to information, cultural diversity, public domain
- TPM provisions (broadcast flag?)
Legal challenges: limitations & exceptions to copyright

- The Three-Step Test for Exceptions (Berne, TRIPS, WCT/WPPT)
  - Special cases
  - Do not conflict with normal exploitation
  - Do not prejudice legitimate interests of creator

- Proposal of Chile
  - Proposal on the Analysis of Exceptions and Limitations (SCCR/13/5, 2005)

- Define minimum exceptions at international level in three areas:
  - Educational uses
  - Libraries and archives
  - Handicapped persons
Legal challenges: limitations & exceptions to copyright

WIPO studies dealing with exceptions & limitations:

- Study on Limitations and Exceptions to Copyright and Related Rights in the Digital Environment (Ricketson, 2003)

- Study on Current Developments in the Field of Digital Rights Management (Cunard, Hill, Barlas, 2004)

- Automated Rights Management Systems and Copyright Limitations and Exceptions (Garnett, 2006)

- Study on Copyright Limitations and Exceptions for the Visually Impaired (Sullivan, 2007)
Political challenges: copyright is under scrutiny

- Horizontal alliances against expansion of rights
  - Among developing countries
  - Developing countries, NGOs representing civil society and user interests, and most recently, telcos/consumer electronics manufacturers (b’cast treaty negotiations)

- The “WIPO Development Agenda”
  - 14 countries + other developing and LD countries
  - Parallel and cross-cutting agendas (patents, TMs, copyright, WIPO governance and supervision)
  - 110+ proposals
  - 45 recommendations adopted by WIPO Assemblies September 28, 2007
Market challenges

• New means of digital content delivery and licensing
  – Legal digital download services: iTunes
  – DRM-free music (EMI)
  – User-generated content: YouTube, MySpace, Second Life
  – Growing variety of digital licenses
    • Offered by collecting societies
    • EC DG Competition, InfoSoc pushing multi-territorial licensing from single collecting society (“one-stop shop”)
  – Open licensing, eg Creative Commons: choice of royalty-free licensing models (200+) for growing variety of creators (ranging from ‘all rights reserved’ to public domain dedications)
Market challenges ...

- Rapid development of pervasive or enabling technologies
  - Peer-to-peer networks (P2P): Napster to Kazaa to BitTorrent
  - The Google phenomenon: search, digitization, publication (is this fair use outside the US?)
  - Net Neutrality debate

- Exponential growth in the number of Internet users, service providers, and information sources
  - broadband access, mobile telephones (3G), digital satellite radio and television (IPTV)

- Convergence of traditional content, media and communications providers and telcos
  - Google’s purchase of YouTube, News Corp purchase of MySpace, Mixi listed on Tokyo stock exchange, Warner Bros’ deal with BitTorrent
Market challenges ...

• Open source (OS) software
  – More than 55 different OS licenses, 3 main varieties: Free-for-all or academic licenses, keep-open licenses, share-alike licenses (eg GPL -- most popular)
  – Interplay between OSS and proprietary software
    • Growth of mixed platforms (OS + proprietary code)
    • Copyright and patent issues
    • The ‘viral effect’ of GPL
    • New issues under GPL v3
      – Limit application of DRMs to GPL-licensed code
      – Prevent assertion of software patents in relation to GPL-licensed code
Market challenges ...

• DRM
  - Interoperability
  - Relationship between DRM and exceptions (including fair use/dealing)
  - DRM and private-copying levies (EU)
  - TPMs ≠ RMI: emerging identifiers for content, parties, licensing terms (music, publishing, AV industries, Creative Commons)

• Standards and Interoperability
  - ICT standard setting bodies (SSOs like MPEG, ISO, W3C)
  - Interoperable rights management technologies (French ‘iPod’ legislation, 2005-6)
  - ‘Open standards’, ‘essential IPRs’ - IPR policies of SSOs
  - IPR licensing terms (RAND, FRAND, RF)
  - Competition issues, different approaches (US vs EU, eg Microsoft decision)
  - Trade dimension -- Chinese position in WTO/TBT Committee, Internet Governance Forum discussions in Rio (11/07)
Issues for WIPO copyright agenda

- Liability of Internet intermediaries

- Interoperability and standards for TPMs and RMI
  WIPO Seminar on Rights Management Information (17/09/07)

- Further work to improve protection of audiovisual performers

- Expanding choice of licensing models, business models and tools to support them

- Enhanced access to public domain material, orphan works

- Copyright guidance for cultural heritage institutions
Words of cautious optimism

- Copyright is not a business model, but a tool for digital content delivery, for commercial and non-commercial uses.
- Creators have more choice than ever before (to collaborate, put works in public domain, share content).
- More content is available now than ever before, a lot for free, more and more under new digital licenses.
- Creators’ choices should be based on full awareness of the consequences for both present and future opportunities.
More cautious optimism

- New limitations & exceptions should be consistent with the three-step test in Berne and TRIPS:
    - future opportunities for exercise of rights must be taken into account
    - emerging markets for licensed content delivery should be given a chance to develop

- TPMs/RMI: how to apply technologies sustainably, to provide interoperability, acceptable security and enforcement for rightsholders as well as delivery of content to satisfy users.
  - Content ID technologies becoming a focus for copyright policy-makers
  - Standards-setting becoming a major policy battleground
  - “Open” standards hold promise, but no guarantees, and not free!

- Law and technology are not sufficient, self- and co-regulatory approaches should be given policy support.
Thank you

http://www.wipo.int/copyright

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