

Country Watch Lists as Global Norm Setting Instruments on Copyright Flexibilities

by Jeremy Malcolm

In this paper I will introduce the Consumers International IP Watch List, a survey that examines the intellectual property (IP) laws and enforcement practices of a range of countries, from the perspective of the world's only global consumer advocacy body, Consumers International (CI).

This first IP Watch List focuses on copyright, because of all of the forms of monopoly right that are commonly described as intellectual property, it is copyright that has the most immediate impact on consumers' access to knowledge, and thereby on their educational, cultural and developmental opportunities.

The intent of this IP Watch List is to assess how well the copyright laws and enforcement policies of the surveyed countries support the interests of consumers, by allowing them fair access to the fruits of their society's culture and science. The results of the survey will illustrate that strong copyright laws, enforced rigidly, can seriously harm the interests of consumers.

This survey finds that what is more important than a *strong* copyright system, is a *fair* copyright system; one that balances the economic interests of rights holders with the compelling economic, social and cultural interests of consumers. As will be seen, such systems can be found in amongst countries that one might not expect.

A response to the USTR Special 301 Report

The original motivation behind the development of the Consumers International IP Watch List was to respond to the one-sided analysis of the state of global intellectual property protection embodied in a similar list: the Special 301 Report that is issued each year by the office of the United States Trade Representative (USTR).

The Special 301 Report is a global survey, conducted pursuant to section 182 of the Trade Act of 1974 of the United States, that takes the nature of a "report card," rating other countries on how closely to they adhere to the USTR's standards of protection and enforcement of intellectual property law. Those countries that the USTR considers to fail its standards most egregiously are highlighted on a "Priority Watch List".

The USTR's standards are not based on the treaty obligations of the countries concerned. For example, in 2008 Israel was condemned for failing to accede to the WIPO Internet treaties,¹ Thailand chastened for issuing compulsory licences for patented pharmaceuticals, and Mexico urged to criminalise camcording in movie theatres – none of which were legal obligations of those countries.

In fact ironically, the benchmark of intellectual property protection that the USTR urges upon other countries even exceeds that applicable in the United States, where consumers enjoy a fairly liberal policy of "fair use" of copyright materials, as well as constitutional guarantees that most of its trading partners lack.

In consequence of condemnation and pressure from the United States both through the Special 301 Report and through bilateral channels, consumers particularly in developing countries have suffered as those countries have been forced to abridge provisions of their domestic law that had been passed for consumers' benefit.

Why are flexibilities in copyright law important?

To take just one example, for two decades the law of the Philippines provided: "Whenever the price of any textbook or reference book duly prescribed by the curriculum ... has become so exorbitant as to be

¹That is, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

detrimental to the national interest ... such book or other written material may be reprinted by the government or by a printer," on terms which included the payment of royalties to the copyright owner.²

In 1997, this provision, which represented a balance between the national interest of the citizens of the Philippines and the economic interest of rights holders, was repealed. As even the Special 301 Report acknowledges, the result has not been to the benefit of rights holders. Rather, the copying of textbooks has simply been driven underground and become a "pirate" activity.

Thus it is often the case that by "strengthening" intellectual property law and enforcement, heedless of the interests of consumers or of national circumstances, consumers and rights holders alike suffer harm.

In contrast, the introduction of flexibilities into copyright law, including exceptions and limitations for personal use of copyright material, along with provisions that promote the development of the public domain, benefit not only consumers, but society as a whole. For example, a 2009 report from the Netherlands found that file sharing, partly in reliance on the personal use exception in Dutch law, has had strongly positive economic implications for welfare in the Netherlands over the short and long terms, substantially outweighing the loss of revenue by rights holders.³

Similarly, a 2006 study of the value of the public domain to the global economy to be extremely high – though impossible to quantify with present data and modelling tools.⁴

Copyright flexibilities, together with innovative non-commercial licensing models, can also spur the production of new content, driven by users rather than by multinational corporations, as found in the burgeoning digital ecosystem of mashups, remixes and user-generated content that is transforming cultural expression as we know it.

Challenging powerful rights holder interests

Why then has the USTR disregarded these developments in pushing through its Special 301 Report for uniformly strong global protection of the interests of rights holders, and ignoring provisions and innovations that could benefit consumers? Largely this can be attributed to the influence of lobby groups representing rights holders, who advocate in their written submissions to the USTR for levels of intellectual property protection that, if adopted worldwide, would severely damage consumer interests.⁵

This is a symptom of the larger problem that rights holders hold undue influence over US policy makers to the detriment of consumers. As just one recent example, in a snub to consumers who had been barred from the closed-door negotiations over a new Anti-Counterfeiting Trade Agreement (ACTA), the world's largest and richest industry lobby group,⁶ the United States Chamber of Commerce, was permitted to host an exclusive luncheon for delegates during the Washington DC round of negotiations in July 2008.

²Presidential Decree 1203 of 1977: see

http://www.lawphil.net/statutes/presdecs/pd1977/pd_1203_1977.html

³A. Huygen, P. Rutten, S. Huveneers, S. Limonard, J. Poort, J. Leenheer, K. Janssen, N. van Eijk, and N. Helberger. *Economic and Cultural Effects of File Sharing on Music, Film and Games*, 2009.

⁴R. Pollock. *The Value of the Public Domain*, 2006.

⁵Most notably the Pharmaceutical Research and Manufacturers of America (PhRMA) and International Intellectual Property Alliance (IIPA), whose submissions in 2008 ran to a total length of over 800 pages.

⁶During the decade 1998 to 2008 it expended over USD\$460 billion, more than twice as much as the second-ranked lobbyist, according to data from the Center for Responsive Politics (see <http://www.opensecrets.org/lobby/top.php?indexType=s>, last accessed 4 March 2009).

United States policy makers are not alone amongst developed countries in privileging the interests of rights holders over consumers. During 2008 negotiations at the World Intellectual Property Organization (WIPO) over the development of copyright flexibilities for the blind, France sought to foreclose further consideration of a proposal brought by the World Blind Union (WBU) for the introduction of uniform global copyright limitations and exceptions for the benefit of vision-impaired users.

Neither is the USTR Special 301 Report the only annual national survey of copyright laws and enforcement practices that betrays partiality to the interests of rights holders. Two private surveys, the Global Intellectual Property Index (GIPI)⁷ and the International Property Rights Index (IPRI),⁸ do the same. Thus it comes as no surprise that the three countries ranked lowest in the GIPI – China, Russia and India – also feature in the Priority Watch List of the Special 301 Report, and amongst the countries common to the GIPI and the IPRI, those same three are ranked lowest again.¹⁰

The 2009 Consumers International IP Watch List

It is in this context that Consumers International considers its IP Watch List as having a vital role in contributing a note of balance from a consumer perspective into global debates on intellectual property law reform and enforcement, which are currently dominated by powerful rights holder interests.

Consumers International denounces the notion propagated by the Special 301 Report and its ilk that anything less than the highest levels of copyright protection is to be associated with piracy and criminality. Rather, we contend that a balanced copyright regime in which the importance of copyright flexibilities and of the maintenance of a vibrant public domain are upheld, is the ideal to which all countries should strive.

In short, equity should not be confused for weakness. Quite the contrary, in fact; any country that can maintain a balanced copyright regime, against the lobbying of powerful multinational media and publishing interest groups, and the censure of other governments that have been captured by those groups, has demonstrated its strength and deserves to be held up as an example of global best practice. That is what Consumers International's IP Watch List seeks to do.

⁷Taylor Wessig. *Global Intellectual Property Index*, 2008.

⁸A. C. Dedigama. *International Property Rights Index 2009 Report*. Property Rights Alliance, Washington, DC, 2009.

⁹The USTR Priority Watch List does not include a strict ranking of countries, but China and Russia are listed first, with the other countries following in alphabetical order.

¹⁰Save that Mexico and Brazil are ranked below India – however they both also rank in the Special 301 Report, and the latter was included in the Priority Watch List until 2007.