

GLOBAL INFORMATION SOCIETY WATCH 2009

*Focus on access to online information and knowledge
– advancing human rights and democracy*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

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*Dedicated to A.K. Mahan - an activist who valued
intellectual rigour and concrete outcomes.*

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Intellectual property rights

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Introduction

The issues of access to information and intellectual property (IP) rights are fundamentally intertwined. A properly calibrated IP system is one of several factors that can facilitate access to information by protecting incentives to create and disseminate content while simultaneously safeguarding the human rights of freedom of expression, communication and cultural participation. Equilibrium in IP law, policy and practice is affected by a number of key issues and institutions.

This report examines two emerging trends in the global governance of IP that most seriously impact on access to information. These are the changing role of intermediaries in online copyright enforcement and the prospective harmonisation of minimum limitations and exceptions to copyright. Such developments have arguably supplanted digital rights management (DRM) systems as the most important current IP issues affecting access to information in 2009.

Intermediaries' changing role in online copyright enforcement

Around the end of the 20th century many countries were introducing legal reforms to clarify the obligations of intermediaries concerning copyright-infringing content on the internet. The most common approach was to immunise intermediaries that act passively in hosting or transmitting online materials; only if they become aware of alleged infringements, usually through notification from copyright holders, do active obligations ensue. Those obligations include most notably a requirement to remove or disable access to the allegedly infringing content. The United States' (US) Digital Millennium Copyright Act is a paradigmatic example of a "passive-reactive" immunity scheme for online service providers, though similar principles are embedded in many national laws in developed and developing countries around the globe.

Recent developments demonstrate a worldwide trend toward a more "active-preventative" role for internet and mobile communications intermediaries in copyright enforcement.¹ By far the most publicly discussed example is the French "three-strikes" law establishing HADOPI, a high-level authority for the diffusion and protection of works on the internet. A new government entity in France will have the power to order internet service providers to implement a graduated response

to allegations of copyright infringement made against their subscribers, beginning with stern warnings but escalating to termination of the accused persons' internet access.

This development has serious, disturbing implications for access to information. Indeed, France's *Conseil constitutionnel* censored the new law and held – based on the 1769 Declaration of the Rights of Man and of the Citizen – that only judges may order internet access denied to alleged infringers following due process of law.

Despite the recognition of access to the internet as a fundamental human right that cannot be completely disregarded in IP enforcement efforts, around the world we are witnessing increased pressure on internet intermediaries to stop their own subscribers and other internet users from infringing copyright. Legislative reforms similar to France's were enacted in South Korea, and very nearly passed in New Zealand as well.

And pressure is not only coming through newly created laws or administrative agencies empowered to potentially cut off alleged infringers' internet access. It is also reflected in judicial decisions from various jurisdictions and even in privately negotiated agreements between copyright holders and online intermediaries. In countries like the US, the United Kingdom and Ireland service providers have voluntarily agreed to more aggressively deter allegedly copyright-infringing activities.

Furthermore, it is not only traditional internet service providers that are playing a greater role in online copyright enforcement. In exchange for immunity from copyright liability for their users' activities, new content distributors like YouTube and DailyMotion, and social networking sites such as Facebook and MySpace, are settling for "best practices" that often require automated content fingerprinting and filtering. Those technologies may contribute to solving some copyright enforcement challenges, but are ill suited to address the nuances of flexibilities including fair use/dealing, or to protect access to the public domain.

Harmonising minimum limitations and exceptions

In the face of threats to freedom of expression and communication that would undermine the balance between IP protection and access to information, efforts are underway to harmonise minimum limitations and exceptions to copyright around the world. As international IP law stands now, only *maximum* limitations and exceptions are specified. This is done through a three-step test, which requires provisions to be limited to certain special cases that do not conflict with copyright holders' normal exploitation of works or unreasonably prejudice their legitimate expectations.

Harmonising *minimum* limitations and exceptions instead of just minimum standards of protection would be a remarkable reform to international IP law, policy and practice.

¹ See de Beer, J. and Clemmer, C.D. (2009) Global Trends in Online Copyright Enforcement: The Role of Internet Intermediaries, *Jurimetrics* 49 (4) (forthcoming), which explains in detail all of the trends described in this section.

Rights-based justifications for standardising protections can be just as compelling when it comes to protecting the right of access to information. And proponents of minimum protection standards have for a long time pointed to the benefits of standardisation, which ostensibly include greater predictability and more cross-border trade. If these justifications hold true for minimum standards of protection, they equally apply to establishing minimum limitations and exceptions. Without a harmonised baseline for limitations and exceptions, copyright holders might not know whether and how their content may be used without permission or payment of royalties. Likewise, copyright users cannot predict the scope of rights and obligations from one territory to another.

The current unstable situation adversely impacts individual consumers; students, teachers, libraries, archives and educational institutions; the sensory and other disabled persons; and of course innovative entrepreneurs and commercial entities experimenting with new kinds of business models. Imbalance compounded by uncertainty jeopardises the efficiency and effectiveness of the entire global system of copyright protection, to the detriment of all stakeholders.

Consequently, support has been growing for some kind of worldwide consensus on the issue of minimum limitations and exceptions to copyright protection. Serious momentum was generated following a report by two respected academics calling for a “soft law” approach to this problem, perhaps as a joint initiative between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).² Others are advocating in favour of formal treaties, in the specific context of education, for example, as a means of implementing WIPO’s Development Agenda.³ And it is now becoming clear that empirical evidence based on rigorous, large-scale research supports the idea of a more flexible system of copyright that takes into account the realities of everyday life in countries across Africa and, presumably, elsewhere in the world.⁴

At a 2008 meeting of WIPO’s copyright committee, Chile, joined by Brazil, Nicaragua and Uruguay, presented a proposal for further study and eventual reform of international and national laws regarding limitations and exceptions. That proposal struggled to gain acceptance from some segments

of the developed world, such as the US and European Union. But when the Standing Committee on Copyrights and Related Rights met again in May 2009, the issue of limitations and exceptions was still on the table.

The most recent reform proposal was more specific than previous ideas had been. In particular, the World Blind Union was working closely with several civil society organisations and delegates of WIPO member states to prepare draft text for a treaty on limitations and exceptions.⁵ Though this proposal was also not received enthusiastically by all member states, WIPO seems to be treating the issue seriously. A media release following the committee meeting explained that work on limitations and exceptions for the reading-impaired, as well as educational exemptions more broadly, would be expedited. Details will be dealt with during a November 2009 WIPO meeting; the lead up to that meeting will undoubtedly be a pivotal period for copyright stakeholders worldwide.

Implications and outcomes

Not long ago, concerns over the use of DRM systems and related prohibitions against picking digital locks preoccupied the minds of many international copyright law and policy observers. Some criticisms of DRM in general were misdirected; DRM systems are simply tools that might enable *or* restrict access to information. The Creative Commons, for example, is an access-enabling method of managing digital rights through privacy-respecting rights management information systems and consumer-friendly end-user licensing agreements. The problematic part of DRM strategies is the use of technological protection measures to unilaterally recalibrate copyright laws’ delicate balance between private and public rights. Fortunately, however, market forces seem to be moving away from technological protection measures as a tool to lock down content. These issues are still simmering, but their priority has been downgraded as more pressing matters have emerged in the short term.

As this report argues, there are two matters deserving the most urgent attention at the moment. One is the trend toward active-preventative copyright enforcement efforts by online intermediaries to either filter out allegedly infringing content from their networks or, worse, block alleged infringers from accessing information on the internet altogether. The other is a path-breaking development at WIPO, where for the first time it seems plausible that some agreement on copyright limitations and exceptions will be seriously discussed as a strategy to facilitate access to information. ■

2 Hugenholtz, B. and Okediji, R. (2008) *Conceiving an International Instrument on Limitations and Exceptions to Copyright*. www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf

3 Rens, A. (2009) *Implementing WIPO’s Development Agenda: Treaty Provisions on Minimum Exceptions and Limitations for Education*, in de Beer, J. (ed.) *Implementing the World Intellectual Property Organization’s Development Agenda*, WLUP-CIGI-IDRC. www.idrc.ca/en/ev-139311-201-1-DO_TOPIC.html

4 African Copyright and Access to Knowledge (2009) *Copyright & A2K in Africa: Research Findings on Limitations & Exceptions from an Eight-Country Study*. www.aca2k.org/attachments/180_ACA2K%20Briefing%20Paper%202%20-%20May%202009.pdf

5 Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union. www.wipo.int/meetings/en/doc_details.jsp?doc_id=122732

GLOBAL INFORMATION SOCIETY WATCH (GISWatch) 2009 is the third in a series of yearly reports critically covering the state of the information society *from the perspectives of civil society organisations across the world.*

GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels
- **Encouraging** critical debate
- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy.* It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

In addition, 48 country reports analyse the status of access to online information and knowledge in countries as diverse as the Democratic Republic of Congo, Mexico, Switzerland and Kazakhstan, while six regional overviews offer a bird's eye perspective on regional trends.

GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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2009 Report

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