

## The Subtle Inequalities of Copyright†

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(Received 25 October 2001)

The paper discusses in detail the copyright provisions in TRIPS Agreement, effects of technological advances on copyright, responsibility of copyright holders, and steps to be taken to help developing countries gain access to the world's knowledge and build up their own publishing industries.

Copyright is well entrenched in international publishing, and yet it faces significant challenges. On the surface, copyright has never been stronger. The concept is increasingly accepted worldwide, and even those Third World countries, such as India, that argued against the inequalities of the international copyright system in the 1960s have largely ceased their carping. Even China has joined the international copyright system. While piracy has not ended, it has gone underground in all but a few countries. Massive pressure from the United States and Britain has brought such former pirates as Korea, Taiwan, and Singapore into the fold. Perhaps most important, the concept of

copyright is almost universally accepted by governments and by those involved in the book trade worldwide.

Copyright has been strengthened by strong governmental pressure from the major publishing countries and from the legal systems in these countries. Copyright has been seen as much as a means of protecting trade advantages as it has as a basic concept of knowledge distribution. The highly industrialized countries have been concerned about the loss of 'knowledge products' of all kinds (of which books are only a very minor part) because these losses contribute to ever-growing negative trade balances.

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The fact that printed word, which is the concern of this article, has been lost in the campaign to protect profits on computer software, compact discs, films and other products is a problem for both publishers and readers, since books and journals present special circumstances that require attention. Further, the courts have been increasingly zealous in their protection of copyright and the prerogatives of the owners of knowledge products. For example, in the United States, the courts have narrowly construed copyright regulations in favor of publishers and against those who have claimed 'fair use' in reproducing materials for academic purposes. These rulings have significantly increased the power of copyright-owners.

### **GATT, World Trade Organization and Intellectual Property**

The negotiations over the trade-related aspects of intellectual property in the framework of GATT (General Agreement on Tariffs and Trade) has further entrenched copyright. Intellectual property-the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement-is a central part of WTO, and WTO enforcement arrangements now join those of the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. The products of the mind are considered as commercial property, to be bought and sold in the marketplace. Few see any difference between knowledge products and any other commodity. GATT enshrines the idea that those who bring knowledge products to the marketplace should be able to completely control them.

It is time to take a step back from rampant commercialism to examine the complex world of copyright and the distribution of knowledge. There is, in reality, a difference

between a Mickey Mouse watch, a Hollywoodfilm, or even a computer software program, on the one hand, and a scientific treatise, on the other. Textbooks, technical reports, and research volumes are subject to the same copyright regulations as a novel by James Clavell. Those who control the distribution of knowledge treat all intellectual property equally—and are perfectly happy to deny access to anyone who cannot pay. The legal structures set up to protect intellectual property benefit the owners. There is no consideration of the user. The attitude seems to be: no pay, no play.

But even in the marketplace of intellectual property, there was room for negotiation during the GATT deliberations. The French successfully argued that there should be limitations on the free flow of American cultural products to Europe because of a fear of inundation by Disney and Rambo. The French had influence, and a compromise was reached. There are, thus, some "non-market" restrictions allowed in GATT. But no such compromises were permitted for those countries that depend on knowledge products from the industrialized nations and cannot afford to pay the going rates for them. There are no provisions in place to ensure that developing countries can have access to books and other knowledge products.

As it stands, TRIPS Agreement is a blunt instrument, which will inevitably work to the disadvantage of poor nations in terms of access to knowledge. Modifications in the current straitjacket imposed by GATT and by the copyright treaties does not mean a rejection of free trade or the idea of a global market-based economy.

### Technological Challenges

Yet, all is not secure in this era of narrowly construed copyright. Perhaps the greatest challenge to traditional copyright is technology. Every new technological advance brings a flurry of litigation and efforts by copyright owners to limit access to new technologies until their rights can be fully protected. The most recent example of this was the fight over digital audio tape (DAT) technology. The widespread dissemination of DAT was held up for several years while the producers of DAT machines and the owners of copyright (mainly the recording companies) struggled over how to ensure that copyright owners would be protected. Photocopiers have posed a continuing challenge to copyright owners and, while the courts have consistently ruled in favor of the publishers, the battle lines are forever changing as new and more sophisticated reprographic technologies are introduced. Data networks are also a new area of contention for copyright holders. How can knowledge products be controlled in an era of instantaneous communication through computer-based networks?

Currently, the most perplexing issues relate to computer programs, computer-based communications networks such as the Internet, and related technological spin-offs. Owners, in this case software companies, data base operators and the like, are concerned that the ownership of such innovative technologies be clear, and that non-sanctioned use be prohibited and punished where it occurs. The TRIPS Agreement has been among the most debated topics in the GATT negotiations. While books and other traditional knowledge products are hardly at the frontier of technology, they have been swept up in the campaign to strengthen ownership.

### Recent Debates

It is significant that these battles are over technological innovations. The debate over copyright principles raged in the 1960s and 1970s over issues relating to the appropriateness of control over knowledge and what responsibilities the rich countries had to help build up the educational and scientific systems of the newly developing nations of the Third World. Few argued for the abolition of copyright but many felt that knowledge should be shared more freely and that the industrialized nations, in part because of their earlier colonial domination of the Third World, had special responsibility to assist in the process of development. Some charged the industrialized countries with purposely maintaining tight control over knowledge products in order to keep the Third World in a dependent relationship and to maximize profits. In the ideologically charged Cold War era, charges of neocolonialism were leveled against the major Western countries, and many argued that Western policies were aimed at continuing domination rather than assistance. UNESCO, through its advocacy of a 'new world information order,' weighed in on the side of the Third World critics, enraging Western governments and contributing to the withdrawal of the United States and Britain from the organization.

It was said, for example, that Western publishers preferred to export relatively small number of books to the Third World rather than grant reprint rights because more profits could be obtained from direct exports. Some claimed that the foreign aid programs of such countries as France, Britain and the United States were aimed at exporting books and ideas rather than at encouraging indigenous development in Third World countries.

The vociferousness of the debates has abated, but the issues remain important. Most realized that the issues were not mainly ideological in nature and are highly complex. India, one of the main critics of the traditional copyright system, found itself emerging as a major producer of books and, not wanting to harm its future export markets, shifted its posture on copyright issues. Most realized that anarchy in the knowledge business would serve no one's long-term interests and that a workable copyright system is necessary and international cooperation a good idea. With the slow winding down of the cold war, most realized the slogans could not change reality. Countries that stood outside the copyright system, including the Soviet Union and China, slowly joined it.

### **Patterns of Inequality**

Yet, it is important to realize that the international knowledge system is highly unequal, and it can be argued that those who are in control of the system—and specifically copyright arrangements—have a special responsibility to assist in the intellectual and educational development of the Third World. There is a kind of OPEC of knowledge in which a few rich nations and a small number of multinational publishers have a great deal of control over how and where books are published, the prices of printed materials, and the nature of international exchange of knowledge.<sup>1</sup> These same forces tend to dominate the new information and knowledge dissemination technologies. Because the knowledge infrastructures are located in these countries, there is a kind of monopoly that has been difficult to break.

And because knowledge is not a finite natural resource but is infinitely expandable, there is the possibility of more countries

becoming members of the cartel. There has, in fact, been relatively little expansion in the number of knowledge producing countries — and the price of entry into the cartel increases as the cost and complexity of knowledge production goes up.

Copyright, from its beginnings in England in the sixteenth century, has been a means of protecting the "haves"—of limiting access to books and information in order to maintain order and discipline in the trade—of creating a monopoly over knowledge. There are, of course, very good arguments in favor of copyright. These include the principle that those who create and disseminate knowledge and knowledge products should economically benefit from these creations and that the creator should maintain some basic control over the creation. Also inherent in the idea of copyright is that intellectual creativity should also benefit society—this is indeed the underpinning of copyright as expressed in the American Constitution.

### **The Responsibility of Copyright**

Along with power, and copyright bestows considerable power on the copyright holder, comes responsibility. For the most part, those who hold most of the world's copyrights and who also control the international copyright system have been largely concerned with power—with maintaining control over their copyrights and with maximizing their economic benefits. Copyright is seen in purely legal and economic terms. There is virtually no recognition that there are inherent non economic factors involved in copyright and that those who hold power now have a responsibility to assist those who do not have access to the world's knowledge.

Copyright, after all, is a moral and ideological concept as well as a legal and economic one. There is no recognition that the legacy of colonialism and the power of the multinationals has, to a significant extent, created the current highly unequal world knowledge system. It is, of course, much easier for the "haves" to cling to the economic and legal underpinnings of a system that has given them a virtual monopoly over the world's knowledge products than to recognize that we live in an interdependent world and that the Third World desperately needs access to knowledge and technology. In the current context, it is unlikely that those who need access to knowledge most will be able to obtain it "at current market rates" any time soon. What is needed now is affirmative action to ensure that books and other knowledge products are not kept from Third World nations because of the restrictions of the copyright system. Copyright holders must now spend as much time thinking about the needs of Third World readers as they do about maintaining market share. In the broader scheme of things, providing the assistance that is needed to the Third World will not cost very much. Indeed, in terms of copyright, what is needed is largely access to permissions, rights, and a very small amount of market share.

A necessary first step is increased consciousness of the complex issues relating to the world's knowledge system and the role of copyright in it and a recognition that a broader perspective is needed. A modest amount of economic sacrifice may also be required along with some inconvenience. Copyright must not be seen in isolation from issues of access to knowledge, the needs of Third World nations and the broad history of colonialism and exploitation. It is not productive to point fingers or assess blame for

past inequities. Rather, we must quickly move toward copyright arrangements that will maintain the copyright system while at the same time permit flexibility so that the needs of the "have nots" can be met.

The needs are indeed great—and they are not limited to the poor countries of the developing world. For example, Moscow's famed Lenin Library is no longer purchasing any scientific journals from the West because there is no allocation of 'hard currency' funds. Few, if any, other libraries or academic institutions in the former Soviet Union are able to obtain access to key books and journals in the current circumstances. The situation is even more desperate for many sub-Saharan African countries, where purchases of books and journals from abroad ceased several years ago because of lack of funds. Some countries lack the facilities to produce many kinds of books and must rely on supplies from abroad. These countries, and the number is depressingly long, are probably in more desperate need now than a decade ago. The end of conflicts in such countries as Cambodia, Laos, Uganda, Angola, Ethiopia, and others has permitted them to turn their attention to the rebuilding of educational and library systems—and there is a desperate need for books of all kinds as well as for the equipment and expertise to build up indigenous publishing capacity. Economic crisis throughout Africa has created special needs—exacerbated in some ways by the emergence of fledgling democratic regimes in some countries that must improve the lives of their citizens if they are to survive. Books are a small but highly visible way of making such improvements. Further, access to knowledge may help to build up a commitment to democratic ideals. Countries in the former Soviet Bloc, from Mongo-

lia and Vietnam to Czechoslovakia and Bulgaria, need speedy access to the world's knowledge, having been cut off from much of it for almost a half-century.

The specific needs vary greatly. In some cases, access to scientific journals and books at subsidized prices for a limited period would help greatly. In others, local publishers with limited markets need easy and inexpensive access to foreign books in order to translate them into the local language. In a different context, permission to reprint books from the industrialized countries in the original language is needed to serve an indigenous population literate in English or French but unable to pay the high cost of imported books. And for some countries, most of the elements of an indigenous publishing industry are missing and there is a need to build it up from scratch. Copyright may not be the key element in all of these circumstances, but it does play a role.

Responsible world citizenship with regard to copyright is unlikely to be extraordinarily costly. Countries and publishers that require special assistance on copyright issues are unlikely to be major customers in any case—markets tend to be small and purchasing power very limited. Yet, there will be some costs involved. Export sales may be modestly reduced and income from the sale of rights foregone or limited. There may also be some administrative costs for industrialized country publishers. But the long-term benefits might well outweigh the immediate costs and inconvenience. A self-sufficient book industry in a Third World country is likely to be a better partner, and in the long term a better customer as well, than would a weak and demoralized publishing community. Further, as the Indian case has shown, self-sufficient publishers tend to be supporters of copyright because they see adherence

to copyright in their best interest. It may be worth recalling that copyright compliance comes naturally with economic and social development. One of the most egregious violators of copyright in the nineteenth century was the United States, which felt, probably incorrectly, that it could build up its domestic publishing industry most effectively by freely reprinting works from abroad while protecting the rights of domestic authors. Once American publishing was well developed, the United States became a defender of copyright. Until the 1960s, the Soviet Union had a similar perspective—international copyright was violated as the country used knowledge from abroad for its own purposes. China has had a similar perspective up to the 1990s and has only recently joined the international copyright system. Nations must see copyright as in their best national interests before then become fully supportive of it.

### What Can be Done?

There are a number of steps that can be taken to help developing countries gain access to the world's knowledge and also build up their own indigenous publishing industries. None require a violation of the basic principles of copyright and, in the long run, will strengthen it because more countries will see it in their best interest to support copyright. There must be a recognition that all knowledge products are not the same, and that while it may be justified to insist on commercial terms for Nintendo games, some flexibility for scientific materials, textbooks and the like is appropriate. The owners of knowledge must modify their purely profit-oriented approach to certain segments of the knowledge industry. Permissiveness in copyright relations in the short run may yield more profits in the long run for owners.

For example, a publisher may obtain less money by licensing a book for a local edition in Africa or a translation in Asia than by exporting copies. In the long run, however, a viable domestic publishing industry and a literate public will buy ever increasing numbers of books.

The idea of compulsory licensing—providing to Third World countries the automatic right under some very limited circumstances to reprint or translate Western books with the payment of reduced fees—was pressed by developing countries and led to revisions of the Berne and the Universal Copyright Convention in 1971. However, the revised text introducing compulsory licensing is so complicated that in more than twenty-five years since its adoption it has hardly been applied. Compulsory licensing should be very simple, permitting Third World publishers quick access to relevant educational and scientific materials by permitting them to reprint or translate materials for educational and a few other uses.

The Third World publisher would be required to inform the copyright holder and provide some payment—often at below-market rates. Such an arrangement would remove much of the bureaucracy from the system and would also permit readers in developing countries to have access to knowledge from abroad fairly quickly. One of the common complaints from Third World publishers is that many Western publishers simply do not respond to requests for reprint or translation rights. Charging fees that are clearly beyond the ability of Third World publishers to pay is another common problem.

In the past decade, the copyright “powers” have used every means available to ensure strict compliance with both the spirit and the letter of international copyright treaties and

with national copyright laws. One of the most successful tactics used to ensure copyright compliance has been to link it to broader trade arrangements. American copyright holders, for example, have pressured their government to threaten countries who do not enforce copyright with the withdrawal of trade preferences. These threats had a role in convincing such major American trading partners to cease most pirating. Some other countries have narrowly avoided severe trade sanctions by the United States because of disputes relating to pirated software, CDs and related products. The TRIPS Agreement has further linked copyright to the world trade system.

While these efforts have yielded some results in terms of immediate compliance, it can be argued that copyright must be “sold” on its own merits, that it is as much a moral issue as a commercial one, and that making copyright hostage to international trade, an arena where developing nations have little leverage in any case, is in the long run detrimental to the emergence of a copyright system based on consensus and mutual understanding.

Publishers in the industrialized countries must take a long-term view of world publishing. This means their policies must permit offering inexpensive access to books and journals for reprinting and translation. There is a feeling in the Third World that these publishers often simply ignore the requests of their publishers and institutions because there is little money to be made and discussions often become complex and sometimes acrimonious. They must respond positively and quickly to requests and understand the problems faced by the publishers in the developing countries. Joint ventures or cooperative arrangements with indigenous publishers in the developing countries

may help both sides. The publishers from an industrialized country provide expertise, products, and sometimes capital. In return, access to markets are opened up. Such ventures must be on the basis of equality, and autonomy for Third World partners is important. There are many kinds of joint ventures, ranging from a major involvement to cooperation on specific projects. Many involve work together on issues relating to copyright.

The book-trade relationships between the industrialized nations and the Third World are unequal. Books are exported from industrialized nations to developing countries. Copyright permissions are requested by Third World publishers and are sometimes granted by counterparts in the industrialized countries. There is very little traffic in the other direction. It may be possible to significantly increase the import of books from developing countries and thus strengthen

Third World publishers significantly. It may also be possible for publishers from the industrialized countries to obtain rights to Third World books for publication and distribution in their countries. Because most of the world's books are published in the major industrialized countries, the unequal relationship will continue, but there may ways of ameliorating it to a modest extent. It is important to keep in mind that what is a modest transaction to a publisher in an industrialized country 'may be a significant development to a Third World firm.

### Conclusions

Copyright is, in a way, symbolic of the relations between the 'haves' and 'have-nots' in publishing. All the cards are in the hands of the publishers from the industrialized coun-

tries. They control the international copyright treaties, which were, after all, established by them and with their interests in mind. These publishers dominate the world book trade. The powerful multinational publishers reach into many countries. Governments in the industrialized nations have played the 'trade' card to ensure compliance with copyright and patent regulations. While the major beneficiaries have been software products, film companies and the like, book publishers have also benefited and have strongly supported these initiatives. Copyright is widely respected internationally and, at least for books, is more tightly enforced than has been the case in the past.

The time has come to recognize that the production of books and journals is more than a business, and that trade in knowledge and knowledge products is somehow different from commerce in automobiles or coconuts. Those who control knowledge distribution have a responsibility to ensure that knowledge is available throughout the world at a price that can be afforded by developing countries. I am not advocating overthrowing the copyright system, or even weakening it. I am arguing for a broader understanding of the responsibilities of publishers in a complex and unequal world. Such an understanding will, no doubt, require some rethinking of the relationships between the knowledge 'haves' and 'have-nots'. In an era of interdependence, this is not an altogether bad thing. It is likely to be controversial and perhaps unpopular. No one with power likes to share it. But if the immense challenges of Third World development are to be solved, publishers will have to play a modest role.