

THE WIPO JOURNAL:

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The Identity of Geographical Indications and Their Relation to Traditional Knowledge in Intellectual Property Law

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☞ Agriculture; Developing countries; Geographical indications; Trade marks; Traditional knowledge; World Trade Organisation

I. Introduction

Since their inclusion in the world's intellectual property (IP) regime under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), geographical indications (GIs) have held centre stage in multilateral, regional and bilateral negotiations. Although the multilateral negotiations concerning GIs under the Doha Development Round of Trade Negotiations (Doha Round) at the World Trade Organization (WTO) are currently at a standstill, questions on the protection of GIs loom large in the context of several other negotiations, such as the Canada-European Union Trade Agreement, the Trans-Pacific Partnership Agreement and a number of bilateral free trade agreements.

In the past, the issue of GIs protection has mainly been a subject of transatlantic debate between the United States and the European Union. In the negotiation process for the TRIPS Agreement, the European Communities recommended comprehensive protection for GIs through specific provisions in the Agreement.¹ The United States, however, opposed such protection as the European Communities proposed.² As a compromise, the final outcome of the negotiations provided for different levels of GIs protection for wines and spirits and for all other agricultural products. Differences in the scope and nature of GIs protection continue to generate intense arguments between the European Union and the United States in multilateral, regional and bilateral negotiations.³

Recently, however, GIs have also attracted significant attention from countries such as India and Brazil, as well as from negotiating blocs such as the African, Caribbean and Pacific Group of States (ACP).⁴ Despite their opposition to the increasingly expansive reach of IP law in international negotiations, these parties have generally supported increasing the current scope of GIs protection in international law to include agricultural products other than wines and spirits. Such an approach is motivated by the desire of developing countries to extend GIs protection to traditional knowledge (TK)-related agricultural resources from indigenous peoples and local communities (ILCs) in their territories. The expansion of GIs protection to products other than wines and spirits necessitates the recognition of GIs as an IP tool, distinct from

¹ Sergio Escudero, "International Protection of Geographical Indications and Developing Countries" (2001) South Centre Trade Working Paper No.10, p.23.

² Christine Haight Farley, "Conflicts between US Law and International Treaties Concerning Geographical Indications" (2000) 22 Whittier L. Rev. 73, 75.

³ Josef Drexl, "Intellectual Property and Implementation of Recent Bilateral Trade Agreements in the EU" in Josef Drexl, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Heidelberg: Springer, 2014).

⁴ Trade Negotiations Committee, "Draft Modalities for TRIPS Related Issues: Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group", July 19, 2008, TN/C/W/52.

trademarks, in a manner that allows for stricter protection at the national level through either new, independent GIs law or amendments to existing trademark law.

Like its earlier opposition to the EU proposal, the United States and its negotiating partners such as Canada, Australia and Argentina oppose expansive protection of GIs. These countries do not support strong GIs protection to any greater degree than what their existing trademark regime can provide. They consider GIs part of their existing trademark law and oppose the recognition of GIs as a separate legal concept. At the centre of the two opposing positions therefore lies the question of whether GIs are a category of IP that is distinct from trademark law.

This article seeks to illustrate the identity of GIs in the IP framework as a category distinct from trademarks, their closest member of the IP family. Such an understanding is necessary if GIs are to be conceptualised as proprietary IP tools whose scope of protection extends to agricultural products other than wines and spirits, particularly those related to TK as anticipated by developing countries. This article further explores the scope of protection that GIs offer by assessing their extension to agricultural products other than wines and spirits. It focuses particularly on the extent to which the definitional features of GIs, as currently recognised under the TRIPS Agreement, accommodate TK-related agricultural products from mostly developing countries.

Section II lays out the nature of GIs protection under the TRIPS Agreement. Section III ventures into the definitional puzzles surrounding the concept of GIs from terminological, historical and comparative perspectives. The discussion in section IV draws the conceptual bounds of GIs by focusing on their distinguishing features from trademarks. Section V attempts to ground GIs as an autonomous IP law suited to knowledge systems in the traditional and communal setting of agricultural production. In this respect, the discussion elaborates on the contents of “quality, reputation or other characteristic” of a product as recognised as subject matter for GIs protection.⁵ As section VI indicates, the contents of the “quality, reputation or other characteristic” of a GI-relevant product forms an important subject matter of protection whose scope goes beyond protection represented by the concepts of indications of source and appellations of origin. This discussion also shows that the nature and scope of protection that GIs offer, as currently recognised under the TRIPS Agreement, is markedly distinct from what trademark law can provide. In arguing for the recognition of GIs as autonomous IP instruments, this article makes a distinction between GIs as a legal concept and their legal means of protection at the national level.

II. Legal protection of GIs in the World Trade Organization

In the negotiation process for the TRIPS Agreement, the European Communities recommended comprehensive protection for GIs through specific provisions in the TRIPS Agreement.⁶ According to the EC proposal, this protection applies to all agricultural products, including products of the vine that are accorded protection in the country of origin. Despite its “strongly pro-protectionist, pro-property position” in the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round), the United States opposed comprehensive protection of GIs in the manner the European Communities proposed.⁷ The United States, instead, proposed to protect only GIs “that certify regional origin by providing for their registration as certification or collective marks [through the trademark regime and thus without a need for specific GIs regime]”.⁸ Since such protection of GIs can be achieved under trademark law, the United States opposed the inclusion of provisions in the TRIPS Agreement specifically for the protection of GIs.⁹

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement).

⁶ Escudero, “International Protection of Geographical Indications and Developing Countries” (2001) South Centre Trade Working Paper No.10, p.23.

⁷ Farley, “Conflicts between US Law and International Treaties Concerning Geographical Indications” (2000) 22 Whittier L. Rev. 73, 75.

⁸ GATT Secretariat, “Communication from the United States”, May 11, 1990, MTN.GNG/NG11/W/70, art.18 (“[C]ontracting parties shall protect geographic indications that certify regional origin by providing for their registration as certification or collective marks.”).

⁹ Albrecht Conrad, “The Protection of Geographical Indications in the TRIPS Agreement” (1996) 86 Trademark Rep. 11, 29.

The TRIPS Agreement presented a compromise between the US and EU proposals. As such, the Agreement provides two levels of GIs protection for different agricultural products: a basic level of protection for all agricultural products and a higher level of protection for wines and spirits.¹⁰ Article 22 provides for the basic level of GIs protection for all agricultural products, requiring WTO members to provide:

“the legal means for interested parties to prevent:

- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of the origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention”

In short, the basic level of protection requires WTO members to declare illegal the use of a GI for any product if such use misleads the public or constitutes an act of unfair competition. The requirement under art.22 makes it incumbent upon aggrieved parties to prove not only that the use of a GI is not correct, but also that such a use may mislead the public or constitute unfair competition. The protection against unfair or misleading use of GIs means that the level of protection in a particular case may vary in accordance with the domestic legal system of a Member State. When GIs are protected under trademark law, the use of a designation identical or similar to a GI may be possible in a number of scenarios.

For example, the use of a designation similar to another GI may be allowed because the indication has become or has always been a generic term in another country.¹¹ Such a use may also be possible in cases where a designation resembling a GI is protected as a trademark and perceived by consumers as such.¹² In this case, the designation may be considered indicative of a particular manufacturer and not the geographical origin of the product. In addition, a designation similar to a protected GI may be sufficiently different from the GI to the extent that consumers are not misled as to the origin of the product.¹³ The use of a designation or indication that is similar to a protected GI might not be prohibited under the three circumstances because such a use may not mislead consumers or constitute unfair competition.

Under art.23, however, the TRIPS Agreement provides a higher level of protection to GIs for wines and spirits. Wines and spirits enjoy an absolute degree of exclusivity, which prevents the use of designations similar or identical to a GI by others in all circumstances. Proof on the degree or existence of consumer confusion or unfair competition is not required. The absolute degree of protection for wines and spirits prohibits the use of a GI or its translated form even with such measures as the use of clear indications of the true geographical origin of the good in question or the use of the GI sign or term “accompanied by expressions such as ‘kind’, ‘type’, ‘style,’ ‘imitation’ or the like”.¹⁴ In addition, the Agreement provides for the refusal or invalidation of trademarks for wines or spirits that contain GIs that identify other wines or spirits.¹⁵

The differential level of protection between GIs for wines or spirits and those for other products, adopted as a compromise between the United States and the European Union, reflects a difference in the

¹⁰ Farley, “Conflicts between US Law and International Treaties Concerning Geographical Indications” (2000) 22 Whittier L. Rev. 73, 77.

¹¹ For discussion of generic use of GIs, see Dev Saif Gangjee, “Say Cheese! A Sharper Image of Generic Use through the Lens of Feta” (2007) 29 Eur. Intell. Prop. Rev. 172.

¹² See the WTO dispute between the United States and the European Union in *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (DS174, 290).

¹³ This occurs, for example, in the case of GI-protected South African port wine. Competitors in other countries create a new association to their products in consumers’ mind with such descriptions as a “port style wine” produced in the United States, Canada and Australia. William A. Kerr, “Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development” (2006) 7 Estey Centre J. Int’l L. & Trade Pol’y 1, 10.

¹⁴ TRIPS Agreement art.23(1).

¹⁵ TRIPS Agreement art.23(2).

conceptualisation of GIs as proprietary IP instruments and as just an aspect of trademark.¹⁶ The absolute degree of protection offered to wines and spirits recognises the EU conception of GIs as independent proprietary tools, while the basic level of protection reflects the US conception of GIs as just part of its trademark law. With a view to consider GIs as tools for protecting TK, developing countries have joined the European Union's request to extend GIs protection for wines and spirits that the Agreement provides to all other agricultural products.¹⁷ However, the current level of protection afforded to wines and spirits does not address the interests of developing countries that sought for a higher level of GIs protection for their distinctive agricultural products, most of which are TK-based.¹⁸ Thus, differences in the understanding of GIs determine the scope and nature of protection under a particular GIs framework. To acquire a clearer understanding of GIs in the current IP landscape, the next section discusses the definitional framework for better conceptualisation of GIs.

III. Geographical indications defined

The term “geographical indications” is relatively new. In its ordinary use, the term refers to signs that are deployed in connection with goods to indicate their geographical origin.¹⁹ Typical examples of well-known GIs include Roquefort cheese, Idaho potatoes, Champagne and Port wine. Widely known GI-relevant products from developing countries include Basmati rice, Aranyik knives, Darjeeling tea and Pisco liquor.

Beyond an illustrative listing of relevant products, it seems difficult to find an all-inclusive definition for GIs. The use of GIs in the literature reflects differences in the understanding of their nature and in the methods of their protection. Various terms are used to refer to GIs, whereas the use of GIs itself tends to be ubiquitous. Reflecting on the diverse use of terms in relation to GIs, a WIPO study concludes that

“there is probably no category of intellectual property law where there exists such a variety of concepts of protection as in the field of geographical indications”.²⁰

However, a clearer understanding of GIs can be established through a study of some of these terms, along with a clarification of the historical evolution of GIs in the IP rights (IPRs) arena. The latter involves a description of the features and the nature of GIs, as compared to the conventional forms of IPRs, mainly trademarks.

In regard to terminology, it is worthwhile to discuss two interrelated concepts recognised in the earliest international treaties: “appellations of origin” (AO) and “indications of source”.²¹ The Paris Convention for the Protection of Industrial Property, the first international IP treaty, uses the term “appellations of origin” without providing a formal definition. Article 2 of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, however, defines AO as

¹⁶ As previously noted, the United States opposed the inclusion of specific GIs provisions in the TRIPS Agreement and opted for a model that mimics its own trademark-based protection. The European Communities, on the other hand, proposed the inclusion of broad GIs provisions that accommodate the EC GIs system adopted in 1992. Conrad, “The Protection of Geographical Indications in the TRIPS Agreement” (1996) 86 *Trademark Rep.* 11, 29.

¹⁷ Trade Negotiations Committee, “Draft Modalities for TRIPS Related Issues”, 2008.

¹⁸ See the position of developing countries in the Uruguay Round regarding GIs in GATT Secretariat, “Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay” art.9, May 14, 1990, MTN.GNG/NG11/W/71; Ernesto D. Aracama-Zorraquin, “The Protection of Geographic Indications in South America” in Herman Cohen Jehoram (ed.), *Protection of Geographic Denominations of Goods and Services* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980).

¹⁹ David Vivas Eugui and Christoph Spennemann, “The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements” in Meir Perez Pugatch (ed.), *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Cheltenham: Edward Elgar Publishing, 2006), p.305.

²⁰ WIPO, *Intellectual Property Handbook: Policy, Law and Use*, 2nd edn (Geneva, 2004), p.120.

²¹ The Paris Convention for the Protection of Industrial Property first introduced the term “appellations of origin”: see Paris Convention for the Protection of Industrial Property 1883 (Stockholm Act 1967) (Paris Convention).

“geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors”.²²

Article 2(2) of the Lisbon Agreement also defines “country of origin” as

“the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation”.

Thus, an AO is always a name designating a country, region or locality. In addition, goods bearing the name should exhibit quality or characteristics attributable to the designated area of geographical origin, such as Champagne wine and Roquefort Cheese, produced in the French districts of Champagne and Roquefort (known for their sparkling and nutritive qualities, respectively).

“Indications of source” are mostly utilised to comply with customs regulations. They are covered under the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods.²³ Although the Agreement provides no definition, art.1(1) clarifies the notion:

“[A]ll goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.”

The language used in this provision illustrates, first, a clear emphasis on the link between the “indication” and the “geographical origin” of the product, which may be a certain country or a place in a country.²⁴ Secondly, the indication in “indications of source” need not be a geographical name. Words or phrases that directly indicate geographical origin—or phrases, symbols or iconic emblems indirectly associated with the area of geographical origin—may constitute an indication of source. Thirdly, unlike AO, an indication of source need not represent a particular distinctive or renowned quality associated with the product’s origin.²⁵ Therefore, indications of source simply designate the geographical place of origin of a product.²⁶

The TRIPS Agreement is the first to make use of the term “geographical indications” in a binding treaty.²⁷ Article 22.1 of the Agreement provides the most extensive definition of GIs. It states that for its purpose, GIs are

“indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”.²⁸

This definition mimics the one WIPO offered in earlier draft treaties, as it encompasses pre-existing notions of indications of source and AO.²⁹

²² Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration 1958 (Lisbon Agreement).

²³ Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods 1891 (Lisbon Act 1958), art.1(1).

²⁴ Dwijen Rangnekar, “Geographical Indications: A Review of Proposals at the TRIPS Council” (2003) UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 4, p.3.

²⁵ The term “indications of source”, therefore, simply refers to signs or expressions that link a product to “a country, a region or a specific place” as exemplified by most commonly used labels, such as “Made in Germany” or “Imported from Japan”: see Lori E. Simon, “Appellations of Origins: The Continuing Controversy” (1983) 5 Nw. J. Int’l L. & Bus. 132; Paris Convention art.10; WIPO, *Model Law for Developing Countries on Appellations of Origin and Indications of Source* (Geneva, 1975).

²⁶ WIPO defines indications of source as “any name, designation, sign or other indication which refers to a given country or to a place located therein, which has the effect of conveying the notion that the goods bearing the indication originate in that country or place”. WIPO, *Introduction to Intellectual Property: Theory and Practice* (Geneva, 1997), para.18.145.

²⁷ The TRIPS Agreement is the first multilateral text to deal with GIs in a groundbreaking manner. Daniel J. Gervais, “The TRIPS Agreement: Interpretation and Implementation” (1999) 21 Eur. Intell. Prop. Rev. 156, 158–159.

²⁸ TRIPS Agreement art.22(1).

²⁹ The proposal for the Revision of the Paris Convention under the WIPO framework adopted the broader terminology of “geographical indications” for the first time. Later, WIPO established the Committee of Experts on the International Protection of Geographical Indications in the hope of drafting

IV. Are geographical indications intellectual property rights?

The inclusion of GIs in the TRIPS Agreement raises the question of whether GIs are part of the conventional IP regime. As a primary international agreement setting out minimum standards for “trade-related” IPRs, the TRIPS Agreement declares that IPRs are private rights.³⁰ In its “general provisions and basic principles”, the TRIPS Agreement also confirms that the term “intellectual property” refers to all categories of IP.³¹ Given that s.3 of the Agreement addresses GIs, they are ipso facto considered part of IPRs.³² Therefore, the TRIPS Agreement considers GIs private property rights in the same way as other IPRs.³³

In spite of the TRIPS Agreement’s categorisation of GIs as “private rights”, GIs seem to be a poor fit with conventional private property rights for a number of reasons. Consider, for example, the distinction between GIs and trademarks, a category of conventional IPRs that are most similar to GIs in functionality.³⁴ Trademarks primarily identify individual commercial actors that offer goods and services on the market.³⁵ Due to the primary recognition of individual persons as rights holders, trademarks bear the hallmarks of IPRs as private property.³⁶

On the other hand, the “substance of the concept” of GIs is that they are

“used to demonstrate a link between the origin of the product to which it is applied and a given quality, reputation or other characteristic”.³⁷

In this respect, GIs mainly designate products originating from places, towns, regions or countries, instead of from specific private individuals. The place-based nature of GIs rights allows ILCs to establish collective rights over traditional resources in a defined geographical area without the need to identify particular rights holders. The amenability of GIs to the tradition of collective production and collective decision-making is an important factor that does not allow for their categorisation as private property rights.

Secondly, rights holders do not own GIs in the same context as trademarks. In GIs protection, “ownership” mainly relates to protection based on a spatial tie that allows for the exercise of traditional systems and cultural practice in a collective and participatory process in a geographical area.³⁸ In trademarks and most other IPRs, however, “protection” means enforcing private and exclusive economic control in order to prevent others from using or reproducing the mark in relation to products.³⁹ The protection of GIs

a treaty for GIs protection that is acceptable to most WIPO members: see WIPO, “Basic Proposals (Supplement to Document PR/DC/3)”, art.10, August 30, 1979, PR/DC/4.

³⁰ The preamble to the TRIPS Agreement emphasises that “intellectual property rights are private rights” available to legal persons, implying that such rights are generally owned by individuals or corporations, and not by communities, states, or nations: see Xavier Seuba, “Human Rights and Intellectual Property Rights” in Carlos M. Correa and Abdulqawi A. Yusuf, *Intellectual Property and International Trade: The TRIPS Agreement*, 2nd edn (London: Kluwer Law International, 2008), p.394.

³¹ TRIPS Agreement art.1(2) (“For the purposes of this Agreement, the term ‘intellectual property’ refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.”).

³² TRIPS Agreement arts 22–24.

³³ It is notable that the art.1(2) of the TRIPS Agreement qualifies its general statement on the private nature of IPRs as being “for the purposes of this Agreement”.

³⁴ Burkhardt Goebel, “Geographical Indications and Trademarks: The Road from Doha” (2003) 93 *Trademark Rep.* 964, 967.

³⁵ There are circumstances in which trademarks may be used to identify a geographical area of production of the products to which they are applied. However, the use of geographical names as trademarks occurs in exceptional circumstances, whereby the name has acquired a “secondary meaning”. Dev Gangjee, “Quibbling Siblings: Conflicts between Trade Marks and GIs” (2007) 82 *Chi.-Kent L. Rev.* 1253, 1259–1260.

³⁶ This feature of trademarks does not change even in circumstances of collective and certification marks because, in both cases, rights holders are necessarily required to form a juridical person. In certification marks, the rights holder is a collective organisation, which certifies that individual traders that use the mark meet specified standards. In collective marks, the rights holder is usually an association or a cooperative, which owns the mark on behalf of its members. In both cases, ownership of the marks or indications is attached to individuals that must be incorporated to form a legal person. Daniel J. Gervais, “The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New” (2002) 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929, 953; cf. Elisabeth Barham, *2004 Annual WTO Public Symposium: ORIGIN Round Table on Geographical Indications Localization within Globalisation: Better Protecting Geographical Indications to Favour Sustainable Development*, May 27, 2004.

³⁷ WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), “The Definition of Geographical Indications”, October 1, 2002, SCT/9/4, para.3.

³⁸ SCT, “The Definition of Geographical Indications”, 2002 (discussing the collective dimension of GIs).

³⁹ For discussion of the common characteristics of the rights known as IPRs, see Gervais, “The Internationalization of Intellectual Property” (2002) 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929, 953. In light of the characterisation of IPRs as private rights, it is important to note that this article

does not necessarily exclude other persons or groups from the use of GIs. Rather, all producers in the area to which the GI refer have the right to use the indication for products that originate from the area (subject to relevant standards of production).⁴⁰ Therefore, “property” in the context of GIs is construed in a strict sense of “rights to something rather than to the thing that is ‘owned’” (and thus always exclusionary, in a private property context).⁴¹

Thirdly, GIs differ from trademarks and other conventional IPRs in that they are not freely transferable.⁴² The non-transferability of GIs is a fundamentally distinguishing feature because the justification for most forms of conventional IPRs lies in the subject matter being freely transferable with minimum transaction costs.⁴³ As opposed to most IPRs, GIs are not transferable through assignment, mortgage or licensing, even if similar goods are manufactured outside the area that the GI designates.⁴⁴

As the above discussion shows, GIs lack the defining attributes of most IPRs. In addition, GIs have unique features that distinguish them from the conventional forms of IPRs. In their evolution in national jurisdictions, GIs have historically been considered a special form of IP that have relevance to public policy objectives in agricultural development.⁴⁵ GIs are conceptualised as “publicly-oriented” rights that have particular relevance for preserving cultural heritage and conserving agricultural systems for multiple benefits.⁴⁶

As widely recognised in most European countries, mainly France, Spain and Portugal, the “public property” nature of GIs relates to their use for protecting the collective interest of tradition-based agricultural producers, preserving cultural heritage and conserving agricultural systems for multiple benefits.⁴⁷ On

makes a technical distinction between the terms IP and IPRs. IPR is a bundle of legal rights recognised for creations and innovations that receive a measure of legal protection. IPRs may therefore refer to only aspects of knowledge that fulfil the requirements of existing IP laws—including, in the context of this article, the TRIPS Agreement’s description of IPRs as “private rights” that have individuals as rights holders. In general, IP can be considered as referring to “anything coming from the working of the human brain”, irrespective of the identity of the knowledge holder. In clarifying IP as a legal concept in a comment on WIPO’s fact-finding missions, the Future Harvest Centres, which were supported by the Consultative Group on International Agricultural Research (CGIAR), remark that “IP is a set of tools, a means by which we attempt to achieve certain objectives”. *WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (Geneva, 2001), p.209. The Future Harvest Centres identify societal, environmental and cultural objectives that may be achieved through an IP system for protecting TK. Nicola Lucchi, “Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection, Technological Measures, and New Business Models under EU and US Law” (2005) 53 *Buff. L. Rev.* 1111, fn.4; Ian J. Lloyd, *Information Technology Law*, 4th edn (Oxford: Oxford University Press, 2004), p.282.

⁴⁰ Goebel, “Geographical Indications and Trademarks” (2003) 93 *Trademark Rep.* 964.

⁴¹ Darrell Addison Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), p.60.

⁴² Tunisia L. Staten, “Geographical Indications Protection under the TRIPS Agreement: Uniformity Not Extension” (2005) 87 *J. Pat. & Trademark Off. Soc’y* 221.

⁴³ William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard University Press, 2003), p.317; William M. Landes and Richard A. Posner, “Trademark Law: An Economic Perspective” (1987) 30 *J.L. & Econ.* 265, 281.

⁴⁴ Irene Calboli, “Expanding the Protection of Geographical Indications of Origin under TRIPS: ‘Old’ Debate or ‘New’ Opportunity?” (2006) 10 *Marq. Intell. Prop. L. Rev.* 181, 187.

⁴⁵ A study by the International Association for the Protection of Intellectual Property (AIPPI) reveals that “a number of Group Reports (Belgium, Brazil, France, Latvia, Luxembourg, Portugal, Russia, Slovenia, Spain, Thailand) note that a GI is best seen as a public good or a collective right”. AIPPI Working Committee, “Summary Report on Question Q191: Relationship between Trademarks and Geographical Indications”, p.3, available at: <https://www.aippi.org/download/committees/191/SR191English.pdf> [Accessed March 27, 2014]. The Slovenian Group speaks of a collective property right, and the French Group a sui generis right. A number of Groups (Belgium, Bulgaria, Croatia, Germany, Luxembourg, Malaysia, New Zealand, Norway, Russia, Spain, Sweden, Switzerland and the United Kingdom) point out that anyone may use a GI so long as the goods in respect of which the GI is used meet the specific geographic and quality requirements set forth by the law. The Group Reports from Mexico, Peru and Venezuela note that the GIs right belongs to the state and the state may authorise the use of such a right.

⁴⁶ Daniele Giovannucci, Tim Josling, William Kerr, Bernard O’Connor and May T. Yeung, *Guide to Geographical Indications: Linking Products and Their Origins* (Geneva: International Trade Centre, 2009), pp.15–16, 20, 36; FAO and SINGER-GI, *Linking People, Places and Products: A Guide for Promoting Quality Linked to Geographical Origin and Sustainable Geographical Indications*, 2nd edn (Rome, 2009–2010), pp.185–186. For opposing views on the public aspect of GIs, see Jim Chen, “A Sober Second Look at Appellations of Origin: How the United States Will Crash France’s Wine and Cheese Party” (1996) 5 *Minn. J. Global Trade* 29; Amy P. Cotton, “123 Years at the Negotiating Table and Still No Dessert? The Case in Support of TRIPS Geographical Indication Protections” (2007) 82 *Chi.-Kent L. Rev.* 1295; Antoine Vialard, “Regulating Quality Wines in European and French Law” (1999) 19 *N. Ill. U. L. Rev.* 235, 243 (“[The French AOs system is] a legal governmental institution consisting of a distinctive, recognized symbol, controlled and protected by laws in the public interest. This distinctive symbol is inalienable and indefeasible from the land. It defines precise geographic areas for production as well as quality factors tied to those areas, which are under state control.”); Louis Lorvellec, “You’ve Got to Fight for Your Right to Party: A Response to Professor Jim Chen” (1996) 5 *Minn. J. Global Trade* 65, 69 (“[AOs] can never be privately owned, and this is where [AOs] law differs from intellectual property law”).

⁴⁷ Bernard O’Connor, *The Law of Geographical Indications* (Folkestone: CMP Publishing, 2004), p.311; Lisa P. Lukose, “Rationale and Prospects of the Protection of Geographical Indication: An Inquiry” (2007) 12 *J. Intell. Prop. Rights* 212, 212–223.

these grounds, public authorities play active role in efforts to enforce and defend GIs rights, beyond their traditional role of setting up legislative, regulatory and institutional frameworks.⁴⁸

The “public property” nature of GIs is reiterated in a survey of national laws undertaken by the International Association for the Protection of Intellectual Property (AIPPI).⁴⁹ The majority of countries that participated in this study confirmed that GIs are not generally associated with private ownership.⁵⁰ The “public property” nature of GIs seems to be recognised in the United States as well, at least as far as domestic GIs for wines are concerned.⁵¹ In view of the foregoing discussion, the categorisation of GIs as private property rights seems to reflect the disagreement generated during the negotiation for the inclusion of GIs in the TRIPS Agreement.⁵²

Despite their inclusion as a category of IP in the TRIPS Agreement, some express doubts regarding the status of GIs as a form of IP.⁵³ In the absence of authoritative definitions in international treaties for what constitutes IP, the involvement of “intellectual input” is a common denominator in a list of the subject matters protected by IP law.⁵⁴ As such, whether GIs are a form of IP is often determined based on the question of whether human factors of production (i.e. skills and knowledge in the process of production) contribute to the “given quality, reputation, or other characteristic” of a product that is the subject matter of GIs protection.⁵⁵ It is sometimes argued that the subject matters of GIs, TK-related resources in most cases, lack the “intellectual process” which is a prerequisite for IP protection.⁵⁶ Focusing on the geographic aspect of GIs, some believe that GIs do not accommodate “human innovation” in the making of relevant products to justify the recognition of GIs as a form of IP.⁵⁷ Therefore, it is pertinent to examine the “knowledge” element of the GI-relevant products that serve as “intellectual inputs” in the protection of IP in general and GIs in particular.

V. The “knowledge” component in geographical indications

The attraction to GIs as likely candidates to protect TK-related resources arises from the definitional aspects of GIs that accommodate the recognition of human input in their scope of protection. A fundamental

⁴⁸ See discussion of the role of public agencies in the protection of GIs: FAO, “Creating Conditions for the Development of GIs: The Role of Public Policies”, available at: <http://www.fao.org/docrep/012/i1057e/i1057e07.pdf> [Accessed March 27, 2014].

⁴⁹ AIPPI Working Committee, “Summary Report on Question Q191”.

⁵⁰ The summary of responses from the study indicates that “the majority of Group Reports (Australia, Belgium, Brazil, Estonia, Germany, Latvia, Luxembourg, Malaysia, Peru, Portugal, Republic of Korea, Singapore, Switzerland, and UK) note that the registration of a GI does not confer a property right [and that] there is generally no individual ‘proprietor’ or ‘right holder’”. AIPPI Working Committee, “Summary Report on Question Q191”, p.3.

⁵¹ In *Bronco Wine Co v Jolly*, the Court of Appeals of California considered whether GIs for US wines with the brand names “Napa Ridge”, “Rutherford Vintners” and “Napa Creek Winery” are private property for the purposes of the American takings jurisprudence. In dismissing Bronco Wine’s claim that the state’s prohibition of the use of the brand names with the word “Napa” unless at least 75 per cent of the grapes used to make the wine are from Napa County deprived the company of a proprietary interest without compensation, the court stated that the labels are highly regulated by the state and possessed only a part of the traditional hallmarks of private property. 29 Cal. Rptr. 3d 462, 493-496 (Ct. App. 2005).

⁵² In the negotiation process for the TRIPS Agreement, the United States prepared a text that did not include specific provisions for GIs, arguing that the Agreement’s trademark provisions already provide sufficient and necessary protection for GIs. However, the European Communities prepared a text that includes a section specifically devoted to GIs that reflects its regional legal framework for GIs in sui generis form. The Dunkel Draft, aimed at concluding the Uruguay Round, introduced “a take it or leave it final draft of the TRIPS Agreement” as a compromise between the two approaches. While recognising the US position, which treats GIs, like trademarks, as private rights, the Dunkel Draft specifically addressed GIs in part II, section 3. Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3rd edn (London: Sweet & Maxwell, 2008), p.293; Peter-Tobias Stoll, Jan Busche and Katrin Arend, *WTO—Trade-Related Aspects of Intellectual Property Rights* (Leiden: Martinus Nijhoff Publishers, 2009), p.380; Peter K. Yu, “The Objectives and Principles of the TRIPS Agreement” in Carlos M. Correa (ed.), *Research Handbook on the Protection of Intellectual Property under WTO Rules* (Cheltenham: Edward Elgar Publishing, 2010), p.149.

⁵³ Chen, “A Sober Second Look at Appellations of Origin” (1996) 5 Minn. J. Global Trade 29; Stephen Stern, “Are GIs IP?” (2007) 29 Eur. Intell. Prop. Rev. 39, 40; Kal Raustiala and Stephen R. Munzer, “The Global Struggle over Geographic Indications” (2007) 18 Eur. J. Int’l L. 337.

⁵⁴ In general, international treaties do not seek to define “intellectual property”. They provide a list of subject matters protected by IPRs, most of which emphasise that the items are products of “intellectual activity”. Convention Establishing the World Intellectual Property Organization 1970; WIPO, “Main Elements of Intellectual Property and Its Impact on Research and Development (R&D)”, June 2003, WIPO-InWent/INN/DE/03/1, para.2; WIPO, “What Is Intellectual Property?”, available at: <http://www.wipo.int/about-ip/en/> [Accessed March 27, 2014].

⁵⁵ Dwijen Rangnekar, “The Intellectual Properties of Geography” (2009) 31 Eur. Intell. Prop. Rev. 537.

⁵⁶ Debabrata Basu and Rupak Goswami, “Scientific and Traditional Knowledge: The Agenda for ‘Mutual Validation’” in R.M. Sarkar (ed.), *Indigenous Knowledge in Traditional Folk Panorama: Genesis, Development and Applications* (New Delhi: Serials Publications, 2011), p.88.

⁵⁷ Lee Bendekgey and Caroline H. Mead, “International Protection of Appellations of Origin and Other Geographic Indications” (1992) 82 Trademark Rep. 781; Raustiala and Munzer, “The Global Struggle over Geographic Indications” (2007) 18 Eur. J. Int’l L. 337.

definitional issue of GIs that has bearing on discussions concerning the “intellectual input” of the products they protect involves the role of GIs in accommodating culture and tradition embedded in agricultural practices associated with a geographic location.

As an indication, a GI directly identifies the product’s origin, but the identification also points to “quality, reputation or other characteristic” attributable to the product.⁵⁸ The “quality, reputation or other characteristic” of a product in the protective scope of GIs is based on the essential link between location of the production of a product and a specific quality attributed to the product, represented by the French term “*terroir*”. In its *Guide on Geographical Indications*, the Food and Agriculture Organization describes *terroir* as:

“a delimited geographic space, (2) where a human community, (3) has constructed over the course of history a collective intellectual or tacit production know-how, (4) based on a system of interactions between a physical and biological milieu, and a set of human factors, (5) in which the socio-technical trajectories put into play, (6) reveal an originality, (7) confer a typicality, (8) and can engender a reputation, (9) for a product that originates in that *terroir*.”⁵⁹

Thus, the protection of GIs primarily responds to demands for protection of the proprietary interest of skilled producers in a *terroir* who, combining traditional techniques with unique geographical characteristics, produce distinctly authentic goods. In a secondary purpose, a GI signifies a distinguishing mark or indication of a product based on the physical aspects of a *geographical* origin.

The capability of GIs in this respect can be illustrated by reference to the linguistic, and consequently juristic, distinction between denotation and connotation of signs that GIs signify. Before the introduction of GIs to the international IP discourse, Ladas pointed to a distinction between “indication” and “appellation”.⁶⁰ In his words, they are not “grammatically, as well as juristically ... identical”. Noting that “appellation, in French as well as in English, means a name given to a person or thing”, he outlines the legal consequence of that distinction: “[Appellation] evokes the idea of susceptibility of appropriation or the idea of a property right”, whereas “indication” refers to “what serves to indicate or point at something, or informs”.⁶¹

Building on this, Taubman suggests that the definition of GIs under the TRIPS Agreement seems both to “name” a product (signified by the term “identifies”) and to convey information about it (indicated by the use of the term “as originating in” a certain location).⁶² This seems consistent with the expanded definition of GIs under the TRIPS Agreement, which enables GIs to be an indication as well as a name (and thus, an appropriate subject of property). Denoting a product’s origin, a GI connotes additional properties. The denotation protected by the law relates to the physical geographic location—“the sign the product points to in the eyes of the consumer”—while the connotation refers to

“the penumbra of associations and qualities [i.e., in the words of the TRIPS Agreement, ‘qualities, reputation or other characteristics’] that ... [could be] ‘usurped’, ‘appropriated’, ‘diluted’ or ‘imitated’”.⁶³

The United International Bureaux for the Protection of Intellectual Property (BIRPI) acknowledged the distinction between the rights included in “indications” and those in “appellations” as early as 1958.⁶⁴ The

⁵⁸ Tobias Kiene, “Needs and Opportunities for the EU in the TK Debates: The Agricultural Dimension” (2006) Institute for Sustainable Development and International Relations, Working Paper No. 3.

⁵⁹ Giovannucci et al., *Guide to Geographical Indications* (2009), p.xv.

⁶⁰ Stephen P. Ladas, *Patents, Trademarks, and Related Rights: National and International Protection* (Cambridge, Mass.: Harvard University Press, 1975), p.1574.

⁶¹ Ladas, *Patents, Trademarks, and Related Rights* (1975), p.1574.

⁶² Anthony Taubman, “Thinking Locally, Acting Globally: How Trade Negotiations over Geographical Indications Improve Fair Trade Rules” (2008) 3 *Intell. Prop. Q.* 231, 238.

⁶³ Taubman, “Thinking Locally, Acting Globally” (2008) 3 *Intell. Prop. Q.* 231, 238.

⁶⁴ Ladas, *Patents, Trademarks, and Related Rights* (1975), p.1574.

Bureaux pointed out that the bundles of rights protected by the term “indications” existed “primarily for the benefit of consumers, to prevent their deception with regard to the geographic origin of the product concerned”.⁶⁵ Nevertheless, BIRPI also noted that protection of rights under “appellations” is concerned with “the class of producers or manufacturers of such products” and that protection is therefore sought “in their [(producers’)] interest ... against the improper use of such appellations by persons not entitled to their use”.⁶⁶ The benefit for consumers relates to the minimisation of the search costs of consumers who would identify the product due to the sign the GI signifies. The producers’ benefits relate to proprietary interests derived from the inherent characteristics of the product the GI connotes.

In discussions about the use of GIs to protect agricultural products that have a rich tradition and culture of production, a particular emphasis is put on the “connotation” dimension because the content of the rights in this respect exhibits “the hallmarks of a property right”.⁶⁷ This is unlike rights related to the denotation aspect of GIs, which results in rights that are similar to those that can be acquired under trademarks.⁶⁸ As the Supreme Court of Canada recently pronounced, trademarks “operate as a kind of shortcut to get consumers to where they want to go”.⁶⁹ Producers’ rights for distinctive marks under trademark law primarily enable consumers to obtain more information about the product through “ways of improving communication” such as advertising, quality signs, guarantee certificates and labelling.⁷⁰ As a result, the rights acquired under trademark law are not proprietary in nature per se. A sign or term under trademark law earns proprietary value to the owner if the sign or term has developed a reputation for a product through continuous use in relation to a product.

The connotation aspect of GIs protection for products with a recognizable “quality, reputation or other characteristic”, however, entails the recognition of proprietary interests of its own (even without a reputation developed through use) because the features of a GI-relevant product, particularly those involving TK-related resources, constitute the “intellectual” aspect of proprietary interest in GIs. At this juncture, it is important to clarify the contents of “quality, reputation or other characteristic” of a GI-relevant product and to demonstrate how TK-related resources may form the subject matter of “connotation” in GIs law.

VI. Quality, reputation or other characteristic in geographical indications

The legal manifestations of “denotation” and “connotation” in GIs protection emanate from the definitional scope of GIs under the TRIPS Agreement. The definitional provision of the TRIPS Agreement provides for consideration of several factors that indicate the inclusion of “intellectual inputs” in a GI-relevant product as protectable subject matter.⁷¹

Before the TRIPS Agreement came into force, WIPO adopted the term “geographical indications” as an all-inclusive concept to describe the subject matter of a new treaty for the protection of AO under the Paris Convention and indications of source under the Lisbon Treaty.⁷² By adopting the term “geographical indications” and relating its definition to “quality, reputation or other characteristic” of products, art.22 of the TRIPS Agreement recognises GIs in the same context as developed in the WIPO process.⁷³ GIs are

⁶⁵ Ladas, *Patents, Trademarks, and Related Rights* (1975), p.1574 (citing *Actes de Lisbonne* 1963).

⁶⁶ Ladas, *Patents, Trademarks, and Related Rights* (1975), p.1575.

⁶⁷ W.A. Van Caenegem, “Registered Geographical Indications: Between Intellectual Property and Rural Policy” (2003) 6 J. World Intell. Prop. 699, 702.

⁶⁸ As Vaver notes, “Trade-marks exist to identify the trade source of products and services to potential consumers.” David Vaver, *Intellectual Property Law: Copyrights, Patents, Trademarks*, 2nd edn (Toronto: Irwin Law, 2011), p.428.

⁶⁹ *Mattel Inc v 3894207 Canada Inc* [2006] 1 S.C.R. 772.

⁷⁰ OECD, “Appellations of Origin and Geographical Indications in OECD Member Countries: Economic and Legal Implications”, December 19, 2000, COM/AGR/APM/TD/WP 15/FINAL, para.7.

⁷¹ TRIPS Agreement art.22(1).

⁷² WIPO, *Introduction to Intellectual Property* (1997), p.18.

⁷³ In his article-by-article analysis of the negotiating history of the TRIPS Agreement, Professor Gervais—a former legal officer at the GATT/WTO—confirms that the TRIPS Agreement adopted the concept of GIs developed in the WIPO process and later adopted by the European Communities. Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2007), p.209; Gervais, *The TRIPS Agreement* (2008), p.293. Describing the definition of GIs under the TRIPS Agreement as a “groundbreaking nature”, Professor Gervais

similar to AOs in that both associate the quality of a good with a geographical location that an indication identifies. Unlike AOs, however, GIs are not restricted to products that have a quality *and* characteristics *due to* natural and human factors *associated* with the geographical environment of their place of origin. They may include goods that have a given *quality, reputation or other characteristic*, which is *essentially attributable to* its geographical origin.⁷⁴

The alternative listing of “quality, reputation or other characteristic”, as opposed to cumulative and restrictive requirement of “quality and characteristics” for AOs in the previous versions of the Lisbon Agreement, indicates that, as a broader concept, GIs incorporate each of the factors—“quality”, “reputation” or “characteristic”—on its own as an adequate condition for grant of protection. In AOs, however, a combination of natural *and* human factors forms the basis of the requirement of the product’s distinctive quality *and* characteristics.⁷⁵ In AOs, therefore, the geographical association of a product is based on the objective notions of quality and characteristics, natural factors forming an essential component.

In GIs, a product’s “quality” suffices for protection as long as the quality is “essentially attributable to” a product’s geographical origin, and not necessarily due to natural factors in the geographical environment.⁷⁶ The determination of “quality” is a subjective notion, which depends on individuals’ appreciation. It is difficult to find an exhaustive list of criteria that takes into account the cultural diversity of the world community to determine a universally acceptable quality. Accordingly, domestic authorities determine “quality” of a product, taking into account specific factual circumstances of the good. As WIPO confirms, the term “quality” appears less to imply a certain quality of the product—qualitative criterion—than a characteristic—legal criterion, which allows the distinguishing of the product based on its geographical origin.⁷⁷ In this respect, a precise description of the product or method for obtaining it may determine “quality”.⁷⁸ Given the culturally and traditionally distinctive production methods that add an identifiable quality or characteristic to agricultural products from ILCs, most TK-related products can easily fulfil the TRIPS Agreement’s “quality or characteristics” criteria for GIs protection.⁷⁹

GIs are not restricted to products having quality. They also apply to products that enjoy a given reputation. As Rangnekar notes, the separate reference to “reputation” allows for the possibility of protecting reputable goods that may not necessarily have a particular quality or characteristic and thus may not have qualified for the protection as an AO.⁸⁰ These factors must contribute to the distinctiveness of the product, such as its capacity to distinguish itself from other products, and the reputation must be assessed, *inter alia*, from the consumer’s perception of the indication.⁸¹

The specific inclusion of “reputation” as an independent protectable subject in the TRIPS Agreement is significant in considering GIs as a protective tool for TK-related agricultural products.⁸² Maskus points out that “reputation” in the protection of GIs may not necessarily arise from “physical characteristics emanating from climate or soil quality” of the product, but other factors in the geographical origin such

asserts that the TRIPS Agreement adopted GIs as a more general concept than AOs and indications of source. Gervais, “The TRIPS Agreement” (1999) 21 Eur. Intell. Prop. Rev. 156, 159.

⁷⁴ Although the Lisbon Agreement’s definition of AOs describes them as applying to products with “quality or characteristics”, the 1958 version of the Agreement as well as the version amended in 1967 described AOs as applying to products with “quality and characteristics.”

⁷⁵ SCT, “The Definition of Geographical Indications”, 2002, para.21 (emphasis added).

⁷⁶ SCT, “The Definition of Geographical Indications”, 2002, para.26.

⁷⁷ SCT, “Geographical Indications”, March 25, 2003, SCT/10/4, para.10.

⁷⁸ WIPO suggests that the description of the product may/should include:

“the raw material, the main physical (Q2 value, pH, shape, weight, appearance, consistency), chemical (presence/absence of additives, residues and so on), microbiological (use of such and such ferments, presence of germs) and/or organoleptic (smell, taste, texture, color, visual and sensory ... profile) characteristics of the product ... the actual presentation of the product (fresh, frozen, preserved)” SCT, “Geographical Indications”, 2003, para.20.

⁷⁹ Thomas Cottier and Marion Panizzon, “Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection” (2004) 7 J. Int’l Econ. L. 371.

⁸⁰ Dwigen Rangnekar, “Demanding Stronger Protection for Geographical Indications—The Relationship between Local Knowledge Information and Reputation” (2004) United Nations University, Discussion Paper Series No.2004/11, p.11.

⁸¹ SCT, “Geographical Indications”, 2003, paras 23–25.

⁸² Rangnekar, “Geographical Indications” (2003) UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 4, p.9.

as “local inventiveness”.⁸³ WIPO also indicates that “reputation” with respect to GIs mainly relates to “the history and historical origin of the product”—an attribute more attuned to TK products.⁸⁴ Unlike marks under trademark law that acquire proprietary value based on reputation resulting from market use, TK-related products from ILCs are automatically eligible for protection since most of these products have acquired reputation from factors related to a specific geographical origin.

A WTO survey lists human features such as “choice of varieties and methods of production; historical and traditional factors; the technical skill of the makers or processors; methods of production, preparation and processing” as factors affecting reputation of a product.⁸⁵ Although assessment of reputation of a product based on these factors may differ according to the systems and the products, and can be made on a local, national or international basis, WIPO suggests that a local reputation be sufficient for protection to be granted.⁸⁶ This highlights the unique aspects of GIs that enable ILCs to reject globalised methods of production for the sake of production methods suited to their traditions and adapted to local context.

It is important to note that both AOs and GIs involve the protection of a reputation.⁸⁷ In case of AOs, the reputation is a consequence of the “quality and characteristic” that the product exhibits by virtue of its geographical origin and the consumer preference associated with it, as represented by the common law conception of “goodwill”.⁸⁸ In GIs, however, reputation may not necessarily relate to the “quality” of the product. Reputation is protectable subject matter in GIs, independently of the “quality” of a product.

It is pointed out that the specific inclusion of “reputation” in art.22.1 of the TRIPS Agreement did not exist in the first draft presented to the Brussels Ministerial Conference in December 1990; rather, the wording is found in the consolidated text that became the basis of the final agreement.⁸⁹ The wording of the TRIPS Agreement in this regard is influenced by the negotiating agenda of the European Council, which advocated for wide inclusion of GIs in the TRIPS Agreement, and closely resembles the definition of GIs in the Council Regulation on Geographical Indications of 1992.⁹⁰

GIs protect some “other characteristic” of the good even when the characteristic does not relate to the “quality” or “reputation” of the product.⁹¹ “Other characteristic” refers to any element that contributes to the typicality of the product.⁹² As WIPO affirms, the most frequently cited factors that contribute to the products’ typicality include natural and human factors.⁹³ Natural factors are the physical attributes of the soil, weather, geographical location and the like. The combination of TK-based practices with these attributes result in specificity to a particular area, represented by the concept of *terroir*.⁹⁴ The recognition of the human factors in areas that GIs designate, as the discussion in the following section indicates, makes it possible to protect products whose unique characteristic derives from TK-based practices in a defined territory.⁹⁵

⁸³ Keith E. Maskus, “Observations on the Development Potential of Geographical Indications”, p.1, available at: <http://www.ycsy.yale.edu/documents/papers/Maskus.doc> [Accessed March 27, 2014] (Observation).

⁸⁴ SCT, “Geographical Indications”, 2003, para.23.

⁸⁵ SCT, “Geographical Indications”, 2003, para.20.

⁸⁶ SCT, “Geographical Indications”, 2003, para.26.

⁸⁷ Although the definition of AO does not include “reputation” as a distinct protectable subject matter, art.2(2) of the Lisbon Agreement makes a reference to “reputation”.

⁸⁸ Most common law jurisdictions protect AO through the law of passing off, which incorporates the element of shared goodwill. Daniel R. Bereskin, “Legal Protection of Geographical Indications”, September 18, 2003, Paper Presented at the Annual Meeting of the Intellectual Property Institute of Canada.

⁸⁹ It is to be noted that the wording of the TRIPS Agreement in this regard is consistent with and closely resembles the definition of GIs in Council Regulation 2081/92 of July 14, 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] OJ L208/1.

⁹⁰ Council Regulation 2081/92 arts 5–6.

⁹¹ TRIPS Agreement art.22.1.

⁹² SCT, “Geographical Indications”, 2003, para.8.

⁹³ SCT, “Geographical Indications”, 2003, paras 27–30.

⁹⁴ FAO and SINGER-GI, *Linking People, Places and Products* (2009), p.12.

⁹⁵ Mathijs Geuze, “Protection of Geographical Indications—International Legal Framework”, Presentation at the National Roving Seminars on Geographical Indications in Chennai, January 29–30, 2009.

In both AOs and GIs, attributes of the product should somehow be linked to a geographical origin. The Lisbon Agreement provides that, to qualify for protection, the “quality or characteristics” of the product should be “due exclusively or essentially to the geographical environment, including natural and human factors”.⁹⁶ Additionally, under the TRIPS Agreement, the dual requirements that “indications identify a good as originating in the territory” and that the “quality, reputation or other characteristic of the good is essentially attributable to its geographical origin” suggest a qualitative link between the product and the geographical environment in which it is found.⁹⁷ The difference in the degree of the products’ attachment to the geographical origin—“due exclusively or essentially to” in AOs and “essentially attributable to” in GIs—demonstrates that the requirement of geographical attachment in GIs is less stringent.

The increased acceptance in GIs protection of products’ “reputation or other characteristics” has earned GIs a recognition as “unique expression[s] of local agro-ecological and cultural characteristics” and “not exclusively commercial or legal instruments”.⁹⁸ The Secretariat of WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore recognises GIs as instruments that protect human factors pertaining to agricultural products—beyond physical factors specific to a geographical location:

“Geographical indications, as defined by Article 22.1 of the TRIPS Agreement ... rely not only on their geographical connotation but also, essentially, on human and/or natural factors (which may have generated a given quality, reputation or other characteristic of the good). In practice, human and/or natural factors are the result of traditional, standard techniques, which local communities have developed and incorporated into production. Goods designated and differentiated by geographical indications, be they wines, spirits, cheese, handicrafts, watches, silverware, and others, are as much expressions of local cultural and community identification as other elements of traditional knowledge can be. Additionally, the geographical reference of a geographical indication or appellation of origin is an indirect means of appropriation of traditional techniques that otherwise might be in the public domain.”⁹⁹

For those reasons, current approaches in IP and development view GIs broadly as

“an integral form of rural development that [offer] a valuable framework for powerfully advancing commercial and economic interests while potentially integrating local needs that are anchored in cultural tradition, environment and broad levels of participation”.¹⁰⁰

The foregoing discussion shows that at the international level, the TRIPS Agreement provides the most extensive definition of GIs as a tool of protection distinguished from trademark law. Despite this recognition, the Agreement does not require WTO Members to provide a uniform means of protection of GIs at the national level.¹⁰¹ In this respect, the Agreement treats GIs in a different fashion from other IPRs. For instance, in the fields of copyrights, trademarks and patents, the concept of protection that the Agreement requires of WTO Members is practically the same in all countries.¹⁰² In contrast, the Agreement does not require a uniform approach to the protection of GIs.

⁹⁶ Lisbon Agreement art.2(1).

⁹⁷ TRIPS Agreement art.22.1.

⁹⁸ Giovannucci et al., *Guide to Geographical Indications* (2009), p.5.

⁹⁹ WIPO, “Review of Existing Intellectual Property Protection of Existing Knowledge”, May 6, 2002, WIPO/GRTKF/IC/3/7, para.40.

¹⁰⁰ Giovannucci et al., *Guide to Geographical Indications* (2009), p.5.

¹⁰¹ The distinction between GIs as a concept and the means for their protection reflects the manner in which the GIs negotiations were conducted in the WTO. As a compromise between the United States, which opposed the inclusion of a specific provision for GIs protection, and the European Communities, which demanded the inclusion of comprehensive GIs rules on the methods for their protection, the TRIPS Agreement recognised GIs at two levels of protection under art.22(1). In art.22(2), the Agreement left the means of protection of GIs to the exclusive jurisdiction of Member States. Gervais, *The TRIPS Agreement* (2008), p.293; Escudero, “International Protection of Geographical Indications and Developing Countries” (2001) South Centre Trade Working Paper No.10, p.23.

¹⁰² For example, Part II, section 5 of the TRIPS Agreement lays out specific requirements for protection of WTO members: art.27 (patentable subject matter), art.28 (rights conferred), and art.29 (conditions on patent applicants). Part II, section 1 stipulates similar requirements for protection in the

The TRIPS Agreement allows WTO Members to choose the means of protection that, in most cases, can be either trademark-based or sui generis (i.e. protection through a law specifically dealing with GIs).¹⁰³ Thus, the European Union protects GIs through sui generis law, which introduces three different types of GIs protection: Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Specialty Guaranteed (TSG).¹⁰⁴ Like its common law counterparts, the United States mainly uses trademark-based protection through the use of certification marks, collective marks and, in some cases, ordinary trademarks. Generally, the protection of GIs through these mechanisms in the United States and other common law jurisdictions stands as an exception to the rule that individual trademarks must not be geographically descriptive.¹⁰⁵

Given the varying cultural, historical and jurisprudential differences across jurisdictions, it is expected that countries will adopt different methods for protecting GIs in their jurisdiction. The scope of protection and the nature of rights in each system can be determined on the grounds on which a country adopts a GIs system. The differences in the legal means for protecting GIs need not, however, be a ground for lack of consensus on the recognition of GIs as an autonomous legal concept in the IP arena.

VII. Conclusion

As shown in the discussion, GIs is a concept with a broad scope of protection that extends to agricultural products other than wines and spirits. The TRIPS Agreement adopts the criteria of “quality, reputation or other characteristic” to describe the subject matters of GIs protection. The broad scope of protection under these criteria makes it possible for GIs systems to accommodate the traditional practice of ILCs which, due to their intergenerational occupancy, are identified with a particular territory. A wider understanding of GIs accommodates the diversity of “creativity” that is abundant in agricultural productions in the realm of TK systems, beyond wines and spirits.

As a concept, GIs have a separate identity of their own that exhibit certain features significantly different from trademark law in the conventional IPRs arena. Unlike trademarks, the concept of GIs does not refer to just the name, sign or indication of a product. Rather, a GI directly denotes a product’s origin based on a name, sign or indication. The identification also connotes “quality, reputation or other characteristic” attributable to the product because of a culturally and traditionally defined agricultural practice in the territory.

Still, countries may choose to implement GIs either in their sui generis form or in a trademark-based model according to the needs and specific circumstances that necessitate the recognition of GIs rights.¹⁰⁶ In GIs implementation necessitated by the publicly oriented goals of TK-related agricultural policy, the sui generis form of GIs protection captures the essentials that accommodate the subject matter of GIs as currently recognised under art.22 of the TRIPS Agreement.¹⁰⁷

In a knowledge-based economy where the value of products is measured against their IP content, the conceptualisation of GIs as IP instruments with distinct identity from conventional IPRs under trademark law holds key potential for economically disadvantaged countries, whose economy is dependent on

copyright area: art.9(2) (stipulating that “copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”); art.12 (term of protection). The requirements for protection of trademarks can also be found in Part II, section 2 of the TRIPS Agreement.

¹⁰³ WIPO, *Intellectual Property Handbook* (2004), p.120 (discussing the protection of GIs in national and regional jurisdictions and noting that “[w]ith the exception of design law, there is probably no category of intellectual property law where there exists such a variety of concepts of protection as in the field of geographical indications”).

¹⁰⁴ EU Regulation 1151/2012 of November 21, 2012 on quality schemes for agricultural products and foodstuff [2012] OJ L343/1.

¹⁰⁵ For example, the Lanham Act prohibits the registration of marks that are “primarily geographically descriptive”. 15 U.S.C. s.1052(e). Similarly, the Canadian Trademarks Act prohibits the registration of marks as trademark if they are “clearly descriptive ... of their place of origin”. Trademarks Act 1985, s.12(1)(b).

¹⁰⁶ WIPO, *Introduction to Intellectual Property* (1997), para.233.

¹⁰⁷ Irina Kireeva and Bernard O’Connor, “Geographical Indications and the TRIPS Agreement: What Protection Is Provided to Geographical Indications in WTO Members?” (2010) 13 J. World Intell Prop. 275, 293.

products identified as “raw products and commodities”. From the perspective of developing countries, therefore, it is of the utmost importance that negotiations for the protection of GIs recognise the conceptual boundaries of GIs as autonomous forms of IP that can protect all agricultural products.

The Role of Copyright in the Protection of the Environment and the Fight against Climate Change: Is the Current Copyright System Adequate?

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☞ Authors' rights; Climate change; Copyright; Database right; Environmental protection; EU law; Interoperability; Moral rights; United States

Introduction

At first sight it may not seem like copyright plays a role in the fight against climate change or the protection of the environment in general. But in many ways, it does, and it does so (perhaps surprisingly) with quite some importance. Indeed copyright works can be extremely varied. Literary and artistic works of various kinds as well as audiovisual works and films are subject to copyright. In the environmental field, they can range from eco-friendly architectural plans and buildings, literature, charts, diagrams, maps, photographs, to films about weather, climate and the size of glaciers, to software and databases used for forecasting or analysis of weather, climate, temperature patterns, changes in fauna and flora, and drought control. These copyrightable works are created either by private entities or by the state, in the latter case either exclusively or in competition with private entities. The question is posed whether the normal copyright regime (namely full exclusivity) should be retained for copyright works containing information or original expressions on the environment, more specifically climate, because of the importance these works have in helping to save our planet and therefore ourselves. Does the current copyright system work well already or do we need to modify it to take account of environmental concerns?

To answer this question, this article scrutinises the various aspects of copyright law: subject-matter, protection requirements, authorship and ownership issues, duration, economic and moral rights, and defences. It also examines the database *sui generis* right (which is a right protecting the investment in the collection, presentation and/or verification of the contents of a database that so far exists only in the European Union)¹ and para-copyright (namely the protection of technological protection measures by anti-circumvention provisions). The discussion of the several aspects of copyright law brings to light the questions of access, dissemination, interoperability and pricing which are especially crucial to environmental issues. The article discusses these aspects from a European perspective, but it also makes some comparisons with US law.

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¹ Council Directive 96/9 of March 11, 1996 on the legal protection of databases [1996] OJ L77/20 (Database Directive); Estelle Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (Cheltenham: Edward Elgar, 2008).

Subject-matter and protection requirements

Subject-matter protection, in general, is not harmonised at the EU level, or at least was not meant to be. Specifically, art.2 of the InfoSoc Directive² does not harmonise subject-matter of protection. The only subject-matter which was harmonised were databases (definition given) and software (no definition given), and to a lesser extent photographs (no definition given).³ Recent decisions of the Court of Justice of the European Union (Court of Justice) seem to suggest that “any work under the sun” can be protected by copyright, provided it is the author’s own intellectual creation.⁴ All the works cited above in the introduction are protected in all Member States. Even though the United Kingdom and Ireland have a categorisation system, all these works fall within the categories. Therefore, provided that the originality requirement is fulfilled—that is, the work is the author’s own intellectual creation—all works are protected (except for certain government works, as discussed below). In the United Kingdom and Ireland, works (except artistic works) must also be recorded in a material form in order to be protected by copyright, but the abovementioned works will invariably be recorded unless the literary work in question is merely oral—for example, an impromptu speech at a conference on an environmental topic.

There is one important category of works which is excluded from protection in most European countries: official texts. Many national laws exclude official texts from protection even if they are original, following the option provided in art.2(4) of the Berne Convention:

“It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.”⁵

Therefore, official literary works relating to the environment are totally free for re-use. This is welcome in terms of the considerable official efforts needed to protect the environment and more specifically to tackle climate change. These official works remain totally unprotected, and everyone can use them without having to ask permission or to pay any royalties to inform, to make other works, and more importantly to solve environmental problems.

However, not all such official works are excluded from protection. Often only *texts of a legislative, administrative or legal nature* are excluded, as the Berne convention itself authorises. The exclusion therefore does not apply to works other than literary ones⁶ and other than of a legislative, administrative or legal nature—for instance, documents prepared by government departments.⁷ The Belgian and Dutch laws provide good examples.

Article 8(2) of the Belgian Copyright Act provides that official acts of the authority are not protected by copyright. The notion of “official act” does not equate with that of “public document”. Therefore there are many public documents which can benefit from copyright and which are not official acts.⁸ It has been submitted that “official act” in the Copyright Act covers acts, regulations, executive measures, parliament works, judgments and indictments of the Crown Prosecution Service.⁹ Furthermore this exclusion was *not*

² Directive 2001/29 of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

³ Directive 2009/24 of April 23, 2009 on the legal protection of computer programs (codified version) [2009] OJ L111/16 (Software Directive); Directive 2006/116 of December 12, 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L372/12 (art.6, relating to photographs), amended by Directive 2011/77 of September 27, 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L265/1 (Term Directive); Database directive.

⁴ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-6569, and more particularly *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury* (C-393/09) [2010] E.C.R. I-13971. *Football Dataco Ltd v Yahoo! UK Ltd* (C-604/10) [2013] All E.R. (EC) 257.

⁵ Berne Convention for the Protection of Literary and Artistic Works 1886 (Paris Act 1971) art.2(4).

⁶ However, other types of works (e.g. artistic) may sometimes be included in administrative or governmental reports.

⁷ John A.L. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 1998), p.219, para.6.35.

⁸ Cécile de Terwangne, *Société de l’information et mission publique d’information*, PhD Thesis, University of Namur, 2000, p.622.

⁹ de Terwangne, *Société de l’information et mission publique d’information*, 2000, p.620.

added in either the Database Act or the Software Copyright Act, which are separate statutes in Belgium.¹⁰ Therefore any official act which is a protected database or a computer program is protected by either copyright, the database sui generis right, or both. One can imagine many such official acts that concern the environment—for example, meteorological databases and the software that may have been specially conceived to run those databases.

In the Netherlands, art.11 of the Copyright Act provides that no copyright subsists in laws, orders and resolutions promulgated by the public authorities, legal decisions or administrative decisions. Article 15(b) further states that reproducing or making available works that were made available by or through the public authorities is not considered to be an infringement of copyright, unless the copyright is explicitly reserved. The Netherlands felt that it was desirable to introduce equivalent provisions to arts 11 and 15(b) of the Dutch Copyright Act for the database sui generis right.¹¹ Article 8 of the Dutch Database Act reads:

- “1. The public authority shall not have the right referred to in Article 2, paragraph 1 [i.e. copyright], with respect to databases of which it is the producer and for which the contents are formed by laws, orders and resolutions promulgated by it, legal decisions and administrative decisions.
2. The right, referred to in Article 2, paragraph 1, shall not apply to databases of which the public authority is the producer, unless the right is expressly reserved either in general by law, order or resolution or in a particular case as evidenced by a notification in the database itself or when the database is made available to the public.”¹²

Other countries have not taken advantage of the option provided in the Berne Convention and thus provide copyright protection for all official works. The United Kingdom, for instance, fully protects Crown and Parliamentary copyright.¹³ Judges also retain copyright in their judgments. There is controversy as to who owns the copyright in judicial decisions (judges or the Crown), but there is no controversy that copyright subsists in them. Nevertheless there are a number of generous defences to infringement, which make it very easy to re-use official documents.¹⁴ In addition, most legislative documents are now covered by a licence for anyone to re-use those documents free of charge at minimal conditions.¹⁵

In the United States, s.105 of the Copyright Act excludes from protection “any work of the US government”.¹⁶ This applies only to works made in the course of government employees’ duties. Despite the use of the term “government”, the exclusion applies to federal legislation, federal decisions¹⁷ and state materials (according to a long standing practice).¹⁸

Returning to originality, the Court of Justice has now clearly set the standard for identifying copyrighted works for all Member States. In *Infopaq*, a case concerning literary works (news articles), it held that the author’s own intellectual creation meant creativity.¹⁹ The Court did not set the level of required creativity, but that level seems low as the Court agreed that copyright could subsist in as few as 11 words. In later cases, the Court of Justice further elaborated the requirement of originality as being free and creative

¹⁰ Act of 30 June 1994 (implementing the Software Directive in Belgian Law); Act of 31 August 1998 (implementing the Database Directive in Belgian Law).

¹¹ Annemarie Beunen, *Protection for Databases, the European Database Directive and Its Effects in the Netherlands, France and the United Kingdom* (Nijmegen: Wolf Legal Publishers, 2007), pp.221–222.

¹² Databankenwet, Act of 8 July 1999.

¹³ Copyright, Designs and Patents Act 1988 ss.163–166; Copyright and Rights in Databases Regulations 1997 ss.14.3, 14.4.

¹⁴ Copyright, Designs and Patents Act 1988 ss.45–50; Copyright and Rights in Databases Regulations 1997 s.20.2, sch.1.

¹⁵ Open Government Licence v 2.0, available at: <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/> [Accessed March 27, 2014].

¹⁶ Thus, the exclusion arguably goes further than art.2(4) of the Berne Convention.

¹⁷ Ralph S. Brown and Robert C. Denicola, *Cases on Copyright, Unfair Competition and Other Topics Bearing on the Protection of Literary, Musical and Artistic Works*, 6th edn (Westbury: The Foundation Press 1995), p.199.

¹⁸ Brown and Denicola, *Cases on Copyright, Unfair Competition and Other Topics Bearing on the Protection of Literary, Musical and Artistic Works* (1995), p.199; Eric Schwartz, “United States” in Paul Geller (ed.), *International Copyright Law and Practice* (Newark: Lexis Nexis, 2014), para.[2][4][e].

¹⁹ *Infopaq* [2009] E.C.R. I-6569 at [45].

choices which as a result stamp the work with the author's personality. What *Infopaq* and its progeny²⁰ have already made clear is that a number of sub-creative works, which were previously protected in the United Kingdom, will now remain unprotected.²¹ Drawings, maps, charts, diagrams and literary works that only involved sweat of the brow, or mere labour, can therefore be re-used without permission.

In the United States, since the 1991 Supreme Court case of *Feist Publications Inc v Rural Tel Service Co*, creativity has also been the criterion for originality.²² In that case, the Court set the level rather low ("a modicum of creativity"). Therefore the two legal systems appear to closely correspond.

The idea/expression dichotomy (where protection is not available for the underlying ideas, but only for their creative expressions) will generally work well for copyright protected "environmental works"—that is, those copyrighted works and databases that relate, discuss, analyse or map the earth's environment, including its climate. Nevertheless, copyright protection will often create a problem for photographs, notwithstanding the idea/expression dichotomy. There may be only one photograph generated by only one photographer available of some climatic, geographic or more general environmental data—for instance, because it was a sudden event or because it is difficult to access the location. The fact that the information embedded in it merges with the expression of the creativity of the photographer (assuming it is not a mere snapshot)²³ will in effect create a monopoly on the information itself. In the vast majority of cases, the whole photograph will need to be used, and thus the permission of the right holder will be needed. The same can be said of some first fixations of films recording environmental data.

The recent *Softwarová* case seems to provide an answer to this merger problem, as it adopts the US merger doctrine (which holds that copyright does not exist when there are only a handful of ways to express an idea). However, the Court of Justice adopted the merger doctrine in an implicit and rather confused manner: it confused (even merged) the two criteria of protection (originality and the idea/expression dichotomy) when it said:

"[W]here the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable."²⁴

Thus, it may be argued that some photographs could be re-used as an application of the merger doctrine. The situation on this point of law in the European Union therefore appears to correspond to that of the United States.²⁵

The EU merger rule neatly resolves the problem of restriction of unique works, as photographs and films of geographical, geological, environmental and climatic changes are important not only for evidentiary but also for analytical purposes, and as these works need to be easily, quickly and cheaply available to solve environmental problems. Note that exceptions to exclusive rights, especially in Europe, may not always allow quick and easy use of photographs for environmental purposes, because of the often numerous and strict conditions with which the user has to comply. One of these conditions is the requirement that only part of the work may be used. Such a requirement often renders the exception for photographs useless. The US fair use doctrine, in comparison, is more flexible.

²⁰ *Softwarová* [2010] E.C.R. I-13971; *Football Association Premier League v QC Leisure* (C-403/08) [2011] E.C.R. I-9083; *Painer v Standard VerlagsGmbH* (C-145/10) [2012] E.C.D.R. 6; *Football Dataco* [2013] All E.R. (EC) 257.

²¹ Estelle Derclaye, "Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law" (2009) 32 *Eur. Intell. Prop. Rev.* 247.

²² *Feist Publications Inc v Rural Tel Service Co* 499 U.S. 340 (1991).

²³ *Painer* [2012] E.C.D.R. 6.

²⁴ *Softwarová* [2010] E.C.R. I-13971 at [49].

²⁵ *Baker v Selden* 101 U.S. 99 (1880).

Authorship, ownership and dealings

The issue here is not really the rules regarding initial ownership, nor those governing employee and commissioned works. It is the rules relating to the type of author (public or private) and the licensing practices of those entities which may not be fully adequate to assure the necessary widespread or innovative uses.

As already noted above, the rules regarding documents created by the state are somewhat different from those created by private individuals or companies. Official texts do not benefit from copyright protection in many European countries. One of the main reasons is that the public necessarily needs to be informed about the rules applying to it. Another is that the public has already paid for the works through taxes. As to other official protected works, some copyright laws also generously include exceptions to allow re-use of these works without permission, or for a nominal price. Other laws, namely freedom of information acts, restrict the application of copyright to most official works. As such laws fall within the issue of exceptions, they will be discussed below under that heading. Only the issue of restrictions on licensing, particularly for interoperability, will be discussed here.

As to works created by private individuals or companies, the regime of full exclusivity normally applies. The consequences of such full exclusivity depend on the rights conveyed. The issue of adequate licensing also occurs for public owners, although the legal regime is different. Assignments will be rarer in the case of state works than works created by individuals or private companies.

The first aspect of licensing is legal openness and interoperability. State works and databases generally are public sector information (PSI). PSI is subject to a special regime in the European Union, owing to the adoption of a Directive on the Re-use of Public Sector Information.²⁶ This Directive aims to facilitate re-use of documents held by public sector bodies of the Member States. “Public sector body” means the state, including regional and local authorities, and bodies governed by public law. The latter are then further defined to include, among others, bodies financed for the most part by the state. Some funded entities, mainly cultural establishments other than libraries, museums and archives, are excluded. Universities, but not university libraries, are also excluded. Note that libraries, museums and archives are subject to slightly different rules. A “document” is defined as

- “(a) any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording); [and] (b) any part of such content”(art.2.3).

However, computer programs are excluded from the Directive’s scope (recital 9). A number of documents such as confidential ones are also excluded (art.1.2). The Directive sets out only a moral (hortatory) duty for Member States to allow for re-use of their PSI (art.3). Technically, therefore, no country is legally obligated to facilitate this re-use, but is only encouraged to do so. This was the major downside of the Directive. However, this duty has now become fully mandatory with the 2013 revision of the Directive. From July 18, 2015, the deadline for the Directive’s implementation, Member States will thus be obliged to make their PSI re-usable according to the rules of the revised Directive.

Article 8 of the Directive prescribes:

- “1. Public sector bodies may allow for re-use of documents without conditions or may impose conditions, where appropriate through a licence[, addressing relevant issues].²⁷ These conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.

²⁶ Directive 2003/98 of November 17, 2003 on the re-use of public sector information, [2003] OJ L345/90 (PSI Directive). This Directive has now been revised by the Directive 2013/37 of June 26, 2013 amending Directive 2003/98/EC on the re-use of public sector information, [2013] OJ L175/1. The latter needs to be implemented in the Member States by July 18, 2015.

²⁷ The words in brackets have been deleted in the revised art.8.

2. In Member States where licences are used, Member States shall ensure that standard licences for the re-use of public sector documents, which can be adapted to meet particular licence applications, are available in digital format and can be processed electronically. Member States shall encourage all public sector bodies to use the standard licences.”

The Directive thus makes an effort to promote legal openness and interoperability as much as possible. These aspects are very important, especially for dynamic content, which often is the case for environmental information—for example, meteorological data. If the data are not readily re-usable, delays in access will often affect by-product works and further innovations based on or using the information.²⁸

In countries where official texts are not protected by copyright, the issue of the need for access through licences does not even arise. Legal openness and interoperability will be optimal. This state (no copyright) is the “ideal starting point”.²⁹ Indeed, as there are no terms for their re-use, the copyright works can be re-used in an infinite variety of ways with “no strings attached”.³⁰ This state, of no copyright protection, is the case for the vast majority of PSI in the United States.³¹

In the European Union, for official documents that are not official texts (and for artistic and audiovisual content), states may make re-use possible through legislation or other measures that ensure the existence and standardisation of public licences. The best standard licence allows for any re-use whatsoever, or preferably, may dedicate the copyrighted work to the public domain. An example is the Creative Commons Zero licence (CC0). Another is the Creative Commons Attribution licence (CC BY), which only requires attribution as a condition. In addition, the Creative Commons Non Commercial Use licence (CC NC) could be used when the state does not want the data to be re-used without payment if the entity re-using it is for profit. The ShareAlike licence could also be used when the state does not want the data to be transformed.

Since Creative Commons licences can be used internationally, they are very favourable to interoperability as their terms are the same in any jurisdiction.³² However the last three forms of license (CC BY, CC NC and ShareAlike) can create problems for interoperability; they add restrictions that impede the merging of copyrighted content, as more licensing conditions have to be respected in the combined expression. (CC BY licences are not problematic, as only a statement attributing the works to the state has to be made; merging copyright works from different sources does not present a problem if attribution is supplied to the combined work.) In the case of ShareAlike licences, merging may be impossible unless the two or more sets of copyright works are all subject to ShareAlike licences.³³ But even then, it may not be possible as ShareAlike licenses may be interpreted to mean that the works must be used *in isolation* as the same terms must be used for derivative works. Thus, if the two original copyright works carry different licences, it may not be possible to merge them if their original licence terms conflict, as those terms will need to be respected down the chain of derivation and re-use.

In summary, the revised PSI Directive ensures re-use and interoperability by forcing Member States to free their copyright-protected PSI.³⁴ The Berne Convention and the World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement),³⁵ however, may create an obstacle to achieving this goal, as protection under those agreements cannot be denied to works other than official

²⁸ Marco Ricolfi, Mireille van Eechoud, Federico Morando, Podromos Tziavos and Luis Ferrao, “The ‘Licensing’ of Public Sector Information” (2011) 20 Riv. Informatica e diritto 129.

²⁹ Ricolfi et al., “The ‘Licensing’ of Public Sector Information” (2011) 20 Riv. Informatica e diritto 129.

³⁰ Ricolfi et al., “The ‘Licensing’ of Public Sector Information” (2011) 20 Riv. Informatica e diritto 129.

³¹ For a summary, see, for example, European Public Sector Information Platform, “State of Play: Public Sector Information in the United States”, available at: http://epsiplatform.eu/sites/default/files/Topic_Report_no25_State_of_Play_US.pdf [Accessed April 12, 2014].

³² Creative Commons, available at: <http://creativecommons.org> [Accessed March 27, 2014].

³³ Ricolfi et al., “The ‘Licensing’ of Public Sector Information” (2011) 20 Riv. Informatica e diritto 129.

³⁴ For more details on the PSI Directive, see Estelle Derclaye, “Does the Directive on the Re-use of Public Sector Information Affect the State’s Database Sui Generis Right?” in Jens Gaster, Eric Schweighofer and Peter Sint (eds), *Knowledge Rights—Legal, Societal and Related Technological Aspects* (Vienna: Austrian Computer Society, 2008), pp.137–69.

³⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

texts. Hence, new international standards should be created to favour optimal, interoperable PSI re-use³⁶ and should be imposed on Member States. In the field of environmental data and works, this is of great urgency. These works and data need to be re-used (commercially or otherwise) in combination with other works and data in order to find quick solutions to environmental problems including climate change.

The situation is different for environmental works created by private entities. Such entities are not like the state, which is paid directly by taxpayers and does not therefore take the same financial risks when creating environmental data and works. Private entities, whether individuals or companies, may only rarely decide to create these works if they cannot recoup their investment. The basic economic copyright rationale applies to such entities: private entities need to have the possibility of recoupment provided by granting exclusive property rights. Charities such as Greenpeace are of course a special case. They are funded by the public and are non-profit entities. So, their situation is closer to that of the state in many respects. Probably such charities should receive similar treatment to states, which prevents ownership and/or requires widespread re-use and interoperability. For private entities needing recoupment for environmental works, if copyright is not available, none or very few such works would be created. Free re-use of environmental works is therefore not a realistic option.

Compulsory licences, and legislation establishing the circumstances in which they can be imposed, should also be carefully evaluated so as to not deter the creation of environmental works by private entities. Specification of the cases in which compulsory licences can be imposed is not adequate in the field of copyright, at least at the international level. Relatively uncontroversial grounds for compulsory licences that exist for patents (for example, failure to work—compare refusals to licence the copyright work for re-use) and that may be granted in cases of emergency (for example, fighting climate change) should also be available under certain conditions (including fair compensation) for copyright works. Compulsory licenses also should be granted only if the copyright holder is in a dominant position, as the market should otherwise function adequately³⁷ and should therefore force copyright holders to licence their works at competitive prices.

Competition law may already curb such abuses, but it is a far less effective and more uncertain remedy than express statutory compulsory licensing provisions, as competition law is dependent on litigation and judicial practices. While litigation provides an *ex post* rather than an *ex ante* remedy, the case law is variable. It is therefore better to integrate compulsory licences into statutory copyright laws. Such mechanisms which exist in certain countries should ideally be added to the TRIPs Agreement in the future. The UK Copyright, Designs and Patents Act of 1988 provides that compulsory licences can be imposed by the Competition Commission in certain cases, mainly when the copyright owner refuses to grant a licence on reasonable terms and when the licence restricts the use of the work by the licensee or the right of the owner to grant other licences.³⁸

Another important aspect of licensing is pricing. Again, one should distinguish between pricing of “public” and “private” copyright works. As to private undertakings, European competition law frowns upon excessive pricing. Ideally, copyright laws also frown upon excessive pricing, but in the end there will always be a need for an arbiter or judge to decide whether the price a copyright holder sets is excessive.

The PSI Directive seeks to regulate the issue of pricing and the nature of licensing by the state. Article 6 encourages pricing that is not excessive. It specifically provides:

“Where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges should be cost-oriented over the appropriate accounting

³⁶ Ricolfi et al., “The ‘Licensing’ of Public Sector Information” (2011) 20 *Riv. Informatica e diritto* 129.

³⁷ Estelle Derclaye, “Intellectual Property Rights and Global Warming” (2008) 12 *Marq. Intell. Prop. L. Rev.* 264, 288.

³⁸ e.g. Copyright, Designs and Patents Act 1988 s.144.

period and calculated in line with the accounting principles applicable to the public sector bodies involved.³⁹

Article 11 ensures that licences are not exclusive, other than in very exceptional cases.⁴⁰ Article 10 prevents the state from unfairly competing with private entities when it uses its PSI for commercial ends.⁴¹ Pricing is therefore well regulated; non-exclusive licensing should assure competitive markets. The Directive thus should enable the availability of all sorts of PSI, including environmental works at a fair price, when a price is charged for such information.⁴² Ideally, the vast majority of state works should be dedicated to the public domain so that the pricing issue does not even arise.⁴³

Duration

The normal term of protection applies to environmental works. The general rule is 70 years after the death of the author, both in the European Union and the United States.⁴⁴ The term of protection is highly contested nowadays for being too long.⁴⁵ While the optimal term of protection is important to the issue addressed in this article, minimal terms are regulated by the Berne Convention and the TRIPs Agreement, and typically all works are subject to the same duration. The issue is thus not discussed further here, even if the existing duration is excessive.

Rights

Copyright gives its owner full exclusivity—specifically, the right to refuse to licence the work. This property right is subject to competition law when the copyright owner is dominant and such refusal is abusive. As discussed above, competition law and compulsory licences attenuate the potentially bad effects of such a full-blown property right.

It is questionable whether further restrictions to full exclusivity need to be introduced for environmental works—particularly in jurisdictions having extensive fair use provisions. The current framework, with the exceptions and tweaks discussed above, functions well. However, this is so only in respect of economic rights—that is, in regard to reproduction and communication to the public of environmental works. More tweaks may be needed with regard to moral rights, mainly the rights of attribution and integrity.

Moral rights are not harmonised in the European Union. Some countries, like the United Kingdom, have very limited moral rights. For example, works made by employees in the United Kingdom are virtually free of moral rights.⁴⁶ There are many other cases where moral rights are curtailed in the United Kingdom.⁴⁷

³⁹ PSI Directive art.6. The revised art.6 is far stricter. It provides: “Where charges are made for the re-use of documents, those charges shall be limited to the marginal costs incurred for their reproduction, provision and dissemination.” An exception to this rule exists for libraries, museums and archives and for public sector bodies that are required to generate revenue to cover a substantial part of their costs. In substance, the current version of art.6 will remain applicable to them.

⁴⁰ PSI Directive art.11.

⁴¹ PSI Directive art.10.

⁴² On pricing, see Marco Ricolfi et al., “The ‘Principles Governing Charging’ for Re-use of Public Sector Information” (2011) 20 Riv. Informatica e diritto 105 (proposing that re-users should pay a charge only if the state’s costs for providing the PSI is above the amount they have paid through their taxes).

⁴³ In some cases, states may want to charge for PSI, owing to differences in general taxation rules in the different Member States and in accordance with the principle of subsidiarity. For proposals in this respect, see Ricolfi et al., “The ‘Principles Governing Charging’ for Re-use of Public Sector Information” (2011) 20 Riv. Informatica e diritto 105.

⁴⁴ Term Directive; US Copyright Act 1976 s.302.

⁴⁵ E.g. Rufus Pollock, “Forever Minus a Day? Calculating Optimal Copyright Term”, available at: http://www.rufuspollock.org/economics/papers/optimal_copyright_term.pdf [Accessed March 27, 2014]; Reto Hilty, Annette Kur, Nadine Klass, Christophe Geiger, Alexander Peukert, Josef Drexler and Paul Katzenberger, “Comment by the Max-Planck Institute on the Commission’s Proposal for a Directive to Amend Directive 2006/116 Concerning the Term of Protection for Copyright and Related Rights” (2009) 31 Eur. Intell. Prop. Rev. 59 (referencing studies of extended term of protection for sound recordings and performers rights); Natali Helberger, Nicole Dufft, Stef van Gompel and Bernt Hugenholtz, “Never Forever: Why Extending the Term of Protection for Sound Recordings Is a Bad Idea” (2008) 30 Eur. Intell. Prop. Rev. 174; Martin Kretschmer, “Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings” (2008) 30 Eur. Intell. Prop. Rev. 341.

⁴⁶ See mainly Copyright, Designs and Patents Act 1988 ss.78, 79 and 81.

⁴⁷ Copyright, Designs and Patents Act 1988 ss.77–85.

Therefore moral rights in the United Kingdom create no impediments to re-use of environmental works created by employees.

In some other European countries such as France, however, moral rights are quasi sacrosanct and can present a hurdle in the exploitation of environmental works. Databases protected by the *sui generis* right do not attract moral rights. So, this problem will not arise for databases that do not also attract copyright protection—that is, databases arranged in a banal way such as many databases on weather patterns, climate, temperature and so on. For other environmental works, such as reports, graphs, maps, audiovisual works, the moral right of attribution may not pose a great problem. After all, it is only fair that authors should be attributed when their works are re-used.

In contrast, the right of integrity will prove a stronger obstacle. Many French courts adopt a subjective test to determine if the author's integrity right has been violated. Thus, if the author feels aggrieved, he or she can block the further exploitation of the work. Such a scenario will often not happen if the author is an individual who has granted a licence in the work that allows adaptation. Blocking could also happen if the author is an employee, as moral rights are inalienable. Employers and contracting parties are therefore well advised to include moral rights waivers in contracts to avoid the blocking of re-use of environmental works. Waivers are not entirely fool-proof, however. In many countries, strict rules must be respected as the waiver is otherwise invalid.

Making the moral rights rules more flexible for environmental works would therefore be in order in those Member States which protect these rights tooth and nail. This is because of the compelling importance of such works for the wellbeing of the planet and its inhabitants. In other words, in this very case, the moral rights of the author weigh far less in the balance. For instance, the moral right of integrity could only prevail in case of gross or manifest disregard.

In the United States, moral rights are rarely impediments to re-use of environmental works as they are only granted to visual artists.⁴⁸ Section 101 defines visual art as only comprising paintings, drawings, prints, sculptures or photographs in one single copy or no more than 200 numbered copies and which are not works made for hire. The moral rights of visual artists are quite protective of authors. For instance, the right of integrity prevents destruction of works of recognised stature, save in exceptional cases. Therefore, a similar rule (gross or manifest disregard for the author's work, reputation or honour) could be applied. Nevertheless, the rule against destruction of works of recognised stature surely applies to works existing in single copies. Environmental works will rarely exist in single copies, as they are more likely artistic works which can be reproduced such as maps, drawings, photographs, charts and so on.

Finally, as already discussed in previous scholarship, the principle of exhaustion (the first-sale doctrine in the United States) applies to the author's right of distribution, enables recycling, and therefore promotes environmental protection.⁴⁹ This principle, which applies to all intellectual property rights, provides that the right of distribution of the intellectual property right holder is exhausted once he or she first puts his or her product protected by the intellectual property right on the market or when the product is put on the market with his or her consent.⁵⁰

Defences

Apart from compulsory licences discussed above, EU law does not provide specific defences to enable freer re-use of environmental works. There are no specific exceptions for such use of copyrighted works in the InfoSoc Directive or any other Directive. One would need to do a thorough review of the copyright exceptions at the national level—in the 28 Member States—to see if there were such exceptions. Indeed,

⁴⁸ US Copyright Act 1976 s.106A.

⁴⁹ Derclaye, "Intellectual property rights and global warming" (2008) 12 Marq. Intell. Prop. L. Rev. 264, 284–285.

⁵⁰ InfoSoc Directive art.4. For case law from the Court of Justice, see Estelle Derclaye, "The European Union and Copyright" in Geller (ed.), *International Copyright Law and Practice* (2014), paras 2[2] and 5[7][a][ii].

the InfoSoc Directive allows Member States to retain minor exceptions existing before the adoption of the Directive.⁵¹ However, an exception that could be used indirectly is art.5(3)(e), which allows reproduction and communication to the public for purposes of public security. A similar exception exists for databases (Database Directive arts 6 and 9). The decompilation exception in the Software Directive (art.6) also helps to achieve interoperability. The exception allows the decompilation of computer programs that are necessary to solve environmental problems, but only for interoperability purposes and thus not to create competing programs. The exception may therefore be a little too narrow in view of the higher environmental interest of climate change. In the United Kingdom, the public interest defence (s.171 of the Copyright, Designs and Patents Act 1988) may also be of some use, although courts have interpreted rather strictly.

US copyright law is generally more flexible as the defence of fair use (s.107 of the US Copyright Act) could well apply in many cases concerning environmental works, especially because the first two factors (purpose and character of the use and nature of the work) may weigh more heavily in the balance in this case. The other two factors are: proportional amount and substance of the use and effect on the original author's economic market.

It may thus be of interest for the European Union to think about either introducing a specifically tailored exception to allow re-use of environmental works under certain conditions or going further to adopt a fair use defence similar or identical to that of the United States. It may be argued that a broader exception for works of "vital importance" is better suited as making such a specific exception may be too particular. Other works—and not only "environmental works"—may deserve such special treatment too. The literature has recently made proposals in this direction.⁵² Otherwise, compulsory licences may also play this role.

Finally, it must be noted that those countries which do not exclude "public works" from protection, such as the United Kingdom, can adopt generous statutory exceptions to copyright to palliate to the full exclusivity regime.⁵³

Technological protection measures and anti-circumvention provisions

A final issue of concern is so-called "para-copyright" provisions. Technological protection measures (TPMs) and anti-circumvention legal provisions relating to TPMs (ACPs) can restrict both access to and re-use of environmental works. In the European Union, since there is no specific exception allowing re-use of environmental works, the full-blown regime protecting ACPs applies to PSI (InfoSoc Directive art.6). It is illegal to knowingly circumvent a TPM to access and re-use a copyrighted (environmental) work to breach any exclusive right granted to the copyright or database right owner (art.6(1)). It is also illegal to make, sell, distribute and promote a product or services which enable circumvention of TPMs (art.6(2)). If, however, the exception of art.5(3)(e) is applicable to an environmental work, then Member States must safeguard this exception (art.6(4)) so that users can access and re-use environmental works despite the TPM protecting them. However, the TPM protection is absolute if any work is accessible online via a contract (art.6(4) in fine)—a much criticised aspect of the Directive.

The United States has in many respects an even stricter regime for the protection of TPMs in the Digital Millennium Copyright Act (DMCA). There is, however, a mechanism which allows the review of the exceptions to the protection every three years, and it is specifically designed to address users' concerns regarding access to and re-use of copyright works.⁵⁴ A number of exceptions have now been added following such reviews. So far no exception has been added in relation to environmental works, as TPM protection

⁵¹ InfoSoc Directive art.5(3)(o).

⁵² E.g. Marie-Christine Janssens, "The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation" in Estelle Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar, 2009); Martin Senftleben, "Overprotection and Protection Overlaps in Intellectual Property Law—The Need for Horizontal Fair Use Defences" in Annette Kur and Vytautas Mizaras (eds), *Structure of Intellectual Property Law: Can One Size Fit All?* (Cheltenham: Edward Elgar, 2011).

⁵³ Copyright, Designs and Patents Act 1988 ss.45–50; Copyright and Rights in Databases Regulations ss.20.2, Sch.1.

⁵⁴ US Copyright Act 1976 s.1201.

under the DMCA apparently has not generated any significant problems of access or re-use in this respect. It will be interesting to see if such exceptions are added following future reviews.

Finally, copyright holders may be tempted to override the principle of exhaustion by way of TPMs, but this is arguably against EU law (under arts 34–36 of the Treaty on the Functioning of the European Union, which address the free movement of goods). In some countries, inalienability clauses have been held void because they are against the very definition of property and the Civil Code, which favours the free circulation of goods (as in Belgium and arguably also in France).⁵⁵ Contracts and TPMs that prevent recycling of copyright works should be void, at least in the European Union.⁵⁶ Even if they were not, they may be in conflict with some EU environmental laws that require recycling, at least in certain technological sectors—for example, vehicles, packaging electronic equipment.⁵⁷ The question of contract pre-emption is not settled in the United States.⁵⁸

The issue of remedies is also important. It may be that injunctions are not indicated in some cases involving environmental works and that the award of only damages is a better option. This is an issue beyond the scope of the present article, but one which would be worth exploring further.

Conclusion

Broadly speaking, the copyright system already caters to environmental works rather well. Efforts have recently been made to “free” PSI in the European Union, and the revised PSI Directive brings further welcome changes along the lines proposed in this article and elsewhere. However, more could be done to enable wider access and re-utilisation of environmental works. Achieving better interoperability is one major task. Restricting the moral right of integrity in countries where it is highly protective of authors is another. Adding carefully crafted compulsory licences to copyright laws is yet another. Competition law is also a good complement to copyright law to combat collusion, refusals to licence, and excessive pricing. Freedom of information laws and environmental laws will also sometimes affect copyright; for example, architects may be forced to adapt their copyright plans to ensure their buildings comply with environmental rules.

Ideally, many of these changes should be done at the international level. But doing so is far slower and much more difficult to achieve. Declarations by intergovernmental organisations such as the World Trade Organization or the World Intellectual Property Organization or, more generally, international soft law instruments may steer much of the world into better tailoring copyright law so that it eventually becomes totally environmentally friendly.

⁵⁵ Jacques Hansenne, *Les biens—Précis* (Liège: Collection Scientifique de la Faculté de Droit de Liège, 1996), p.584, fn.631, cited by Séverine Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique, Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres* (Brussels: Larcier, 2005) p.405, fn.517.

⁵⁶ Estelle Derclaye, “Blocking Repair and Recycle through End User Licence Agreements and Technological Protection Measures” in Anselm Kamperman Sanders and Christopher Heath (eds), *Intellectual Property Law: Repairs, Interconnections and Consumer Welfare* (The Hague: Kluwer Law International, 2009), section II.B.

⁵⁷ Derclaye, “Blocking Repair and Recycle through End User Licence Agreements and Technological Protection Measures” in Kamperman Sanders and Heath (eds), *Intellectual Property Law* (2009), section III.A.

⁵⁸ Compare *ProCD v Zeidenberg* 86 F. 3d 1447 (7th Cir. 1996) with *Vault v Quaid* 847 F. 2d 255 (5th Cir. 1988).

Historical Evolution of Copyright Legislation in Africa

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☞ Africa; Colonial legislation; Copyright; Developing countries

Introduction

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) was adopted in September 1886, one year after the Berlin Conference of 1885 which formally empowered European powers of the time to colonise Africa and to impose their rules on these territories. Leading European countries, such as France, Great Britain and Spain, were among the signatories to the Berne Convention in 1886 and also the first to ratify it in 1887. In accordance with art.19, which stated that “the countries acceding to this Convention also have the right to accede at any time for their colonies or foreign possessions”, the application of the Berne Convention was extended to the colonies in Africa through declarations made by France, Great Britain and Spain at the time of signing or ratification. Thus, the Berne Convention not only impacted on the laws of these colonial powers, but also became applicable in the colonies by virtue of these declarations.

The question is: how were copyright matters regulated in the colonies? Put differently, which copyright legislation was declared to be applicable in the colonies? During the colonial period, the shortcut used by the colonial powers was merely to extend the application of their own copyright laws to their colonies. Consequently, the British Copyright Laws of 1911 and 1956, the French Copyright Laws of 1791, 1793 and 1957, the Spanish Copyright Law of 1847 and the Belgian Copyright Law of 1886 were deemed to be *mutatis mutandis* the copyright laws of their colonies, unless otherwise provided.

After a great number of African countries declared independence in the 1960s, two options were on the table for these former colonies: either (1) denounce the Berne Convention that had been applicable in their territories since the colonial period; or (2) make an open declaration of its continued application. An additional challenge was to decide whether to continue to enforce copyright laws inherited from the former colonial powers or to break from the colonial system by adopting new laws that adapted to their needs and priorities.

A respectable number of African countries, mostly former French colonies, acceded to the Berne Convention in the 1960s or made a clear declaration of the Convention’s continued application. Former British colonies took some time to accede to the Berne Convention after their independence. It should be underscored that several African countries enacted their first independent copyright laws between 1961 and 1986. As will be seen below, most of these laws had a flavour of the Berne Convention and were also influenced by both the Universal Copyright Convention of 1952¹ and the Tunis Model Law on Copyright for Developing Countries of 1976.

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¹ This study will not cover this Convention.

The aim of this study is to highlight the main features of African copyright legislation from the colonial period up to 1990. It is divided into three main sections: (1) the Berne Convention in the colonial period from 1886 to 1960; (2) copyright legislation in Africa during the colonial period; and (3) copyright laws in African countries after their independence. A brief conclusion will follow.

The Berne Convention in the colonial period from 1886 to 1960

Before 1886, there was a proliferation of bilateral agreements regulating copyright protection between states. Under this regime, recognition of the rights of foreign authors was based on the principle of reciprocity. These bilateral treaties were deemed unsatisfactory. The need for a truly multilateral treaty was felt by all stakeholders. As an example, many author associations, through different gatherings, demanded the establishment of an international institution and a system aimed at harmonising copyright legislation of the states.

Members of the international community also sensed the desire to establish an International Union in the field of copyright. Three diplomatic conferences² which took place in Berne in 1884, 1885 and 1886 were in the end useful to establish the Berne Union.³ The Berne Convention, was adopted on September 9, 1886 by the following 10 countries: Belgium, Germany, Great Britain, France, Haiti, Italy, Liberia, Spain, Switzerland and Tunisia.⁴ With the exception of Liberia,⁵ all of these countries signed the Berne Convention on September 9, 1886 and ratified it on September 5, 1887. The Convention came into force on December 7, 1887.

The first great innovation of the Berne Convention was the establishment of the same rights between the nationals of the Union Members (national treatment). In other words, there was no discrimination between nationals and foreigners with regard to the enjoyment of rights as long as the conditions were met. The enjoyment of these rights was subject to the conditions and formalities prescribed by the legislation of the country of origin of the work. The duration of protection for the work in other countries could not exceed what was provided in the country of origin.

Article 4 of the Convention defined the expression “literary and artistic works” by listing works which should fall under. The discussion was, *inter alia*, whether to admit photographic works into the list of the protected works in art.4. It was subsequently agreed to have a provision for this in the annexed Final Protocol.

Among the rights, the exclusive right of the author to authorise the translation of his or her work was of the most critical concern. This right lapsed after 10 years from the publication date of the original work. According to art.17, the Convention was subject to revision in order to incorporate improvements to enhance the system. An additional article was annexed to the Berne Convention and was considered to be an integral part of the Convention. Under this provision, existing Conventions concluded prior to the adoption of the Berne Convention between the parties were not affected, as these conventions could provide to the authors or their successors more extensive rights than those granted by the Union, or they could contain provisions that were not contrary to this Convention. A Final Protocol, also deemed to be an integral part of the Convention, was further annexed to the text of the Berne Convention.⁶

² “La constitution de l’Union, Les Conférences diplomatiques”, *Droit d’auteur*, March 1888, pp.21–24.

³ “Convention du 9 septembre 1886 concernant la création d’une union internationale pour la protection des œuvres littéraires et artistiques”, *Droit d’auteur*, January 1888, p.4.

⁴ It should be pointed out that Japan and the United States participated in the Berne Diplomatic Conference but did not sign the Berne Convention.

⁵ Ratification: October 16, 1908; entry into force: October 16, 1908; denunciation of the Berlin Act of 1908 and the Berne Additional Protocol of 1914: February 22, 1929, with effect on February 22, 1930.

⁶ “Convention du 9 septembre 1886 concernant la création d’une union internationale pour la protection des œuvres littéraires et artistiques”, *Droit d’auteur*, January 1888, pp.6–7.

What was the position of the colonies in general and African countries in particular at the time of adoption of the Berne Convention in 1886? The answer to this query was provided in art.19 of the Convention:

“Countries acceding to this Convention also have the right to accede at any time for their colonies or foreign possessions.

They may, for this purpose, make a statement or declaration whereby all their colonies or possessions are included in accession either explicitly name those included therein, or simply state those who are excluded.”

In conformity with this provision, Great Britain and France declared while signing the Berne Convention that accession to the Convention included their colonies.⁷ Spain declared that it reserved the use of that option at the exchange of ratification. A year later, on September 5, 1887, Spain ratified the Berne Convention and declared that its ratification included the dependent territories or colonies. So, the application of the Berne Convention was extended to most colonies in Africa through declarations made by France, Great Britain and Spain at the time of the signing or ratification of the Berne Convention in accordance with art.19.

It should be underscored that, for the application of the subsequent revisions of the Berne Convention to be extended to the colonies, declarations from the colonial powers were also required for each revision—namely, the Paris Additional Act of 1896, the Berlin Act of 1908, the Berne Additional Protocol of 1914, the Rome Act of 1928 and the Brussels Act of 1948.

The Berne Convention was slightly amended at Paris on May 4, 1896 through the Paris Additional Act. This Act aimed to improve the Berne Convention by underlining reciprocal rights and obligations of authors and the public.⁸ The amendment was limited to a number of provisions, namely arts 2, 3, 5, 7, 12 and 20. It also amended the Final Protocol (paras 1–4) annexed to the Berne Convention of 1886.⁹ It similarly adopted a Declaration on May 4, 1896 interpreting some provisions of the Berne Convention of 1886 and of the additional Act of May 4, 1896.

The Berne Convention was further revised at Berlin.¹⁰ Adopted on November 13, 1908, this Act aimed to revise the provisions of the Berne Convention as adopted in 1886, the Paris Additional Act of 1896, the revised Final Protocol annexed to the Berne Convention in 1896, and the Interpretative Declaration of 1896 attached to the Paris Additional Act. The Berlin Act tried to harmonise the provisions of the Berne Convention of 1886 and the Paris Additional Act of 1896.

The Berlin Act was innovative in many ways. Among others, the main innovation was that no formality, such as registration, was required for a work to be eligible for copyright protection. In addition, the protection accorded in another country was independent of the protection conferred in the country of origin of the work. The duration of protection was set for the life of the author plus 50 years after death.¹¹ The right of translation was no longer limited to 10 years of exclusivity. In addition, the list of works enumerated under art.2 was extended under the Berlin Act. The language of this article was also changed by making this provision mandatory vis-à-vis the contracting states. Accordingly, under the Berlin Act, this article incorporated choreographic and architectural works in the list of protected works. The article also extended the protection of the author’s economic rights. Photographic works were expressly recognised as protectable works, and contracting states were obliged to provide protection (art.3). Cinematographic works were considered as literary or artistic works (art.4).

⁷ “Convention du 9 septembre 1886 concernant la création d’une union internationale pour la protection des œuvres littéraires et artistiques”, *Droit d’auteur*, January 1888, pp.7–8.

⁸ “La conférence de Paris du 16 avril 1896”, *Droit d’auteur*, April 1896, p.50.

⁹ “Textes adoptés par la conférence de Paris—Acte additionnel du 4 mai 1896”, *Droit d’auteur*, June 1896, pp.77–80.

¹⁰ “Convention de Berne révisée pour la protection des œuvres littéraires et artistiques (du 13 novembre 1908)”, *Droit d’auteur*, November 1908, pp.141–145.

¹¹ This provision was optional, and Member States could provide different terms of protection.

The Berlin Act was the basis of several revisions of national copyright laws of Member States of the Berne Union. Because the Berne Convention also impacted on bilateral treaties concluded between Member States, the influence of the Berlin Act was wider at both the national and international levels. As far as the colonies were concerned, art.26 of the revised Berne Convention (Berlin Act) stated:

“The Contracting States have the right to accede at any time to the present Convention on behalf of their colonies or possessions. They may, for this purpose, make a general statement or declaration that all their colonies or possessions are included in the accession or explicitly name those who are excluded. This declaration shall be notified in writing to the Government of the Swiss Confederation thereof and in all others.”¹²

Thus, the application of the Berlin Act was extended to the colonies in Africa through declarations made by the former colonial powers. This was the case, for instance, for Portugal, which adopted a decree on March 18, 1911 to accede to the Berlin Act. The Swiss Confederation was notified of the accession by the Government of Portugal on March 29, 1911. The notification stated clearly that the accession to the Berlin Act was made for Portugal and its colonies.¹³

On March 20, 1914, Member States of the Berne Union adopted an Additional Protocol annexed to the Berne Convention as revised by the Berlin Act of 1908. Known also as the Berne Act of 1914, this optional protocol aimed at limiting in certain circumstances the benefit of the Berne Convention with regard to the non-Member States. According to para.1 of the Additional Protocol,

“when a non-Member of the Berne Union fails to protect in an adequate manner works of nationals of one of the countries of the Berne Union, the Contracting State may limit the protection of the first published works of nationals of the said non-Member of the Berne Union if these authors do not reside or are not domiciled in one of the countries of the Union”.¹⁴

The Berne Convention was further revised on June 2, 1928 in Rome.¹⁵ Under the Rome Act new provisions were introduced, and some where the consensus of member states was hard to reach were clarified. The duration of protection was one of them. Accordingly the term of protection of the life of the author plus 50 years after death remained optional under this Act.

In addition, the moral right of the author in art.6*bis* was explicitly provided for in the Rome Act:

“(1) Notwithstanding the author’s economic rights, and even after the conveyance of the said rights, the author retains the right to claim authorship of the work, and the right to oppose any distortion, mutilation or other modification of the said work, which would be prejudicial to his honour or reputation.”

The Rome Act also removed a great number of permitted reservations provided under the previous Acts of the Berne Convention.

The application of the Berne Convention to the colonies in Africa was based on art.26 of the Rome Act which stipulated:

“(1) Any country of the Union may at any time notify in writing to the Government of the Swiss Confederation that this Convention is applicable to any of his colonies, protectorates, territories under mandate or any other territories subject to its sovereignty or authority. The

¹²“Convention de Berne révisée pour la protection des oeuvres littéraires et artistiques (du 13 novembre 1908)”, *Droit d’auteur*, November 1908, pp.141–145.

¹³“Etudes générales, le Portugal et l’Union de Berne”, *Droit d’auteur*, January 1912, p.3.

¹⁴“Protocole additionnel à la Convention de Berne révisée du 13 novembre 1908”, *Droit d’auteur*, April 1914, p.45.

¹⁵“Convention de Berne pour la protection des oeuvres littéraires et artistiques du 9 septembre 1886 révisée à Berlin le 13 novembre 1908 et à Rome le 2 juin 1928”, *Droit d’auteur*, June 1928, pp.73–78.

Convention shall apply to all the territories named in the notification. Without this notification, the Convention does not apply to these territories.

- (2) Any country of the Union may at any time notify in writing to the Government of the Swiss Confederation that this Convention shall cease to apply to all or part of the territories that have been the subject of the notification referred to in the preceding paragraph, and the Convention shall cease to apply in the territories named in this notification 12 months after receipt of the notification of the Government of the Swiss Confederation.”

This provision is self-explanatory. In general terms, the amendment of the Berne Convention was applicable to the colonies only when the Swiss Confederation was notified of a clear declaration extending the application. In accordance with art.26 of the Rome Act, Belgium, in November 1948, notified the Swiss Confederation of the extension of the application of the Rome Act to the Belgian Congo and Rwanda-Urundi.¹⁶

On June 26, 1948, the Berne Convention was revised at Brussels to provide effective and uniform protection to the rights of authors over their literary and artistic works.¹⁷ The Brussels Act had the merit of putting in one text all the provisions of the Berne Convention without any annex(es). The Brussels Act also introduced four new articles and modified the language of several others for the sake of clarity. Out of 34 articles, only 10 remained untouched. By extending the list of protected works prescribed in art.2, the Brussels Act made it very clear that cinematographic, photographic and applied art works¹⁸ were literary or artistic works and were included in the list of protected works. The change in the language of art.2 made it directly applicable to the territories of all Members of the Berne Union. Furthermore, protection of oral works came under intense discussion during the Brussels Conference.

In addition, the Brussels Act strengthened and expanded the scope of protection of the author’s moral rights. The author could not only oppose any distortion, mutilation or other modification of the work, but also oppose any act on the same work that was detrimental to his honour or reputation. Conditions on the application or exercise of these rights were no longer reserved to the national copyright laws of the Members of the Union. Article 14*bis* was newly introduced to handle what is presently known as *droit de suite*. As to the duration of protection, life of the author plus 50 years after death was provided as the minimum, giving leeway to each Member to offer more.

With regard to the extension of the application of the Brussels Act to the colonies, art.26 provided:

- “(1) Any Country of the Union may at any time in writing notify the Swiss Government that this Convention shall apply to its overseas territories, colonies, protectorates, territories under its trusteeship, or to any other territory for the international relations of which it is responsible, and the Convention shall thereupon apply to all the territories named in such notification, as from a date determined in accordance with Article 25, paragraph (3). In the absence of such notification, the Convention shall not apply to such territories.
- (2) Any Country of the Union may at any time in writing notify the Government of the Swiss Confederation that this Convention shall cease to apply to all or any of the territories which have been made the subject of a notification under the preceding paragraph, and the Convention shall cease to apply in the territories named in this notification twelve months after its receipt by the Government of the Swiss Confederation.”

¹⁶“Belgique, Application de la convention de berne, révisée à Rome le 2 juin 1928, aux territoires du Congo Belge et du Ruanda Urundi”, *Droit d’auteur*, December 1948, p.141.

¹⁷“Convention de Berne pour la protection des oeuvres littéraires et artistiques du 9 septembre 1886 révisée à Berlin le 13 novembre 1908, à Rome le 2 juin 1928, et à Bruxelles le 26 juin 1948”, *Droit d’auteur*, July 1948, pp.73–87.

¹⁸With regard to applied art works, they were assimilated to artistic works but Member States of the Berne Union had leeway to regulate this further at the national level and to limit the scope of protection and conditions vis-à-vis the industrial designs regime.

The application of the Brussels Act was extended to Mauritius by the declaration the United Kingdom made on October 12, 1964.

It should be remembered that further revisions of the Berne Convention took place in 1967 and 1971, after the independence of many African countries.

Copyright legislation in Africa during the colonial period

As noted above, the Berne Convention impacted on the copyright laws of the colonial powers. As also stated, the application of copyright laws of these countries was also extended to their colonies. Consequently, the British Copyright Laws of 1911 and 1956, the French Copyright Laws of 1791, 1793 and 1957, the Spanish Copyright Law of 1847 and the Belgian Copyright Law of 1886 were deemed to be *mutatis mutandis* the copyright laws of their colonies, unless otherwise provided. Some colonies also adopted specific copyright legislation.

It is not the intent of this section to analyse the colonial copyright laws extended and applied to the colonies. The main idea here is to highlight the copyright legislation of a few African countries adopted during the colonial period.

Liberia was officially colonised by the United States from 1820 to July 26, 1847, the date of its independence. In 1886, Liberia, as an independent country, signed the Berne Convention and ratified it in October 1908. Liberia had its first Copyright Law in 1911.¹⁹ Evidently, that law was influenced by the Berne Convention.

Article 1 of the Liberian Copyright Law of 1911 provided:

“Authors of literary, scientific, and artistic works will enjoy in the Republic of Liberia exclusive right to reproduce and to sell or to authorise reproduction.”

This exclusive right was enjoyed during the life of the author plus 20 years after death. To be protected, the work has to be registered through the deposit of a copy of the work with the State Department. Thereafter, if the Secretary of State deemed the work as original, a copyright certificate would be issued to the author ascertaining the compliance of the author with national legislation. Consequently, he or she could enjoy exclusive right. The list of protected works was *mutatis mutandis* similar to the one provided under the Berne Convention.

On June 21, 1948, a Royal Decree on Copyright²⁰ was adopted to regulate copyright matters in Belgian Congo. The application of this Royal Decree was likewise extended to Rwanda-Urundi, another Belgian colony. According to art.1, the author of a literary or artistic work was the only one entitled to reproduce or authorise the reproduction of his or her work in any kind. Furthermore, the copyright in a literary work included the exclusive right to make or authorise translation. In general terms, a literary work was protected for the life of the author plus 50 years after death. Among the exceptions and limitations, the right to make quotations, when conducted for the purpose of criticism, controversy or teaching, was permitted. Also set out were provisions on copyright in musical works and visual art and on enforcement measures.

To obtain protection in Belgian Congo, the work has to be registered in the registry at the headquarters of the General Government. The registration was required within six months from the date of publication, representation or execution for literary, musical or dramatic works and from the date of exhibition for visual art works. In conformity with the Royal Decree of June 1948, the General Governor issued an ordinance in December 1948 prescribing that the Royal Decree would come into force in Belgian Congo on January 1, 1949.²¹

¹⁹“Libéria, Loi concernant le droit d’auteur du 22 décembre 1911”, *Droit d’auteur*, August 1912, p.106.

²⁰“Congo Belge, Décret Royal concernant la protection du droit d’auteur”, *Droit d’auteur*, October 1948, pp.118–120.

²¹“Congo Belge, Ordonnance relative au droit d’auteur du 10 décembre 1948”, *Droit d’auteur*, June 1949, p.61.

British colonies were governed by the British Copyright Law as amended. To start with, on June 25, 1886, the International Copyright Acts (1884–1886) were adopted to amend the Laws relating to the international and colonial protection of copyright and related rights.²² According to art.8 of the amending law,

“the Law on the protection of copyright shall apply to any literary or artistic work produced for the first time in a British possession in the same manner as they apply for a work produced for the first time in United Kingdom. However, as regards registration of works, this law does not apply if a British possession required local registration of the work.”

The King of England was given leeway to revise any law or ordinance on copyright adopted for the colonies. It was also prescribed that the International Copyright Acts could not prevent any colony from adopting any copyright law or ordinance.

On December 16, 1911, a new British Copyright Law aimed at revising previous Copyright Acts, including the International Copyright Acts, was adopted.²³ In accordance with art.36 of this Law, the previous Copyright Acts were repealed, unless otherwise mentioned. As a matter of fact, the 1911 Copyright Act governed copyright matters not only in Britain but also in the colonies. Several provisions of that new law related to its application to the British colonies. Article 1 of the 1911 Copyright Act stated:

“Subject to the provisions of this Act, it will be recognised in all possessions of her Majesty governed by this Act and during the period mentioned below a copyright in any original literary, dramatic, musical and artistic works if, a) in the case of a published work, it was published for the first time in the said possessions, and b) in the case of an unpublished work, the author was, at the time it was created, a British subject or resident in one of the said possessions.”

This provision clearly extended the application of the British Copyright Act of 1911 to the colonies and possessions. The protection period was set for the life of the author plus 50 years after death. It was prescribed in art.23 of the 1911 Copyright Act that works of foreign authors published for the first time in the British possessions were governed by this Act.

Chapter Seven of the 1911 Copyright Act covered, in particular, matters relating to the application of the Act to the British possessions, including colonies. According to art.25, the British Copyright Act was extended to all the British possessions, except for those provisions whose application was expressly restricted to the United Kingdom. However, the Act was not extended to the autonomous possessions, unless the legislature of the latter declared it applicable, whether or not modifications were made. The discretion to adopt any additional or complementary legislation to the British Act in the field of copyright was left to these possessions or colonies.

Part Two of the Act dealt with the international protection of copyright, encompassing foreign works and the British possessions. According to art.30, Part Two of the Act (international protection of copyright) was applicable to the British possessions governed by the Act, except for autonomous possessions, unless the latter specified otherwise.

The 1911 British Copyright Act was repealed by the Copyright Act of 1956 which covered both copyright and related rights.²⁴ Unlike the earlier Act, the 1956 Act did not explicitly refer to its application to the British possessions or colonies. With regard to the exclusive right, for instance, the Act referred to the

²²“Loi pour amender la législation concernant la protection internationale et coloniale des droits d’auteur (du 25 juin 1886)”, *Droit d’auteur*, November 1894, pp.156–159.

²³“Grande Bretagne, Loi destinée à modifier et à codifier la législation concernant le droit d’auteur (du 16 décembre 1911)”, *Droit d’auteur*, February 1912, pp.17–26.

²⁴“Grande-Bretagne, Loi sur le droit d’auteur (du 5 novembre 1956) (première partie)”, *Droit d’auteur*, March 1957, pp.33–42; “Grande-Bretagne, Loi sur le droit d’auteur (du 5 novembre 1956) (deuxième partie)”, *Droit d’auteur*, April 1957, pp.53–62; “Grande-Bretagne, Loi sur le droit d’auteur (du 5 novembre 1956) (troisième partie)”, *Droit d’auteur*, May 1957, pp.73–80; “Grande-Bretagne, Loi sur le droit d’auteur (du 5 novembre 1956) (quatrième partie)”, *Droit d’auteur*, June 1957, pp.93–102.

performance of these acts “in the UK or any other country to which the relevant provision of the Act applied”. The silence of the Act may be explained given its adoption on the eve of independence of several British colonies. Article 51(3), however, explicitly mentioned that the Act was applicable to Northern Ireland. In other words, unless otherwise specified through a separate ordinance, the 1956 Act was not automatically extended to the British colonies. This explains why most of those colonies in Africa continued to apply the 1911 British Copyright Act after their independence and until they adopted their own copyright laws. Nevertheless, it should be noted that the United Kingdom extended by ordinance the application of its 1956 Act to Mauritius on May 12, 1964, effective from May 21, 1964.²⁵

With regard to the French colonies, it should be recalled that the French copyright system was governed by the Copyright Laws of 1791 and 1793.²⁶ The application of these Laws was extended to the colonies of the time first by the Decree of December 9, 1857²⁷ issued by the President of France and subsequently by the Decree of October 29, 1887 adopted by the President of France, which extended the application of all the laws relating to copyright to all colonies with no exception.²⁸ The 1791 and 1793 Copyright Laws were repealed by a Copyright Act adopted on March 11, 1957. It can be said that the French Copyright Act of 1957 was the first French Copyright Law enacted after 1885.²⁹ The 1957 Act was greatly influenced by the Berne Convention as revised. According to art.81, this law was applicable in overseas territories and Cameroon. By decrees, the application of this Act was extended to a number of French colonies in Africa.

Copyright laws in African countries after their independence

This section will begin by ascertaining the status of the Berne Convention in African countries shortly after their independence. The section will then explore some of the first copyright legislation adopted by these independent countries as well as the Tunis Model Law on Copyright for Developing Countries of 1976, which impacted on the copyright laws of African countries.

The Berne Convention as revised and African countries after independence

As mentioned above, the Berne Convention was applicable in the colonies by clear notification or declaration emanating from the colonial powers, contracting states to the Berne Convention and Member States of the Berne Union. In general terms, British, French, Belgian, Portuguese and Spanish colonies saw the Berne Convention applied and taking effect in their territories without their direct participation in the negotiations. The question that was put on the table after the independence of these countries was whether they would accept the continued application of the Berne Convention in their territories or denounce it.

In accordance with art.25 of the Brussels Act,³⁰ several African countries favoured the Berne Convention by either (1) acceding to the Convention as a Member, with no reference to the past, in conformity with

²⁵ “Ordonnance de 1964 sur le droit d’auteur (Ile Maurice) (N.689, du 12 mai 1964, entrée en vigueur le 21 mai 1964)”, *Droit d’auteur*, September 1964, p.218. Mauritius was still a British colony until its independence in 1968.

²⁶ Copyright Law of 13–19 January 1791; Copyright Law of 19–24 July 1793.

²⁷ *Décret portant que les lois et tous les actes y désignés, qui régissent la propriété littéraire et artistique dans la métropole sont déclarés exécutoires dans les colonies françaises*, December 9, 1857, available at: http://cdigital.dgb.uanl.mx/la/1190001123/1190001123_38.pdf [Accessed March 27, 2014].

²⁸ *Décret déclarant applicables aux colonies les dispositions législatives qui règlent en France la propriété littéraire et artistique*, October 29, 1887, available at: http://cdigital.dgb.uanl.mx/la/1190001123/1190001123_38.pdf [Accessed March 27, 2014].

²⁹ 1885 was the year of the Berlin Conference, which officially marked the commencement of colonisation in Africa.

³⁰ Article 25 of the Berne Convention, as revised in 1948 (Brussels Act), provides:

- “(1) Countries outside the Union which make provision for the legal protection of the rights forming the object of the present Convention may accede thereto upon request.
- (2) Such accession shall be notified in writing to the Government of the Swiss Confederation, who shall communicate it to all the other Countries of the Union.

art.25, whereby the Convention came into effect one month after the date of the notification made by the Government of the Swiss Confederation to other countries in the Union; or (2) accepting the continued application of the Convention as declared by the former colonial power.

To illustrate this, Côte d'Ivoire acceded to the Berne Convention in December 1961 with effect on January 1, 1962.³¹ However, Benin (formerly Dahomey) made clear in a declaration in 1961, confirming the continued application of the Berne Convention as revised, without interruption, as of May 26, 1930.³² Gabon acceded to the Berne Convention in 1961. In May 1962, Niger notified the Swiss Confederation of the continued application of the Berne Convention as revised in its territory, as of May 26, 1930.³³ Senegal acceded to the Berne Convention as revised on July 25, 1962, effective on August 25, 1962.³⁴ Burkina Faso (formerly Haute-Volta) acceded to the Berne Convention in 1963. Mali declared the continued application of the Berne Convention in 1962. The Democratic Republic of Congo declared the continued application of the Berne Convention in October 1963. Madagascar made its declaration in 1966. Cameroon declared in September 1964 the continued application of the Berne Convention as revised in its territory without interruption as of May 22, 1952.³⁵

Mauritius gained its independence from the United Kingdom in March 1968. On April 12, 1970, Mauritius notified the Swiss Confederation of the non-application³⁶ of the Berne Convention (Brussels Act of 1948) in its territory as of August 18, 1971.³⁷ It should be recalled that the application of the Brussels Act was extended to Mauritius by the declaration the United Kingdom made on October 12, 1964.³⁸

It should be underscored that the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted in October 1961 to secure protection for performers, phonogram producers and broadcasting organisations. Only a few African countries have acceded to this Convention.³⁹ Congo acceded to the Rome Convention on June 29, 1962, and the Convention came into effect on May 18, 1964. Niger acceded to the Convention on April 5, 1963, with effect on May 18, 1964.

As far as the Berne Convention is concerned, two main revisions took place after the independence of most African countries: the Stockholm Act of 1967⁴⁰ and the Paris Act of 1971.⁴¹ The Convention

- (3) Such accession shall imply full acceptance of all the clauses and admission to all the advantages provided by this Convention, and shall take effect one month after the date of the notification made by the Government of the Swiss Confederation to the other Countries of the Union, unless some later date has been indicated by the acceding Country. It may, nevertheless, contain an indication that the adhering Country wishes to substitute, provisionally at least, for Article 8, which relates to translations, the provisions of Article 5 of the Convention of 1886 revised at Paris in 1896, on the understanding that those provisions shall apply only to translations into the language or languages of that Country."

³¹ "Côte d'Ivoire, Adhésion à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée en dernier lieu à Bruxelles le 26 juin 1948 (avec effet à partir du 1er janvier 1962)", *Droit d'auteur*, October 1961, p.257.

³² "Dahomey, Déclaration de continuité à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Bruxelles le 26 juin 1948 (sans interruption à partir du 26 mai 1930)", *Droit d'auteur*, March 1961, p.69.

³³ "Niger, Déclaration de continuité à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Bruxelles le 26 juin 1948 (sans interruption à partir du 26 mai 1930)", *Droit d'auteur*, August 1962, p.170.

³⁴ "Sénégal, Déclaration de continuité à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Bruxelles le 26 juin 1948 (avec effet à partir du 25 août 1962)", *Droit d'auteur*, August 1962, pp.170-171.

³⁵ "Cameroun, Déclaration de continuité à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Bruxelles le 26 juin 1948 (sans interruption depuis le 22 mai 1952)", *Droit d'auteur*, November 1964, p.273.

³⁶ The non-continued application of the Berne Convention (as extended during the colonial period). In other words, Mauritius denounced the Berne Convention as revised after its independence.

³⁷ "Maurice, Déclaration concernant la non-application de la Convention de Berne pour la protection des oeuvres littéraires et artistiques", *Droit d'auteur*, October 1970, p.221.

³⁸ "Maurice, Déclaration concernant la non-application de la Convention de Berne pour la protection des oeuvres littéraires et artistiques", *Droit d'auteur*, October 1970, p.221.

³⁹ Cape Verde, Congo, Liberia, Lesotho, Niger, Nigeria and Togo.

⁴⁰ "Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Stockholm le 14 juillet 1967", *Droit d'auteur*, August 1967, pp.173-186.

⁴¹ "Conférence diplomatique de révision de la Convention de Berne (Paris, 5 au 24 juillet 1971) (Acte de Paris)", *Droit d'auteur*, August 1971, pp.135-149.

Establishing the World Intellectual Property Organization (WIPO) was adopted on the same date of July 14, 1967 as the Stockholm Act during the same diplomatic conference.⁴²

Shortly before the Stockholm Conference in 1967, developing countries had requested a reform of international intellectual property law.⁴³ The new reality was that, after the former colonies declared their independence, their interests also had to be taken into consideration to enable them to benefit from the international copyright system, including the Berne Convention. Finally, unlike other previous Acts, the Stockholm and Paris Acts included specific annexes relating to developing countries.

Both Acts were welcomed by African countries, mainly the former French and Belgian colonies which signed or acceded to one of the Acts within reasonable time. Despite this dynamism from the French speaking countries, most former British colonies acceded to the Paris Act after 1990. The same situation happened in the field of industrial property.⁴⁴ It should, however, be remembered that Liberia, a former US colony, participated in the negotiations of the Berne Convention as an independent state, signed the original Convention and ratified it in 1908 before eventually denouncing it on February 22, 1929 (effective on February 22, 1930) and then acceding again to the Paris Act in 1988.

From 1967 to 1980, 18 African countries signed and ratified or acceded to one or both of the Stockholm and Paris Acts. To illustrate this, the Democratic Republic of Congo signed the Stockholm Act but acceded to it in 1974, with effect in 1975. Gabon was among the signatories to the Stockholm Act and acceded to the Paris Act in 1975. Madagascar signed the Stockholm Act in 1967. Cameroon signed the Stockholm Act and ratified the Paris Act in 1973. Benin acceded to the Paris Act in 1974. Burkina Faso acceded to the Paris Act in 1975. Central African Republic and Mali acceded to the Paris Act in 1977. Mauritania acceded to the Stockholm Act in October 1972 and to the Paris Act in June 1976. Morocco was a signatory to both the Stockholm and Paris Acts. The same can be said for Senegal which signed both Acts and ratified the Paris Act in 1975. Togo acceded to the Paris Act in 1975. Guinea acceded to the Paris Act in 1980.

The Tunis Model Law of 1976 on Copyright for Developing Countries

The need for a Model Law may be traced back to 1960 after the independence of a great number of African countries. In 1976, the Tunis Model Law was adopted when developing countries in general and African countries in particular were designing their new copyright laws, which were supposed to be different from the ones adopted by former colonial powers in the colonial period. The other aim of this model law was to harmonise national laws to avoid conflict with international norms.

In several meetings organised by the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the United International Bureaux for the Protection of Intellectual Property (BIRPI) between 1961 and 1963, many stakeholders from Africa voiced the need to elaborate a model law on copyright for developing countries in Africa. Regional meetings took place in different locations to discuss different options from 1964 to 1973. A Committee of Experts in charge of drafting a Model Law on Copyright for Developing Countries in Africa was convened at Abidjan, Côte d'Ivoire in October 1973 under the auspices of UNESCO in collaboration with WIPO (BIRPI became WIPO in 1970). After discussion, it was decided that the geographical scope of the model would be extended to accommodate all developing countries given that most of them had the same issues and a model was needed to serve the same purpose. So, the draft model law was renamed the draft Model Law on Copyright for Developing Countries (by removing the term "Africa").

⁴² "Convention instituant l'Organisation Mondiale de la Propriété Intellectuelle signée à Stockholm le 14 juillet 1967", *Droit d'auteur*, August 1967, pp.154–160.

⁴³ Hans Peter Kunz-Hallstein, "Recent Trends in Copyright Legislation of Developing Countries" (1982) 13 IIC 694.

⁴⁴ Tshimanga Kongolo, "Historical Developments of Industrial Property Laws in Africa" (2013) 5 WIPO J. 105.

Based on the discussions that took place in Abidjan, and after consideration of several comments, the Secretariats of UNESCO and WIPO established a final draft model law on copyright for the use of developing countries. This draft was submitted to the Committee of Governmental Experts to prepare a Model Law on Copyright for Developing Countries. This Committee approved the draft law during its meeting which was held from February 23 to March 2, 1976⁴⁵ in Tunis, Tunisia. The Model Law was adopted on March 2, 1976 and was named the Tunis Model Law on Copyright for Developing Countries.

The Model Law tried to be compatible with both the Paris Act of the Berne Convention and the Universal Copyright Convention as revised in 1971. It also attempted to accommodate both the common law and civil law systems. The Model Law covered the following items: works protected, derivative works, works not protected, economic rights, *droit de suite*, moral rights, works of national folklore, fair use, ephemeral recordings, limitation of the right of translation, limitation of the right of reproduction, ownership of copyright, transfer of copyright, duration of economic rights, organisation of authors, infringements and sanctions, field of application of law, *domaine public payant* and definitions.⁴⁶

This Model Law served as the foundation for many first or first revised copyright laws of African countries. At least in terms of structure, it had the merit of harmonising the copyright laws of many developing countries.

Selected African copyright legislation after the colonial period

This section will illustrate the first copyright laws adopted by some African countries after their independence. Even though former British colonies in Africa took a long time to adopt their own independent laws in the field of industrial property, they had been very dynamic in the field of copyright and related rights and enacted copyright legislation long before the former French colonies in Africa.

Ghana gained independence from Britain in 1957 and adopted its first Copyright Act on November 8, 1961, which entered into force on March 1, 1962.⁴⁷ The Ghanaian Copyright Act repealed the British Copyright Act of 1911. Ghana was reluctant to continue the application of the Berne Convention as revised in its territory, given the high level of protection provided under the Convention. So, Ghana chose not to accede to the Berne Convention, but to the Universal Copyright Convention, which seemed to favour developing countries. Ghana did not accede to the Berne Convention until 1991.

Uganda became an independent country from Britain in 1962 and adopted its first Copyright Law on June 22, 1964.⁴⁸ This law repealed the British Copyright Act of 1956 as applicable in Uganda. Malawi became fully independent from Britain in 1964. It adopted its first Copyright Act in 1965.⁴⁹ The Act repealed the British Copyright Act of 1911 and entered into force on May 24, 1965. Kenya gained its independence from Britain in 1963. The first Kenyan Copyright Law was adopted in 1966 and entered into force on April 1, 1966.⁵⁰ This copyright law repealed the British Copyright Law of 1956 as applicable in Kenya.

The United Republic of Tanzania (Tanzania) was formed out of the former Tanganyika and Zanzibar. Tanganyika gained its independence from Britain in 1961, and Zanzibar in 1963. On April 26, 1964, Tanganyika united with Zanzibar to form the United Republic of Tanganyika and Zanzibar. The country was renamed the United Republic of Tanzania on October 29, 1964. Tanzania adopted its first Copyright

⁴⁵ “Ezzedine Abdallah, Principes fondamentaux de la loi type de Tunis sur le droit d’auteur à l’usage des pays en voie de développement”, *Droit d’auteur*, November 1977, pp.294–303

⁴⁶ The Tunis Model Law is available at: <ftp.wipo.int/pub/library/ebooks/historical/ipbooks/TunisModelLawOnCopyright/TunisModelLawOnCopyright> [Accessed March 27, 2014].

⁴⁷ “La loi ghanéenne sur le droit d’auteur (études générales)”, *Droit d’auteur*, July 1962, pp.156–161.

⁴⁸ “Ouganda, Loi sur le droit d’auteur (du 22 juin 1964)”, *Droit d’auteur*, November 1964, pp.278–282.

⁴⁹ “Malawi, Loi sur le droit d’auteur, 1965 (N° 38, de 1965)”, *Droit d’auteur*, August 1965, pp.177–182; “Quelques notes concernant la loi malawienne sur le droit d’auteur études générales)”, *Droit d’auteur*, August 1965, pp.183–184.

⁵⁰ “Kenya, Loi sur le droit d’auteur, 1966 (N° 3, de 1966)”, *Droit d’auteur*, May 1966, pp.138–143.

Law on December 14, 1966⁵¹ and repealed the British Copyright Act of 1911. The Law entered into force on October 1, 1967.

Sierra Leone became an independent country from Britain in 1961. It adopted its first Copyright Law on May 5, 1965, and the law became effective on May 28, 1966.⁵² It repealed the British Copyright Act of 1911 as applicable in Sierra Leone.

Nigeria gained its independence from Britain in 1960 and enacted its first Copyright Act in 1970. This Act abolished the application in Nigeria of the British Copyright Act of 1911, which was extended to Nigeria by Order-in-Council of June 24, 1912.⁵³

Côte d'Ivoire gained its independence from France in 1960 and enacted its first Copyright Law on October 17, 1978. Effective on the same date, this law repealed the French Copyright Law of March 11, 1957 as extended to Côte d'Ivoire through the Decree of April 19, 1958.⁵⁴

Senegal became fully independent from France in 1960 and adopted its first Copyright Law on December 4, 1973.⁵⁵ This law repealed the French Copyright Law of March 11, 1957 applicable in Senegal by extension.

Congo gained its independence in 1960 from France and adopted its first Copyright and Neighbouring Rights Law on July 7, 1982. This law entered into force on the same date and repealed the extended French Copyright Law of March 11, 1957 as well as the Ordinance of 1970.⁵⁶

The Democratic Republic of Congo became independent from Belgium in 1960. Its first Copyright and Neighbouring Rights Law was adopted on April 5, 1986.⁵⁷ This law repealed the Decree of June 21, 1948 adopted in the colonial period. The 1986 Law is still in force to date.

Conclusion

This study has examined the historical evolution of copyright legislation in Africa from 1886 to 1990. The findings have shown that the copyright system was introduced to Africa during the colonial period. Former colonial powers did extend the application of their own copyright laws to the colonies by virtue of ordinances, orders or any other legal means. As a result, the British Copyright Laws of 1911 and 1956, the French Copyright Laws of 1791, 1793 and 1957, the Spanish Copyright Law of 1847 and the Belgian Copyright Law of 1886 were deemed to be *mutatis mutandis* the copyright laws of their colonies, unless otherwise specified.

At the international level, the Berne Convention, adopted in 1886, changed the copyright physiognomy of the time by providing minimum protection of copyright works and by setting up the same rights between nationals of the contracting states to the Berne Convention. Several revisions took place to improve the system. The Berne Convention influenced the copyright laws of the colonial powers. The latter, in conformity with the Berne Convention, extended the Convention's application to the colonies by virtue of declarations or notifications. So, the Berne Convention was applicable in the colonies in Africa by extension as well.

After the independence of a great number of African countries in the 1960s, the crucial question concerned the continued application of the Berne Convention in these territories. With the exception of a few countries, most African countries either accepted the continued application of the Berne Convention

⁵¹“Tanzanie, Loi sur le droit d’auteur de 1966 (du 14 décembre 1966)”, *Droit d’auteur*, February 1968, pp.40–45.

⁵²“Sierra Leone, Loi sur le droit d’auteur de 1965 (N° 28, du 5 mai 1965)”, *Droit d’auteur*, June 1968, pp.131–142; “Sierra Leone, Loi sur le droit d’auteur de 1965 (N° 28, du 5 mai 1965)”, *Droit d’auteur*, July 1968, pp.162–171; “Sierra Leone, Loi sur le droit d’auteur de 1965 (N° 28, du 5 mai 1965)”, *Droit d’auteur*, August 1968, pp.182–192.

⁵³Folarin Shyllon, “Copyright Law and its Administration in Nigeria” (1998) 29 IIC 173.

⁵⁴“Cote-d’Ivoire, Loi portant protection des oeuvres de l’esprit (N° 78-634, du 28 juillet 1978)”, *Droit d’auteur*, July-August 1979, pp.201–209.

⁵⁵“Sénégal, Loi relative à la protection du droit d’auteur (N° 73-52, du 4 décembre 1973)”, *Droit d’auteur*, August 1974, pp.223–229.

⁵⁶Law No.24/82 of July 7, 1982 on Copyright and Neighbouring Rights (Congo).

⁵⁷Ordinance-Law No.86033 of April 5, 1986 on the Protection of Copyright and Related Rights (Democratic Republic of Congo).

or acceded to the Convention. In addition, most African countries adopted new copyright laws after their independence repealing the colonial copyright laws inherited from the colonial powers.

The Digital Intellectual Property Challenge Revisited: File-sharing and Copyright Development in Hungary

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Introduction

What type of a crime is online copyright infringement, often referred to as “online piracy” or “electronic piracy”?¹ Many studies have shown how a majority of primarily the younger generation has file-shared copyright-protected files, or in general does not feel that there is something wrong with this.² This particular behaviour, which may be at odds with a near globally homogenous regulation, is closely connected to digital development and takes part in a context with strong political and industrial influences. The fact that unauthorised file-sharing is, most often, criminalised, in combination with its commonness, makes it a (cyber) criminological issue of perhaps unusual character. This however by no means diminishes the need for understanding the causes or logic of this oft-illegal behaviour.

* This study is partly funded by the Swedish Research Council (dnr 2013-336).

¹ Epaminondas E. Panas and Vassilia E. Ninni, “Ethical Decision Making in Electronic Piracy: An Explanatory Model Based on the Diffusion of Innovation Theory and Theory of Planned Behavior” (2011) 5 *Int’l J. Cyber Criminology* 836.

² Cf. Yuval Feldman and Janice Nadler, “The Law and Norms of File-sharing” (2006) 43 *San Diego L. Rev.* 577; Katarzyna Gracz, “Bridging the Gaps between Social and Legal Norms Concerning Protection of Intellectual and Artistic Creations: On the Crisis of Copyright Law in the Digital Era” (2013) 16 *J. World Intell. Prop.* 39; Stefan Larsson, “Conceptions of Copyright in a Digital Context: A Comparison between French and American File-sharers” (2014) *Lexis—E-journal in English Lexicology* 89; Stefan Larsson, “Metaphors and Norms: Understanding Copyright Law in a Digital Society”, PhD Thesis, Lund Studies in Sociology of Law, Lund University, 2011; Stefan Larsson, Susan Wnukowska-Mtonga, Måns Svensson and Marcin de Kaminski, “Parallel Norms: File-sharing and Contemporary Copyright Development in Australia” (2014) *J. World Intell. Prop.* (forthcoming); Måns Svensson and Stefan Larsson, “Intellectual Property Law Compliance in Europe: Illegal File-sharing and the Role of Social Norms” (2012) 14 *New Media & Soc’y* 1147.

Even if studies on online piracy from a theoretical viewpoint of low self-control,³ rational-choice,⁴ strain,⁵ neutralisation⁶ and deterrence theory⁷ has aimed at explaining illegal file-sharing, the fact remains that a key feature of this behaviour is that it is so common that it may straddle “the crucial boundary between criminal and non-criminal behaviour”, as noted by Nelken regarding white-collar crime.⁸ The dilemma that Nelken identifies is that many white-collar crimes are “merely technically criminal” and are not socially considered on par with ordinary crimes and therefore do not “satisfy the requirements of a sociological definition of crime”.⁹ In fact, like white-collar crime, illegal file-sharing may illustrate

“the possibility of divergence between legal, social, and political definitions of criminality—but in so doing it reminds us of the artificiality of all definitions of crime”.¹⁰

The challenge that illegal file-sharing poses to legal criminalisation is addressed in this study. Nonetheless, the pretexts and reasons for the specific character of file-sharing behaviour and norms in a community likely, to various degrees, correlate with the specifics in the legal regulation relating to a particular jurisdiction. Therefore, we argue for the importance of empirically studying both the legal development and the file-sharing practices existing in parallel to the legal development within the domain’s specific jurisdiction. This study will elaborate quite extensively on the contemporary development and the status of copyright in Hungary. This is followed by a sample of Hungarian respondents to a survey on file-sharing, which is then compared with a large set of global respondents in order to determine the specific character of the former sample—if such character is found.

Purpose and research questions

The purpose of this article is to better understand digitally mediated copyright infringement in relation to the legal structures for criminalising online file-sharing of copyrighted content. Focusing on Hungary, This case study has two main aspects: first, it consists of a legal investigation of trends in contemporary Hungarian copyright law; and second, it provides a contrasting, empirical survey of actual file-sharing behaviour in Hungary. Specifically, this survey explores three questions:

1. In terms of demographics, who are the typical Hungarian file-sharers?
2. To what extent do Hungarian file-sharers diverge from others?
3. What is the character of Hungarian IP regulation in relation to international treaties and trade agreements, enforcement, the role of the Internet Service Providers (ISPs) and its contemporary development in general?

In May 2012, the Cybernorms research group conducted a survey on file-sharing in collaboration with the infamous website, The Pirate Bay (TPB). The survey was reached via a link from TPB’s main page by clicking a remodelled TPB logo termed “The Research Bay” depicting a magnifying glass over a pirate ship. Visitors who clicked on the altered logo were transferred to an online survey that was open for 72

³ George E. Higgins, “Can Self-Control Theory Help Understand The Software Piracy Problem” (2005) 26 *Deviant Behavior* 1.

⁴ George E. Higgins, “Digital Piracy, Self-Control Theory, and Rational Choice: An Examination of the Role of Value” (2007) 1 *Int’l J. Cyber Criminology* 33.

⁵ Sameer Hinduja, “General Strain, Self-Control, and Music Piracy” (2012) 6 *Int’l J. Cyber Criminology* 951; Stefan Larsson, Måns Svensson and Marcin de Kaminski, “Online Piracy, Anonymity and Social Change: Deviance through Innovation” (2012) 19 *Convergence* 95.

⁶ George E. Higgins, Scott E. Wolfe and Catherine D. Marcum, “Music Piracy and Neutralization: A Preliminary Trajectory Analysis from Short-Term Longitudinal Data” (2008) 2 *Int’l J. Cyber Criminology* 324.

⁷ Ram D. Gopal, G. Lawrence Sanders, Sudip Bhattacharjee, Manish Agrawal and Suzanne C. Wagner, “A Behavioral Model of Digital Music Piracy” (2004) 14 *J. Organizational Computing & Electronic Com.* 89; George E. Higgins, Abby L. Wilson and Brian D. Fell, “An Application of Deterrence Theory to Software Piracy” (2005) 12 *J. Crim. Just. & Popular Culture* 166.

⁸ David Nelken, “White-collar and Corporate Crime” in Mike Maguire, Rodney Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2012), p.631.

⁹ Nelken, “White-collar and Corporate Crime” in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (2012), p.632.

¹⁰ Nelken, “White-collar and Corporate Crime” in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (2012), p.632.

hours. The survey received over 96,000 respondents, of which 568 answered that they were from Hungary. These data form the empirical basis for this study. They also allow Hungarian respondents to be compared with the global population.¹¹

Background on illegal file-sharing

So, while being reminded by Nelken of the “artificiality of all definitions of crime”,¹² we turn to the explicit case of online file-sharing as a copyright infringing activity *en masse*. Peer-to-peer (P2P) file sharing “has gained notoriety for facilitating Internet piracy” internationally.¹³ In a study on social norms relating to copyright, Svensson and Larsson conclude:

“The sharing of computer programs, movies and music via the internet marks an *all-time-high* in the persistent controversy between intellectual property owners and the users of different reproduction technologies”.¹⁴

This indicates, much like what the American legal scholar Lawrence Lessig argues,¹⁵ that the issue is bigger and more structural than just relating to a few deviants and that it regards a generation of Internet “natives”.¹⁶ As Lysonski and Durvasula point out, the lawsuits seem to have neither slowed down the rate of unauthorised file sharing nor solved the issue.¹⁷ Moreover, others have noticed that the use of tools that make file-sharers harder to trace in an online context are more common amongst high-frequency sharers,¹⁸ and the overall use of these tools are increasing,¹⁹ indicating that the enforcement of legislation is increasingly difficult.

There have been numerous attempts to stimulate, or more brutally enforce, stronger compliance with intellectual property law online. These efforts, which originate from industrial representatives, rights holding organisations and governmental policymakers, include massive amounts of lawsuits²⁰; developing digital “locks”²¹; forbidding circumvention of such “locks” (as in the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the EU InfoSoc Directive); cutting of internet access after so-called “three (or more) strikes”²²; adding decoys to the file-sharing networks—what Lundblad has called “noise tactics”²³; various attempts to gain stronger control over the Internet and over access to “rogue websites” that disseminate copyrighted content,

¹¹ For an Australian comparison, see Larsson, et al., “Parallel Norms” (2014) J. World Intell. Prop. (forthcoming).

¹² Nelken, “White-collar and Corporate Crime” in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (2012), p.632.

¹³ John Lambrick, “Piracy, File Sharing ... and Legal Fig Leaves” (2009) 4 J. Int’l Com. L. & Tech. 185, 185.

¹⁴ Måns Svensson and Stefan Larsson, “Intellectual Property Law Compliance in Europe: Illegal File-sharing and the Role of Social Norms” (2012)

14 New Media & Soc’y 1147, 1147; cf. Larsson, “Metaphors and Norms”, 2011.

¹⁵ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).

¹⁶ Cf. John Palfrey and Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (New York: Basic Books, 2008).

¹⁷ Steven Lysonski and Srinivas Durvasula, “Digital Piracy of MP3s: Consumer and Ethical Predispositions” (2008) 25 J. Consumer Marketing 167.

¹⁸ Stefan Larsson, Måns Svensson, Marcin de Kaminski, Kari Rönkkö and Johanna Alkan Olsson, “Law, Norms, Piracy and Online Anonymity—Practices of De-identification in the Global File Sharing Community” (2012) 6 J. Res. Interactive Marketing 260.

¹⁹ Larsson, Svensson and de Kaminski, “Online Piracy, Anonymity and Social Change” (2012) 19 *Convergence* 95.

²⁰ Jordana Boag, “The Battle of Piracy Versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act as Its Weapon against Internet Users’ Privacy Rights” (2005) 41 Cal. W. L. Rev. 241.

²¹ Stefan Larsson, “The Path Dependence of European Copyright” (2011) 8 *SCRIPTed* 8.

²² On the UK Digital Economy Act, see Enrico Bonadio, “File-sharing, Copyright and Freedom of Speech” (2011) 33 Eur. Intell. Prop. Rev. 619, 625; Dinusha Mendis, “Digital Economy Act 2010: Fighting a Losing Battle? Why the ‘Three Strikes’ Law Is Not the Answer to Copyright Law’s Latest Challenge” (2013) 17 Int’l Rev. L., Computers & Tech. 60. On New Zealand, see Simon Fogarty, “New Zealand: Copyright (Infringing File-sharing) Amendment Bill” (2010) 11 Computer L. Rev. Int’l 60, 61. On the French “graduated response” system, see Bonadio, “File-sharing, Copyright and Freedom of Speech” (2011) 33 Eur. Intell. Prop. Rev. 619, 624–625. Dóra Hajdú, “A fájlcsere elleni küzdelem egy lehetséges útja—Három a francia igazság?” (2011) 8 *Infokommunikáció és Jog* 95; Alain Strowel and Vicky Hanley, “Secondary Liability for Copyright Infringement with Regard to Hyperlinks” in Alain Strowel (ed.), *Peer-to-peer File-sharing and Secondary Liability in Copyright Law* (Cheltenham: Edward Elgar, 2009), pp.77–80.

²³ Nicklas Lundblad, “Noise Tactics in the Copyright Wars” (2006) 20 Int’l Rev. L., Computers & Tech. 311.

such as in the US SOPA/PIPA proposals²⁴ or in the Anti-Counterfeiting Trade Agreement (ACTA)²⁵; and forcing Google to downgrade search results for sites with high numbers of so-called “copyright removal notices” such as BitTorrent sites, after much pressure from the content industry and the American copyright holders’ organisation RIAA.²⁶

The legal background of P2P file-sharing in Hungary

The Hungarian conformist approach

Since Hungary’s accession to the Berne Convention for the Protection of Literary and Artistic Works in 1922, the Hungarian legislature follows a conformist approach in respect to international intellectual property law. Hungary has not only joined and rapidly implemented the newly created treaties and agreements, but it has also played a vital role in their formulation. The Hungarian delegations have always been present at the relevant diplomatic conferences of WIPO or the WTO, and they have also played an important, though definitely not leading, role in EU legislative processes. Their presence is equally evident if we take a look at those international norms that have more or less relevance to P2P file-sharing. The Hungarian legislature have implemented, almost verbatim, the exclusive right of “making available to the public” (WCT art.8; WPPT art.14; EU InfoSoc Directive art.3), the provisions on digital rights management systems (technical protection measures) (WCT art.11; WPPT art.18; InfoSoc Directive art.6) and the EU Directives on Electronic Commerce (2000/31) and Intellectual Property Enforcement (2004/48). Similarly, the Hungarian Government signed the ACTA in January 2012, even though the Hungarian copyright lawyers heavily criticised the agreement.²⁷

Civil law liability in Hungary

The conformist approach means that the Hungarian copyright regime theoretically includes all the relevant provisions that might be applicable to finding civil liability of the private users and the intermediaries involved in P2P file-sharing. This is, however, partly misleading, since these factors are not the only decisive ones in solving legal disputes. This is clearly proven by the specific legal patterns related to the private users of P2P file-sharing services.

The use of BitTorrent services presumes the downloading of at least one segment of data (here: protected subject-matter) and the simultaneous sharing of the already downloaded content. To translate it to the language of copyright law, users affect the respective right holders’ exclusive rights of reproduction and of making available to the public. Article 35(1) of the Hungarian Copyright Act (HCA) allows for making copies of protected subject-matter (except for software) solely for private purposes, irrespective of whether the source material is acquired from legal or illegal sources.²⁸ In contrast, the HCA does not grant any limitation or exception related to the private user’s right of making available to the public. This means that due to the dynamic operation of the BitTorrent protocol, any user who accesses a source material also becomes a disseminator, and thereby loses the statutory benefit of the private copying exception. This loss follows from the ancient Roman premise of *nemo plus iuris* (“no one can transfer to another a larger right than he himself has”) which has formed a part of the Hungarian Civil Law.²⁹ Indeed, art.6:524 of the Hungarian Civil Code allows the right holders to sue two separate users for the “same” activity: the user

²⁴ Sandra Schmitz, “The US SOPA and PIPA—A European Perspective” (2013) 27 Int’l Rev. L., Computers & Tech. 213; Peter K. Yu, “The Alphabet Soup of Transborder Intellectual Property Enforcement” (2012) 60 Drake L. Rev. Discourse 16, 28–33.

²⁵ Peter K. Yu, “Six Secret (and Now Open) Fears of ACTA” (2011) 64 SMU L. Rev. 975.

²⁶ Stefan Larsson, “Sociology of Law in a Digital Society. A Tweet from Global Bukowina” (2013) 15 *Societas/Communitas* 281.

²⁷ Péter Mezei, *A fájlcseré dilemma—A perek lassúak, az internet gyors* (Budapest: HVG-Orac, 2012), pp.220–229.

²⁸ Contrary to this, under the settled case law in Germany, the lawful nature of the source material is a prerequisite to the application of the private copying exception: Mezei, *A fájlcseré dilemma* (2012), p.156.

²⁹ Mezei, *A fájlcseré dilemma* (2012), pp.167–171.

who makes the work available to the public and the user who downloads it. Acting collectively, both users are equally liable for each other's act.³⁰

Another dimension of the liability of private users is the so-called "three strikes regime".³¹ Neither a public³² nor private³³ three strikes regime is on the agenda in Hungary yet. This would be extremely difficult in light of the strong resistance to this form of law enforcement in Hungarian society, which has worked as a catalyst for strengthening the Hungarian pirate movement in the past few years.

The liability of intermediaries is a more problematic issue in Hungary. Intermediaries include both service operators of file-sharing software or platforms and Internet service (access) providers. The various pieces of worldwide case law are evidence that operators of different file-sharing services can be found liable for the contribution to, or the inducement of, illegal activities of private users.³⁴ These decisions are based on some kind of secondary (civil) liability doctrines. The members of the European Union, however, rarely have special secondary liability doctrines in the field of copyright law. For example, TPB was generally found liable based on the Criminal Law of Sweden. The charges against Mininova were rooted in the e-commerce provisions of the Netherlands.³⁵ There are several countries in the European Union that have secondary liability doctrines within the frames of general civil law. A great example is the German concept of "Störerhaftung" ("disturbance liability"), which provided the basis in several important cases against the operators of websites that offered illegal sources for users in Germany.³⁶

The Hungarian Civil Code (Act V of 2013), which came into effect on March 15, 2014, includes similar provisions (arts 6:519 and 6:524); however, no file-sharing related civil or copyright law decision based upon these sections has been published yet. Indeed, the Expert Opinion 07/08/1 of the Hungarian Copyright Expert Board stressed, in 2008, that operators of so-called DC++ file-sharing services are not directly liable for their users' activities. Consequently the court might order them to terminate the contribution to infringements committed by the user or to disclose information related to the infringing users. This is partially due to the right holders' inadequate sources for collecting evidence and for initiating proceedings against infringers. Indeed, right holders rely more often on criminal law and state resources to combat file-sharing.

ISPs are subject to legal proceedings worldwide as well, but the right holders have historically lost the first few court decisions.³⁷ ISPs were originally charged with direct or indirect copyright infringements. However, effective safe harbour provisions are applied to ISPs both in the United States and the European Union (cf. DMCA s.512; EU E-Commerce-Directive arts 12–14). ISPs are therefore exempt from civil liability as long as they either do not have any actual knowledge of the infringements or block access to, or delete, the infringing materials expeditiously after becoming aware of the illegal use of their services, as in the Swedish court case against TPB.³⁸ Notwithstanding the above, ISPs have recently been subjected

³⁰ Ákos Kóhidi, "A polgári jogi felelősség digitális határai Európában—A P2P rendszerekben megvalósuló szerzői jogi jogsértések felelősségtani vonatkozásai", PhD Thesis, Széchenyi István Egyetem, Állam- és Jogtudományi Doktori Iskola, 2012, pp.169–170, available at: <http://doktiskjog.sze.hu/images/doktori.hu-ra/kohidi%20akos/A%20polg%C3%A1ri%20jogi%20felel%C5%91s%C3%A9g%20digit%C3%A1lis%20hat%C3%A1rai%20Eur%C3%B3p%C3%A1ban.pdf> [Accessed March 25, 2014].

³¹ Enrico Bonadio, "File-sharing, Copyright and Freedom of Speech" (2011) 33 Eur. Intell. Prop. Rev. 619; Annemarie Bridy, "Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement" (2010) 89 Or. L. Rev. 81; Mendis, "Digital Economy Act 2010" (2013) 17 Int'l Rev. L., Computers & Tech. 60.

³² Operated in France, for example. In addition, the Digital Economy Act of the United Kingdom and the Copyright (Infringing File-Sharing) Amendment Act of New Zealand envisioned a similar, but not identical, (statutorily regulated) graduated response regime.

³³ Running in Ireland and started in the United States during 2013: Bridy, "Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement" (2010) 89 Or. L. Rev. 81; Eva Nagle, "To Every Cow its Calf, to Every Book its Copy"—Copyright and Illegal Downloading after EMI (Ireland) Ltd v Eircom" (2010) 21 Ent. L. Rev. 209; Peter K. Yu, "The Graduated Response" (2010) 62 Fla. L. Rev. 1373.

³⁴ For comparisons with the Napster, Grokster, Kazaa, isoHunt and Limewire cases in the United States, see Strowel (ed.), *Peer-to-peer File-sharing and Secondary Liability in Copyright Law* (2009).

³⁵ Mezei, *A fájlcsere dilemma* (2012), pp.112–126.

³⁶ Ákos Kóhidi, "A polgári jogi felelősség digitális határai Európában", 2012, pp.122–136; Gerald Spindler and Matthias Leistner, "Secondary Copyright Infringement—New Perspectives in Germany and Europe" (2006) 37 IIC 798; Gerald Spindler, "Präzisierung der Störerhaftung im Internet—Besprechung des BGH-Urteils 'Kinderhochstühle im Internet'" (2011) 113 GRUR 101.

³⁷ Cf. Lambrick, "Piracy, File Sharing ... and Legal Fig Leaves" (2009) 4 J. Int'l Com. L. & Tech. 185.

³⁸ Stefan Larsson, "Metaphors, Law and Digital Phenomena: The Swedish Pirate Bay Court Case" (2013) 21 Int'l J.L. & Info. Tech. 329.

to court orders to block access to infringing websites (in most TPB cases) in countries such as the United Kingdom, Denmark, Finland and Italy.³⁹

The situation for Hungarian ISPs differs from the previous set of facts. It is true that Hungary has a detailed set of rules for e-commerce service operators, and as mentioned above, this statute mirrors the DMCA rather than the EU directive. However, the social environment is unique in nature. The Hungarian language is used by only approximately 15 million people. Movies regularly, and TV-shows almost always, display Hungarian translation which, combined with the low number of foreign language speakers, has contributed to the appearance of “national” trackers, mainly used by Hungarians. This serves as a clear explanation for the popularity of Hungarian darknet sites in the country⁴⁰ and within the Hungarian communities beyond the country’s borders.⁴¹ Consequently, ISPs have much less “actual knowledge” of these darknet sites, not to mention the fact that many darknet sites operate their servers outside of Hungary and are consequently not subject to Hungarian jurisdiction and the HCA. This means that the indirect fight (via ISPs) against file-sharers turns out to be very difficult, if not impossible, in Hungary.

Another reason for the lack of civil or copyright law cases against ISPs is the purely rational fact that the Hungarian market is much smaller than many other markets in Europe or the United States. Similarly, the probability of any successful claim for damages (and the actual payment of damages) is much lower compared to the above countries. Even though the effective Hungarian Civil Code includes a provision on “general damages” (art.6:531), this is not at all similar to the “statutory damages” of the US Copyright Act (s.504(c)). The latter allows US federal judges to award—in lieu of the amount of actual damages—a minimum of US\$750 and a maximum of US\$30,000 in damages for any infringement, if the copyright holder has registered her work at the US Copyright Office (s.412). Under the Hungarian rule of “general damages”, however, where the precise amount of damages is impossible to discover, judges may award an amount of damages for the infringed parties that is capable of compensating for the damages suffered by the right holder. Accordingly, the Hungarian civil law favours actual damages over punitive damages. The two types of damages discussed above may lead to extremely different amounts per infringement, which provides disincentives to suing users in Hungary. It is simply not worth it for right holders to go to court to fight “average file-sharers”.

Criminal law liability in Hungary

Article 329/A of the Hungarian Criminal Code of 1978 called for the punishment of those who infringe upon the copyright or related right of any right holder for the purpose of gaining financial advantage or thereby causing financial injury. Although the basic punishment could have been imprisonment for up to two years, art.38(3) of the Criminal Code allowed for the substitution of imprisonment for alternative sanctions—for example, fines. Gaining financial advantage is generally not a part of an average file-sharer’s activities, and criminal courts therefore regularly relied on the statutory term “causing financial injury”.

Hungarian criminal law lists damages (loss of value of one’s property) and loss of profit under financial injury. File-sharing does not cause any loss to the value of any copyright or related right. However, loss of profit might be shown in a court proceeding. Since the former criminal law system did not include any petty offence in respect to copyright infringement (where the distinction between a petty offence and a misdemeanour depended upon the amount of financial injury caused by the user), the punishment for even a single act of reproduction or of making available to the public would contravene the Hungarian Criminal

³⁹ Mezei, *A fájlcsere dilemma* (2012), pp.187–194.

⁴⁰ Mezei, *A fájlcsere dilemma* (2012), pp.100–102, 105–108; Chao Zhang, Prithula Dhungel, Di Wu, Zhengye Liu and Keith W. Ross, “BitTorrent Darknets”, available at: <http://cis.poly.edu/~ross/papers/Darknet.pdf> [Accessed March 27, 2014].

⁴¹ Balázs Bodó, “Set the Fox to Watch the Geese: Voluntary, Bottom-up IP Regimes in Piratical File-sharing Communities” in Martin Fredriksson and James Arvanitakis (eds), *Piracy: Leakages from Modernity* (Los Angeles: Litwin Books, 2013).

Code. This regulation did not seem to be in accordance with the “ultima ratio” feature of modern criminal law.⁴²

The irrationality of the existing system led the legislators to modify the above regulation within the frames of the most recent criminal law reform. Article 385 of the new Hungarian Criminal Code is an almost verbatim copy of the former text, with some serious differences. First, “gaining financial advantage” is no longer a prerequisite to finding the basic version of the misdemeanour (art.385(1)). Secondly, art.385(5) stipulates that, where the reproduction or the making available to the public occurs without the user’s intention to gain either direct or indirect financial advantage, she is not committing any crime. This paragraph refers, however, only to art.385(1). Article 385(3) criminalises acts that lead to a loss of profit above 500.001 HUF (approximately €1,700). This means that users who technically cause any right holder a loss of that amount shall be deemed criminals. Thirdly, art.461(2)(d) declares as petty offences infringements of copyright or related rights that lead to less than 100.000 HUF (approximately €330) in loss of profit.

This solution leads to a comical situation. Those file-sharers who download or make available to the public works of a value of up to 100.000 HUF are committing a petty offence and may be prosecuted by the police. Those who commit infringements of a value between 100.001 and 500.000 HUF will not be prosecuted under art.385(5). Those who cause a loss of profit of over 500.000 HUF face sanctions (imprisonment or fine) under art.385(3). This chaotic provision of the new Criminal Code entered into force on July 1, 2013.

Studying Hungarian file-sharers

After studying the trends in contemporary Hungarian copyright law, including law, international treaties, court rulings and related doctrines, this article provides the findings of an online survey that was conducted to study demographics, frequencies and opinions on file-sharing. This survey allows for Hungarian respondents to be compared with a near global population.

As mentioned earlier, in May 2012, we conducted a survey on file-sharing via collaboration with the actual BitTorrent site TPB. The survey, which was reached via a link from the main page of TPB, was open for 72 hours. Analysing all tables, we performed a chi-square test at the 5 per cent significance level with a null hypothesis of no difference between the countries. We also compared the response alternatives within Hungary.

Empirical findings from surveying a file sharing community

This section deals with the findings in the online survey. In this survey, 568 respondents answered that they were from Hungary, which represents 0.59 per cent of all the 96,659 respondents in the global study. Although the Hungarian sample is small compared with the global sample, it is in fact large when viewed as a study of the *file-sharing community* in Hungary, as opposed to the entire Hungarian population. It is therefore likely that the findings are representative of this particular community in Hungary, but unlikely all Hungarians. On a similar note, one can point to the fact that there are numerous file-sharing studies that have been carried out with smaller samples and that still contribute important findings regarding the particular communities, behaviours and normative preferences they study.⁴³ This being stated, there are commentators stating that Hungarians may be sceptical towards these kinds of relatively open surveys,

⁴² Mezei, *A fájlcseré dilemma* (2012), pp.179–184.

⁴³ As with Feldman and Nadler, “The Law and Norms of File-sharing” (2006) 43 San Diego L. Rev. 577, which had a sample of 240 undergraduate students at a public university in the United States.

and they may fear that their anonymity will suffer even if precautionary measures have been taken to protect the respondents' identities.⁴⁴

Of the global group, a majority of 52.5 per cent were from Europe, followed by 25 per cent from North America. When it came to gender distribution in the global group of 96,114 respondents, a very strong majority of 93.6 per cent (89,931) were male and 6.4 per cent (6,183) were female. This overrepresentation of men is consistent through all age groups, and the female share in Hungary is exactly the same: 6.4 per cent (36) as in the global population. Furthermore, file-sharers tend to be young. Globally, 57.4 per cent of the respondents are younger than 25, and 5.9 per cent are older than 45, which is quite similar to the Hungarian population (see Table 1).

Table 1: Respondents' age in Hungary v. Global.⁴⁵

	0–17	18–24	25–29	30–36	37–45	46–52	53–65	66-	No re- sponse	Total re- spondents
<i>Global</i>	N 13,393	40,846	17,166	11,260	6,266	2,486	2,245	816	2,181	94,478
	% 14.2	43.2	18.2	11.9	6.6	2.6	2.4	0.9		
<i>Hungary</i>	N 75	278	107	70	28	5	5	0	0	568
	% 13.2	48.9	18.8	12.3	4.9	0.9	0.9	0		

Media types

A question of key interest concerns what kind of media is shared when file-sharing takes place. Music is still one of the most shared media types (63.6 per cent globally, 65.6 per cent in Hungary), followed by movies (78.6 per cent globally, 78.1 per cent in Hungary), TV shows (62.6 per cent globally, 58.2 per cent in Hungary) and games or software (56.5 per cent globally, 66.5 per cent in Hungary). The Hungarian respondents stand out in relation to the global population in terms of a higher degree of sharing of games or software and a slightly higher degree of sharing of e-books (see Table 2).

Table 2. Media type that is being shared (multiple options are possible).⁴⁶

	Hungary		Global	
	Count	Per cent	Count	Per cent
Music	362	65.6	56,986	63.6
Movies	431	78.1	70,404	78.6
TV Shows	321	58.2	56,058	62.6
Sports Material	28	5.1	5,423	6.1
Games/Software	367	66.5	50,607	56.5
E-books	192	34.8	27,090	30.2
Pornography	102	18.5	13,960	15.6
Other	72	13.0	12,410	13.9
No response	16		7,102	

⁴⁴ Balázs Bodó, *A szerzői jog kalózai—A kalózok szerepe a kulturális termelés és csere folyamataiban a könyvnyomtatástól a fájlcsere hálózatokig* (Budapest: Typotex, 2011).

⁴⁵ There is a statistically significant difference between the different age groups of the respondents both within Hungary and when comparing Hungary to Global.

⁴⁶ Regarding the file sharing of different media types and comparing Hungary and Global, there is a statistically significant difference between Hungary and Global at the 5 per cent significance level.

	Hungary		Global	
	Count	Per cent	Count	Per cent
<i>Total response</i>	552		89,557	

Alternative techniques for sharing files

Not the least where law and its enforcement are concerned, the format or specific method used for file-sharing is of interest. BitTorrent is, of course, not the only technique used for sharing files. For example, so-called one click hosting sites, where you can share a folder or upload files for others to download via a specific link, are used by almost half of the global respondents (48.2 per cent) and 44.7 per cent of the Hungarian respondents (see Table 3). Note that 54.6 per cent in the global survey claim to use offline sharing—for example, USB sticks, mobile phones, CDs—while, a much lower 42.1 per cent of the Hungarian respondents claim the same. Hungary stands out in the data mainly in regard to the higher degree of use of other or private BitTorrent trackers, taking into account the weaker online law enforcement and the stronger fight against bootleg copies in Hungary. One of the key reasons why Hungary is not included in the Special 301 Report of the United States Trade Representative since 2010 was the successive elimination of bootleg markets in the major cities in the previous years.

Table 3. Other file-sharing techniques that are used (besides TPB) (multiple options are possible).⁴⁷

	Hungary		Global	
	Count	Per cent	Count	Per cent
Other/Private BitTorrent Trackers	361	67.0	44,397	51.2
Other peer to peer networks	100	18.6	20,691	23.9
One click hosting sites (Dropbox, Rapidshare, Megafire etc.)	241	44.7	41,751	48.2
FTP servers	85	15.8	13,101	15.1
Instant messaging (MSN, Skype, Gtalk etc.)	109	20.2	21,319	24.6
E-mail	115	21.3	22,588	26.1
Offline file-sharing (USB sticks, mobile phones, burned CDs/DVDs)	227	42.1	47,347	54.6
Other	43	8	10,823	12.5
None	52	9.6	11,114	12.8
No response	29		9,974	
<i>Total number of respondents</i>	539		86,685	

Upload v download

BitTorrent technically means that while you download, you by default also share the same file (upload) with “the swarm” or network of nodes downloading the same file. However, it is clear that most file-sharers mainly intend to download and not to share with the community. Globally, a majority of 65.3 per cent never upload any new material to the community, and only about 12 per cent do so more than once a week. Of the Hungarian respondents, 68.1 per cent never upload and 6.6 per cent upload more than once a week, but the difference between Hungary and Global is not significant (see Table 4). The Hungarian respondents

⁴⁷ When looking at other file sharing-techniques, we also found a statistically significant difference between Hungary and Global as well as within Hungary comparing the different techniques.

download more than the global population, with 74.9 per cent claiming to download more than once a week (combined with “every or almost every day”), as compared with the 63.9 per cent in the global survey (see Table 5).

Table 4. Upload frequency of p2p file-sharing.⁴⁸

<i>Hungary</i>						
	<i>Never</i>	<i>More than once a month</i>	<i>More than once a week</i>	<i>Every or almost every day</i>	<i>No response</i>	<i>Total</i>
Count	359	101	32	35	41	527
Per cent	68.1	19.2	6.1	6.6		
<i>Global</i>						
	<i>Never</i>	<i>More than once a month</i>	<i>More than once a week</i>	<i>Every or almost every day</i>	<i>No response</i>	<i>Total</i>
Count	55,607	19,420	5,730	4,387	11,515	85,144
Per cent	65.3	22.8	6.7	5.2		

Table 5. Download frequency of p2p file-sharing.⁴⁹

<i>Hungary</i>						
	<i>Never</i>	<i>More than once a month</i>	<i>More than once a week</i>	<i>Every or almost every day</i>	<i>No response</i>	<i>Total</i>
Count	30	105	183	219	31	537
Per cent	5.6	19.6	34.1	40.8		
<i>Global</i>						
	<i>Never</i>	<i>More than once a month</i>	<i>More than once a week</i>	<i>Every or almost every day</i>	<i>No response</i>	<i>Total</i>
Count	6,771	24,489	26,898	28,405	10,096	86,563
Per cent	7.8	28.3	31.1	32.8		

Anonymity and file-sharing

The Hungarian respondents use anonymity tools to a lesser extent than the global population. One way to measure an increased awareness of the need for protection against legal actions in the file-sharing community is to ask about the use of anonymity services such as those with encryption. Approximately 16.4 per cent of the global respondents use some variant of VPN or encrypted anonymity service in the global population, and a lower 11.7 per cent of the Hungarian respondents do the same (see Table 6). Particularly, the use of purchased versions of anonymity tools is very low in Hungary. Even though international researchers indicate that the cost-free nature of file-sharing is one, but not the leading, motive for file-sharers,⁵⁰ the unwillingness of Hungarians to pay for a digital disguise is a clear indicator that, for these respondents, the costless nature of file-sharing is a commanding feature of this phenomenon. Noteworthy is that more than half of the respondents (in Hungary as well as globally) claim that they want

⁴⁸ We did not find a statistically significant difference between Hungary and Global when looking at the upload frequency. However, there is a statistically significant difference between the response alternatives in Hungary.

⁴⁹ We found a statistically significant difference between Hungary and Global when analysing the download frequency. We also found a statistically significant difference between the different response alternatives in Hungary.

⁵⁰ Annelies Huygen et al., “Ups and Downs—Economic and Cultural Effects of File-Sharing on Music, Film and Games”, available at: http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf [Accessed March 25, 2014].

to be more anonymous online (see Table 6). The willingness to subscribe to a VPN service will definitely be greater in Hungary as soon as one or more major torrent indexing sites is shut down by court decisions. However, there have been no such known decisions yet.

Table 6. VPN as means for anonymity.⁵¹

		Yes, free	Yes, paid	No but I would like to be anonymous online	No, I don't care about anonymity	I do not know	No response	Total
<i>Hungary</i>	Count	52	9	285	114	61	47	521
	Percent	10.0	1.7	54.7	21.9	11.7		
<i>Global</i>	Count	9,271	4,420	45,479	15,306	8,772	13,411	83,248
	Percent	11.1	5.3	54.6	18.4	10.5		

Analysis

Here, we should refer back to the specific language that Hungarians have as a starting point of the analysis. Since the amount of foreign language speakers is generally lower in Hungary than in many other EU countries, a high proportion of Hungarians depend on the translated versions of movies. Darknet sites have therefore become extremely popular in respect to this type of subject matter. The same applies to e-books. The research of Bodó and Lakatos showed the popularity of sites that offer niche or out-of-market contents to the users. In respect to music, Hungarians also use domestic darknet sites, TPB and other options equally, such as YouTube, free streaming services and webcasting of legal radio channels. Regarding software (especially computer games), Hungarian darknet and international opennet sites have equal popularity.

As shown in Table 2 above, music is still one of the most shared media types, whereas the share in Hungary is slightly higher than the global average. The slightly higher number of music file-sharers is partially due to the lack of multiple legal services. Although Deezer (but not Spotify and Rhapsody) is present on the Hungarian market and although several music stores offer content to download, the number of these services is still extremely low compared with that in Western Europe or the United States. In respect to audio-visual contents, the main rationale for a lower proportion of file-sharers in Hungary is clearly due to the language barrier of Hungarians. The average language knowledge of Hungarians is visibly weaker than in many other European countries. This gap in knowledge logically led to the strengthening of darknet sites, where users are equally interested in the most recent contents (mainly movies) and those works that are otherwise inaccessible on the legal market.⁵² The need for the original language releases is, however, equally visible. Many users claim that the official translations of movies and TV shows are poor. An extensive “subtitle subculture” has been developed in Hungary, where the original audio-visual content and an illegal subtitle is available within hours after the premiere in the United States (or elsewhere). Members of this subculture clearly compete with each other to produce the highest quality of subtitles. The language barrier is evidenced in sport events as well: users still tend to choose the original broadcast of football matches rather than downloading recorded versions from torrent

⁵¹ There is a statistically significant difference in the results between the use of VPN both within Hungary and when comparing Hungary to Global.

⁵² Balázs Bodó and Zoltán Lakatos, “A filmek online feketepiacja és a moziforgalmazás—A tranzakciósintű elemzés lehetőségei (Kulturális alkotások magyarországi online kalózközönségének empirikus vizsgálata) 1. Rész” (2010) 20 *Szociológiai Szemle* 34–75; László Németh, “Az első és a Másnaposok—filmkritika a torrentes letöltésekben?” (2012) 13 *Jogelméleti Szemle* 1.

sites or watch live streams.⁵³ The higher proportion of computer “pirates” must be motivated by the extreme prices of software on the Hungarian market.

Even if the Hungarian respondents use anonymity tools to a lesser extent than do the global population, the popularity of Hungarian darknet sites might mean that such tools are of no use. The sharing is hard to trace anyway, given the structural feature of “secret clubs” for sharing: rather than sharing visibly in the open, users hide the link between the internet protocol address and their offline identity. The common practice among Hungarian file-sharers to register two or more darknet sites is another barrier to a growing popularity of VPN services. This means, in practice, users will have other accounts to use for sharing data in case any major indexing site is shut down either by a court order or voluntarily.

The outcome of “The Research Bay” project and the experience of Hungarian researchers indicate that the most important motive of file-sharers in Hungary is to evade paying for copyrighted contents. As long as the price/value of legal downloading services is high compared to the average income of Hungarians, there is no reason for them to abandon illegal activities. The other main motive for using P2P services is the limited amount of legally accessible repertoire. There have been several impressive improvements in the music market: several, new, lawful streaming and downloading services (including Deezer, iTunes and T-Home) have entered the market in the last few years. YouTube also introduced its Hungarian channel and entered into an agreement with the competent collective rights management association to pay royalty for each and every view of music videos by Hungarian artists. There is no similar development in the movie, software or e-book market.

None of these reasons has any relation to the emerging “pirate thinking” of file-sharers in Sweden or Germany, however. The Pirate Parties (*Piratpartiet* in Sweden and *Piratenpartei* in Germany) tend to collect votes (mainly from the young generations) through platform rhetoric based on Internet freedoms and anti-copyright arguments. The Hungarian Pirate Party expressed its willingness to run in the 2014 parliamentary elections. However, it lacked voter support to register its party list and consequently did not even participate in the elections. Arguments mentioned above do not activate young people in a country which has a political environment that is based on *homo hominem lupus est* (“man is a wolf to his fellow man”). Likewise, although collective rights management associations are—unfoundedly—criticised by Hungarian users for collecting royalties on behalf and in favour of right holders, it is not enough to motivate file-sharers to “fight against” the content industry and to cooperate under the umbrella of any political organisation.

Conclusion

In this study we set out to better understand digitally mediated copyright infringement in relation to the legal structures for criminalising online file-sharing of copyrighted content. The focus of this case study is Hungary. On the one hand, we conduct a legal investigation of trends in contemporary Hungarian copyright law. On the other hand, we conduct an empirical survey of actual file-sharing behaviour in Hungary. Furthermore, the selection of 568 Hungarian respondents is compared with a large scale, near global population of over 96,000 respondents, which allows us to determine the distinctive traits of the Hungarian file-sharing community. The findings indicate that, due to their particular language, Hungarians are more motivated to set up and run their own darknet sites where copyrighted contents—mainly movies and TV-shows—are available not only in original releases, but with Hungarian translations as well. The key motivation for file-sharers in Hungary seems to be the sites’ cost-free nature. As long as the price of copyrighted contents is high compared to their average income, Hungarians will not be motivated to use

⁵³ Péter Mezei, László Németh, Gergely Békés and Péter Munkácsi, “Empirikus felmérés a 2010-es Labdarúgó Világbajnokság torrent és streaming oldalakon való követéséről”, available at: <http://www.scribd.com/doc/75640904/Empirikus-felmeres-a-2010-es-labdarugo-vilagbjajnsag-streaming-es-torrentoldalokon-valo-koveteser%C3%911> [Accessed March 27, 2014].

subscription models or purchase works in hard copies. File-sharing, therefore, seems to represent resistance to the pricing models of works rather than any expression of political opinion or ideology.

Progress on the Implementation of the WIPO Development Agenda: Coordination, Core Development Programs and Budget Allocations

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☞ Copyright; Developing countries; International co-operation; WIPO

Introduction

In 2007 the General Assembly of the World Intellectual Property Organization (WIPO) adopted a Development Agenda in order to address the concerns of developing countries. As the organisation has acknowledged:

“The adoption of the Development Agenda recommendations by the Member States has provided an opportunity for WIPO to undertake concrete and tangible actions to mainstream the development dimension into the Organization’s programs and activities.”¹

While there is already a substantial body of scholarship on the content of the Development Agenda and on WIPO’s development-related intellectual property (IP) treaty activities, scholars have thus far said less about the many “concrete and tangible actions” that WIPO has taken to implement the Development Agenda. Drawing on WIPO’s biennial budget reports and other WIPO documents, this article will attempt to fill the gap in the scholarly literature by examining the organisation’s development-related initiatives and the resources devoted to them. What this article demonstrates is that WIPO has thus far made considerable progress in implementing the Development Agenda—first, by coordinating the process of mainstreaming the Development Agenda across a wide range of its activities; secondly, by establishing and expanding a set of core development programs under a common strategic goal; and thirdly, by consistently allocating substantial funding to these core programs, while also providing increased funding for the development activities of other programs. It should be noted, however, that this article is concerned primarily with describing the actions WIPO has taken to implement the Development Agenda. It does not evaluate the extent to which these actions have assisted in the creation of IP regimes that meet the particular development needs of developing countries.

The development agenda: Content and context

WIPO was established at the Stockholm Conference in 1967. Article 3 of WIPO’s founding Convention identifies the organisation’s two main purposes: first, to promote the protection of IP around the world, and secondly, to ensure administrative cooperation among the IP treaties within its authority.² Thus, at the outset WIPO’s primary function was to perform the administrative tasks related to the Paris Convention for the Protection of Industrial Property (1883), the Berne convention for the Protection of Literary and Artistic Works (1886) and the Rome Convention for the Protection of Performers, Producers of Phonograms

¹ WIPO, *Program and Budget for the 2010/11 Biennium* (Geneva, 2009), p.61.

² Convention Establishing the World Intellectual Property Organization 1967.

and Broadcasting Organizations (1961). WIPO's treaty-related responsibilities have since expanded. The organisation now administers two dozen international treaties, including substantive IP agreements such as the WIPO Copyright Treaty (1996), registration agreements such as the Patent Cooperation Treaty (2001) and classification agreements such as the Strasbourg Agreement Concerning International Patent Classification (1979).³ In addition to carrying out these treaty-related functions, WIPO has provided a broader range of services related to IP law, including technical assistance, arbitration and mediation.

WIPO has given more attention to development issues during the past decade, particularly through its Development Agenda. Brazil and Argentina first proposed that the organisation adopt such an agenda at the WIPO General Assembly in 2004. Following up on this initial proposal, 12 other developing countries joined Brazil and Argentina to form the Friends of Development, which in turn produced a more elaborate proposal for a WIPO agenda. In sum, the Friends of Development sought to incorporate development concerns within WIPO's mandate and governance, norm-setting, technical cooperation and transfer of technology activities.⁴ In response to these proposals the WIPO General Assembly created a provisional committee to review and evaluate specific proposals for the agenda. At its meeting in 2007 the General Assembly finally adopted its Development Agenda on the basis of recommendations received from the provisional committee, and in 2008 the Assembly entrusted the implementation of the agenda to a newly created Committee on Development and Intellectual Property (CDIP). The Development Agenda consists of 45 recommendations divided into six clusters: (a) technical assistance and capacity building; (b) norm-setting, flexibilities, public policy and public domain; (c) technology transfer, information and communication technologies (ICT) and access to knowledge; (d) assessment, evaluation and impact studies; (e) institutional matters, including mandate and governance; and (f) other issues.⁵

The Development Agenda calls on WIPO to engage in development-oriented activities that are crafted according to the specific development needs of individual developing countries. This principle is stated expressly in three of the Agenda's recommendations:

1. WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs [least developed countries], as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.
13. WIPO's legislative assistance shall be, inter alia, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.
15. Norm-setting activities shall:
 - be inclusive and member-driven; [and]
 - take into account different levels of development⁶

Through these three recommendations, WIPO has rejected a "one size fits all" approach to its technical assistance, legislative and norm-setting activities. Several scholars have thus suggested that the adoption of the Development Agenda marked the beginning of a "calibration" phase in global IP. During this ongoing "calibration" phase, the key issues relate not to evaluating the relationship between stronger IP

³ All of the agreements administered by WIPO can be found at <http://www.wipo.int/treaties/en/> [Accessed March 27, 2014].

⁴ Graham Dutfield and Uma Suthersasen, *Global Intellectual Property Law* (Cheltenham: Edward Elgar, 2008), p.277.

⁵ WIPO General Assembly, "Report of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)", September 17, 2007, A/43/13 Rev., Annex 1.

⁶ WIPO General Assembly, "Report of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)", 2007, Annex 1.

regimes and development, but to determining how global IP can be tailored to the diverse needs of its many stakeholders.⁷

Although it includes only a single recommendation, Cluster F (“other issues”) is important because it links the WIPO Development Agenda to the normative content of the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Recommendation No.45 calls for an approach to IP enforcement that accounts for both “broader societal interests” and “development-oriented concerns”, citing the objectives articulated in art.7 of the TRIPs Agreement:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”⁸

Article 7 combines with art.8 of the TRIPs Agreement to identify broad objectives that can support a flexible approach to interpreting and enforcing the Agreement. Peter Yu has argued that these provisions together offer a “guiding light” to the interpretation and implementation of TRIPs, a “shield” against the further expansion of IP rights, a “sword” to attack the lack of balance in the current international IP system, a “bridge” to connect TRIPs with more favourable legal regimes and a “seed” for new international IP norms.⁹

The larger relationship between the WIPO Development Agenda and the TRIPs Agreement should be viewed in terms of the political process that Laurence Helfer has labelled “regime shifting”. Helfer defines regime shifting as

“an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another”.¹⁰

The process has also been described as “forum shopping”, which can consist of either horizontal forum shopping (across multilateral organisations) or vertical forum shopping (below the multilateral level).¹¹ Helfer’s regime shifting narrative begins during the 1980s, when the United States and other developed countries were becoming increasingly dissatisfied with WIPO’s inability to enforce the multilateral IP treaties. In their move away from WIPO and their search for a more robust rights regime, these countries fashioned the TRIPs Agreement. Developing countries, however, understood that TRIPs was an instrument designed primarily to benefit the rights holders of the wealthier countries. Following the conclusion of the TRIPs Agreement in 1994, the developing countries therefore engaged in another process of regime shifting, seeking various ways to balance their interests against the strong protections and enforcement mechanisms of the TRIPs regime. Thus, developing countries brought IP issues to other legal regimes, particularly biodiversity, plant genetic resources, public health and human rights.¹² It was also in this context of regime shifting that developing countries directed much of their focus to WIPO for the purpose of integrating development issues into the international IP law system. Just as the regime shifting carried on by the developed countries had produced the TRIPs Agreement, the subsequent regime shifting activities of the developing countries produced the WIPO Development Agenda. More recently, in 2011–2012 the United States and other proponents of stronger enforcement of (TRIPs-plus) IP rights signed the

⁷ Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question* (London: Routledge, 2012), p.73.

⁸ WIPO General Assembly, “Report of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)”, 2007, Annex 1; Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, art.7.

⁹ Peter K. Yu, “The Objectives and Principles of the TRIPs Agreement” (2009) 46 Hous. L. Rev. 779, 1019–1020.

¹⁰ Laurence R. Helfer, “Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking” (2004) 29 Yale J. Int’l L. 1, 14.

¹¹ Susan K. Sell, “TRIPs Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP” (2011) 18 J. Intell. Prop. L. 447, 450–451.

¹² Helfer, “Regime Shifting” (2004) 29 Yale J. Int’l L. 1, 18–27.

Anti-Counterfeiting Trade Agreement (ACTA), though the treaty has not yet come into force because there have not been sufficient ratifications.¹³

In addition to being a counterweight to the TRIPs regime, the Development Agenda constitutes a compromise between WIPO's original mandate to protect IP rights at the international level and WIPO's role as an agency of the United Nations. As we have seen, WIPO's founding Convention provides that the organisation's objectives are: (1) to promote the protection of IP throughout the world; and (2) to ensure administrative cooperation among the multilateral treaties within its mandate.¹⁴ The Convention says nothing about development. WIPO's objectives and obligations expanded, however, when the organisation became a UN agency under the Agreement between the United Nations and the World Intellectual Property Organization (1974). Article 1 of the Agreement expressly links WIPO to development:

“The United Nations recognizes the World Intellectual Property Organization ... as a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development ...”¹⁵

Developing countries could thereafter point to this Agreement in order to press WIPO to focus more on their development needs.¹⁶ Further momentum in this direction was provided by the development goals articulated in the United Nations Millennium Declaration (2000).¹⁷ The Development Agenda accordingly refers not only to WIPO's status as a UN agency (Recommendation No.44) and to the need for cooperation with other UN agencies (Recommendation No.40), but also to the development goals of the Millennium Declaration (Recommendation No.22).

WIPO's adoption of the Development Agenda raised new questions for international IP scholars. How will WIPO implement the Agenda? How will such implementation shape WIPO's orientation and organisation? How will the Development Agenda bring concrete benefits to developing countries? Several commentators have viewed the Development Agenda as a crucial step toward fashioning a more balanced and development-oriented global IP regime. Jeremy de Beer, for instance, has referred to the Development Agenda as “at least an attempted paradigm shift for IP policies in the twenty-first century”.¹⁸ Neil Netanel has likewise described the Agenda as a significant landmark for WIPO and global IP:

“[F]or the first time in WIPO's history, it places the need for balance, flexibility, and a robust public domain on par with promoting IP protection in all WIPO matters affecting developing countries.”¹⁹

Other scholars have offered more cautious assessments of the Development Agenda. Recognising the weight of WIPO's previous political and normative commitments, Susan Sell has rightly observed that “[i]t is a tall order to undo decades of discourse, norm setting and rule making that have treated intellectual property protection as valuable for its own sake”.²⁰ Chidi Oguamanam has similarly called attention to WIPO's history, warning that in spite of the Developing Agenda's call for deeper ties between WIPO and

¹³ For a discussion of the negotiations leading to the ACTA, see Peter K. Yu, “ACTA and Its Complex Politics” (2011) 3 WIPO J. 1.

¹⁴ Convention Establishing the World Intellectual Property Organization 1967.

¹⁵ UN General Assembly, “Agreement between the United Nations and the World Intellectual Property Organization”, December 17, 1974, A/RES/3346 (XXIX), para.1.

¹⁶ Peter K. Yu, “A Tale of Two Development Agendas” (2009) 34 Ohio N.U. L. Rev. 465, 490.

¹⁷ UN General Assembly, “United Nations Millennium Declaration”, September 18, 2000, A/RES/55/2, paras 11–20.

¹⁸ Jeremy de Beer, “Defining WIPO's Development Agenda” in Jeremy de Beer (ed.), *Implementing the World Intellectual Property Organization's Development Agenda* (Waterloo: Wilfrid Laurier University Press, 2009), p.2.

¹⁹ Neil Netanel, “Introduction: The WIPO Development Agenda and Its Development Policy Context” in Neil W. Netanel (ed.), *The Development Agenda: Global IP and Developing Countries* (Oxford: Oxford University Press, 2008), p.2.

²⁰ Susan K. Sell, “Everything Old Is New Again: The Development Agenda Then and Now” (2011) 3 WIPO J. 17, 23.

other UN agencies, those agencies should continue to be “mindful of WIPO’s poor score card in regard to development”.²¹

The successful implementation of the Development Agenda has been closely tied to WIPO’s ability to mainstream the agenda into the entirety of its activities and bodies. This mainstreaming process remains ongoing during the 2012/13 biennium. The latest Director General’s Report on Implementation of the Development Agenda, for example, highlights the mainstreaming in the work of several WIPO bodies, including the Standing Committee on the Law of Patents, the Standing Committee on the Law of Trademarks, Industrial Designs and Geographic Indications, the Standing Committee on Copyright and Related Rights and the Patent Cooperation Treaty Working Group.²² Significantly, WIPO has sought to carry out the mainstreaming process during a period of wide-ranging strategic and institutional reforms. WIPO’s Director General initiated a Strategic Realignment Programme (SRP) in October 2008, just 12 months after the organisation had adopted its Development Agenda.²³ The Program and Budget for the 2008/09 biennium was then structured on the basis of nine new strategic goals, and subsequent Program and Budgets have retained this structure. The current institutional hierarchy responsible for implementing the WIPO Development Agenda may be described in terms of three tiers. The CDIP occupies the highest tier of this hierarchy. The intermediate tier has a strategic and budgetary dimension, consisting of the nine strategic goals, as well as an administrative dimension, focusing on seven organisational sectors. The base tier of the institutional hierarchy is formed by 29 programs, each assigned to a particular strategic goal and sector. The relationship between strategic goals, sectors and programs is complex, as the implementation of a particular program may involve the cooperation of more than one organisational sector, while the programs grouped together under a common strategic goal do not always match those grouped together under a common organisational sector.²⁴

Coordination: The CDIP and Program 8

In light of WIPO’s complex, extensive and rapidly changing institutional framework, coordination activities have been integral to the organisation’s efforts to mainstream the Development Agenda and to carry out development-related activities in an efficient manner. As the 2010/11 Program and Budget indicates, “[a]n effective implementation of the WIPO Development Agenda requires coordination”.²⁵ The task of coordinating the implementation and mainstreaming of the Development Agenda falls primarily within the purview of the CDIP and Program 8 (Development Agenda Coordination), which is administered by the Development Agenda Coordination Division (DACD). The CDIP has provided overall policy-making functions related to development, as well as supervised the implementation of various development-related projects. The DACD, for its part, not only assists the CDIP, but also coordinates the development-related activities of WIPO’s programs and external stakeholders. This section will accordingly focus on the coordination work of these two WIPO bodies.

As the institution primarily responsible for implementing the Development Agenda, the CDIP has provided broad leadership with regard to mainstreaming the Development Agenda throughout WIPO. The General Assembly’s decision to adopt the Development Agenda in October 2007 was accompanied by its decision to establish the CDIP. The Assembly’s General Report clearly identifies the CDIP’s three main purposes:

²¹ Oguamanam, *Intellectual Property in Global Governance* (2012), p.71.

²² WIPO Committee on Development and Intellectual Property, “Director General’s Report on Implementation of the Development Agenda”, March 5, 2013, CDIP/11/2, pp.9–12.

²³ For a summary of the Strategic Realignment Program, see Carolyn Deere Birkbeck and Ron Marchant, “Implementation of the Technical Assistance Principles of the WIPO Development Agenda” (2011) 14 J. World Intell. Prop. 103, 113.

²⁴ Carolyn Deere Birkbeck and Santiago Roca, *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development* (Geneva: WIPO, 2011), p.14; WIPO, *Program and Budget for the 2012/13 Biennium* (Geneva, 2011), p.24.

²⁵ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.61.

- (a) develop a work-program for implementation of the adopted recommendations;
- (b) monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose it shall coordinate with relevant WIPO bodies; and
- (c) discuss intellectual property and development related issues as agreed by the Committee, as well as those decided by the General Assembly.²⁶

The General Report further states that the CDIP would hold two sessions each year and that WIPO would provide funds to support the participation of representatives from developing countries.²⁷ The CDIP has accordingly held a total of 11 sessions between March 2008 and May 2013.

At the project level, the CDIP has adopted a two-pronged methodology for implementing the Development Agenda recommendations. At the first and second sessions of the CDIP several delegations expressed concern about the duplication of proposals for implementing the Development Agenda, a lack of information regarding adopted measures, and the slow progress then being made in discussing and agreeing upon additional measures. The CDIP Secretariat responded to these concerns at the committee's third session (April–May 2009) by proposing a project-based methodology for implementation that would involve two categories of projects. The first category consists of those projects that were easily matched to specific Development Agenda recommendations and that had already been approved at the first two sessions of the CDIP. The second category consists of “thematic projects”: the projects that could not be matched with a single recommendation and that are accordingly placed into thematic groupings which impact upon more than one recommendation. The CDIP has also appointed a project manager to each project. These managers are responsible for developing documents, overseeing the implementation of their respective projects, reporting to the CDIP on the progress of these projects and coordinating with the DCAD.²⁸ At the time of writing, the CDIP operated 10 recommendation-specific projects (Recommendations 2, 5, 8, 9 and 10) and 24 thematic projects.²⁹ Implementation of the Development Agenda stalled at the first two sessions of the CDIP, but as de Beer and Bannerman have observed, the adoption of the project-based methodology “brought momentum back to the Development Agenda and established clearer strategies, budgets, timelines and benchmarks for success”.³⁰

One CDIP project has particular importance for coordinating the mainstreaming of the Development Agenda: the Project on Enhancement of WIPO's Results-Based Management (RBM) Framework to Support the Monitoring and Evaluation of Development Activities. This thematic project, first implemented in January 2010, is designed to meet three objectives, each defined by a particular Development Agenda recommendation. Specifically, the project's tasks are: (1) to support the development of an effective annual evaluation mechanism for all of WIPO's development-oriented activities (Recommendation No.33); (2) to strengthen WIPO's capacity to perform objective assessment of these activities (Recommendation No.38); and (3) to review all technical assistance activities in the area of cooperation and development (Recommendation No.41).³¹ In order to meet its first objective, the project organised a series of RBM workshops for project managers and other senior WIPO staff in 2010 and followed up by engaging in extensive dialogue, coaching and cooperation with the workshop participants. The second objective was addressed by facilitating an external review of WIPO's cooperation and development activities. The consultants who conducted this review submitted their report to the Secretariat in August 2011.³² Finally,

²⁶ WIPO General Assembly, “General Report”, November 12, 2007, A/43/16, p.152.

²⁷ WIPO General Assembly, “General Report”, 2007, p.152.

²⁸ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.70.

²⁹ WIPO, “Projects for Implementation of the Development Agenda Recommendations”, available at: <http://www.wipo.int/ip-development/en/agenda/projects.html> [Accessed March 27, 2014].

³⁰ Jeremy de Beer and Sara Bannerman, “Foresight into the Future of WIPO's Development Agenda” (2010) 1 WIPO J. 211, 213.

³¹ WIPO Committee on Development and Intellectual Property, “Project on Enhancement of WIPO's Results-Based Management (RBM) Framework to Support the Monitoring and Evaluation of Development Activities (Recommendations 33, 38 and 41)”, December 1, 2009, CDIP/4/8 Rev, pp.2–3.

³² Birkbeck and Roca, *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development* (2011).

according to the most recently published CDIP Progress Report, work directed toward the third objective of this project was to be completed sometime in 2012.³³

In 2008 WIPO established Program 8 (Development Agenda Coordination), as well as the DACD, the body that manages this program. In broad terms, the DACD is responsible for managing and coordinating the Development Agenda process through Program 8.³⁴ Although the DACD reports directly to the most senior official at WIPO, the Director General, most of this body's activities are directed toward assisting the CDIP.³⁵ Specifically, the DACD provides the Secretariat for the CDIP and helps to monitor, assess, discuss and report on the Development Agenda recommendations.³⁶ As a consequence of the DACD's role as a coordinator, Program 8 is linked not only to the other Development Agenda programs, but also to a much broader range of WIPO programs engaged in development-related activities. These other programs include Program 1 (Patents, Innovation and Technology Transfer), Program 4 (Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources) and Program 18 (IP and Global Challenges).³⁷ The DACD's coordination activities also extend to stakeholders outside of WIPO: the Member States, other UN agencies, inter-governmental organisations, non-governmental organisations, IP rights holders and the public at large.³⁸

The need to coordinate development initiatives may have been most urgent when implementation of the Development Agenda began in 2008–2009, but the DACD has since continued to perform many coordination activities. WIPO indicates that Program 8 made significant achievements during the 2010/11 biennium, including substantial reporting on the implementation of projects adopted by the CDIP, development of a coordination mechanism and budgetary process for CDIP projects that the General Assembly approved, and consolidation of the project-based methodology. All of these achievements have facilitated the integration of the Development Agenda recommendations into WIPO's programs, budget and medium-term strategic planning. The DACD and Program 8 remain committed to mainstreaming the Development Agenda within WIPO through monitoring, assessment and reporting activities. During the 2012/13 biennium, however, the DACD has also been charged with placing greater emphasis on engagement with other stakeholders through meetings, symposia and a conference on IP and development.³⁹

Both the process of mainstreaming the Development Agenda and WIPO's efforts to coordinate its development-related activities remain ongoing in 2013. The 2011 External Review indicated that the mainstreaming of the Development Agenda was still quite uneven across WIPO's programs and sectors, as well as identified several key weaknesses in the coordination of WIPO's development-related activities during the 2010/11 biennium. For example, several sectors and programs were then engaged in technology transfer activities, but the lack of a coordinated effort was said to have created a "missed opportunity for impact, cost-efficiency and synergy of activities".⁴⁰ The External Review further pointed out that the difficulties involved in coordinating the implementation of the Development Agenda were heightened by WIPO's dual organisational structure: while the Program and Budget is organised on the basis of programs and strategic goals, the staffing structure is organised on the basis of the seven sectors.⁴¹ WIPO has responded by taking measures to meet some of the criticisms and recommendations contained in the 2011 External Review. Indeed, at the 11th session of the CDIP in May 2013, the WIPO Secretariat produced a report detailing the implementation of the External Review's recommendations. This recent report calls attention to, inter alia, WIPO's continuing improvements with respect to the internal coordination of

³³ WIPO Committee on Development and Intellectual Property, "Progress Reports", October 4, 2011, CDIP 8/2, Annex XIII, pp.3–4.

³⁴ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (Geneva, 2008), p.71.

³⁵ WIPO Committee on Development and Intellectual Property, "Proposed Methodology for Implementation of the Development Agenda Recommendations", April 23, 2009, CDIP/3/INF/1, p.5.

³⁶ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), pp.71–72.

³⁷ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.72.

³⁸ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.61.

³⁹ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.70.

⁴⁰ Birkbeck and Roca, *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development* (2011), p.177.

⁴¹ Birkbeck and Roca, *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development* (2011), p.175.

development activities, the integration of Development Agenda principles and guidelines, and the integration of budgets and planning for all development-related activities into the larger planning and budget process.⁴²

The core development programs

The Strategic Realignment Programme introduced in 2008 established 29 programs, each assigned to one of nine strategic goals. The creation of Strategic Goal III (“Facilitating the Use of IP for Development”) and its set of core development programs was a significant measure taken to implement the Development Agenda. While there are many programs and strategic goals that impact on development issues, implementation of the Development Agenda falls primarily within the purview of Strategic Goal III and the core development programs. During the 2008/09 biennium, there were four such programs: (1) Program 8 (Development Agenda Coordination); (2) Program 9 (Africa, Arab, Asia and the Pacific, Latin America and the Caribbean Countries, Least Developed Countries); (3) Program 10 (Cooperation with Certain Countries in Europe and Asia); and (4) Program 11 (The WIPO Academy). The 2008/09 Program and Budget explains that these programs

“will work together, and with other sectors, to assist developing countries in sharing the benefits of IP for development and in pursuit of the Millennium Development Goals”⁴³

Program 30 (Small and Medium-Sized Enterprises (SMEs) and Innovation) joined these four programs during the 2010/11 biennium, bringing the total of core development programs under Strategic Goal III to five. As we have seen, Program 8 is concerned with coordinating and integrating the Development Agenda across WIPO’s programs. This section will survey the remaining core development programs, which are designed to assist developing countries in facing IP law challenges at the national and international levels. Collectively, these core development programs have succeeded in expanding their activities and tailoring these activities more closely to the needs of individual developing countries and regions.

Program 9 (Africa, Arab, Asia and the Pacific, Latin America and the Caribbean countries, least developed countries)

Program 9, the largest of WIPO’s Development Agenda programs, is charged with carrying out a wide range of technical assistance activities for the benefit of developing countries and LDCs. The 2012/13 Program and Budget states that “[t]his Program is at the forefront of WIPO’s cooperation and engagement with Member states”⁴⁴ Program 9’s technical assistance activities can be divided into four broad categories. The first category consists of activities directed toward improving the administration of IP. Through these activities, WIPO has sought to update work methods, streamline operations and enhance the services of IP offices at both the national and regional levels. The second category of activities has been concerned with assisting developing countries in the drafting of their respective IP statutes so as to support development goals and comply with international treaties. The third category of activities has been directed toward outreach for the promotion of “IP culture” in developing countries, where awareness of IP is particularly low. The fourth category of Program 9 activities has promoted various forms of collaboration, including inter- and intra-regional cooperation initiatives, partnerships between the public and private sectors, and partnerships between national IP offices and SMEs (now governed by Program 30).⁴⁵

⁴² WIPO Committee on Development and Intellectual Property, “Status of Implementation of Certain Recommendations Extracted from the Report on the External Review of WIPO Technical Assistance in the Field of Cooperation for Development”, May 13, 2013, CDIP/11/4, pp.10–11, 13.

⁴³ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.70.

⁴⁴ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.74.

⁴⁵ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), pp.76–78.

During the 2010/11 biennium, Program 9 underwent significant reform in order to become more responsive to regional differences. The Program and Budget for this biennium describes the impetus for and nature of this reform:

“A key challenge of this Program is to ensure that technical assistance and capacity building provided to developing countries and least developed countries ... is delivered in an effective, efficient and coordinated way, that it is targeted at the specific needs of countries in different regions and at different stages of development, and is tailored to meet those needs. Central to meeting this challenge is the need for systematic assessment of the needs of each developing country.... Based on that assessment, this Program will support the development and implementation of country-owned National IP and Innovation Strategies aimed at addressing their specific needs. On this basis, this Program has been developed along the lines of region specific challenges and strategies, as well as recognizing the need to address the particular requirements of LDCs.”⁴⁶

The reform of Program 9 was a clear response to Development Agenda Recommendation No.1, which called for a country-specific approach to technical assistance. Program 9’s activities were organised into five streams. One stream was devoted to the LDCs, while each of the other four streams was directed toward a particular region: (1) Africa; (2) the Arab states; (3) Asia and the Pacific; and (4) Latin America and the Caribbean. In the African region, for example, Program 9’s strategies placed particular emphasis on the need for more training programs and the development of IP programs that add value to and further commercialise key African assets, including natural resources, agricultural products, crafts and designs. Program 9 adopted a much different set of strategies with respect to the Latin American and Caribbean region, as the program set out to build upon this region’s more developed IP regimes by focusing on matters such as regional cooperation and the collective management of copyright.⁴⁷

Program 10 (cooperation with certain countries in Europe and Asia)

Like Program 9, Program 10 is engaged in a broad range of development-related technical assistance activities, including the formulation of national IP strategies and the encouragement of cooperation among local entrepreneurs and industry leaders. There are, however, three main differences between Program 9 and Program 10. First, as its name suggests, Program 10 has a distinct geographic focus, providing assistance to Member States in Eastern Europe, the Baltic, the Caucasus and central Asia. Secondly, as many of the states affected by Program 10 are middle-income countries that already have considerable experience with IP law and policy-making, the needs of these countries are different from the needs of developing countries or LCDs in other regions of the world. Thus, it is evident that “[t]he challenge for WIPO will be to provide more advanced and specialised assistance to satisfy the expectations” of the countries under Program 10.⁴⁸ Thirdly, as a result of Program 10’s particular geographic focus, many of its activities relate to compliance with the IP law and enforcement requirements of the European Union. Specifically, assistance under Program 10 must account for the differing needs of current EU members, candidates for EU membership and countries that benefit from the European Neighbourhood Policy.⁴⁹

Program 11 (The WIPO Academy)

The purpose of the WIPO Academy is to promote the use of IP for development by providing training to government officials, policy makers, academics, legal professionals and other stakeholders. Founded in

⁴⁶ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.65.

⁴⁷ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), pp.6, 71.

⁴⁸ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.80.

⁴⁹ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.81.

1998, the WIPO Academy was already a well-established institution within WIPO when it became a core development program under Strategic Goal III in 2009. At that point, the Academy's activities were re-focused in order to support its development-related mission, leaving this institution with three sub-programs: a professional development program, a partnership program and a distance learning program. The professional development program involved cooperation with national and regional IP offices for the purpose of training government officials and other professionals. Under the partnership program, the WIPO Academy collaborated with universities and the WTO to train the educational professionals who would in turn be equipped to train others in their respective countries. The distance learning program continued to offer courses that had been offered in previous years and began work on developing new distance learning courses.⁵⁰

Since 2010 the process of re-focusing the WIPO Academy's activities to support the Development Agenda has proceeded along two lines. First, the Academy has sought to integrate development issues into its existing educational programs and course content. The 2010/11 Program and Budget accordingly states:

“In implementing Development Agenda principles, all programs of the Academy will be further enhanced by including in the content and curriculum more components on development and on relevant public policy initiatives with a special focus on an interdisciplinary approach to IP education.”⁵¹

Secondly, in order to better meet its development-related mission, the Academy has expanded the number of its programs from three to seven. The first two programs are the professional program and the distance learning program. Enrolment in the latter program has expanded rapidly from 35,000 learners in 2006/07 to 100,000 learners in 2010/11.⁵² The third program is the academic institutions program, which replaced the partnership program and confers master's degrees through partner universities. A new executive program designed to benefit executives, entrepreneurs and senior officials from developing countries and countries with economies in transition constitutes the Academy's fourth program, while the new summer school program, offering courses at a series of rotating locations around the world, constitutes the fifth program. The Academy's sixth program, apparently still under development during the 2012/13 biennium, is the Developing the Development Agenda National Start-Up Academy project. Finally, the seventh program is the global network of IP academies, which helps to coordinate the activities of these academies and training institutions established in the Member States.⁵³

The “WIPO Academy Education and Training Programs Portfolio 2013” provides a clear picture of the expanded scope of the Academy's current activities, and the extent to which these educational activities now incorporate development issues. The courses under the professional development program are available only to participants from developing countries and countries with economies in transition.⁵⁴ Although most of these courses are offered in Europe, three of them are offered in developing countries (Algeria, Morocco and Egypt). Many of the courses offered under the distance learning program include at least one module focusing on relevant development issues. The Academy is also developing three development-oriented pilot courses for offer in 2014: (1) Economics of IP and Innovation, (2) IP and Public Health and (3) IP and Traditional Knowledge.⁵⁵ The academic institutions program operates LLM degree programs in cooperation with six universities, three of which are located in developing countries: Africa University (Zimbabwe), Austral University (Argentina) and University of Yaoundé II (Cameroon).

⁵⁰ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), pp.84–85.

⁵¹ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.86.

⁵² WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.84; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.85.

⁵³ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), pp.88–89.

⁵⁴ WIPO, “WIPO Academy Education and Training Programs Portfolio 2013”, p.8.

⁵⁵ WIPO, “WIPO Academy Education and Training Programs Portfolio 2013”, p.69.

The Academy provides a total of 70–75 scholarships for students from developing countries to pursue these graduate degrees.⁵⁶ Finally, five out of the nine courses included under the 2013 summer school program were to be offered in developing countries or countries with economies in transition: Thailand, Russia, Ukraine, Mexico and South Africa.

Program 30 (small and medium-sized enterprises and innovation)

WIPO's activities related to innovation for SMEs initially formed part of Program 9, but obtained independence as Program 30 during the 2010/11 biennium.⁵⁷ Although small and medium-sized enterprises represent more than 90 per cent of all enterprises in many countries, most of these smaller companies have not made effective use of IP law.⁵⁸ Program 30 was therefore created in order to facilitate the effective use of IP asset management strategies by SMEs, particularly in developing countries, LDCs and countries with economies in transition. This program originally engaged in three main activities: (1) identifying and understanding the IP needs of SMEs; (2) encouraging the creation of policies for integrating IP asset management into national initiatives designed to promote innovation and SME competitiveness; and (3) strengthening awareness and creating capacity for IP asset management among entrepreneurs, SMEs and other relevant stakeholders.⁵⁹ Program 30's assessment and policy-making activities require close cooperation with Programs 9 and 10, while its educational activities involve cooperation with Program 11.⁶⁰

Program 30 expanded during the 2012/13 biennium to include activities focused specifically on innovation and technology transfer. The intent behind this expansion was to build “innovation ecosystems” characterised by openness, connectivity, flexibility and the cross-pollination of ideas. The 2012/13 Program and Budget identifies four strategies to be applied during this biennium for the purpose of building these innovation “ecosystems”. The first of these strategies is to contribute to the formulation and implementation of IP and innovation planning at the national level. The second strategy is to support capacity building for various institutions, including universities, technology transfer offices, technology management offices, technology parks and business centres. Assisting Member States to create innovation ecosystems, particularly by encouraging open collaboration among actors involved in innovation, constitutes the third strategy. Finally, the fourth strategy, which is related to innovation and technology transfer, is to develop human capital through education in areas such as technology licensing, IP valuation, IP marketing and university-related IP commercialisation.⁶¹

Budget allocations and development

Each biennial Program and Budget has expressly emphasised WIPO's commitment to implementing the Development Agenda. The 2010/11 Program and Budget, for example, states:

“Successfully implementing and ensuring the appropriate level of funding for approved Development Agenda recommendations as well as development activities as a whole, remains a key priority for the Organization.”⁶²

The two questions to be addressed in this section are: first, does WIPO's allocation of funds reflect its stated commitment to implementing the Development Agenda; and second, if so, how has WIPO prioritised

⁵⁶ WIPO, “WIPO Academy Education and Training Programs Portfolio 2013”, pp.73–79.

⁵⁷ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.77.

⁵⁸ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.93.

⁵⁹ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), pp.76–77.

⁶⁰ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.93.

⁶¹ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.94.

⁶² WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.22.

its spending in order to meet this commitment? The answer to the first question is affirmative, as the available evidence suggests that the overall allocation of funds for development-related activities under WIPO's biennial budgets generally supports the organisation's professed commitment to implementing the Development Agenda. With respect to the second question, the evidence indicates that while WIPO has slightly reduced the proportion of its budget allocated to the core development programs, this reduction has been more than off-set by significant funding increases for the development-related activities of other programs. The biennial Program and Budgets further reveal shifts in WIPO's development priorities, both among the core development programs and among the other programs engaged in development-related activities.

The Program and Budget for the 2008/09, 2010/11 and 2012/13 biennia reveal that WIPO has allocated increasing shares of its financial resources to what it calls "development expenditures". Although the measurement of such expenditures may not be entirely satisfactory,⁶³ the 2012/13 Program and Budget states that "[e]xpenditure is defined as development expenditure only where the beneficiary is a developing country and the equivalent expenditure is not available for developed countries".⁶⁴ The organisation's overall nominal value expenditures have increased since the adoption of the Development Agenda in 2007, rising sharply from 532.6M Swiss Francs (SFr) in 2006/07 to 628.4M SFr in 2008/09, declining slightly to 618.6M SFr in 2010/11 and then rising again to reach 647.4M SFr in 2012/13.⁶⁵ Meanwhile, development expenditures for all programs totalled 117.5M SFr in 2008/09, 118.6M SFr in 2010/11 and 144.3M SFr in 2012/13. Thus, the development expenditures translate into 18.7 per cent of WIPO's overall expenditures in 2008/09, 19.2 per cent of overall expenditures in 2010/11 and an impressive 22.3 per cent of overall expenditures in 2012/13.⁶⁶ The development expenditures of the regular Program and Budgets include budget allocations for core development programs, the development-related activities of other programs, and the CDIP projects. As such, the regular budgets actually understate the resources devoted to development-related activities because they do not include other sources of funding for these activities: the extra-budgetary national funds in trust for 2008/09, the supplementary reserve appropriation for the WIPO Development Agenda for 2010 and the extra-budgetary funds in trust for development assistance in other countries for 2008/09 and 2010/11. These additional resources totalled 47.6 M SFr during 2008/09 and 2010/11.⁶⁷

Generally, funding for the core development programs under Strategic Goal III has remained consistent, but this funding has declined slightly as a proportion of WIPO's overall expenditures. There has been little change in WIPO's nominal value funding for the core development programs: 67.9 M SFr in 2008/09, 68.5M SFr in 2010/11 and 67.7M SFr in 2012/13.⁶⁸ Thus, while WIPO devoted 10.8 per cent and 11.1 per cent of its expenditures to the Development Agenda Programs in 2008/09 and 2010/11 respectively, the organisation devoted only 10.4 per cent of its expenditures to these programs in 2012/13. Yet, the small drop in the proportion of funding allocated to the core development programs does not really reflect a softening of WIPO's support for these essential programs. A comparison of the budget allocations for the nine strategic goals shows that Strategic Goal III has been one of WIPO's top priorities since it reorganised its programs under the nine strategic goals in 2008. In terms of funding, Strategic Goal III was ranked third among WIPO's nine strategic goals during the 2008/09 biennium, and it has maintained this ranking during the 2010/11 and 2012/13 biennia. The only strategic goals that have received more funding are Strategic Goal II, which includes the Patent Cooperation Treaty, other registration systems,

⁶³ Birkbeck and Roca, *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development* (2011), p.11.

⁶⁴ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.10.

⁶⁵ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.28; WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.18; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.18.

⁶⁶ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.23; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.23.

⁶⁷ Birkbeck and Roca, *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development* (2011), p.15.

⁶⁸ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.11; WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.10; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.12.

domain names, mediation and arbitration; and Strategic Goal IX, which covers, inter alia, executive administration, finance, human resource management and construction.⁶⁹

In addition to demonstrating WIPO's ongoing commitment to funding the core development programs, the biennial budgets also reveal some shifts in WIPO's priorities with respect to these programs. Program 8 (Development Agenda Coordination) has received less funding in each consecutive biennium: 5.4M SFr in 2008/09, 5.3M SFr in 2010/11 and 4.8M SFr in 2012/13.⁷⁰ This trend likely reflects the Program's own success: once it met the initial challenges associated with integrating the Development Agenda throughout WIPO's programs, the burden of coordination should have become lighter. Program 9 (Africa, Arab, Asia and the Pacific, Latin America and the Caribbean Countries, Least Developed Countries) suffered the largest loss of funding: although the expenditures of this program totalled 45M SFr in 2008/09, such expenditures fell to 36.6 million and 35.1 million in the next two biennia.⁷¹ It should be noted, however, that most of this decrease resulted from the transfer of the SMEs activities to the newly formed Program 30 in 2010.

Even though there was a small dip in funding for the core development programs as a whole, three of these programs benefited from increased budgetary allocations. Program 10 (Cooperation with Certain Countries in Europe and Asia) received a modest funding increase, from 5.6M SFr in 2008/09 to 6.4M SFr for both 2010/11 and 2012/13.⁷² WIPO has given even greater priority to the activities of Program 11 (The WIPO Academy) and Program 30 (Small and Medium-Sized Enterprises and Innovation). Program 11 has seen its budget rise from 8.8M SFr in 2008/09 to 10.3M SFr in 2012/13, an increase of nearly 20 per cent.⁷³ The additional funding has allowed the WIPO Academy to expand the number of its educational programs and course offerings, as described in the previous section. Meanwhile, the resources allocated to the SMEs activities have seen a similar increase, rising from 9.7M SFr in 2010/11 to 11.3M SFr in 2012/13.⁷⁴ Like education, engagement with SMEs in developing countries clearly represents a priority within WIPO's mission to support development through IP.

Significant increases for development expenditures in programs outside the purview of Strategic Goal III have more than off-set the small reduction in the proportion of the budget allocated to the core development programs. Development expenditures were identified in a total of 18 WIPO Programs for the 2008/09 biennium, and this figure rose to 24 programs for the 2012/13 biennium. Similarly, while four programs outside of Strategic Goal III devoted 5M SFr or more to development expenditures during the 2008/09 biennium, there are six such programs for the 2012/13 biennium.⁷⁵ The latter set of programs includes Program 3 (Copyright and Related Rights), Program 4 (Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources), Program 5 (the Patent Cooperation Treaty System), Program 14 (Services for Access to Knowledge), Program 15 (Business Solutions for IP Offices) and Program 19 (Communications). Development expenditures outside of the core development programs totalled 76.4M SFr in 2012/13, a significant increase from the 54.7M SFr provided for these development expenditures in 2010/11.⁷⁶

Much of the increase in development expenditures for the programs outside of Strategic Goal III has been directed toward two areas of priority: Program 3 (Copyright and Related Rights) and Program 19 (Communications). Broadly, Program 3 carries out two types of development-related activities. First, this program is engaged in normative and policy work, largely under the auspices of the Standing Committee

⁶⁹ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), pp.11–12; WIPO, *Program and Budget for the 2010/11 Biennium* (2009), pp.10–11; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.12.

⁷⁰ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.73; WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.64; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.72.

⁷¹ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.79; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.81.

⁷² WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.83; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.86.

⁷³ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.86; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.86.

⁷⁴ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.97.

⁷⁵ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.23; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.23.

⁷⁶ WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.23.

on Copyright and Related Rights. Secondly, the program provides developing countries with technical assistance in a wide range of areas, including collective management, copyright licensing and digital technologies.⁷⁷ Development expenditures for Program 3 were 6.4M SFr in 2008/09, and they climbed to 8.5M SFr in 2010/11 and 14.5M SFr in 2012/13. Meanwhile, Program 19's development expenditures have nearly equalled those of Program 3, totalling 6.6M SFr in 2008/09, 11.9M SFr in 2010/11 and 7.4M SFr in 2012/13.⁷⁸ The development-related activities of Program 19 have consisted primarily in providing education materials and advice in organising IP awareness-raising campaigns that are both development-oriented and country-specific.⁷⁹

Conclusion

WIPO embarked on a new path when it adopted the Development Agenda in 2007. It has since had to grapple with the many challenges associated with implementing the Development Agenda. Yet as this article has shown, the organisation has had considerable success in meeting these challenges. The evidence for such progress is three-fold. First, the policy and planning of the CDIP, the broad coordination efforts of the DACD and the results-based management project have enabled WIPO to integrate the Development Agenda into a wide range of its activities in a coordinated manner. Secondly, the core development programs under Strategic Goal III have done much to deliver IP technical assistance tailored to the needs of particular countries and regions, offer more IP training programs that include development-related content, and help prepare SMEs in developing countries to profit from their IP assets. Thirdly, and perhaps most importantly, WIPO has consistently allocated strong levels of funding to the core development programs, while significantly increasing its funding for the development-related activities of other programs. Although the implementation of the Development Agenda remains a work in progress, it is evident that WIPO has already distanced itself considerably from the "maximalist rights culture" that was said to have dominated the organisation when the Agenda was first adopted.⁸⁰ Yet, as suggested in the introduction, the question remains as to whether or not WIPO's implementation of the Development Agenda will succeed in fostering IP regimes in developing countries that are adequately responsive to the particular development needs of each country. Given the broad range of WIPO's development-related activities and the number of affected countries, this question ought to provide international IP scholars with many significant avenues for further research.

WIPO's demonstrated commitment to implementing the Development Agenda will likely have an important impact on the international IP landscape. To begin with, the organisation's embrace of the Development Agenda should deepen its ties to both the developing countries and the development-oriented agencies of the United Nations. The strengthening of these relationships will in turn shape the complex processes of regime shifting and forum shopping that have become increasingly central to international IP during the past 30 years. If Susan Sell is correct in predicting that "Brazil, China, and India will most likely write the next chapters in the intellectual property policy saga",⁸¹ then WIPO's implementation of the Development Agenda has surely positioned the organisation to act as the focal point for this new direction in policy-making. More confident in their ability to use WIPO as a forum, developing countries may accordingly have less incentive to engage in further horizontal forum shopping. With no ratification of the ACTA in sight, the developed countries may likewise move away from horizontal forum shopping by directing their energies back to WIPO in order to engage more directly with the concerns of developing

⁷⁷ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), pp.41–44; WIPO, *Program and Budget for the 2010/11 Biennium* (2009), pp.33–35; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), pp.35–37.

⁷⁸ WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.23; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.23.

⁷⁹ WIPO, *Revised Program and Budget for the 2008/09 Biennium* (2008), p.120; WIPO, *Program and Budget for the 2010/11 Biennium* (2009), p.23; WIPO, *Program and Budget for the 2012/13 Biennium* (2011), p.135.

⁸⁰ Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (London: Routledge, 2007), p.89.

⁸¹ Sell, "TRIPs Was Never Enough" (2011) 18 J. Intell. Prop. L. 447, 449.

countries there, even as they continue to seek expanded IP rights and engage in vertical forum shopping through bilateral and regional agreements.

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