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ARTICLES

COPYRIGHT AND THE INTERNET: FROM OWNER RIGHTS AND USER DUTIES TO USER RIGHTS AND OWNER DUTIES?

David Vaver[†]

INTRODUCTION

This article looks both backwards and forwards (although not simultaneously). First, the claimed assumptions of the World Intellectual Property Organization (“WIPO”) Internet treaties will be re-examined,¹ particularly the notion of copyright as a balance between owners and users. We may find that the treaties, like wines that were coarse when vinified, have not improved with age. Second, the paper examines some problems involved in implementing the treaties. The focus is mainly on the U.K. and Europe, with the occasional sideways glance elsewhere. Lastly, the paper concludes by suggesting that the metaphor of copyright balance be taken more seriously, and by revisiting the neglected field of user rights and owner duties in copyright law and policy.

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¹ For a survey of the WIPO treaties closer to the time of their conclusion, see D. VAVER, INTERNATIONALIZING COPYRIGHT LAW: IMPLEMENTING THE WIPO TREATIES (Nov. 16, 1999), www.oiprc.ox.ac.uk/EJWP0199.pdf.

THE WIPO INTERNET TREATIES: GREAT ASSUMPTIONS,
SMALL TRUTH

Since the late 19th century, multilateral copyright treaties have, with a few hiccoughs, had a habit of being renewed or revised every generation or so. The first Berne Convention in 1886 included a provision requiring periodic revision but said nothing about frequency. The cycle of renewal every twenty years or so may have several explanations. Perhaps it takes a new generation to shed old thought habits and invent and promote new technologies that elude existing laws which now must be "dealt with" to accommodate their novelty. Perhaps each new generation that succeeds to the executive boardrooms of right holders wants some easy new way to prolong revenue streams: simply getting the rules of the game changed in its favour is a good low-cost option. Perhaps one set of treaty negotiators simply can't bear re-facing the same problems until they have been replaced by a fresh generation of negotiators with no memory of how gruesome the last occasion was. Perhaps now that so much IP is being renegotiated internationally—often bilaterally or regionally in free trade agreements—each IP right must wait its turn on the schedule for individual attention. Technologies may change annually or faster, but international legal responses may take time: years, even decades.²

These elements were all more or less present when the WIPO treaties came to be negotiated in the mid-1990s. The last revision of the Berne Convention in Stockholm in 1967, which concluded with the Paris Act of 1971, had been a fractious affair with developing nations demanding some crumbs from the copyright pie that had till then been the sole preserve of the developed world's industries. The developing dissidents got a few worthless scraps but their power play highlighted WIPO's vulnerability. No longer did WIPO look quite the safe haven for copyright rules minted by and for the usual industry players.

The rest of the story is familiar. After the U.S. became a convert to the book of Berne in 1988, it moved to reshape world IP rules in its image through the General Agreement on Tariffs and Trade ("GATT") and World Trade Organization ("WTO"). WIPO found itself an impotent bystander as the U.S., Europe and Japan used the Uruguay round of the GATT talks to impose new WIPO-plus IP rules on those nations with a serious interest in international trade—i.e., pretty well everyone. It was a desire to regain its status and rebrand

² See, e.g., Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 10 MARQ. INTELL. PROP. L. REV. 205 (2006).

itself as world IP kingpin that caused WIPO to pursue a diplomatic conference to update copyright rules to the new Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") standards and to further the copyright agenda by including new rules for the Internet and the digital environment. To make its point, WIPO did not name the treaties for Geneva, their place of conclusion. Unlike the great conventions of Paris, Berne, and Rome, the new treaties were entitled simply the WIPO Treaty on Copyright ("WCT") and the WIPO Treaty on Performances and Producers ("WPPT")—lest those WTO upstarts forgot who really was international boss on copyright and neighbouring rights reform.

The simultaneous push at Geneva to conclude a treaty creating European-style database rights fizzled—wisely, perhaps, in light of the later angst that came to surround that right in Europe. Database rights, introduced in Europe also in 1996, certainly proved a boon for IP and media lawyers, who benefited mightily from having to advise on and litigate cases arising under the new legislation. Few others benefited. The claim that a database right would stimulate the production of more and better databases in Europe proved illusory, as its critics had predicted. All the scheme did and continues to do is to create additional costs, obstacles and uncertainties for users and alleged beneficiaries alike.³

The WCT and the WPPT were signed in 1996 and took effect in 2002, having received the necessary 30 ratifications. Since then, ratifications have almost doubled but the number of complying states is much greater. Still formally off the list, for example, are individual European Union ("EU") member states, even those who initially signed the treaties. They have been put off signing by the EU itself, which also signed the treaties on its own behalf and proposes to ratify them once all members are in compliance. At future revision rounds, the EU will then be able to exercise its members' votes *en bloc*. Meanwhile, the slightly odd situation prevails that Poland has ratified the treaties (having done so before it became an EU member) while states such as the U.K., Germany and France have not, even though their national laws have implemented them.

Pressure is also being put on other states to comply. Thus, any bilateral Free Trade Agreement ("FTA") to which the U.S. is a party invariably contains, at U.S. insistence, a clause requiring the parties to ratify and implement the WIPO treaties. The obligation is of course one-way since the U.S. has already ratified and implemented them.

³ I agree with Mark Davison on this; see generally Mark Davison, *Database Protection: Lessons from Europe, Congress, and WIPO*, 57 CASE W. RES. L. REV. 829 (2007).

This insistence produces a snowball effect: states that come under this obligation to their U.S. partner will seek likewise to impose this obligation when negotiating their own bilateral FTA deals with other states. So what the U.S. did to Singapore and Australia in its FTAs with them, Singapore and Australia did to each other in the Singapore-Australia FTA.⁴

The date of signing of the WCT and WPPT—December 20th, 1996—was appropriate. Copyright holders got their Christmas present for 1996 and decades to come: international legal control over digital and online distribution of current and future inventory. But they gave nothing in return: copyright holders' view of exchange is "you give, we take." All these modern day Scrooges were happy to give in exchange for their new rights of control was the certainty of higher prices for the products they control and less freedom to the public to do what it wished with copyright material. With this came what holders have always been liberal in providing, this time through their proxies in the contracting governments: plenty of humbug. Take the WCT's preambles.⁵ The first testifies to the parties' desire to develop and protect the rights of "authors" as effectively and uniformly as possible. This parrots the convenient fiction that copyright law drafters deliberately created from at least the first Berne Convention onwards.⁶ In fact, copyright is geared less to protect the rights of authors than those of copyright "owners." The fiction finds its familiar, if grotesque, root in the U.S. "work for hire" doctrine: an employee author is no author at all, his employer is; and the actual writer, artist or composer is a useful extra who makes a quick entrance and is then noiselessly dispatched stage left. Other countries reach similar results, although not quite as crudely: the employee may maintain his status as author (and so sometimes retain his moral rights) but the employer is made either the initial title owner or the automatic successor to the author's initial title.

The North American Free Trade Agreement ("NAFTA") and TRIPS try to keep the story of Little Red Riding Author straight, but

⁴ See, e.g., Free Trade Agreement, U.S.-Austl., art. 17.1(4) (2004), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf [hereinafter U.S.-Austl. FTA] ("Each Party shall ratify or accede to the *WIPO Copyright Treaty* (1996) and the *WIPO Performances and Phonograms Treaty* (1996) by the date of entry into force of this Agreement, subject to the fulfilment of their necessary internal requirements"); Free Trade Agreement, Sing.-Austl., ch. 13, arts. 2(2-3), July 28, 2003, available at <http://www.austlii.edu.au/au/other/dfat/treaties/2003/16.html> [hereinafter Sing.-Austl. FTA] (but providing a 4-year grace period).

⁵ Similar provisions appear in the WPPT.

⁶ SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND § 7.23 (2d ed. 2006).

can't stop Big Bad Owner wolf from gobbling up grandma. Thus, in one provision the treaties track Berne by referring to "authors and their successors in title" (TRIPS) or "authors and successors in interest" (NAFTA); in another, nations are told not to enact copyright exceptions or limitations that unreasonably prejudice the legitimate interests "of the right holder."⁷ The reason for these equivocations is no secret. When promoting the first copyright law of 1710, the London stationers knew that laws that claim to protect authors attract more attention and sympathy than laws that claim to protect publishers. Today's media and entertainment executives and the diplomats that draft treaties for them are no less savvy.

Consider too the WCT's third preamble. There the routine boilerplate of copyright laws and treaties reappears: the parties claim to "emphasiz[e] the outstanding significance of copyright protection as an incentive for literary and artistic creation." Far from copyright having "outstanding significance" to encourage literary and artistic creativity, we know that much copyright-protected production is routine stuff—including academic papers and law review articles—that would occur without the lure of copyright, and certainly without a lure that runs for a minimum 70 years, with a variable automatic maximum of perhaps another 70 or more, depending on the youth of the author at the time the work was produced and his eventual longevity. It would be more honest to say that copyright has, as the WPPT recognized for record producers, "outstanding significance" to protect the distribution systems of copyright owners—but once again, that would be to reveal too much to the *ignorantes*.

The final bad joke lies in the WCT's fifth and final preamble. There the parties claim to "recogniz[e] the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention."⁸

⁷ Compare North American Free Trade Agreement, U.S.-Can.-Mex., art. 1705(2), with art. 1705(5), Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA]; compare General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, arts. 10 and 11 with art. 13, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

⁸ World Intellectual Property Organization Performances and Phonograms Treaty pmbl., Dec. 20, 1996, S. TREATY DOC. NO. 105-17, available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P109_12974 [hereinafter WPPT]. Although, the third preamble to the WPPT downgrades the adjective: the development of technology has merely a "profound impact" rather than an "outstanding significance" in the production of phonograms.

Notice first the usual contrast: copyright owners ("authors") have rights, while the public has none. It has a mere "interest" in education, research and access to information.

Notice next how this "larger public interest" is actually recognised in the operative provisions of the WCT: not by any affirmative provision that says straightforwardly that states may enact user rights to further that interest. Instead there is a crabbed provision that allows states to enact "limitations of or exceptions to" the copyright holder's rights if, but only if, the provision passes what has come to be dubbed a "3-step test," but which more aptly should be called a "triple gauntlet." This ordeal beats these "limitations or exceptions" down to (1) only "certain special cases" that (2) do not "conflict with a normal exploitation of the work," and that (3) do not "unreasonably prejudice the legitimate interests of the right holder."⁹

If user rights were truly to be balanced against owner rights, one would expect to find a provision that owner rights should be enacted or enforced only in (1) certain special cases that (2) demonstrably encourage the production of the work, and that (3) do not unreasonably prejudice the legitimate interests of users. That feature of balance does not yet appear on any WIPO or TRIPS agenda. It should.

Notice finally the more basic point of this fifth preamble: how it reverses the importance of ends and means. It implies that copyrights are ends in themselves and that the public interest is subordinate, something to be balanced off against the self-evident truths of copyright. Compare this with how copyright was first introduced in early 18th century England. The Statute of Anne of 1710 had, in the fashion of the day, a long title that stated both ends and means. It was not called a Copyright Act, but instead an act "for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies."

Drafting convention today would shorten this mouthful simply to "The Learning Encouragement Act." But the old long title got things the right way round. The law's object was to further learning; its means were to grant a copyright to the author and (obviously and more honestly than the WIPO treaties admit) to those who bought the author out. The clause on copyright in the U.S. Constitution

⁹ World Intellectual Property Organization Copyright Treaty art. 10, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT] (applying the restriction to rights under the WCT in art. 10, § 1; applying it to applications of the Berne Convention art. 10, § 1). How far the fifth preamble requires the triple gauntlet to be eased beyond the severe interpretations WTO panels have placed on virtually identical language in art. 13 of TRIPS may be worth considering.

consciously tracks the English pattern: it is expressly “to promote the progress of science and the useful arts” that Congress is empowered to enact laws granting authors and inventors “the exclusive right to their respective writings and discoveries.”¹⁰ Three centuries on, the WIPO treaties turn this discourse on its head. The means—copyrights—are treated as ends in themselves, not as measures that are justifiable only if, and insofar as, they further education, research and access to information. To subordinate these goals and treat them as mere “interests” to be balanced against self-evidently justifiable means, is a perversion of history, logic, and—if that matters—good public policy.

In fact, the last thing the promoters of the WCT and WPPT wanted was for copyrights to be traded off against other rights or even interests. The first thing they did was to entrench in the treaties the provisions in TRIPS that reined governments in from acting on their view of the public interest in furthering education, research and access to information: the triple gauntlet any user right had to run to survive.¹¹ Next the promoters compelled states to legitimize how copyright owners were using technology: first, to track who was accessing their products and what they were doing with it; and second, to block copying of information except on the copyright owner’s terms. The means of compulsion was a requirement that states enact measures to clamp down on devices that avoided anti-copying and tracking technology.¹² The WCT promoters even initially tried to restrict governments from acting in “the larger public interest” to grant users access rights that were permitted under the Berne Convention. In this attempt, however, they failed, at least temporarily. The diplomatic conference finally adopted an agreed statement allowing users to have access to digitized products within the limits permitted by Berne.¹³ But the access must still run the three gauntlets—a restriction first introduced by TRIPS but not one required across-the-board under Berne.

EU IMPLEMENTATION: HARMONIZATION AND OTHER BAD MUSIC

The EU implemented the WCT and WPPT in a copyright directive of 2001.¹⁴ Eurocrats promoted it as a directive to promote the

¹⁰ U.S. Const., art. I, § 8.

¹¹ WCT, *supra* note 9, at art. 10; WPPT, *supra* note 8, at art. 16.

¹² WCT, *supra* note 9, at arts. 11–12; WPPT, *supra* note 8, at arts. 18–19.

¹³ WCT, *supra* note 9, at n.10 (agreed statement adopted by the Diplomatic Conference concerning art. 10); WPPT, *supra* note 8, at n.15 (agreed statement adopted by the Diplomatic Conference concerning art. 16).

¹⁴ Council Directive 2001/29/EC, 2001 O.J. (L 167) 10 [hereinafter Stranglehold

so-called “information society”; but if its name is truly to reflect its contents and intent, it should be dubbed a directive to promote and secure the stranglehold of copyright owners over digital content, for short the “Stranglehold Directive”—and so I shall refer to it here. This measure was part of a wider drive the European Community (“EC”) had undertaken since the 1980s to standardize national IP laws with the aim of eliminating differences that impeded the smooth working of the single European market, i.e., to create a level IP playing field throughout Europe.

While good in theory, standardization—or the more attractively sounding “harmonization”—has been a mixed boon in practice. The EC adopted the dogma that the more IP there is, the better. In its own bureaucratese: “Any harmonisation of copyright and related rights must take as a basis a high¹⁵ level of protection, since such rights are crucial to intellectual creation.”¹⁶ So, unsurprisingly, the Stranglehold Directive gives copyright holders more than the Internet treaties required.

Perhaps more surprisingly, standardization has been only spottily achieved. While some of the Stranglehold Directive’s provisions are mandatory, others are not; and even the mandatory ones are often drafted so as to give member states a wide discretion on implementation. Member states have acted accordingly. Anyone who thinks that copyright rules for the digital environment produce a level legal playing field throughout the EU for either right holders or users will leave the pitch bloodied and bruised.

Anti-Circumvention Measures

The WIPO treaties bless the copyright industries’ adoption of technological means to fend off unauthorized copiers. “Adequate” protection and “effective legal remedies” must be enacted against “circumvention of effective technological measures” used “by authors” in connection with the exercise of rights under the WCT, WPPT or Berne. The provisions must be directed at restricting infringing acts—i.e., those not “authorized by the authors concerned” or “permitted by law.”¹⁷ States thus have wide room on how to implement this obligation: who should be liable for what, whether civil or criminal law should apply, and what defences and remedies

Directive].

¹⁵ Not merely a “fair” level of protection.

¹⁶ Stranglehold Directive, *supra* note 14, at recital, ¶ 9.

¹⁷ WCT, *supra* note 9, at art. 11, WPPT *supra* note 8, at art. 18.

should be available. Implementation has varied depending on the pressures national governments succumbed to and the precise wording of the legislation involved.

The EU had already, in 1991, issued a directive on copyright for computer programs. It included a short paragraph requiring action to stop the circulation or commercial making, distribution or possession of devices the sole intended purpose of which was to remove or circumvent technical measures protecting computer programs against copying.¹⁸ The Stranglehold Directive left this earlier directive standing.¹⁹ Since the WCT also covers computer programs, presumably the 1991 directive was thought to comply fully with the WCT. The U.K. had implemented it by imposing civil liability on circumventers, makers, and distributors as if they were copyright infringers. No criminal liability was attached.²⁰

The Stranglehold Directive could have simply extended the computer provision to all copyright matter. Instead the EU responded to pressure to adopt a version of the U.S. Digital Millennium Copyright Act of 1998 by producing something as complex and tortuous to read and understand as that Act, but with different provisions.

First, the Stranglehold Directive imposes strict liability on commercial makers, distributors, and providers of circumvention devices and services, and those individuals who circumvent effective technological measures with “knowledge or reasonable grounds to know” they are doing so.²¹

Second, an elaborate definition is provided of the technological protection measures (“TPMs”) that are covered and the practices that are condemned. A key feature is that the TPM must be designed to prevent or restrict acts that fall within the rights granted to copyright owners.²² Technology that restricts merely access to a product is not included, since access as such is not a right granted to a copyright holder. On the other hand, a digital product, to be viewed, usually needs to be copied temporarily into a computer’s RAM—the copying, though ephemeral, is an act of reproduction and so within the copyright owner’s control. The WIPO treaties recognize this phenomenon by extending the concept of reproduction only to digital

¹⁸ Council Directive 91/250/EEC, art. 7 § 1(c) 2001 O.J. (L 122) 42; *see also* Copyright, Designs and Patent Act, 1988, c. 48, § 296 (Eng.) (as amended in 2003) [hereinafter CDPA].

¹⁹ Stranglehold Directive, *supra* note 14, at art. 1(2)(a).

²⁰ CDPA, *supra* note 18, at § 296 in its original form and as amended in 2003.

²¹ Stranglehold Directive, *supra* note 14, at arts. 6, §§ 1–2.

²² *Id.* at art. 6(3).

"storage," not transient copying.²³ The Stranglehold Directive translates this view into a mandatory exemption for uses that are lawful, "transient or incidental, [and] an integral and essential part of a technological process . . . which [has] no independent economic significance."²⁴ Once upon a time, this activity was called "reading" or "viewing."

A further difficulty should be noted. A law that treats circumvention issues differently depending on whether the item protected is a computer program or something else is technologically moronic. If one plays a video game, computer programs and other copyrighted matter (audiovisual, literary, musical and artistic) interact. If, as is common, the maker of the player console and the games played on it is the same, whether TPMs protect the program, the games or their hybrid interaction is factually an issue of engineering and legally a matter of chance. To treat anti-circumvention measures for programs less favourably than those for other material suggests that programs are getting less than "adequate" protection under the WCT. Adequacy is not an absolute quantity: it invites comparison ("adequate" in relation to what?). Not only may the laws of other states be taken as comparators, but also so may the state's own laws on analogous subject-matter.

Third, the Stranglehold Directive wants right holders to let lawful users benefit from most national exemptions. Unfortunately, this indulgence applies only if no "voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned" exist. Moreover, where members of the public can access material on "agreed contractual terms . . . from a place and at a time individually chosen by them," the rightholder is totally relieved of the exemption-for-all provision.²⁵ Exactly what services, other than video on-demand, are covered by the latter language is far from clear. If it is read broadly, all material available on the Internet that can be accessed only by password or click-on agreement could be freed of exemptions. Also what counts as an "agreement" or "agreed contractual terms" is unclear. Are "click-on" agreements on the screen included, even if everyone knows they are rarely read or, if read, understood? Will the elimination of all or most exemptions

²³ WCT, *supra* note 9, at art. 1, § 4 & n.1 (agreed statement adopted by the Diplomatic Conference stating "[i]t is understood that the storage of a protected work in digital form . . . constitutes a reproduction"); WPPT, *supra* note 8, at art. 16, § 2 & n.14 (agreed statement adopted by the Diplomatic Conference stating "[i]t is understood that the storage of a protected performance . . . in digital form . . . constitutes a reproduction").

²⁴ Stranglehold Directive, *supra* note 14, at art. 5, §1, at 16.

²⁵ *Id.* at art. 6, § 4, at 17-18.

against a consumer be considered an unfair contract term that may be struck out under national consumer protection laws?²⁶

The Stranglehold Directive's prevarication is reflected in the diverse ways EU member states have exercised the discretion given to them to regulate over-zealous TPM use. With few exceptions, users are now supplicants, dependent on the goodwill of right holders for the bowls of gruel that were supposed to be their right in what WIPO termed "the larger public interest [of] education, research and access to information." Virtually the entire spectrum of possibilities has been employed from, at one end, total inertia (e.g., the Netherlands) to, at the other end, an elaborate scheme where rightholders must grant individuals access for single private copying, where officials can force access for public security, administrative, parliamentary or judicial purposes, and an aggrieved party can resort, to both ADR and court in other cases of non-access (Italy).²⁷ Along different points of the spectrum, we see other states setting up just ADR procedures with a right to go to court if they fail (e.g., Greece and Latvia). Yet other states have given disaffected users—individuals (Ireland), or both individuals and interest groups (Germany)—the right to sue abusive right holders. In the U.K. an individual or representative of a class of affected individuals can complain to an official in the Secretary of State's department, who can order the right holder to provide the user with his exemption or be sued for damages if he does not.²⁸ In Denmark, an aggrieved user faced with a non-complying right holder can, after four weeks, circumvent the device himself. In Norway, he must first get approval from a state administrator. Whether time will move states or the EU towards a more uniform model that grant users rights instead of mere indulgences remains to be seen.

This experience highlights an aspect of anti-circumvention that the WIPO treaties, the EU Stranglehold Directive and national laws have studiously ignored. It is assumed that only users will abuse freedoms available to them; right-holders will self-evidently use TPMs only to stop such abuse and not for ulterior purposes. If perchance right holders do abuse the system, the standard IP argument—trotted out on every occasion by right holders (but apparently never available to users)—is that it is for other, non-IP, laws to regulate that sort of abuse. Since exogenous regulation of IP is typically backward-looking, patchy or non-existent, in practice few

²⁶ See Council Directive 93/13/EEC, 2001 (L95) 29 (on unfair terms in consumer contracts).

²⁷ The possibilities are usefully summarized by Stefan Bechtold in *CONCISE EUROPEAN COPYRIGHT LAW* 392 (Thomas Dreier & Bernt Hugenholtz eds., 2006).

²⁸ CDPA, *supra* note 18, § 296ZE.

disincentives to abuse exist. Copyright holders therefore test the system to the maximum. Regulatory delay means that, at worst, the abuse will be stopped only after plenty of profit is raked in. The chances that the profitter will be forced to disgorge some or all of its ill-gotten gains in compensation or fines are pretty slim. The risk is certainly worth running, and in practice it is run.

TPMs are, for example, used to establish territorial barriers and price discrimination between countries or regions—private immigration policies and border controls that are imposed unilaterally on the world, except that the imposer is a goods manufacturer and the immigrants are goods, not people. The controls are an electronic hardware lock and a corresponding software key that lets software and hardware interact and without which the two elements are just lumps of useless debris. Different locks and keys can be produced for different markets. Customs or courts, instead of the Immigration Service, can frisk down importers so that only goods with the right credentials can enter the country. Thus distribution and pricing systems can be established that are impregnable so long as people can be stopped by law from bypassing the TPMs.

Immigration control of goods—parallel importing—has long been controversial internationally. Parallel imports benefit local consumers by providing genuine articles at the internationally lowest price instead of prices imposed by the manufacturer and the authorized local, often vertically integrated, distributor. Often finding competition authorities and the principles of the general law unhelpful, manufacturers have turned to IP laws to try to equate parallel importers with unauthorized copiers, even though the difference is obvious: manufacturers profit from the first sale of a genuine good that has entered commerce but don't profit from the sale of unauthorized copies. IP law here seeks to control the movement of genuine goods in commerce. That is how the maxim "think internationally, act globally" works in practice here.

Like TRIPS, however, the WIPO treaties do not demonize parallel imports. Countries can decide their own parallel import policy,²⁹ at least until they are told otherwise by an FTA. For the EU,³⁰ this has meant erecting a Fortress Europe: allowing parallel imports within the internal market, but raising the drawbridge on imports from outside the market.³¹ In other words, the EU has let those doing business in or

²⁹ WCT, *supra* note 9, art. 7, § 2, at 7 (contracting parties may provide conditions that apply after the first sale of an original work or a copy of a work authorized by the author).

³⁰ Including members of the European Economic Area, i.e., Norway, Iceland and Lichtenstein.

³¹ The EU applies this rule to sale of goods only, not services such as renting, nor to

with Europe set up and enforce Europe-wide distribution and pricing policies and insulate them from outside competition. Consumers may have to pay 30% more for a videogame obtained in the U.K. than for the same game obtained off a U.S. website,³² but Eurocrats seem content with this result so long as a German can buy the game from the U.K. at the 30% premium and a Briton can buy the game from Germany at the German price. European courts have supported these results in trademark, design and copyright cases involving both physical imports and offshore websites offering goods for import into Europe.¹

How do TPMs affect these policies? That was partly what two cases Sony brought in the U.K. and one in Australia were about—to protect its pricing policies. Sony moved to stop the import and distribution of “mod chips” that would let transregional games, designed to work with North American or Japanese NSTC-system television receivers, work with Sony PlayStations designed only for PAL system receivers (i.e., those in Europe). When inserted into the PlayStation, the mod chip fools the console into believing that a foreign game is a native of the region.

Sony won both its U.K. cases. Neither defendant appealed, which is unsurprising given the enormous difference in resources that Sony can throw into legal cases compared with those available to small traders. In *Sony I*, on the pre-WIPO provisions protecting TPMs on computer programs, the court decided with little ado that to load the game on to the computer was to copy it; that the coding on the game was designed to prevent or restrict its being loaded; and that the importers of the mod chips knew all this and so were liable.³⁴ The court did not care that the lock on the PlayStation could equally prevent non-infringing copies from being played (e.g., back-ups) or that the TPM prevented the exercise of a right to individuals to import even infringing copies of a work “for private and domestic use.”³⁵ It added, gratuitously in view of these findings, that a Sony game that

Internet communications.

³² On a given date in 2003, Sony videogames were reported to be selling at \$20 off Sony's North American site, \$27 off its U.K. site, and \$36 off its Japanese site. Brian Esler, *Judas or Messiah? The Implications of the Mod Chip Cases for Copyright in an Electronic Age* 1 HERTFORDSHIRE L.J. 1, 3 (2003).

¹ See, e.g., *Sony Computer Entm't v. Pacific Game Tech. (Holding) Ltd.* [2006] EWHC 2509 (Pat) (holding that a Hong Kong website offering Sony videogame products in £stg infringed trademark and design laws, as well as copyright—the issue of copies to the public without the copyright owner's consent, contrary to CDPA § 18).

³⁴ *Sony Computer Entm't Inc. v Owen*, [2002] EWHC (Ch) 45 (Eng.).

³⁵ CDPA, *supra* note 18, § 22.

had a sticker on it saying "For Japan only" amounted to a licence for Japanese use only, so that uses outside Japan were unauthorized and infringing.

Sony II involved both pre- and post-WIPO TPM provisions. It reached the same result as the first case. Even though the court accepted that the post-WIPO TPM provisions applied only to prevent or restrict unauthorized copying, not just access, it again held that loading is copying. A label on the games stating that they were "only compatible" with PlayStations carrying the PAL logo again was interpreted to mean the games were licensed only for playing on such consoles. The importer, manufacturer, seller or advertiser of the mod chip was strictly liable for selling it because it was "primarily" designed or produced to enable or facilitate circumvention of the TPM and had "only a limited commercially significant purpose" to do anything else.³⁶ The installer was also liable because he knew or had reasonable ground to believe the device would be used to circumvent. But mod chips destined for export were not caught because the court was concerned only with preventing infringement in the U.K.³⁷

The ease with which liability was found in *Sony II* is a little disconcerting, because these provisions (unlike those for computer software TPMs) impose criminal as well as civil liability on commercial handlers of circumvention devices; to avoid liability, defendants carry the onus of proving they did not know and had no reasonable ground to believe that a device enabled or facilitated circumvention.³⁸

On one level, these decisions do advance the EU's policies by stopping unauthorized parallel imports into the EU, while supporting the circulation of authorized imports within the EU, which uses the PAL system. But ordinary European consumers are also blocked from playing games they may have lawfully acquired in, or imported or downloaded from, Japan or North America on PAL PlayStations sourced within the EU. Consumers who bring NSTC-compatible PlayStations into Europe either as immigrants or importers are also impeded from playing PAL games lawfully acquired in the EU. A question that lurks behind these cases is whether a seller who fails clearly to notify buyers in advance of these deliberate deficiencies is breaking implied promises of fitness for purpose or for enjoyment of

³⁶ *Id.* at § 296ZD(1)(b)(ii).

³⁷ *Kabushiki Kaisha Sony Computer Entm't Inc. v Ball* [2004] EWHC (Ch) 1738 [19]-[21] (Eng.); *see also* CDPA, *supra* note 18, § 296 (computer programs pre-WIPO); CDPA, *supra* note 18, § 296ZD (post-WIPO, sale, etc.); CDPA, *supra* note 18, §296ZA (installation).

³⁸ CDPA, *supra* note 18, § 296ZB(5) ("It is a defence to any prosecution . . . for the defendant to prove that he did not know.").

quiet possession on the sale of goods, which may entitle the buyer to reject them or get compensation.

Sony I and *II* are difficult on more technical levels. Sony certainly has the legal expertise to know how to write bans and restricted licences. Is it self-evident that the soft language on the game labels, saying they work only with a PAL receiver or in Japan, is equivalent to banning readers from trying, by themselves or with help, to make the games work on a non-PAL player or using them outside Japan?³⁹ Such notices are anyway effective only where clearly brought to a buyer's notice before purchase; even then they are usually treated at best as warnings, or as attempts (if given timeously) to negate or modify implied promises of fitness for purpose.

Sony II also did not consider the language in the Stranglehold Directive, mentioned earlier, that transient or incidental copying is allowed for technological reasons, i.e., if digital products are to be something other than junk. The same language appears in the U.K. Act, although, like the EU Stranglehold Directive, it does not apply to computer programs or databases.⁴⁰ The court did not clearly sort out the TPM engineering. Quite possibly, the copying was transient or incidental copying of non-computer program material on to RAM and so outside the TPM provisions. The point should have been expressly dealt with. The court in both *Sony I* and *II* plainly thought the legislature meant to protect all forms of TPMs from all forms of anti-circumvention and summarily dismissed arguments that tried to circumvent anti-circumvention. But the U.K. act is not worded that expansively and so need not and should not be read it as if it were. The Australian counterpart to *Sony II* made that point in 2005.⁴¹ Again, Sony complained about mod chips being sold and installed that could allow PlayStations to run not only transregional but also unauthorized copies. The defendant, a small shop-owner, accepted the mod chips were circumvention devices but said Sony's TPM was designed to prevent access, not copying; the circumvention of only anti-copying TPMs was all that Australian law forbade. The astonishing thing about this case—given that losers in Australian litigation usually have to pay a good part of the winner's legal costs—

³⁹ Cf. *Mars UK Ltd. v. Teknowledge, Ltd.* [1999] EWHC (Pat) 226 [33] (Eng.) (stating that a notice on black box technology saying "'confidential—you may not de-encrypt'" does not place the decoder under a duty of confidence, or it seems, to the notifier).

⁴⁰ CDPA, *supra* note 18, § 28A ("Copyright in a literary work, other than a computer program or a database . . . is not infringed by the making of a temporary copy which is transient or incidental.").

⁴¹ *Stevens v Kabushiki Kaisha Sony Computer Entm't*, [2005] HCA 58, [55]–[56] (Austl.) (disagreeing with the interpretation of the English court). Whether the case still remains good law in Australia is unclear, since the statutory language has since been changed.

is the persistence of this defendant. He won at trial but lost in the intermediate appeal court after the invariable appeal by Sony; however, with the three appeal judges all producing different reasons, the defendant managed to get leave to appeal. Australia's final appeal court, the High Court of Australia, disagreed with almost everything the intermediate court judges had said and restored the trial judgment for the defendant.

Like EU and U.K. law, the Australian TPM provisions implement the WIPO treaties, but with different language. The Australian court did not comment on *Sony I* or *II* other than to note the difference in language in passing. The Australian judges, however, proved themselves more English than the English: their method of reasoning runs truer to the English common law tradition than did the opinions written by the English first instance judges.⁴² Had Australian law been worded the same as the U.K.'s, the Australian judges would likely have reached a different result from both *Sony I* and *II*.

The clincher was that the Australian court refused to read the TPM provisions expansively. It gave a number of reasons. First, the wording and purpose of the provisions were opaque because they resulted from a compromise. Some groups wanted broad anti-circumvention measures, others wanted narrower ones; still others wanted to preserve or extend user rights in the face of TPMs. Second, TPMs preventing access moved copyright law far beyond its traditional purpose—stopping copying. Clear language might achieve this “paracopyright” purpose, but it wasn’t there. Anyway, could a federal legislature, acting under a power to legislate for copyright, regulate access to material?⁴³ Third, selling circumvention devices was a crime. Nobody should be made a criminal on ambiguous language.⁴⁴ Fourth, PlayStation console and game owners also had fundamental rights that had existed well before copyright laws did: to enjoy and use their property as they wished. Those fundamental rights could be cut down only by clear language.⁴⁵ Fifth, there was no

⁴² The English *Sony* cases were first instance decisions argued by junior counsel. They were clearly not as rigorously argued or decided as the counterpart case was in the Australian final appellate court, with seven lawyers (including four silks) arguing before six judges over the four different judgments delivered in the inferior courts.

⁴³ See *Stevens v Kabushiki Kaisha Sony Computer Entm't*, [2005] HCA 58, [219] (Kirby J., concurring) (Austl.) (stating that a legislature should only attach criminal liability to circumvention of technological protection measures on copyrighted material in unmistakable terms).

⁴⁴ This reasoning would not apply to *Sony I*, since circumventing computer programs is not presently a crime in the U.K.

⁴⁵ *Stevens v Kabushiki Kaisha Sony Computer Entm't*, [2005] HCA 58, [213]–[214] (Kirby J., concurring) (Austl.) (stating that an individual who purchases a CD-ROM overseas has a pre-existing property right that should allow that individual to modify a console purchased

reason to help TPMs do indirectly what Australia's copyright law refused to do directly, namely, partition global markets.⁴⁶ Lastly, only a small part of the game is reproduced on RAM at any time. It was not proved that this fleeting copy reproduced a substantial part of the game's copyrighted material.⁴⁷

CONCLUSION: OF USER RIGHTS AND OWNER DUTIES

The WIPO treaties are about owner rights and user duties. The treaties do not suggest that users have any rights nor that owners have any duties. These omissions merit correction.

User Rights

The WIPO treaties persist in the rhetoric that what users may do in relation to protected items are exceptions to or limitations on the control rights of owners. This style of language certainly suits copyright owners but its effects are pernicious. It treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activities to be narrowly construed and not extended. The metaphor language of balance cannot sensibly work from such a starting point: how can rights be balanced against exceptions? The scales already start weighted on one side.

The way out of this linguistic hole is easy enough. Since a use that falls within an exception or limitation does not infringe copyright, the owner's right must stop at the point where a user can lawfully act. "Exceptions and limitations" define the outer limits of the owner's rights. Owners cannot control acts in this territory because their rights do not run there. What owners cannot control, users must be able freely to do. If we are to balance like against like, what acts users may do must themselves be treated as their rights; these rights can then be balanced off against the rights of owners. Thus, compromises can be fairly struck when policy is formulated and resulting laws are interpreted.

This approach already has respectable judicial backing. In 2004, the Supreme Court of Canada declined to analyze fair dealing as an

in Australia to play the CD-ROM and language is not clear enough to compel a different result).

⁴⁶ *Id.* at [211] (stating that TPMs may allow Sony to pursue different pricing structures in varying geographic markets for products coded to function only in certain geographic regions).

⁴⁷ The court also held that the reproduction was not in a "material form" for Australian law, unlike U.S. law, did not include cases where a further device was needed before a work was copy-able.

exception even though the relevant provision appeared in a part of the Copyright Act headed "Exceptions." Instead the court adopted a concept of "user rights" that formed an integral part of the balance that produced the copyright system. Speaking for a unanimous court, the Chief Justice said:

[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."⁴⁹

Such an approach has also appeared in the United States,⁵⁰ although too sporadically yet to amount to a trend. Nothing in the WIPO treaties nor its implementing statutes precludes the same approach from being taken in Europe.⁵¹

Owner Duties

Copyright law today nevertheless seems to be mainly about rights, and the rights of only one class of actor: copyright owners.⁵²

⁴⁹ *Law Society of Upper Canada v. CCH Canadian Ltd.*, [2004] 1 S.C.R. 339, 364 (Can.) (citing DAVID VAVER, *COPYRIGHT LAW* 171 (2000)).

⁵⁰ *See, e.g., SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 n.3 (11th Cir. 2001) ("I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. However, fair use is commonly referred to an affirmative defense, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590, 114 S. Ct. 1164, 1177, 127 L.Ed.2d 500 (1994), and, as we are bound by Supreme Court precedent, we will apply it as such. . . . Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes." (citations omitted)).

⁵¹ Bechtold, *supra* note 27, at 369 ("In recent years, it has been increasingly questioned whether copyright limitations should be conceptualized as mere exceptions to exclusive rights or whether they grant beneficiaries real subjective rights. The [European Directive of 2001] does not adopt an explicit position on this issue."); *c.f.* Thomas Riis & Jens Schovsbo, *Users' Rights: Reconstructing Copyright Policy on Utilitarian Grounds* 29 EUR. INTEL. PROP. REV. 1 (2007) (arguing that the Berne Convention allows for greater protection of users' rights than presently afforded under most implementations).

⁵² This section draws partly on David Vaver, *Publishers & Copyright: Rights Without Duties?* 40 BIBLIOTHEKSDIENST 743, 749–50, available at http://www.zlb.de/aktivitaeten/bd_neu/heftinhalte2006/Recht020606.pdf.

Everyone other than them, it seems, has responsibilities. Rights without responsibilities are wonderful things, especially for monopolists. The main reason for these laws having been passed from the outset can then be conveniently forgotten: to quote from a WWI-vintage case from the U.S. Supreme Court, “not the creation of private fortunes for the owners of [copyrights], but is ‘to promote the progress of science and the useful arts.’”

That point was clear in the 18th century when the Statute of Anne was passed. The Statute did not merely give authors a copyright; with it came duties imposed on publishers, who, as all knew, would inevitably own the copyright by assignment from the author. As part of its aim of “the encouragement of learning,” the Statute required publishers to provide nine free copies of the publication “upon the best paper” to the centres of learning: the English and Scottish university libraries and Edinburgh’s law library. Swingeing penalties were provided for failure: the value of the book, plus £5, plus costs, for each book not delivered. As importantly, publishers owed the public another duty: to keep prices “[r]easonable.”⁵⁴ Any member of the public who felt aggrieved by a price that he or she thought unreasonable could complain to one of a group of designated officials: the archbishop of Canterbury, the bishop of London, any chief judge, the vice-chancellor of the university of Oxford or Cambridge or his counterpart at Edinburgh. The tribunal could then summon the bookseller or printer to determine whether or not the price was right. If it was not, the tribunal could reduce it to what it thought “just and reasonable.” Again, a swingeing penalty was provided for disobedience.

I do not suggest a return to the idea of giving university presidents and vice-chancellors power to set book prices, however intriguing a notion that might seem today. My point rather is that from its inception copyright has been considered a right that was freighted with a public interest. The copyright owner was in this respect like an innkeeper, who was obliged to provide food and lodgings to the wayfarer who needed to stay the night and had money to pay. The keeper could not ask an outrageous sum even if (particularly if) his inn were the only one for miles. He was providing a necessity that placed him under a special duty to deal, and to deal honestly and fairly. Similar duties were placed on other people providing the necessities of life such as common carriers and salvors.

⁵⁴ Copyright Act, 1710, 8 Ann., c. 19, § 4 (Eng.) (commonly referred to as the Statute of Anne).

I suggest there is a need to a return to this mindset when dealing with copyright owners. We should recognize that copyright owners have duties as well as rights. Among these duties are the provision of fair access to content at fair and non-discriminatory prices. For the provision of information to the populace is no less important today than was the provision of provender and lodging to the travellers of old.