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Foreign and International Influences on National Copyright Policy: A Surprisingly Rich Picture (F. McMillan, ed.)

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14. Foreign and International Influences on National Copyright Policy: A Surprisingly Rich Picture

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National copyright policy, traditionally reflective of domestic cultural and economic priorities,¹ is increasingly shaped by foreign and international influences. In this chapter, I sketch some of the changes in copyright lawmaking that have given rise to this phenomenon. Especially when viewed in historical context, foreign and international influence on the development of copyright law is now quite pervasive – albeit in ways, and effected through a number of institutions, that might appear surprising.

1. THE CLASSICAL COPYRIGHT SYSTEM

1.1 Features of the Public International System

The international copyright system, as classically established by the Berne Convention,² intruded only minimally on national copyright policymaking. The core issues motivating the conclusion of the convention were basic protection for authors against rampant piracy and protection for the works of

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1 See J.C. Ginsburg, 'International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code', *Journal of the Copyright Society of the USA* 37 (2000), 265, 267 ('National copyright laws are a component of local cultural and information policies. As such, they express each sovereign nation's aspirations for its citizens' exposure to works of authorship, for their participation in their country's cultural patrimony.').

2 See Berne Convention for The Protection of Literary and Artistic Works (1971, Paris text), 1161 U.N.T.S. 3 (first concluded in 1886).

foreigners.³ To achieve these ends, the treaty could be relatively respectful of national policy choices. A low level of protection was sufficient to provide tools to combat blatant piracy (raw duplication of works) and national treatment ensured protection to foreigners. Thus, under the Berne Convention, nations retained a great deal of flexibility to pursue local policy objectives through the construction of distinct national systems of copyright law.

This flexibility was ensured by a number of features of the public international copyright system. The international system was primarily a codifying device: substantive norms were typically mandated internationally only after some positive experience in a number of countries' national laws. As a result, international instruments tended not to impose radically new obligations on signatory countries. Moreover, even where international obligations might dictate changes in national law, states could pay relatively scant attention to those obligations because the international system contained no real enforcement mechanism.⁴ For example, the United States could adhere to the Berne Convention and (almost without blushing) claim compliance with the obligation in Article *6bis* of Berne⁵ to provide certain forms of moral rights protection based upon a patchwork of state and federal laws.⁶ As a result, the classical international system was relatively lax on substantive levels of protection, and quite deferential to national autonomy. This was not to say that national copyright laws did not contain detail. They did. But those details were in large part unconstrained by international influences.

1.2 Features of the System of Private international Law

3 See generally S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (New York: Oxford University Press, 2005, 2nd edn).

4 Although later versions of the Convention permitted the referral of disputes regarding compliance with the Convention to the International Court of Justice, see Berne Convention, *supra* n. 2, article 33, this mechanism was never used.

5 Article *6bis* requires that 'independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation'.

6 See H.R. Rep. No. 100-609, at 34 (1988) (reciting the different causes of action upon which the argument of compliance rested); Letter from Dr Arpad Bogsch, Director-General of WIPO, to Irwin Karp, Esq. (16 June 1987), *reprinted in pertinent part in* H.R. Rep. No. 100-609, at 37 (1988); see also E.J. Damich, 'Moral Rights in the United States and Article *6bis* of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention', *Columbia-VLA Journal of Literature & Arts* 10 (1986), 655. ('[I]t is the lack of effective compliance among Berne countries, rather than the protection given moral rights in American law, that removes Article *6bis* as an obstacle to U.S. adherence.').

The basic principle of territoriality underlying the Berne Convention was also used by national courts to help limit external influence on copyright lawmaking. The principle of territoriality is capable of a wide range of interpretations, as is well known by scholars of private international law. However, national courts applied their conflicts laws or private international law in ways that substantially minimized the influence of foreign or international law.

In particular, most national courts did not permit adjudication of foreign copyright claims.⁷ Courts either found no jurisdiction over such claims or assumed that the dispute was subject to local law. And there was almost no discussion of the principles according to which to localize transborder disputes and thus wrestle with competing applicable national laws.⁸ As a result, there was no judicial exploration of the circumstances where a foreign state might have an interest in having its copyright laws applied in the transborder setting, and little need to consider foreign copyright law.

There was, therefore, minimal engagement by the courts with *foreign* copyright laws. This judicial insularity operated in parallel with the lack of real legislative engagement with *international* laws described above, to ensure broad national autonomy in setting copyright policy.

2. THE NEW INTERNATIONAL COPYRIGHT SYSTEM

How has this classical system changed? An appreciation of the changes involves looking separately, first, at the public international system and, second, at the conduct of private transborder litigation.

2.1 Public International System

2.1.1 Enforcement environment

The classical system of international copyright law has clearly changed. One could identify a number of dates on which the classical system changed, but one of the most significant points is surely the conclusion of the TRIPs Agreement in 1994.⁹ The TRIPs Agreement retained important flexibilities

7 See G.W. Austin, 'The Infringement of Foreign Intellectual Property Rights', *Law Quarterly Review* 113 (1997), 321.

8 To be sure, transborder disputes were less common than in the twenty-first century, but such disputes were not as rare as the sparse case law on conflict of laws and intellectual property would suggest.

9 See Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, Volume 31, 33 *International Legal Materials* 81 (1994).

for national policymaking (perhaps more than is sometimes appreciated). But the standards outlined in that agreement were somewhat more extensive than those found in the Berne Convention. And the more effective enforcement mechanisms of the World Trade Organization (WTO) dispute settlement system restricted the latitude of national policymaking that formerly came from 'creative' interpretation of international obligations. The international environment has become defined by compliance rather than latitude, making the substantive standards more real.

However, emphasizing effective enforcement and the availability of the WTO dispute settlement may overstate and, at the same time, understate what the WTO dimension has added to the influence of the international system on national copyright policymaking. It *overstates* the importance of the WTO in at least two respects. First, even prior to the advent of WTO dispute resolution, it was true that (to paraphrase Louis Henkin's statement about international law generally) *most* of the countries of the world complied with *most* of their international copyright obligations *most* of the time.¹⁰ Second, the introduction of the WTO enforcement machinery has hardly ensured 100 per cent compliance with international law. Most notably, the United States has still not made the changes to its national copyright law necessary to comply with the adverse ruling by a WTO dispute settlement panel in the complaint brought by the European Union regarding section 110(5) of the US Copyright Act (the Fairness in Music Licensing Act).¹¹

By the same token, focusing only on the outcome of WTO dispute settlement proceedings *understates* the changes effected by the decision to involve the new trade regime in copyright law and, as a result, to introduce effective enforcement mechanisms. Although members of the Berne Union did indeed largely comply with the set of obligations that they had undertaken pre-TRIPs, the incorporation of Berne within the WTO ensured that an even higher number of countries – every country that wanted the benefits of the global free trade regime – signed up to core copyright obligations. And the TRIPs Agreement augmented the substantive standards that had been set out in the Berne Convention; it added to the set of common international copyright standards.¹² To be sure, those additions did not require the United States or the European Union or other developed countries to make many changes to *their* copyright laws. But for many other countries the changes to national copyright law mandated by TRIPs were quite meaningful.

10 Compare with L. Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979, 2nd edn), 320–21.

11 See United States-Section 110(5) of the US Copyright Act, Doc. No. WT/DS160/R (WTO DSB Panel, 15 June 2000) (finding the US Fairness in Music Licensing Act to be in violation of TRIPs).

12 See TRIPs Agreement, *supra* n. 9, Articles 9–14.

Furthermore, although there has only been one report issued by a WTO dispute settlement panel regarding a copyright dispute, and notwithstanding that the United States has failed to amend its law in the two TRIPs cases it has lost, reports issued by the dispute settlement body represent only the tip of an important iceberg. Since 1994 many national laws that were not in conformity with international copyright standards have been amended after other WTO countries raised non-compliance with those standards in informal discussions in the TRIPs Council.¹³ Often changes are made to national law without the need for the initiation, let alone the completion, of any formal dispute settlement proceedings. Thus, the environment of compliance or enforcement within the WTO may have been more important in changing the influence of international standards in national copyright policymaking than an analysis of the reports of dispute settlement panels might suggest.

2.1.2 Immediate, forward-looking international lawmaking

Since 1994 copyright norms that have not been the product of widespread national deliberation are being discussed (and endorsed) at the international level. Most notably, the 1996 World Intellectual Property Organization Copyright Treaty (WIPO Copyright Treaty) was an attempt to create an international norm that would structure then-nascent national approaches to the circumvention of technological protection measures.¹⁴ Indeed, one of the principal motivations behind the efforts of the United States to internationalize debate about digital rights management in 1996 was arguably to mandate internationally what could not have easily been achieved nationally, and thus reframe the later domestic implementation debate. As a result, the backwards-looking aspect of the classical international copyright system, which tended to preserve national autonomy and ensure low internationally-mandated levels of protection, has been somewhat disrupted.

2.1.3 Bilaterals

In addition, gaps that consciously existed in the international copyright system – where national copyright policymaking was intended to operate free of international constraints – have been filled in by bilateral and regional trade agreements that include substantial copyright components. For example, over seventy countries (including EU countries or EU-‘wannabes’) have now agreed to adopt the equivalent of the EU Database Directive, notwithstanding

¹³ See M. Geuze and H. Wager, ‘WTO Dispute Settlement Practice Relating to the TRIPs Agreement’, *Journal of International Economic Law* 2 (1999), 347.

¹⁴ See WIPO Copyright Treaty, WIPO Doc. CRNR/DC/94 (20 December 1996) 36 *International Legal Materials* 65.

the failure to move multilaterally on that front in the decade since the Geneva Diplomatic Conference in 1996.¹⁵

Likewise, the implementation of the WIPO Copyright Treaty by the Digital Millennium Copyright Act (DMCA) in the United States may go further than the Treaty requires.¹⁶ This is, of course, a national policymaking choice that the United States Congress is free to make; international copyright instruments impose floors above which national legislatures may offer greater protection. But that is a choice that several countries are now effectively waiving (in return for often unrelated trade benefits) in bilateral agreements with the United States in which they assume an international obligation to implement the detailed provisions of the DMCA, constraining the national copyright policy choices afforded by extant multilateral instruments.

2.1.4 Multiplying fora

A range of new international institutions are looking to promulgate copyright norms, each potentially creating additional constraints on national lawmaking.¹⁷ But unlike the obligations classically imposed by the international system, some of these international norms would require national copyright policy to limit the scope of authors' rights. For example, critics of expansive copyright protection are working within the framework of international human rights to frame copyright in terms of its effect on fundamental universal rights, such as free speech and access to information.¹⁸ And in a number of international fora (including WIPO), a coalition of developing countries and user groups have sought to introduce 'substantive maxima' into international copyright instruments. These provisions would require national policymakers to include defined exceptions and limitations in national copyright law, constraining what at present is a largely unfettered capacity to increase copyright protection.

15 See Directive 96/9/EC of The European Parliament and of The Council of 11 March 1996, on the Legal Protection of Databases, 1996 O.J. (L 77).

16 See Digital Millennium Copyright Act 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998); see also P. Samuelson, 'Intellectual Property And The Digital Economy: Why The Anti-circumvention Regulations Need to Be Revised', *Berkeley Technology Law Journal* 14 (1999), 519, 530-33 (discussing implementation of WIPO Copyright Treaty); P. Samuelson, 'The U.S. Digital Agenda at WIPO', *Virginia Journal of International Law* 37 (1997), 369, 373-4 (1997) (discussing conclusion of WIPO Copyright Treaty).

17 See generally G.B. Dinwoodie, 'The Institutions of International Intellectual Property Law: New Actors, New Institutions, and New Sources', in *Proceedings of the 98th Annual Meeting of the American Society of International Law* 213 (2004) (discussing the proliferation of institutions on both the public and private side), reprinted in *Marquette Intellectual Property Law Review* 10 (2006), 187.

18 See generally L.R. Helfer, 'Toward a Human Rights Framework for Intellectual Property', *University of California Davis Law Review* 40 (2007), 971; P.K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', *University of California Davis Law Review* 40 (2007), 1039.

This multiplication of international institutions addressing copyright law is in part a function of an enhanced realization, prompted by the global expansion of intellectual property rights, that copyright affects so many facets of human existence.¹⁹ But the proliferation of political institutions may also reflect what Peter Drahos and Larry Helfer have separately called ‘forum shifting’ or ‘regime shifting’, now being used by developing countries to create counter-norms internationally, and strategically to stall what they see as harmful additional multinational lawmaking.²⁰

But this proliferation of international lawmaking raises several hard questions for those who wish to use international norms to shape domestic copyright policy. Regime shifting has proven to be a very good strategy for blocking further multilateral agreement. But this strategy may create too much of a cacophony when pursuing a positive international agenda, such as mandatory users’ rights to copy in certain circumstances. Moreover, these new international sources may be less predictable constraints than those hoped for by copyright critics. For example, a human rights framework might validate property-based human rights claims that might be asserted by copyright owners to mandate national copyright protection rather than limit it.²¹

Regardless of the wisdom of this proliferation, however, a growing collection of different universal standards may come to constrain national copyright policymaking. Of course, to the extent that a cacophony of different international norms engenders sufficient ambiguity, or disrupts the understanding of a particular international obligation, this proliferation of international norms might come paradoxically to weaken international constraints on national copyright law. But that outcome is far from certain. And most of the countries and NGOs pursuing this new agenda are motivated more by their view of particular substantive norms (for example, the right to copy to ensure interoperability or to speak in particular ways) than by the more academic cries for national policymaking autonomy.²²

19 See G.B. Dinwoodie, ‘The International Intellectual Property System: Treaties, Norms, National Courts and Private Ordering’, in *Intellectual Property, Trade and Development: Normative and Institutional Aspects*, D. Gervais, ed. (Oxford University Press, forthcoming 2007).

20 See L.R. Helfer, ‘Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking’, *Yale Journal of International Law* 29 (2004), 1 (discussing ‘regime-shifting’); J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge University Press, 2000), 564 (suggesting different forms of ‘forum-shifting’).

21 In the context of trade mark law, the European Court of Human Rights was recently pressed to consider whether trade mark registrations were protected by property guarantees in the European Convention on Human Rights. See *Anheuser-Busch, Inc. v. Portugal*, Application No. 73049/01 (Grand Chamber 2007).

22 It is intriguing that critics of broad copyright protection in the United States have also supported the constitutionalization of copyright policymaking, which would impose

2.1.5 EU law

Finally, within the European Union, there have been additional constraints placed upon national copyright lawmaking. In the early days of the EU, the principal effect of EU law on national copyright policy was on constraining national rights from interfering with primary treaty provisions on competition policy or the free movement of goods. That is, EU law was relevant to national copyright policy primarily in controlling overbroad assertions of national copyright. But once the Commission decided, starting with the Software Directive in 1991, to pursue the harmonization of national copyright laws under secondary legislation, a shift occurred in the relationship between national and EU law. This new relationship occasioned a different and much more substantial series of constraints on national copyright policymaking, largely requiring higher levels of protection in accordance with EU norms.

Thus, the constraints imposed by EU law were more substantial than imposed globally under the minimum standards regime of Berne. However, the EU instruments also contained the first sign of real mandatory exceptions.²³ And these are real, effective, constraints because, within the EU, there is much more vigilant monitoring and enforcement mechanisms through standing institutions such as the Commission and the ability of national courts to refer questions of interpretation to the European Court of Justice.²⁴

2.2 Private International Law Developments

Focusing on increased public lawmaking activity would, however, give only a glimpse of the diverse ways that foreign and international influences are shaping national copyright law. There have also been important changes in the private international law of intellectual property law: in fact, at long last we have actually developed a private international intellectual property law. This will also enhance foreign influences on copyright policy.

Increasingly, the domestic copyright law of one country is being applied and interpreted by courts of other nations. A genuine approach to choice of law in multinational copyright cases has really only developed in the last fifteen years. In the United States, for example, the *Itar-Tass* decision of the Court of Appeals for the Second Circuit in 1998 was arguably the first considered appellate analysis of choice of law in copyright disputes. There, the court applied Russian copyright law to determine whether a plaintiff possessed an ownership interest essential to having the standing to pursue

additional constraints on national legislatures. But those constraints would be grounded in fundamental national, rather than international, norms.

²³ See, for example, Software Directive, Article 5.

²⁴ See EC Treaty, Article 234.

claims of infringement in, and under the copyright law of, the United States.²⁵ The influence of Russian law in this context is on the outcome of multinational copyright disputes litigated in the United States, rather than on the shaping of American domestic copyright policy as such. The court, acting under the doctrine of *depeçage*, was applying foreign law to resolve discrete issues necessary to adjudicate claims of infringement in the forum.

In recent years, however, the most dramatic change in private international law has been in the adjudication of (sometimes several consolidated) national copyright *claims* under a law other than that of the forum. Both in the EU, under the rubric of the Brussels Regulation, and in the United States through judicial decision, courts are beginning to adjudicate claims under, and thus interpret, the law of foreign nations.²⁶ This device has substantial advantages and challenges, and is likely only to increase as parties seek global (or regional) enforcement of rights.

What is the significance of these different developments in private international law? In one sense, the relationship between robust national autonomy and private international law is dynamic and mutually supporting. A genuine private international law, which helps efficiently to resolve transborder disputes occasioned by the maintenance of different national laws, should reduce pressure to adopt universal substantive norms as a matter of public international law.

On the other hand, judicial engagement with foreign copyright laws might cause national courts – perhaps subconsciously – to effect a harmonization or convergence of national laws. Asked to apply eighteen different copyright laws, there may be an understandable tendency on the part of trial courts to effect an assimilation of those laws.

3. CONCLUSION

This brief sketch of a range of developments in copyright law highlights some of the many entry points for foreign and international law in the development of domestic copyright policy. The classical system of public international copyright law sought only minimally to affect domestic copyright policy; the lack of any real system of private international law in copyright matters foreclosed one of the principal means by which domestic courts were forced to consider foreign law. But the ambition of contemporary public international copyright law is, in several ways, much more substantial.

25 See *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 153 F.3d 82, 89 (2d Cir. 1998).

26 See *Boosey & Hawkes Music Pubs. v The Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998); *Pearce v Ove Arup Partnership*, [1999] 1 All E.R. 769 (Ct. Appeal, 1999) (Eng.).

Through a number of institutions and devices, it is seeking to shape the detail of domestic copyright policy. And a developing private international law of intellectual property, nominally supportive of separate national policy choices, will expose national courts to foreign copyright influences from which the classical system kept them insulated.