Gartner G2

Copyright and Digital Media in a Post-Napster World: International Supplement

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0. Introduction

The foundational White Paper "Copyright and Digital Media in a Post-Napster World,"[1] by the Berkman Center for Internet & Society and GartnerG2, explores a variety of issues surrounding the current digital media ecosystem. The White Paper examines legal and regulatory developments regarding copyright and related intellectual property (IP) issues, discusses existing business models upset by digital media distribution and emerging models newly possible, and analyzes shifts in consumer attitudes and behavior. However, the emphasis of the foundational White Paper is on the U.S. law and market.

This Supplement to the White Paper focuses on international legal issues.[2] It considers developments regarding copyright and related rights in jurisdictions outside the United States against the backdrop of earlier Digital Media Project[3] works that reviewed the interplay among law, technology and the business ecosystem.[4] In essence, the purpose of this Supplement is threefold:

- First, it offers a broad knowledge base about international legal issues and the emerging legal framework relating to the shift from analog/offline to digital/online media.

- Second, it aims to provide a rough overview of the different paths and stages of evolution of the copyright ecosystems across three continents: Europe and the Asia/Pacific region, including Australia.

- Third, it seeks to inform stakeholders—users, rightholders, business executives, intermediaries, policymakers, etc.—about basic similarities as well as conceptual differences in global and U.S. digital media laws at a time when U.S.-based services are expanding to international markets.[5]

In Part 1, we start with a brief discussion of the basic international copyright framework and provide an overview of three sets of important copyright agreements: The Berne Convention, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organization (WIPO) treaties.

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[1] See http://cyber.law.harvard.edu/home/uploads/254/2003-05.pdf.
[2] Last update: 30 December 2004.
[3] See http://cyber.law.harvard.edu/media for further information about the Digital Media Project.
[4] The Berkman Center's iTunes Case Study explores the interactions between legal regimes and business models in greater detail. See "iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media," available at http://cyber.law.harvard.edu/media/itunes. A detailed study on online business models will soon be released by the Berkman Center's Digital Media Project (the study will be posted at http://cyber.law.harvard.edu/media/publications).
[5] See, e.g., iTunes Europe: A Preliminary Analysis, at http://cyber.law.harvard.edu/media/itunes_europe.

Part 2 discusses the copyright framework in Europe as established by the European Copyright Directive and other European Union (EU) legislation. In this context, we explore legislative and regulatory developments both at the EU and the EU member states level. A selection of cases from European countries illustrates the current state of “digital media law in action.”

Part 3 reviews legislative and regulatory developments in the Asia/Pacific region and provides brief descriptions of the copyright laws in Australia, Singapore, Malaysia, China, Japan and South Korea. In this context, we examine the impact of the international copyright treaties discussed in Part I. This section also provides an overview of actions taken against file-sharing Web sites and peer-to-peer (P2P) services in selected countries in the Asia/Pacific region.

Part 4 summarizes the legal campaign against online piracy, provides information about legal actions taken against individual file-sharers and briefly outlines current attempts to fight online piracy in coordinated operations across the world.

And finally, Part 5 offers some conclusions about how the legal landscape is evolving in response to the challenges and opportunities posed by digital media.

1. Basic Frameworks

This section provides a rough overview of international agreements of particular importance to the still-evolving international copyright framework. Because they establish rights and responsibilities regarding intellectual property (IP) that signatory countries have agreed to implement internally, later sections will refer back to them.

A set of **international treaties** establish standards for copyright protection, such as the Berne Convention for the Protection of Literary and Artistic Rights; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the Universal Copyright Convention (UCC); and—of increasing relevance—the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[6]

Recently, two other important international treaties entered into force: the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 and the WIPO Performances and Phonograms Treaty of 1996. These treaties essentially reiterate the principles of the Berne Convention and the TRIPS Agreement, while adding provisions that address digital transmissions and technological protection measures.

To present some milestones in the evolution of the international legal framework, we begin our discussion with the Berne Convention, then present an overview of TRIPS, and finally conclude with the WIPO Treaties of 1996.

Berne Convention

The Berne Convention[7] for the Protection of Literary and Artistic Works is an international copyright agreement that was adopted by an international conference in Berne, Switzerland, in 1886. The signatories of the Berne Convention constitute a union for the protection of the rights of authors in their literary and artistic works, known as the "Berne Union."

The Berne Convention protects "**literary and artistic works.**" This expression includes a broad range of products. It covers, in essence, every production in the literary, scientific and artistic domain such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show[8]; musical compositions with or without words; cinematographic works and those created by analogous processes; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works and

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[6] The interactions among these Treaties are complex. The baseline is that each Treaty creates a separate set of obligations, often between different parties. The provisions set forth in the Treaties are sometimes complementary, and sometimes similar (the "three-step-test" for exceptions, for instance, can be found in several Treaties.) However, important conceptual differences (e.g., with regard to enforcement of Treaty obligations) as well as differences in the substance of law (e.g., term of protection) remain.

[7] See http://www.wipo.int/clea/docs/en/wo/wo001en.htm.

[8] Dumb shows are performances using gestures and body movements without words.

those created by analogous processes; works of applied art; and illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. It also protects, among other things, translations, adaptations, and arrangements of music and other alterations of literary and artistic works, including cinematographic and photographic ones.

What are the main features of the Berne Convention? The term of copyright for most types of works is the **life of the author plus 50 years**, but some countries might have a longer term, because the Convention only establishes a minimum standard. Most importantly, the Convention sets forth the principle of "**national treatment**," which requires a Berne Union signatory to provide the same rights established by its domestic laws for its own nationals to the nationals of every Berne Union country. **Automatic protection** is required for works published in any Berne Union country and for unpublished works authored by a citizen or resident of any Berne country. (Special provisions apply where the work has been first published in a Berne country but the author is a national of a non-Berne country.)

The Convention has been modified several times to expand the works and rights that it covers in response to changes in markets and technologies.[9] The latest significant revision occurred in 1971. Since then, the **WIPO**, charged with the administration of the Convention, has pursued a "**guided development**" approach aimed at fostering the information exchange among member states, and offering recommendations and model laws rather than at making further substantive revisions of the Convention itself.

One consequence of this less-centralized approach has been the differing development of copyright regimes in different nations, despite the simultaneous emergence of global markets for information goods. The tension between global markets and idiosyncratic local copyright laws on the one hand and the lack of an enforcement mechanism under the WIPO regime on the other hand led to calls for a new set of rules at the level of public international law. The starting point for the next phase of international copyright treaties was not, however, triggered by WIPO, but the General Agreement on Tariffs and Trade (GATT) Uruguay Round, which led to the Uruguay Round Protocol that includes the TRIPS Agreement.

[9] *Technological changes have necessitated that the Berne Convention be revisited approximately every two decades. Supplementary agreements extending the initial Berne Convention include the 1928 Rome Convention for the Protection of Performers, Producers of Phonograms & Broadcasting Organizations; the 1971 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; and the 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.*

TRIPS

In order to catch up with globalization and to reduce differences in the **protection and enforcement of IP rights** around the world, new internationally adopted trade rules for those rights were introduced by the 1994 TRIPS Agreement.[10]

TRIPS covers areas such as copyright and related rights, trademarks, geographical indications,[11] industrial design, patents, layout designs and trade secrets. It addresses five **broad issues**:[12]

- Application of basic principles of the trading system and other international IP agreements (such as national treatment and most-favorable-nation treatment).
- Obligations of member governments to provide for adequate protection of IP rights.
- Responsibilities of member governments for effective enforcement within their boundaries.
- Adoption of the World Trade Organization (WTO) dispute settlement mechanism to disputes under TRIPS.
- Special transitional arrangements, including arrangements for developing and least-developed countries.

As to copyright specifically, TRIPS requires that its signatories comply with the substantive provisions of the Berne Convention. The Agreement also ensures that computer programs will be protected as literary works under the Berne Convention, and lays down basic principles with regard to the copyright protection of databases. Furthermore, the Agreement adds important provisions on rental rights to the international copyright framework. The term of protection must extend to at least 50 years after the year of authorized publication; special requirements apply to phonographic works and other categories of works. TRIPS also incorporates the "three-step-test," which requires that national exceptions to copyright must be limited to: (i) certain special cases, (ii) which do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the rightholder.[13]

The TRIPS Agreement provides evidence for the increased importance of trade rules in the realm of international IP law. However, TRIPS was not a comprehensive response to the new challenges and changes in the information environment. Rather, the Agreement can be seen as a mere expansion in depth and geographical coverage of IP protection along the lines of the existing regimes of the industrialized world.

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[10] *See http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.*

[11] *Roughly, geographical indications are signs used on goods that have a specific geographical origin and possess qualities (or a reputation) that are due to that place of origin (e.g., "Roquefort" for cheese produced in France; see http://www.wipo.int/about-ip/en/geographical_ind.html).*

[12] *See http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.*

[13] *See Art. 13 TRIPS.*

WIPO treaties

During the TRIPS negotiations, it became clear that the Agreement would not catch up with recent developments in digital communication and information technologies. Against this backdrop and facing the threat of losing relevance, WIPO suggested a **new treaty for the online environment** and an update of the protections for performers, producers of phonograms and broadcasting organizations. Since a revision of the Berne Convention—requiring all signatory nations to vote unanimously for the amendments—was not a feasible option, WIPO appointed a committee of experts to draft a Special Agreement.[14] At a diplomatic conference in December 1996, finally, the WIPO Copyright Treaty (WCT)[15] and the WIPO Performances and Phonograms Treaty (WPPT)[16] were adopted. They became law in May 2002. The United States signed both, and the European Union (EU) implemented the treaties through the European Copyright Directive. The EU member states are following suit in the course of transposing EU copyright law into national law.

In this section, we focus on the **WCT** of 1996. This Treaty governs the protection of literary and artistic works and is in its scope identical to the Berne Convention. It explicitly confirms that copyright protection extends to computer programs and databases. The Treaty clarifies three specific rights and addresses three important issues.

- **Right of distribution.** The Treaty provides an exclusive right of distribution to authors. Under the Berne Convention, this right had only been granted with respect to cinematographic works. The Treaty leaves it to its signatories to determine if and under what conditions the exclusive distribution right will apply beyond the first authorized transfer of ownership. In the United States, for instance, the distribution right exhausts after the first sale (the “first sale doctrine”).

- **Right of rental.** In addition, the Treaty grants a right of rental to authors of certain kinds of works such as computer programs, cinematographic works and works embodied in phonograms. Accordingly, authors have the exclusive right to authorize the commercial rental to the public of the originals or copies of their works. The Treaty also sets forth important exceptions to these rights.

- **Right of communication to the public.** Further, the Treaty grants authors of literary and artistic works the exclusive right to authorize any communication to the public of their works, by wire or wireless means, including by making them available via interactive on-demand services or the like. Under the Berne Convention, this right had been limited

[14] *This lengthy process started in 1991 and involved many studies and reports submitted by national governments and other players.*
[15] *http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm.*
[16] *http://www.wipo.int/documents/en/diplconf/distrib/95dc.htm.*

both to certain categories of works and with regard to the means of communication.

The WCT deals with three particularly important issues among others. First, the minimum duration of the protection of photographic works is raised from 25 years after the author's death to 50 years to match all other works under the Berne Convention. Second, the treaty establishes the framework for **limitations of and exceptions to copyrights**: Signatory nations may provide for limitations of or exceptions to the rights granted under the WCT regime (for instance, "private copying exceptions") under the condition that they may apply only to certain special cases, that the limitations or exceptions do not conflict with the normal exploitation of the work, and that the legitimate interests of the author are not unreasonably prejudiced (the three-step-test). Third, and this aspect is particularly important for online media, the Treaty obliges ratifying member states to provide for adequate **legal protection and effective legal remedies** against the **circumvention of effective technological measures**—such as access and copy control technology—that are used by authors in connection with the exercise of their rights under the WCT or the Berne Convention, and that restricts acts that are not authorized by the authors concerned or permitted by law.

Thus, the WCT has introduced new international rules—such as a comprehensive right of communication to the public and the protection of technological protection measures, among others—that benefit rightholders and the copyright industry at large. Because the WCT is perceived to favor IP owners' interests over others, WIPO has recently been called upon to take a more balanced view of the social benefits and costs of IP rights as a tool for supporting creative activities. In the aftermath of the "Geneva Declaration,"[17] WIPO's General Assembly decided to advance a "**development agenda**" that acknowledges the need for balance in worldwide policy on IP rights.[18]

In sum, the WCT introduced new international rules regarding copyright, and also clarified how certain existing rules should be interpreted given new technological developments. In doing so, the WCT has helped level the playing field among national copyright regimes. However, the WCT still leaves significant leeway to the contracting states. As a consequence, significant differences among national copyright regimes remain, as this Supplement will illustrate.

[17] *See http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf.*
[18] *See http://www.cptech.org/ip/wipo/wipo10042004.html.*

2. EU Legislative and Regulatory Developments

European copyright framework

Copyright issues and related rights in Europe are governed not by a single body of law, but by legislation both at the EU level and the national level. EU member states, however, significantly harmonized their national copyright laws between 1991 and 1996 as a result of several EU Directives aimed at vertical standardization, including the Software Directive, Rental Right Directive, Satellite and Cable Directive, Term Directive, Database Directive and the Artists' Resale Rights Directive.

Perhaps the most important pieces of EU legislation regarding digital media are the **European Union Copyright Directive** (EUCD)[19] and the recently enacted **IP Enforcement Directive**. Still pending implementation in some member states, the EUCD aims to harmonize national laws horizontally and sets the European Community legal framework for copyright by standardizing three fundamental exclusive rights, introducing an exhaustive list of copyright exceptions, and stipulating obligations on safeguarding technical protection measures. The IP Enforcement Directive concerns the measures, procedures, and remedies necessary to ensure enforcement of IP rights,[20] in tandem with the earlier Directive on Electronic Commerce[21] and the Directive on Access Control Services.[22]

First, to achieve the harmonization of fundamental **exclusive rights**, the EUCD:

- Specifies the acts covered by exclusive reproduction rights for authors, performers, phonogram producers, producers of films, and so forth.
- Grants authors an exclusive right to authorize or prohibit any communication to the public—including interactive on-demand transmission—of the originals and copies of their work.
- Harmonizes for authors the exclusive right of distribution to the public of their works or copies thereof, and stipulates—for tangible works—a communitywide principle of exhaustion ("first sale").

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[19] *See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.*
[20] *See Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of IP rights.*
[21] *See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.*
[22] *See Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.*

Second, the EUCD stipulates an exhaustive list of **exceptions** to the right of reproduction and the right of communication. However, adoption of only one exception—regarding temporary acts of reproduction integral to a technological process enabling lawful use or transmission, such as proxy caching by an Internet service provider (ISP)—is mandatory for member states, and the provision's wording creates a multitude of interpretative questions. The Directive's 20 optional exemptions and limitations on rights of reproduction and communication concern the public domain. For three of these exceptions—reprography, private use, and broadcasts made by social institutions such as hospitals or prisons—the rightholders should receive fair compensation. Exceptions to distribution rights are granted depending on the exceptions relating to reproduction or communication.

Third, the EUCD implements the WIPO Treaties and requires member states to enact **anti-circumvention provisions** that impose legal liability for circumvention of any effective technological measure protecting copyrighted materials or rights management information. Technological measures are defined as any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts not authorized by the rightholder of a copyright or a related right. The standard for the "effectiveness" of such measures has not yet been determined. The Directive also requires that in the absence of voluntary measures taken by rightholders, member states ensure the implementation of **exceptions** or limitations for certain privileged uses. EU member states may incorporate additional exceptions and limitations—for instance, for private use—if certain requirements are met. However, it is noteworthy that these exceptions do *not* apply to on-demand services such as an online music store. Further, the EUCD does *not* set forth limitations on the legal protection of technological measures for purposes such as news reporting, parody and criticism, or quotation. Thus, the Directive differs significantly from its U.S. counterpart and gives EU member states significant leeway to define the scope of their own Digital Millennium Copyright Act (DMCA) type of protections.

Finally, it is also important to recognize what the EUCD does not harmonize. It does *not* deal with important issues such as ownership of rights, copyright contracts, moral rights, collective administration of rights, choice of law and jurisdictional issues.

EU legislative developments

Although the EUCD has not yet been fully implemented by the EU member states, in February 2003 the **European Commission** proposed another directive to enforce IP rights and bolster the fight against piracy and counterfeiting. Despite strong criticism by civil liberties organizations, scientists and even some industry groups, the controversial IP Enforcement Directive—supported by the music and movie industries and the U.S. government, among others—moved through the legislative process with almost unprecedented speed and was adopted in a

fast-track proceeding in April 2004 by the EU Parliament and the Council.

The **IP Enforcement Directive's** powerful new enforcement measures ensure a high, equivalent and homogeneous level of protection of IP rights across the EU common market. The Directive, for instance, requires that EU member states implement aggressive evidence preservation mechanisms, including secret court authorizations for raids by plaintiffs' agents ("Anton Piller orders"); precautionary seizures of alleged infringers' property (e.g., servers, computers, etc.), including by blocking bank accounts and other financial assets ("Mareva injunctions"); and forced disclosures of personal and commercial information, akin to the subpoena powers granted by the DMCA. The IP Enforcement Directive, to be implemented by the member states by 29 April 2006, applies to *any* infringement of IP rights as provided for by community law or by the national law of EU member states. Thus, the Directive's scope is extremely broad. It includes even minor, unintentional and noncommercial infringements, including peer-to-peer (P2P) file-sharing, although some of the measures set forth in the Directive (e.g., precautionary seizure and blocking of bank accounts) can be applied only in cases where infringing acts are carried out on a commercial scale. In sum, the Directive significantly increases enforcement on behalf of IP owners.

More recently, an EU official confirmed that committees of the EU Parliament and the Council are working on two pieces of legislation aimed at **criminalizing piracy and counterfeiting**. Both a draft directive and a draft decision were expected to be introduced by the end of 2004, in tandem with a study on the impact of piracy on the IP industry.[23] However, no update was published at the time of this writing in December 2004.

Moreover, the Commission recently assessed the coherence of the existing legislation in a **staff working paper** reviewing the legal framework in the field of copyright and related rights.[24] The working paper concludes that there is no need for a substantive revision of existing directives,[25] but that fine-tuning is necessary to ensure that definitions (e.g., the term "reproduction right"), exceptions and limitations set out in different sector-specific Directives are coherent and in compliance with the standards set forth by the EUCD. In the context of the working document, the Commission notably recommends *not* to extend (from 50 years to 95 years) the copyright protection for recorded music as advocated by the entertainment industry.

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[23] See http://www.heise.de/newsticker/meldung/48232.

[24] See http://europa.eu.int/comm/internal_market/copyright/review/review_en.htm.

[25] This statement is in tension with the Commission's earlier discussion of a "Super Directive" on copyright and related rights in the context the 2002 Santiago de Compostela revision conference. See http://www.edri.org/issues/copyright/eu.

At the **EU member state level**, EUCD implementation is still in progress.[26] The implementation deadline of 22 December 2002, was only met by two EU member states.[27] As of today, 16 members[28] have transposed the Directive into national law. The remaining nine states have published draft legislation, and implementation efforts continue. In December 2003, the European Commission pursued infringement cases and referred the defaulting member states to the European Court of Justice for noncommunication of the national implementing measures.

Initial analysis of the enacted legislation reveals **significant differences** in interpretations of the Directive by several member states. In the provision on legal protection of technological measures such as digital rights management (DRM) systems, for example, the EUCD refers to "access controls" and "copy controls," but unlike the DMCA, it does not differentiate between the two as far as circumvention acts are concerned. This particular design generated diverging regimes: Under Danish law, for instance, the circumvention of access controls—such as those used in DVD region coding—is likely to be considered fair use. In contrast, the U.K.'s EUCD implementation bans circumvention of both access and copy controls by combining them under the common label "technological measures." The sanctions imposed on circumventors or on those trafficking in circumvention devices also vary among different EU member states. Under U.K. law, for instance, violators of the anti-circumvention provision might be subject to both fines and imprisonment. Similarly, Germany contemplates fines and prison sentences, except that infringers who circumvent technological measures for personal, noncommercial uses are not subject to (criminal) prosecution. The Danish system, by contrast, provides no criminal sanctions for those who violate its anti-circumvention provision for whatever purpose, imposing only civil damages and fines.

Beyond implementing the EUCD, some EU member states amended their national laws to fight **Internet piracy**. The Italian Parliament, for instance, recently enacted Europe's toughest penalties for illegal file-sharing and other forms of online piracy.[29] The law imposes up to three years in prison and fines from €2,500 to €15,500 for copyright infringements conducted over the Internet. The law punishes merely downloading files for private use by a fine of €1,500. ISPs that do not cooperate with law enforcement authorities to fight Internet piracy risk administrative sanctions. This legislation also implements some of the remedies in the IP Enforcement Directive.

France, finally, enacted the *Loi pour la confiance dans l'économie numérique* (LCEN) on 21 June 2004,[30] which transposes the EU Directive on Electronic Commerce into

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[26] For an overview, see Urs Gasser and Michael Girsberger, Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States – A Genie Stuck in the Bottle?, Berkman Research Publication No. 2004-10, to be available at http://cyber.law.harvard.edu/media/eucd.

[27] Denmark and Greece.

[28] Greece, Denmark, Italy, Austria, Germany, the United Kingdom, Malta, the Slovak Republic, the Czech Republic, Ireland, Luxembourg, Hungary, Poland, Slovenia, Latvia and Lithuania.

[29] See http://www.usatoday.com/tech/news/techpolicy/2004-05-28-italy-piracy-law_x.htm?POE=TECISVA.

[30] See http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOX0200175L.

French law. The new law covers a broad range of topics, including the limited responsibility of providers for content they host, caching of content by ISPs, online advertising, digital signatures, cryptography, online contracts and cybercrime.[31] Recently, leading French ISPs and the music industry signed an agreement under the auspices of the French Ministries of Industry, Culture and Finance. According to the cooperation agreement, any offender's Internet account could be terminated within a few hours after a judicial order at the request of a record label monitoring P2P networks based on contractual termination or suspension clauses in the subscriber's agreement with the ISP. In the past, such requests were subject to review by a penal court.[32] The French ISPs also agreed to send warning messages to users upon request from rightholders and to provide P2P filtering software to their users, allowing them to block access to P2P systems such as eDonkey.[33] Further, the *Loi informatique et libertés* was amended in August 2004, allowing collecting societies and other representatives of rightholders to collect and process personal data (in particular the IP address) of alleged infringers in order to secure the evidence necessary to initiate proceedings or send warning messages about the economic and legal consequences of infringement.[34]

EU regulatory developments

In its first decision regarding the collective management and licensing of music on the Internet, in October 2002 the European Commission granted an antitrust exemption to the International Federation of the Phonographic Industry (IFPI) in Europe, which represents a large portion of the international recording industry.[35] In the **IFPI Simulcasting Agreement**, members agreed to a new category of multiterritorial copyright licenses for the simultaneous broadcasting of music over traditional channels (terrestrial or cable transmission) and the Internet. Accordingly, TV and radio broadcasters whose signals originate in a member state of the European Economic Area (EEA) can approach any EEA-based collecting society to obtain a single license covering most European countries and selected countries outside Europe.

Although the Commission supports the "one-stop-shop" principle of online licensing, it recently warned 16 organizations that collect royalties on behalf of music authors that their **Santiago agreement** potentially violates EU competition rules.[36] The agreement's purpose is to allow each of the participating collecting societies to grant to online commercial users one-stop-shop copyright licenses that include the music catalogs of all of the societies and that are valid in all of their territories.[37] In

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[31] *See http://www.dmeurope.com/default.asp?ArticleID=2158.*
[32] *See http://www.dmeurope.com/default.asp?ArticleID=2342.*
[33] *See http://www.technologyreview.com/articles/04/07/ap_2072804.asp?trk=top.*
[34] *See http://www.cnil.fr/index.php?id=1699.*
[35] *See IFPI Simulcasting, decision of 8 October 2002, OJ L107 (30.04.2003), p. 58.*
[36] *See http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged= 0&language= EN&guiLanguage=en.*
[37] *The Santiago agreement covers the performance rights of music authors for streaming and Webcasting as well as music and music video on demand, including music in films available on the Internet. A similarly designed agreement, the Barcelona agreement, covers the mechanical rights of authors.*

contrast to the IFPI simulcasting agreement for collecting societies of recording companies, however, the Santiago cross-licensing agreement—concerning collecting societies of music authors—effectively locks up national territories because commercial users can only obtain a license from the monopolistic collecting society established in their own member state. The territorial exclusivity imposed by the Santiago agreement means the societies do not compete with one another to provide licenses and may result in unjustified inefficiencies for both licensees and consumers. A hearing was held in November, and it is expected that the EU ruling will be made public in a couple of months.[38]

A recent European Commission communication addresses general concerns about the transparency and further development of **collecting societies**[39] The Commission proposes a legislative framework at the community level for the governance of collecting societies; the framework would address, among other issues, the establishment and status of collecting societies, their relationship with rightholders and commercial users, and their supervision.

In the same communication, the Commission also addresses **DRM** systems in general and the **interoperability** of DRM systems and services in particular. The Commission argues that the choice of the appropriate business model for the rightholders and commercial users remains to be made, and suggests that the use of DRM systems and services remain voluntary and market-driven. However, the Commission also makes clear that "the establishment of a global and interoperable technical infrastructure on DRM systems based on consensus among the stakeholders appears to be a necessary corollary to the existing legal framework and a prerequisite for the effective distribution and access to protected content in the internal market."[40] The European Commission concludes that close monitoring of market developments is essential to safeguard the public interest; however, no immediate legislative action is proposed.

Similarly, a High-Level Group on Digital Rights Management, established by the Commission in the context of implementing the eEurope 2005 action plan, explored the interoperability problem and identified different factors and scenarios for the evolution of DRM standards.[41] Recent DRM hearings in October 2004 organized by the Commission suggest ongoing tussles between the content and hardware industries, between these industries and collecting societies, and between industry representatives and consumer advocates.[42]

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[38] *See http://digital-lifestyles.info/display_page.asp?section=business&id=1783.*
[39] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market, 16.04.2004, COM(2004) 261 final.*
[40] *Id. at 11.*
[41] *See http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/index_en.htm.*
[42] *http://www.edri.org/edrigram/number2.20/DRM, http://www.edri.org/issues/copyright/drm/contact041011, and http://docshare.beuc.org/4/DKHJIELCHKEAELGGHPLAMMFGPDBK9DWYPK9DW3571KM/BEUC/docs/DLS/2004-01224-01-E.pdf.*

Selected European cases

This section seeks to provide an overview of recent case law that is likely to have an impact on the further evolution of the digital media ecosystem in Europe. Before we turn to national courts' rulings dealing with issues such as fair use, technological protection measures and secondary liability, we take a look at two important **antitrust actions** taken by the European Commission.

The EU's current antitrust case against **Microsoft** was initiated by the European Commission in 1998 and concerns Microsoft's refusal to provide interface information for interoperability of competing server operating systems as well as the bundling of jukebox and media software with Microsoft's Windows operating system. In March 2004, the European Commission concluded that Microsoft has violated EU competition law by leveraging its near monopoly in the market for operating systems onto the markets for workgroup server operating systems and for media players. On this basis the Commission imposed a record €497.2 million (US$613 million) fine. Even more importantly, however, the court ordered Microsoft to offer a version of its Windows operating system stripped of Windows Media Player.[43] Microsoft tried to reach a settlement, offering to include the media players of several of its competitors with Windows.[44] However, since EU regulators are reportedly extremely concerned with influencing Microsoft's monopolistic behavior in the future, a settlement was not reached.[45] Consequently, Microsoft challenged the Commission's decision and appealed to the European Court of First Instance in Luxembourg.[46] At the beginning of the hearings in September 2004, Microsoft asked the Court to suspend the Commission's far-reaching antitrust order until the end of the appeals process, which is expected to last at least two years.[47] The European Court of First Instance recently dismissed Microsoft's application for interim measures in its entirety, since Microsoft "has not shown that it might suffer serious and irreparable damage as a result of implementation of the contested decision."[48]

In August 2004, the European Commission decided to open an in-depth investigation into a proposed joint acquisition of the U.S. DRM company **ContentGuard** by Microsoft and Time Warner. After a routine review, the Commission decided to investigate whether the deal might possibly create or strengthen a dominant position for Microsoft in the market for DRM solutions. The Commission pointed out that the joint acquisition could slow down the development of open interoperability standards. However, it is important to note that the opening of a second-stage merger investigation does not prejudge the Commission's conclusions and final decision. This decision must

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43 See http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en.
44 Id.
45 See http://www.microsoft.com/presspass/press/2004/mar04/03-18EC_NPR.asp.
46 See http://www.nytimes.com/2004/07/28/business/worldbusiness/28euro.html.
47 See http://www.nytimes.com/2004/10/01/technology/01soft.html.
48 See http://money.cnn.com/2004/12/22/technology/microsoft_eu.reut/index.htm?cnn=yes.

be reached in a maximum of four months, by January 2005.[49] Recently, however, the Commission has stopped the clock on its review, because the structure of the transaction changed fundamentally when French technology firm Thomson unexpectedly joined the deal in November 2004.[50]

As in the United States, national courts of EU and EEA member states have considered cases regarding, among other issues, fair use, technical protection measures and secondary liability. Specifically, a series of cases are dealing with the question of whether rightholders can put **technological protection measures** on DVDs and CDs, even if doing so vitiates existing consumer rights, and whether consumers can legally circumvent such technological measures to preserve those rights.

In December 2003, a Norwegian appellate court upheld a ruling finding **Jon "DVD-Jon" Johansen** not guilty of violating Norwegian criminal law against breaking into digital data that one has no right to access.[51] The teenager was charged for his role in creating a program, DeCSS, to bypass the encryption on commercial DVDs.[52] The appellate court noted that DeCSS enabled a legal right—the making of a copy of a legally purchased DVD for one's own use—and that this legal utility made its publication on the Internet legal and outweighed the danger of abuse it might pose by enabling illegal reproduction of DVDs in competition with movie rightholders.[53] Currently, Norway—a member of the EEA, but not the EU—is transposing the EUCD into national law pursuant to its WIPO obligations. Interestingly, its proposed anti-circumvention provision, following the rationale of the "DVD-Jon" ruling, still allows circumvention for private and ordinary use. Moreover, the Norwegian **Consumer's Ombudsman** recently announced an evaluation of the legality of copy protections on CDs (but not DVDs) under Norway's Marketing Act.[54]

In contrast, the District Court of Paris recently ruled in ***UFC v. Films Alain Sadre et al.***[55] that a copy protection system on a DVD does not conflict with provisions of the French Intellectual Property Code, which limit copyright owners' rights regarding reproductions made strictly for the copier's private use. UFC, a consumer rights association, claimed it received complaints from consumers about DVD copy protections that prevent purchasers from making copies for private use. The court confirmed that such technical protection measures comply with the EUCD, though the EUCD is not yet transposed into French law. Recently, however, French authorities have launched an investigation of **EMI France** and Fnac, a leading music retailer in France, over copy protection technology. The investigation is based on consumer protection laws and was ordered by a

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[49] *See http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/1044&format=HTML&aged=0&language=EN&guiLanguage=en.*
[50] *See http://www.washingtonpost.com/wp-dyn/articles/A22074-2004Nov30.html.*
[51] *See http://www.theregister.co.uk/2004/01/06/us_inspired_copyright_laws_set/.*
[52] *See http://www.itworld.com/Man/2683/030107dvdjon/page_1.html.*
[53] *See http://efn.no/DVD-dom-20031222-en.html.*
[54] *See http://www.forbrukerombudet.no/index.db2?id=1438.*
[55] *Tribunal de Grande Instance de Paris, 3ème chambre, 2èeme section, N RG 03/08500, Judgement rendu le 30 Avril 2004.*

magistrate judge following a review of consumer complaints suggesting that EMI France's copy protection technology makes CDs unplayable on some systems.[56]

In line with the French case, in May 2004 a Belgian court rejected a complaint made by the consumer organization ***Test-Achats*** against record companies in Belgium, which challenged the use of technical measures to protect music on CDs. Test-Achats asked the court to prevent the record companies from using technical control measures on CDs and to remove all copy-controlled CDs from the market.[57] In its ruling, the court held there is no right to make a private copy under Belgian law and rejected Test-Achats' demands. Test-Achats announced an appeal.[58]

At least two other cases have dealt with enforcing national implementations of the EUCD anti-circumvention provisions. An Italian court rejected the seizure of **Sony Playstation** game consoles with modified chips that allow unauthorized uses of the system. The court held that the new anti-circumvention provisions were inapplicable because the modified chips were not primarily intended to circumvent copyright protection measures. Rather, the chips enabled consumers to exercise a fuller range of rights, including reading imported discs and creating back-up copies of games. The court determined that the owners of a product are entitled to use their property as diversely as possible.[59]

In the ***Copy-Count*** case, a Munich regional court held that using software to circumvent copy-prevention measures on a CD constitutes copyright infringement under the recently amended German Copyright Act. The court rejected the software producer's argument that a user's right to make a private copy also permits circumvention of copy-protection measures.[60]

At least one European case touched on the liability of major P2P network for copyright infringements. The Dutch Supreme Court addressed the question of **secondary liability** for operating the file-sharing service KaZaA in the appellate case ***Buma/Stemra v. KaZaA***. It confirmed a 2002 ruling denying an order requested by Buma that would have required KaZaA to take measures to prevent infringement of copyrighted music on its P2P service. According to the ruling, KaZaA successfully demonstrated that it is impossible to implement filtering mechanisms that differentiate between copyrighted works and other material.[61] The Supreme Court reaffirmed that such an order cannot be issued if compliance would be technically impossible. Further, the Supreme Court noted that KaZaA was not itself infringing copyrights, and that Dutch law does not recognize the concepts of contributory or vicarious infringement.[62]

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[56] *See http://zdnet.com.com/2100-1104-5325887.html.*
[57] *See http://www.theregister.co.uk/2004/01/03/belgian_watchdog_sues_record_biz/.*
[58] *See http://www.edri.org/cgi-bin/index?id=000100000151.*
[59] *See http://www.ipjustice.org/media/release20040112_en.shtml.*
[60] *See http://www.zdnet.de/news/software/0,39023144,39120245,00.htm?h.*
[61] *See http://news.com.com/2100-1023-870396.html..*
[62] *See http://www.infoworld.com/article/03/12/19/HNcourtkazaa_1.html.*

Another Dutch court ruled in ***Techno Design v. Brein*** that the MP3 search engine zoekmp3.nl does not infringe copyright law by merely informing its users where they can find MP3 files for download. The court ruled that it is possible to download noninfringing files using zoekmp3.nl. Further, the court held that copying/downloading a copyrighted MP3 file for personal use without rightholders' authorization does not constitute a violation of Netherlands' Copyright Act.[63] However, it also ruled that Techno Design, the operator of the search engine, might be obliged, based on the standard of due care, to render its assistance and take adequate measures as soon as it learns that any link its search engine displays refers to a Web site containing an infringing or otherwise illegal MP3 file.[64] At the same time, the court denied that Techno Design is under an obligation to ascertain on its own initiative whether the files referred to are authorized or not.

A recent ruling by a Belgian court addresses the obligations of an ISP in cases where its users infringe copyrights. The Belgian Society of Authors, Composers and Publishers (SABAM) instituted in June 2004 a prohibitory injunction in the court of first instance of Brussels against the ISP **Tiscali**. Through this injunction, SABAM seeks to put an end to the use of P2P networks in Belgium.[65] Reportedly, the court ruled in November 2004 that Tiscali should disconnect customers if they violate copyrights, and block the access for all customers to Web sites offering file-sharing programs. The court also ordered a technical investigation into the possibility of blocking access. The decision is not public yet.[66]

A case of direct infringement was recently settled in Spain. The Web site **Puretunes.com** sold music downloading subscription for US$4 for eight hours a month access to the site, to US$168 for one year access in mid-2003. The operator of the Web site argued that a loophole in Spanish copyright law allowed it to sell to the United States music licensed through Spanish music publishing agencies but without having to deal with the record labels themselves.[67] The Recording Industry Association of America (RIAA) sued Puretunes's operators and the firm that owned it, Sakfield Holding Company SA, in July 2003, while the site was shutting down. Recently, the defendants agreed to pay US$10.5 million to the music labels to settle the copyright infringement case.[68] A lawsuit against a similar service is pending in Australia,[69] while comparable Russian Web sites such as AllofMP3.com and mp3search.ru are still in operation.[70]

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[63] *See http://www.solv.nl/rechtspraak_docs/District%20Court%20Haarlem%20120504.pdf (English translation).*
[64] *Id.*
[65] *See http://www.sabam.be/Web site/data/tiscaliangl.doc,*
[66] *See http://www.edri.org/edrigram/number2.23/p2p.*
[67] *See http://www.theregister.co.uk/2003/05/27/drmless_mp3s/.*
[68] *See http://www.theregister.co.uk/2004/10/27/puretunes_settlement/.*
[69] *See next section.*
[70] *See http://www.technewsworld.com/story/34512.html.*

3. Asia/Pacific Legislative and Regulatory Developments

Copyright ecosystems in Asia/Pacific region

Tracking developments of (digital) copyright law in the Asia/Pacific is challenging for several reasons.[71] The Asia/Pacific region includes many nations with different historical and colonial backgrounds, divergent political ideologies (ranging from capitalism to socialism or communism), and very different levels of economic development. These factors, among other issues, determine the manner how—and if, at all—copyright systems have emerged and what today's levels of protection are. Thus, for instance, copyright law is much less developed in the Pacific region—including the least-developed countries (e.g., Samoa, Solomon Islands, Tuvalu and Vanuatu)—than in East Asia (e.g., Japan, South Korea) or in some Association of Southeast Asian Nations (ASEAN) countries such as Singapore or Malaysia.

Against this backdrop, one might roughly distinguish between **three stages of development** of copyright protection in the Asia/Pacific region:[72]

- **Copyright laws at a very nascent stage.** Copyright laws of countries in this category either do not exist at all (e.g., Laos), or have not incorporated the relevant protection levels set forth by basic international treaties such as the Berne Convention or TRIPS. Most of the countries in the Pacific region fall into this category,[73] as do nations in other parts of the Asia/Pacific region such as Vietnam, Laos, Sri Lanka and the Maldives.

- **Copyright laws that provide a level of protection as set forth by TRIPS.** In the Asia/Pacific region, TRIPS has certainly been the major driving force in legislative changes over the past five years. Most ASEAN countries are in this category,[74] but also some East Asian nations[75] and other states (e.g., India). Some South Asian and Pacific countries, by contrast, are considered to be least-developed countries, and therefore the TRIPS obligations are postponed until 2005.

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[71] For an overview, see Ang Kwee Tiang, Legislation on Copyright Protection in the Asia & Pacific Region, Scripted Online Journal, at http://www.law.ed.ac.uk/ahrb/script-ed/elaw/Asia/Pacific.asp.

[72] These categories are based on the state of the "law in the books." Here, as elsewhere, the map of effective enforcement of copyright law ("law in action") might look somewhat different.

[73] e.g., Fiji, Kiribati, Nauru, New Caledonia, Papua New Guinea, Solomon Islands, Tahiti, Tuvalu, Tonga, Vanuatu.

[74] e.g., Singapore, Malaysia, Thailand, The Philippines, Indonesia, and Cambodia.

[75] Most prominently Japan and South Korea, but also Hong Kong and—at least in part—Chinese Taipei.

- **Copyright laws that have incorporated the WIPO Treaties or are otherwise in compliance with WCT/WPPT.** The most advanced legislations in the Asia/Pacific region have recently been amended to bring them into compliance with the WIPO treaties—although many of them are currently not party to the WCT and WPPT treaties. The list of countries in this category includes Australia, Malaysia and Japan. Others, such as Singapore and South Korea, are currently in the process of bringing their copyright laws into compliance with the WIPO treaties.

The following section focuses on this third category. More specifically, it provides a rough overview of recent developments in the copyright laws of Australia, Singapore, Malaysia, China, Japan and South Korea.

Asia/Pacific legislative and regulatory developments

Australia's copyright legislation is certainly one of the most advanced in the Asia/Pacific region. The Australian Copyright Act of 1968 is based on U.K. copyright law, but also reflects the obligations under the Berne Convention and considers special Australian circumstances. In the context of this White Paper, particularly important is the Australian Copyright Amendment (Digital Agenda) Act of 2000.[76] This came into effect in March 2001, and addressed the challenges posed by the Internet, pay-TV and other digital technologies. It also implemented the WIPO treaties. The most significant change is the introduction of the right of communication to the public, which gives copyright owners a right to control how their works are electronically transmitted to the public or made available online. It covers a broad range of uses and forms of distribution, including broadcasting, cable-diffusion, e-mail and Web publishing. The Digital Agenda Act also introduced anti-circumvention provisions aimed at protecting technological measures such as access codes, encryption and software locks. The Copyright Act as amended makes it illegal to produce or deal commercially in devices or services that have only a limited commercial purpose other than the circumvention of technological copyright protection measures. This definition suggests that a device or a service that has a commercially significant purpose other than circumvention would be legal under Australian law.[77] The act of circumvention itself is not specifically prohibited under the Digital Agenda Act. The Act sets forth certain exceptions to the ban on trafficking in circumvention tools or services. Especially, it does not prohibit a circumvention device that is supplied to a beneficiary of an exception for a permitted use (e.g., reproduction of computer programs for purpose of interoperability; lawful copying by libraries, educational

[76] *See http://www.austlii.edu.au/au/legis/cth/num_act/caaa2000n1102000321/.*
[77] *See http://www.dcita.gov.au/ip/digital_rights_management,_and_digital_and_online_ip/copyright_reform_and_the_digital_agenda/guide_to_the_copyright_amendment_(digital_agenda)_act_-_fact_sheet.*

organizations, etc., but not "private copying"), if the person provides the supplier with a signed declaration.[78]

The Act has also clarified the responsibilities of telecommunications carriers and other service providers, including ISPs. These groups are not liable for infringing material communicated via their facilities, unless they have control over the content of the material or they authorize an infringing act by another party such as a subscriber.[79]

Important amendments to the Australian Copyright Act, finally, result from the Free Trade Agreement between Australia and the United States (AUSFTA),[80] which aims—among other goals—to strengthen the protection of IP rights. The relevant chapter 17 of the AUSFTA on IP rights includes 29 articles and three exchanges of side letters. It endorses, among other things, multilateral treaties such as TRIPS, addresses parallel importation, covers the protection of materials in digital form and distributed over electronic networks, stipulates the principle of national treatment, and extends, in the "Mickey Mouse clause," the duration of protection for copyrighted work from 50 years under current Australian law to 70 years after the death of the author. Further, the Agreement obliges the parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures. It has been argued that the relevant article of the AUSFTA goes beyond the protection granted by the Digital Agenda Act. Arguably, it narrows the scope of exceptions under which circumvention devices may be used and extends the scope of criminal offences related to the trafficking in circumvention devices.[81] The Agreement also stipulates rules regarding ISP liability, adopted by Australia in the form of a "notice and take-down" system.[82]

The enabling legislation for the AUSFTA was passed by the Australian Parliament in August 2004, and the Agreement will be implemented by 1 January 2005. However, the government left the IP enforcement measures out of the enabling legislations and will deal with them in separate regulations.[83] Most recently, a draft regulation has been introduced to soften the impacts of the AUSFTA copyright legislation on ISPs.[84]

Singapore's Copyright Act has its roots in the Australian Copyright Act of 1968 and, consequently, the U.K. Copyright Act of 1956. It has been revised and amended several times since 1987. The 1999 amendments introduced new provisions in order

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[78] See Jeffrey P. Cunard, Keith Hill and Chris Barlas, Current Developments in the Field of Digital Rights Management, Standing Committee on Copyright and Related Rights, Tenth Session, Geneva 2003, available at http://www.wipo.int/documents/en/meetings/2003/sccr/doc/sccr_10_2_rev.doc, 87.

[79] The elements that must be taken into account are discussed at http://www.dcita.gov.au/ip/digital_rights_management,_and_digital_and_online_ip/copyright_reform_and_the_digital_agenda/guide_to_the_copyright_amendment_(digital_agenda)_act_-_fact_sheet

[80] See http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html.

[81] See http://www.aph.gov.au/Library/pubs/rp/2003-04/04rp14.htm.

[82] See http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/letters/17_isp_liability.pdf.

[83] See http://www.theaustralian.news.com.au/common/story_page/0,5744,11077715%5E2702,00.html.

[84] See http://www.smh.com.au/news/Breaking/Bid-to-soften-copyright-law-impact/2004/12/15/1102787130962.html.

to protect works in cyberspace and clarified, among other things, that the exclusive right to make copies includes electronic reproductions. The Copyright Act provides an exception for browsing of copyright materials made available on the Internet. The exception may apply where the work is temporarily downloaded for viewing or accessing material online, but is limited and does not apply if the material is saved or stored in any permanent form.[85] The Singapore Copyright Act also includes a notice and take-down procedure and remedies against the removal or alteration of electronic rights management information. In January 2004, the U.S.-Singapore Free Trade Agreement (USSFTA) aimed at trade liberalization between the two countries entered into force. Among many other things, this Agreement demands that Singapore implements anti-circumvention provisions similar to those of the DMCA.[86] Consequently, Singapore's parliament passed in November 2004 several amendments to its Copyright Act. The Copyright (Amendment) Act of 2004 now bans, among other things, the act of circumventing technological protection measures and trafficking in circumvention devices, and introduces a new criminal offence for direct infringements, according to which anyone who downloads music or movies on a "commercial scale" could face criminal charges, including fines of up to US$11,920 (S$20,000) and six months in jail.[87] At this stage, it remains unclear what the term "commercial scale" means and under what circumstances criminal liability would be triggered.[88]

Copyright protection in **Malaysia**, a signatory of the Berne Convention but not a signatory to the WCT or the WPPT, is governed by the Copyright Act of 1987, which provides comprehensive protection for copyrightable works.[89] The Act outlines the nature of works eligible for copyright, the scope of protection and the manner in which the protection is accorded. It also sets forth provisions about the enforcement of copyright law. The Copyright Act was amended in 1997, primarily in response to new challenges imposed by the Internet. The amended Copyright Act clarifies that any unauthorized transmission of copyrighted works over the Internet is an infringement of copyright, and the definition of a literary work has been extended. The copyright owner has the exclusive right to control the transmission of a work through wire or wireless means to the public. This right includes making available a work to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them. Further, the Malaysian Copyright Act bans the circumvention of effective technological protection measures and the manipulation of electronic rights management information. In sum, the Malaysian legislation has recently come close to the standards set forth by the WIPO Treaties.[90]

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[85] *See http://www.ipos.gov.sg/main/aboutip/copyright/copynetsoftware.html.*
[86] *Art. 16.4 of the USSFTA, available at http://www.fta.gov.sg/. See http://news.com.com/2100-1025_3-1000154.html.*
[87] *See http://www.parliament.gov.sg/Legislation/Htdocs/Bills/0400048.pdf.*
[88] *http://www.reuters.com/locales/c_newsArticle.jsp?type=technologyNews&localeKey=en_IN&storyID=6539749.*
[89] *See http://www.unesco.org/culture/copy/copyright/malaysia/sommaire.html.*
[90] *See Ang Kwee Tiang, Legislation on Copyright Protection in the Asia & Pacific Region, Scripted Online Journal, at http://www.law.ed.ac.uk/ahrb/script-ed/elaw/Asia/Pacific.asp.*

Copyright law in **China** is a relatively new field of legislation—the first copyright statute was passed in 1990 as part of the nation's effort to enter the WTO.[91] Chinese copyright law promotes cultural development within a socialist framework. Creators of protected works enjoy personality and property rights that include publication, identification, alteration, reproduction, distribution, exhibition, performance, transmission and broadcasting. These rights are protected by civil, administrative and criminal penalties for infringement. China balances copyright entitlements with limitations that permit uses without compensation or authorization. These limitations are enumerated in the copyright act and include—among other things—certain uses for private study, research, self-entertainment and teaching. In 2003, China's National Copyright Administration strengthened copyright laws with four new regulations, including ones that further protect the rights of network information distribution.[92] The Supreme People's Court of China, furthermore, has interpreted copyright law in the context of Internet copyright disputes.[93] The Court reaffirmed that copyright protects digital embodiments of protected works and that creators may distribute their works over the Internet.[94] The Court also promulgated rules for direct and contributory copyright infringement by ISPs and created generous rules for damages. Moreover, the Chinese Copyright Act sets forth anti-circumvention provisions, making it illegal to circumvent or destroy technological measures taken by a rightholder for protecting the copyright or copyright-related rights in his work without the permission of the copyright owner.[95]

Beside these developments, China recently unveiled a new IP rights policy strategy aimed at promoting innovation and protecting foreign imports,[96] which began with an educational campaign including press events, seminars and outreach via TV and print media. In the light of the new strategy, China also launched a Web site designed to help inform its citizens of IP law and encourage them not to infringe copyrights.[97] Further, the Chinese government released new anti-piracy seals for CDs, DVDs and other media to combat counterfeiting,[98] and the National Copyright Administration and the Ministry of Information Industry plan to issue measures for the administrative protection of the right to dissemination over information networks, which will include a notice-and-takedown procedure for ISPs.[99] The Supreme People's Court, finally, recently announced that it will

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[91] *Brent T. Yonehara, Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws, 22 DePaul-LCA J. Art & Ent. L. 63, 65 (2002).*

[92] *See http://www.infomonkey.com/edigest/125/2,1,1,75875,9,1006,1019,1.mspx.*

[93] *Judicial Committee of the Supreme People's Court, Interpretations of the Supreme People's Court on Laws for Trying Cases Involving Internet Copyright Disputes (Nov. 22, 2000), translation available at http://www.chinaiprlaw.com/english/laws/laws3.htm.*

[94] *See http://cyber.law.harvard.edu/media/uploads/81/iTunesWhitePaper0604.pdf.*

[95] *http://www.chinaiprlaw.com/english/laws/laws10.ht*m.

[96] *See http://uk.news.yahoo.com/040603/323/ev4er.html. See also the action plan under the U.S.-China Joint Commission on Commerce and Trade (JCCT) at http://www.ustr.gov/Document_Library/Fact_Sheets/2004/The_U.S.-China_JCCT_Outcomes_on_Major_U.S._Trade_Concerns.html.*

[97] *See http://www.siliconvalley.com/mld/siliconvalley/news/editorial/7927945.htm.*

[98] *See http://www.siliconvalley.com/mld/siliconvalley/news/editorial/7918904.htm.*

[99] *See http://www.usito.org/uploads/281/weekly_nov19.htm.*

issue judicial interpretations to elaborate criteria of IP crimes and strengthen IP protection.[100]

Japan has a well-established copyright system and has updated its laws to address technological changes. Authors of creative works automatically enjoy moral and economic rights such as the rights to reproduce the work, to perform or publicly transmit the work, to distribute the work and to transfer its ownership, to lend it, and to create derivative works based on it. Copyright entitlements are protected by civil and criminal penalties for infringement. The economic rights are limited by enumerated exceptions, including private copying rights, protection of scholastic and journalistic uses, etc. Japan amended its copyright statutes in 1997 to specifically address Internet transmissions.[101] These amendments, among other things, broadened the exclusive rights of copyright owners to include authorizing public transmission over the Internet. The anti-circumvention provisions of the WIPO treaties have been implemented in 1999 amendments to the Copyright Act and the Unfair Competition Prevention Law.[102] However, the Japanese anti-circumvention provisions differ in several respects to the DMCA.[103] Japanese law, for instance, does not prohibit circumvention acts directly.[104] Japan has also adopted a notice and take-down system.

South Korea is a signatory to the Universal Copyright Convention and a member of the Berne Union, but has not yet become a party to the WIPO Treaties. South Korea has a well-established copyright system that meets the TRIPS obligations. The 2003 revision of the Korean Copyright Act was aimed at accommodating copyright law to the digital environment. The amendments include the introduction of a notice and take-down system similar to the provisions set forth by the DMCA. Further, the Korean Copyright Act as amended prohibits the production of and trafficking in devices aimed at circumventing technological protection measures. However, access control technologies do not lie within the scope of the anti-circumvention provisions. Moreover, current Korean copyright law—in contrast to U.S. and European law, but similar to the Japanese law—does not specifically prohibited the act of circumvention.[105]

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[100] *See http://news.xinhuanet.com/english/2004-09/08/content_1953924.htm.*

[101] *See Daniel J. Gérvais, Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States, 34 Vand. J. Transnat'l L. 1363, 1382 (2001).*

[102] *See Jeffrey P. Cunard, Keith Hill and Chris Barlas, Current Developments in the Field of Digital Rights Management, Standing Committee on Copyright and Related Rights, Tenth Session, Geneva 2003, available at http://www.wipo.int/documents/en/meetings/2003/sccr/doc/sccr_10_2_rev.doc, 91.*

[103] *For example, the provision is limited to devices and computer programs. Unlike the DMCA, the Japanese statute requires a tangible circumvention measure to find liability.*

[104] *See http://cyber.law.harvard.edu/media/uploads/81/iTunesWhitePaper0604.pdf*

[105] *See www.amchamkorea.org/publications/ 2004ikbc/Intellectual%20Property%20Rights.doc.*

Selected Asia/Pacific cases

The following section provides a selection of actions taken against file-sharing Web sites and P2P services in the Asia/Pacific region, focusing on Australia, China, Japan and South Korea.[106]

In **Australia**'s largest copyright infringement case, three university students received criminal sentences for running a Web site called **MP3/WMA Land**, which offered more than 1,800 pirated songs for download.[107] In light of their age at the time and the fact that they never profited from their actions, the court warranted 18-month suspended sentences for two of the students and an additional fine of US$5,000 for one of them. Moreover, one student and a third participant were given 200 hours of community service.[108]

Another investigation into a different Australian MP3-sharing Web site has resulted not only in the shutdown of the Web site and a US$360 million lawsuit against its operator,[109] but also in a lawsuit against the Web site's ISP, marking the first time the music industry has accused an ISP of being directly involved in copyright infringement by allowing its network to be used for file-sharing activities.[110] At the center of the legal controversy is **mp3s4free.net**, a Web site alleged to contain MP3 audio files that infringe upon the copyrights of the record labels, but is, in fact, a collection of links to other Web sites on the Internet, and other MP3 files distributed by permission of the rightholders.[111] The litigation addresses the question of whether linking to copyright infringing material from a Web page is itself an infringing act. Against the record labels' demands, the host of the Web site, **ComCen,** refused to remove the site, claiming that since no music files were located on the servers that hosted the site, the Web site was merely analogous to a search engine or directory, and that there was no liability on the part of the ISP.[112] In response, the record labels included ComCen in their lawsuit, arguing the ISP should take responsibility for the copyright infringing behavior of its subscribers.[113] The trial against Stephen Cooper, the operator of mp3s4free.net, started at the end of October 2004 at the Federal Court in Sydney.[114]

The Asia/Pacific legal development that has attracted the most attention in the United States is the Australian trial of **Sharman Networks**, the owners of KaZaA. In Ferbruary 2004, the Australian Music Industry Piracy Investigations (MIPI) obtained a court order that allowed MIPI to enter the premises of Sharman Networks, some universities and, among others, ISP Telstra in

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[106] *See also an earlier report by Renny Hwang of the Berkman Center's Digital Media Project, available at http://cyber.law.harvard.edu/media/uploads/52/Asia/Pacific.pdf.*
[107] *Id.*
[108] *See http://www.mp3newswire.net/stories/2003/tran.html.*
[109] *See http://www.news.com.au/common/printpage/0,6093,11103594,00.html.*
[110] *See http://www.zdnet.com.au/newstech/ebusiness/story/0,2000048590,20279975,00.htm.*
[111] *See http://news.zdnet.co.uk/internet/0,39020369,39117400,00.htm.*
[112] *Id.*
[113] *See http://www.zdnet.com.au/news/business/0,39023166,20281016,00.htm*
[114] *See http://www.zdnet.com.au/news/business/0,39023166,39164069,00.htm.*

order to search for and seize documents and electronic evidence to support its case against the P2P software provider.[115] The validity of the "Anton Pillar" orders had been challenged by Sharman Networks and Telstra.[116] A federal court's decision allowing the admission of evidence obtained under the particular search order had later—unsuccessfully—been appealed by Sharman[117] and other procedural matters raised in court, while the directed discovery and affidavit proceedings were completed by October. The trial on civil copyright infringement charges started mid-November 2004, and a ruling is pending.[118]

Reportedly, **China** has become a leading exporter of counterfeit and pirated goods to the world.[119] The U.S. industry estimates the value of counterfeit goods in China at US$19 billion to US$24 billion, with losses to U.S. companies exceeding US$1.8 billion a year.[120] The severe piracy problems derive from a combination of cultural, historic and economic factors and are further aggravated by inconsistent, weak enforcement by officials.[121] File-sharing Web sites and networks such as Jelawat and Kuro have been developing rapidly, too. The distributors of P2P software claim that file-sharing falls within the private use exception to copyright, but the Supreme People's Court of China rejected this interpretation.[122] Increasingly, copyright owners and right organizations are challenging file-sharing Web sites on copyright infringement claims.

For example, in December 1999, China Record, Sony Music, Universal Music and Warner Music filed a lawsuit against **MyWebInc.com** in the Second Intermediary People's Court of Beijing. The music industry claimed that MyWeb—a leading TV portal facilitating Internet usage through television set-top boxes—set up pages on its China-based portal that enabled Internet surfers to illegally download copyrighted sound recordings in MP3 format through hyperlinks and search engines. The lawsuit was settled in 2000. Under the agreement, MyWeb paid the court costs, apologized to the plaintiffs, took down its hyperlinks to unauthorized MP3 files and launched a copyright campaign with the IFPI.[123]

In November 2003, Huaxia Film Distribution Company—a major film distributor in China—filed a lawsuit against **chinadotcom**, a major Internet portal in China, accusing the Web site of providing unauthorized downloads of "Terminator 3."[124] Similarly, Warner

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[115] *See http://www.zdnet.com.au/news/business/0,39023166,39116016,00.htm.*
[116] *See http://www.zdnet.com.au/news/business/0,39023166,39116050,00.htm and http://www.zdnet.com.au/news/business/0,39023166,39116067,00.htm. See also http://www.zdnet.com.au/news/communications/0,2000061791,39116240,00.htm.*
[117] *See http://www.zdnet.com.au/news/business/0,39023166,39116545,00.htm, and http://www.zdnet.com.au/news/business/0,39023166,39162227,00.htm.*
[118] *See http://www.washingtonpost.com/wp-dyn/articles/A14701-2004Nov26.html?nav=rss_technology, and http://news.com.com/Witness+assaults+Kazaa+filter+claims/2100-1027_3-5474498.html.*
[119] *See http://www.ustr.gov/reports/2004-301/special301-306.htm.*
[120] *See http://economy.news.designerz.com/report-on-chinas-wto-compliance-highlights-copyright-market-access-concerns.html.*
[121] *See http://www.ustr.gov/reports/2004-301/special301-306.htm.*
[122] *See Wei Yanliang & Feng Xiaoqing, Comments on Cyber Copyright Disputes in the People's Republic of China: Maintaining the Status Quo While Expanding the Doctrine of Profit-Making Purposes, 7 Marq. Intell. Prop. L. Rev. 149, 181 (2003), 182.*
[123] *See http://www.ifpi.org/site-content/press/20000323.html.*
[124] *See http://www.asianlaws.org/cyberlaw/newsletter/issues/cl_nl_32.htm#04.*

recently sued **Net263**, a Chinese ISP, for facilitating the distribution of copyrighted materials, especially songs, over its network. Reportedly, Net263 agreed to stop the online transmission of songs, to apologize to Warner and to pay compensation.[125]

The Beijing No 1 People's Court ruled in April 2004 that the Web site **chinamp3.com** violated the IP rights of Hong Kong-based entertainment companies Go East Entertainment and Sony Music Entertainment (Hong Kong), and ordered the site to pay US$19,000 in damages. The suit concerned the unauthorized distribution of MP3 music files. The defendant argued that he had merely provided links for download and not a direct download service, and therefore should not be held responsible for the IP rights violations. According to observers, the court's ruling may prove to be a significant development in the nascent field of Chinese copyright enforcement in the digital age.[126]

In **Japan**, file-sharing operators and online pirates have increasingly found themselves under greater legal scrutiny over the past few years. In 2001, for instance, the Recording Industry Association of Japan (RIAJ), 19 record companies and the authors' society JASRAC sued Japan MMO, the operator of the popular **FileRogue P2P** service. The plaintiffs successfully demonstrated that the vast majority of the 70,000 files available on the service were commercial CD tracks put on the Internet without permission from the rights owners. In April 2002, a preliminary injunction required Japan MMO to suspend the service, and one year later, the Tokyo District Court found that both Japan MMO and its principal Michio Matsuda were liable for copyright infringement.[127] The court subsequently ordered Japan MMO to pay 71 million yen in compensation to the plaintiffs for damages.[128]

In May 2004, Japanese authorities arrested **Isamu Kaneko**, a well-known software engineer and research associate at the University of Tokyo, for authoring **Winny**, a popular P2P file-sharing program.[129] He was charged with infringing copyright law by allowing his software program to assist other people in downloading and sharing copyrighted movies, music and game files.[130] If he is convicted, he will face steep penalties, including up to three years in prison and a fine of up to 3 million yen (about US$27,500).[131] This move is unprecedented,[132] representing the first criminal charges in Japan against a P2P software creator. The trial started in September 2004.[133]

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[125] *Premium Global E-Law Alert, Baker & McKenzie, 28 November 2004.*
[126] *See http://www.jetrobkk-ip.com/Monthly_Report/may04en.pdf.*
[127] *See http://www.ifpi.org/site-content/press/20030129a.html.*
[128] *See http://www.japantoday.com/gidx/news282503.html.*
[129] *See http://www.abc.net.au/news/newsitems/s1105174.htm.*
[130] *See http://www.asahi.com/english/nation/TKY200406010157.html.*
[131] *See http://www.smh.com.au/articles/2004/05/10/1084041324598.html?oneclick=true.*
[132] *See http://www.technewsworld.com/story/ptech/33774.html.*
[133] *See http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040902a6.htm.*

In **South Korea**, the P2P music site **Soribada** has been sued for both its first and second incarnations. Soribada launched its first version in 2000, which facilitated music exchange for its nearly 4.5 million users through central file servers. Soribada 2.0 debuted in July 2002, with searching that did not use central servers. The cases' results proved identical to the *Napster* and *Grokster* decisions: The first Soribada version led to fines for contributory copyright infringement for Soribada's creators,[134] but the same court ruled that Soribada's second version, with its lack of caching and centralized searching, did not engender liability for contributory infringement.[135] However, the software developers—two brothers—also face criminal charges in the Seoul District Court.[136] If convicted, they could be jailed for up to five years. The district court initially dismissed the charges due to insufficient evidence regarding whether Soribada had secondary liability for copyright infringements committed by its users. Although the case was later revived by the prosecutors with the introduction of new evidence, the district court has indicated that it is leaning toward not holding the brothers liable for the criminal charges.[137]

In August 2004, South Korea's largest music streaming site, **bugs.co.kr**, announced it had reached an agreement with the Korean Association of Phonogram Producers (KAPP) on longstanding copyright conflicts. Previously, KAPP and other recording labels filed lawsuits against Bugs in 2003, arguing that the Web site operator made unauthorized use of copyrighted songs. According to a local Internet market research firm, Bugs was the fifth-most-visited site in Korea, with a total of 12.8 million users logged on in July 2004.[138]

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[134] *See http://www.siliconvalley.com/mld/siliconvalley/news/editorial/7094236.htm?template=contentModules/printstory.jsp.*
[135] *See http://times.hankooki.com/lpage/tech/200310/kt2003102920305811800.htm.*
[136] *See http://www.siliconvalley.com/mld/siliconvalley/news/editorial/7094236.htm?template=contentModules/printstory.jsp.*
[137] *See http://times.hankooki.com/lpage/tech/200310/kt2003102920305811800.htm.*
[138] *See http://times.hankooki.com/lpage/200408/kt2004082717245553460.htm.*

4. Legal Campaign Against Online Piracy

Context and background

Since 1999, the legal campaign against online piracy—accompanied by legislative initiatives and educational campaigns—has evolved across three components. Initially, the copyright industry fought against file-sharing Web sites and P2P services such as Napster, Aimster, KaZaA and Grokster. These legal battles are described in more detail in the GartnerG2 and Berkman Center's foundational White Paper, and the international developments have been discussed in the preceding sections.[139]

In a second step, rightholders and their representatives—most prominently in the United States and Europe—have systematically taken legal actions against individual file-sharers, specifically focusing on large-scale uploaders of copyrighted materials, especially music files. These legal actions have gained much public attention and are discussed in greater detail in the next section.

In a third and most recent step, the anti-online piracy efforts have been internationally orchestrated and include not only rightholders and international IP rights organizations, but increasingly governmental task forces and law enforcement authorities. These organized efforts are taking action against P2P services, individual file-sharers and those engaging in organized piracy for commercial gain. The April 2004 international campaign against online piracy organized by the U.S. Department of Justice is illustrative. Reportedly, law enforcement authorities from 11 countries, including the United States, conducted over 120 searches worldwide to dismantle some of the most well-known and prolific online piracy organizations. Legal actions were taken in European countries, but also in the Asia/Pacific region. The operation—the largest global enforcement action so far—also targeted so-called "warez" release groups that specialize in online distribution of pirated material.[140]

Actions against individual file-sharers

The international recording industry was not as quick to sue individual personal-use file-sharers as was the **RIAA**, which—recently supported by actions of the U.S. Department of Justice[141]—has sued more than 6,950 American music file-sharers since August 2003.[142] International industry associations

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[139] *http://cyber.law.harvard.edu/home/uploads/254/2003-05.pdf.*
[140] *See http://www.usdoj.gov/opa/pr/2004/April/04_crm_263.htm.*
[141] *On 25 August 2004, federal agents seized computers and software as part of an investigation targeting an Internet network used to illegally share copyrighted music, movies, software and games. See http://www.justice.gov/opa/pr/2004/August/04_ag_578.htm.*
[142] *See http://www.siliconvalley.com/mld/siliconvalley/news/editorial/10216917.htm. Recently, the Motion Picture Association of America (MPAA) filed its first round of lawsuits against alleged file-traders, see*

in general and the European industry in particular frequently mentioned a desire to start a similar legal campaign. But until recently, they have relied instead on alternative strategies like using DRM for content protection, promoting public awareness through education campaigns about the illegality of file-swapping, and cooperating with ISPs to close Web sites offering music illegally.[143]

In March 2004, however, the **IFPI** and its national recording associations brought legal actions on behalf of their member record companies, and in some cases by record labels, against over 200 alleged illegal file-sharers in Denmark, Germany, Italy and Canada.[144] Similarly, the Swiss IFPI branch launched a legal campaign against individual file-sharers.[145] The IFPI has also announced a new series of legal actions against alleged illegal file-sharers in Europe's two largest music markets, the United Kingdom and France, as well as in Italy, Denmark and Austria.[146] This second wave of litigation brings the total number of cases in the EU, both criminal and civil suits, to more than 650.

Due to different civil and criminal procedure laws across Europe, the proceedings against alleged file-sharers may vary significantly. For instance in the United Kingdom,[147] the industry can ask courts to issue subpoenas to ISPs to obtain subscribers' names. In other cases—for example, under German law—the music industry has to ask prosecutors to initiate criminal investigations of file-sharers to get the names of users associated with file-sharing IP addresses, since German law does not include a DMCA-like subpoena provision.

Sanctions imposed have included fines and compensation of a magnitude to be significant to individual noncommercial infringers and, in some cases, criminal liability as well. The first German to be convicted for swapping copyrighted music on the Internet via P2P, a 23-year-old trainee from Cottbus, was fined €400 by the court and settled with the German music industry for an additional €8,000 in civil damages. Most recently, a German teacher agreed to pay €10,000 in damages for illegally offering 2,000 songs over the Internet. He is also expected to face criminal sanctions.[148] In Denmark, 17 individuals agreed to pay compensation averaging €3,000 each. Further criminal proceedings against individual file-sharers are pending in Germany and Italy.

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http://www.wired.com/news/digiwood/0,1412,65730,00.html, and against P2P BitTorrent trackers as well as eDonkey servers (see http://news.com.com/MPAA+targets+core+BitTorrent%2C+eDonkey+users/2100-1025_3-5490804.html?tag=nl and http://news.com.com/BitTorrent+file-swapping+networks+face+crisis/2100-1025_3-5498326.html?tag=nefd.lede.)

[143] *See http://cyber.law.harvard.edu/media/uploads/72/7/breakingnews.htm.*

[144] *See http://www.ifpi.org/site-content/press/20040330.html.*

[145] *See http://www.swissinfo.org/sen/swissinfo.html?siteSect=105&sid=4862096. Reportedly, however, IFPI Switzerland has been targeting file-sharers since 1999. According to an IFPI spokesman, the industry settled approximately 800 cases by June 2004 with users. The file-sharers had received civil demand letters from the IFPI via ISPs, demanding they stop illegal file-sharing and pay compensation or face legal action. (See http://www.nzz.ch/2004/06/27/wi/page-article9OVJB.html.)*

[146] *http://www.ifpi.org/site-content/press/20041007.html.*

[147] *See http://news.bbc.co.uk/1/hi/entertainment/music/3743596.stm.*

[148] *See http://www.chip.de/news/c_news_12051604.html.*

5. Conclusions

This Supplement provided a brief introduction to the basic frameworks of international copyright law. It has reviewed some of the key legislative and regulatory developments in Europe—surveying both EU legislation and national implementations of EU law—and in selected countries of the Asia/Pacific region. We have analyzed the different paths and stages of evolution of the copyright ecosystems on both continents. The report has also described current trends in case law and private and public responses to piracy in the above-mentioned jurisdictions. In this final section, we offer some tentative conclusions based on the preceding analysis.

Evolution of national copyright regimes

The discussion so far has made clear that copyright regimes still vary significantly among continents and across regions, despite globalization of commerce, communication and some law. With regard to what we might call the evolutionary state of copyright regimes, three rough categories can be described:

- **Nascent regimes.** Copyright laws of countries in this category either do not exist at all or have not incorporated the relevant minimal protection levels set forth by the Berne Convention or other international treaties. Many countries of the Pacific region belong to this category.

- **Well-developed regimes.** Certainly those legal regimes that are TRIPS-compliant (even in the nontechnical sense) belong to this second category. As demonstrated, most of the Western countries as well as many countries in the ASEAN region fall into this category.

- **Most advanced regimes.** Countries in this category have copyright laws incorporating the WIPO Treaties or that are otherwise in compliance with WCT/WPPT. These regimes are advanced in the sense that they have already responded to the transition from offline/analog to online/digital media and information. Examples of countries belonging to this category include the United States, the European countries that have implemented the EUCD, Australia, Japan and Malaysia.

Driving forces of international harmonization

Despite continuing differences in the levels of copyright protection, we have identified a trend toward harmonization—or convergence—of copyright laws. What are the driving forces behind this phenomenon?

In many parts of the world, trade interests have become the major driving force for further development of national and regional IP regimes. Accordingly, TRIPS seems to be the key

mechanism aimed at creating a level playing field of IP protection, including copyright. Today, TRIPS plays a particularly important role in the transition from what we called "nascent" to "well-developed" copyright regimes. The implementation of the WIPO Treaties, somewhat in contrast, can be understood as the "fine-tuning" of copyright legislation, often triggering the transition from "well-developed" to "most advanced" copyright regimes.

More specifically, the need for bilateral trade agreements drives some countries to adopt the highest standards of IP protection. As the frequently stronger party in negotiations for such agreements, the United States and other exporters of information goods and entertainment products (e.g., music and movies), make them contingent on the other contracting nation to meet TRIPS or WIPO standards. The AUSFTA and the USSFTA are examples mentioned in this White Paper.

Thus, the international treaty system—including the Berne Convention, TRIPS, WCT, WPPT and other treaties—works as a leveler by harmonizing fundamental issues and cornerstones of national copyright system. Prerequisites of copyright protection, duration and scope of protection, and basic rules regarding limitations and exceptions to copyright are only a few examples of areas and issues increasingly harmonized by international copyright law.

Differences remain

Despite these forces for harmonization, as we have pointed out in this Supplement as well as in other reports of the Berkman Center's Digital Media Project, significant differences among national copyright laws remain.[149] Even in the context of the most advanced copyright regimes, one can identify differences in the substance of law. Thus, one might conclude that, despite powerful international attempts to create a level playing field, national **policymakers** still have some leeway in the way they design their copyright ecosystem. In fact, international copyright treaties harmonize some of the most important elements of a copyright system but often do not necessarily mean to achieve uniformity. Rather, international copyright treaties as well as regional legislation leave some degree of freedom regarding how to comply with the (minimal) standards they set forth. Varying EU nation state efforts to implement EU legislation on the legal protection technological measures illustrate the point that national legislators often may consider and implement alternative approaches without violating treaty obligations.[150]

Moreover, the laws aimed at governing digital media—even among most advanced regimes—vary significantly when it comes to the "law in action" as opposed to the "law in the books." The reasons for differences in copyright enforcement are diverse and include fundamental differences in civil and criminal

[149] *See, e.g., iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media, available at http://cyber.law.harvard.edu/media/itunes.*
[150] *In the EU and WCT context, see Urs Gasser and Michael Girsberger, Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States–A Genie Stuck in the Bottle?, Berkman Research Publication No. 2004-10, to be available at http://cyber.law.harvard.edu/media/eucd.*

procedure laws—an area of law that has not been harmonized to the same extent as substantive copyright law—as well as economic, cultural, historical and other differences in law enforcement practices.

However, this Supplement has also described how law enforcement efforts regarding online piracy are evolving to become increasingly internationally orchestrated multi-actor efforts involving rightholders, rights organizations, governmental task forces and other stakeholders across national boundaries.

Effects on stakeholders

Given the harmonizing trends yet persistent differences, what are the effects of international copyright frameworks and corresponding national legislation on a certain information environment? To approach this question (a comprehensive answer must be saved for later), one might want to distinguish among different stakeholders such as rightholders, businesses (the "copyright industry"), consumers and creators. In this White Paper, we have not presented empirical data to support comprehensive statements on the precise effects of legislative developments on each group of stakeholders. However, we can at least suggest certain **trends** based on our review of the legislative and regulatory developments as well as current case law.

Rightholders and the copyright industry have benefited from international harmonization because it has tended to expand their rights and to decrease local idiosyncrasies in laws and enforcement that make cross-border operations more complex and expensive. Arguably, current international copyright frameworks and, consequently, the most advanced copyright systems have a bias toward strong protection of **rightholders** and their representatives, including the **copyright industry**. International treaties and national copyright laws have expanded the scope of protection, copyrightable subject matters, term of protection, etc., over the past decades. By contrast, limitations and exceptions to copyright—aimed at balancing between the interests of rightholders and the public—have been narrowed down or have diminished in practice, for instance in the context of technological protection measures.

However, rightholders and businesses have to master regional and national differences not only in copyright, but also contract and consumer protection laws and the like. Further, rightholders and the digital media industry must deal with varying enforcement practices against copyright infringements across the world. From a business perspective, both circumstances are significant impediments to the global distribution of digital media services such as online music stores, on-demand video services, etc. The staggered expansion of Apple's iTunes Music Store into new markets might illustrate some of the consequences of different legal and regulatory regimes and practices.[151]

[151] *See e.g., iTunes Europe—A Preliminary Analysis, available at http://cyber.law.harvard.edu/media/itunes_europe.*

Rights cannot be expanded for one party without a contraction for another, here borne by the **consumers** of IP. Users are increasingly constrained in what they are allowed to do with digital content. Digital capturing and sharing are more and more restricted. Copy and access control technologies and supporting laws—promoted by international treaties like the WCT/WPPT and embodied in free trade agreements—along with reluctant application of traditional exemptions (like first sale or fair use), limit users' access to and use of digital content. This shift in the delicate balance between rightholders' interests on the one hand and the public's interests on the other hand is troubling in its implications. The resulting constraints on consumers might even undercut the greatest promise of the Internet—that it can transform passive receivers of information into active users and **creators** of content—and thus the shift is likely to chill creativity.[152]

Steps ahead

The findings of this Supplement suggest, among others, two topics for future research. One topic focuses on commercial aspects, the other one on legislative and regulatory issues.

- Online media services like Napster, MusicMatch, Real Networks' Rhapsody and iTunes are expanding their markets across national boundaries. Assessing the degree to which the success of this expansion depends on the further evolution of the international copyright system and on further improvements to national digital law ecosystems will be a provocative exercise in understanding the evolving global online economy. Further, it will be interesting to observe and analyze whether rightholders and other digital media industry participants pursue different business models and practices driven by the particular legal regime in which they find themselves physically located, or whether convergence will happen too quickly to permit such experimentation to develop.

- From a legal and regulatory perspective, the question of "best practice models" of copyright legislation in the digital age is up for discussion. In other words: Given the obligations under international treaty law, what degrees of freedom exist to create a legal and regulatory environment for digital media that take into account all relevant interests and seek to achieve a new equilibrium between them? Such best practice models could be particularly important for countries finding themselves at an earlier stage in the evolution of their copyright ecosystem, but hopefully also for advanced legal regimes that are required to find sustainable responses to powerful challenges imposed by digital technology on the one side and persistent expectations of users on the other.

[152] *See e.g., Lawrence Lessig, Free Culture, How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, New York 2004.*

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