THE NEXT TEN YEARS IN COPYRIGHT LAW: AN ASIAN PERSPECTIVE

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THE LANDSCAPE OF INTERNATIONAL COPYRIGHT: THE 1990'S TO THE PRESENT DAY (2007)

In discussing the next ten years in international copyright law, it may be helpful to first note several key anniversaries that will occur this year. 2007 will mark the fifth year of the entry into force of the 1996 WIPO Internet Treaties[1], the tenth anniversary of the conclusion of the Diplomatic Conference that led to their adoption, and the potential[2] convening of the first copyright-related Diplomatic Conference – on the protection of broadcasting organizations[3] – since the last Diplomatic Conference in 2000 (on protection for audiovisual performances which, unlike the 1996 Diplomatic Conference, did not lead to a successful treaty conclusion.) It may be helpful also to recall that, besides the international activity at WIPO during the 1990s, there was a flurry of regional activity relating to copyright as well. For example, between 1991 and 2004, the European Union adopted no fewer than eight copyright-related Directives, and is currently considering a proposal for a Directive relating to criminal measures to enforce

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[1] The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty were concluded at the WIPO Diplomatic Conference in December 1996. However, the Treaties could come into force only after a three month period from the deposit of instruments of accession with WIPO by thirty countries; this date was reached in March 2002 for the WCT and May 2002 for the WPPT.

[2] See note 8 and accompanying main text, *infra*.

[3] The 33rd meeting of the WIPO General Assembly, meeting between September 25th and October 3rd 2006, agreed that the Diplomatic Conference would be convened from November 19th to December 7th 2007. The full report is available online at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_33/wo_ga_33_10.pdf (WIPO Document Number WO/GA/33/10; page last accessed February 9th 2007.) The full Assemblies of the WIPO Member States adopted the report at its 42nd meeting on October 3rd 2006; the full Assembly report is available online at http://www.wipo.int/edocs/mdocs/govbody/en/a_42/a_42_14.pdf (WIPO Document Number A/42/14; page last accessed February 9th 2007.)

intellectual property rights (IPRs).[4] In Asia, the various member states of the Association of South East Asian Nations (ASEAN) adopted a Framework Agreement for Intellectual Property Cooperation in 1995[5], and in 1996, the Asia-Pacific Economic Forum (APEC) set up an Intellectual Property Rights Experts Group (APEC-IPEG)[6]. Between 1993 and 1997, the European Commission (EC) collaborated with ASEAN on ECAP-I, an initiative aimed at assisting ASEAN nations to strengthen their IPR protection. In 2000, ECAP-II was launched, with an emphasis on IPR enforcement[7].

The 1990s and the early years of the 21st century therefore saw a great deal of legislative and policy activity on the international and regional copyright front. The most recent and potentially most significant (in the sense of changing the copyright landscape by mandating new rights) initiative is the agreement by the WIPO General Assembly to convene a Diplomatic Conference in 2007, for the proposed Broadcasting Treaty. The history and the process of discussion of such a treaty has been dogged by disagreement over issues ranging from the need for such a treaty to the scope of rights

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[4] The Directives currently in force are as follows: Directives for the legal protection of computer programs (1991); rental rights and lending rights (1992), satellite broadcasting and cable retransmissions (1993); duration of the copyright term (1993); the legal protection of databases (1996); artists' resale rights (2001); copyright and related rights in the information society (2001); and the enforcement of intellectual property rights (2004.) For a full listing of the legislative measures and other official documents relating to the European Union's copyright-related Directives, see this webpage from the Copyright section of DG Internal Market, European Commission: http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm (page last accessed February 10th 2007.)

[5] ASEAN was established in 1967 and currently consists of 10 member states: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Its aim is to "accelerate economic growth, social progress and cultural development in the region and promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter": see http://www.aseansec.org/64.htm (page last accessed February 9th 2007.) The Framework Agreement contemplates cooperation in IPR enforcement activities, strengthening of IPR administration and the possibility of a regional patent and trademark system: see http://www.aseansec.org/5179.htm (page last accessed February 9th 2007.)

[6] APEC was established in 1989 and currently consists of 21 member states: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Taiwan, Thailand, the United States and Vietnam: see http://www.apecsec.org.sg/ (page last accessed February 9th 2007.) APEC aims to facilitate free trade and investment in the Asia-Pacific region. APEC-IPEG coordinates APEC initiatives in the field of IPRs, and favors a strong and effective IPR system in order to boost trade and investment: see http://www.apecipeg.org/default.asp (page last accessed February 9th 2007.)

to be included and their relationship to other copyrights and activities not currently protected by copyright (or related rights). Even decision to convene a Diplomatic Conference was conditional upon the Standing Committee on Copyright and Related Rights (SCCR) achieving prior agreement on a revised proposal, to narrow the proposed treaty by focusing on signal theft and relating only to "traditional" forms of broadcasting (thereby excluding hotly-debated forms of transmission such as webcasting and simulcasting)[8]. At the January 2007 Special Session of the SCCR, however, no agreement was reached on the language or scope of a draft treaty. The Chair of the meeting is expected to provide a new paper by May 1st, 2007, which will form the basis of discussion at the June 2007 Special Session of the SCCR. Depending on the outcome of that session, the WIPO General Assembly will then at its September session make a final decision as to whether or not to convene the Diplomatic Conference. This year could thus be a potentially significant year for international copyright, although at the present time it is still too early to say if the existing problems and disagreements that have surfaced during the process of discussion can be resolved in time. Should the Diplomatic Conference be convened, however, and should it – like the 1996 Diplomatic Conference on the WIPO Internet Treaties – achieve some measure of consensus, the copyright landscape over the next ten years could be substantially affected by its process and outcomes.

THE PROLIFERATION OF REGIONAL & BILATERAL FREE TRADE AGREEMENTS: 2000-2006

In parallel to the seeming frenzy of international copyright policy activity, and underlining the growing importance of trade to IPR protection, the post-TRIPS period witnessed an increase in the number and pace of bilateral free trade agreements (FTAs). Between 1995 and 2002, the number of FTAs that were notified to the World Trade Organization (WTO) increased from 130 to 250, of which over 170 are operational.

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[7] See http://www.ecap-project.org/ (page last accessed February 9th 2007.)
[8] For an overview of the process and continuing disagreements over the scope of the treaty, see Margaret Mikyung Lee, "WIPO Treaty on the Protection of Broadcasting Organizations", a Congressional Research Service (CRS) prepared for the US Congress in January 2007 (CRS Order Code RS22585; available online at http://www.cptech.org/ip/wipo/bt/crs_report_congress.pdf (page last accessed February 11th, 2007.) The current draft of the proposed treaty can be

The first US bilateral FTA (with Israel) went into effect in 1985, with Canada (1989) and the North American Free Trade Agreement (NAFTA; 1994) following at roughly five-year intervals thereafter. Since then, however, the pace of US FTA negotiations and conclusion has quickened considerably: between 2000 and 2006, the US concluded FTAs with Jordan (2000), Chile and Singapore (2003), Australia, Bahrain and Morocco (2004), Central America-Dominican Republic (2005) and Oman (2006). In 2006, the US also concluded Trade Promotion Agreements with Colombia, Panama and Peru[9]. It is currently pursuing negotiations with Korea, Malaysia, the Southern African Customs Union and the United Arab Emirates.

A similar phenomenon can be observed in Asia, where ten years elapsed between the first regional FTA (the ASEAN Free Trade Area (AFTA) in 1992) and the first bilateral FTA (between Japan and Singapore (JSEPA) in 2002.) Since then, however, ASEAN has entered into FTAs – largely in the form of Framework Agreements, Cooperative Economic Partnerships or similar agreements – with China (ACFTA, relating to trade in goods, in 2004), Japan (2003), India (2004) and Korea (2006.) As of early 2007, ASEAN has signed an FTA with China relating to trade in services (to be effective July 2007), is continuing negotiations jointly with Australia and New Zealand and exploring a possible FTA with the EU. The EU has itself concluded FTAs with Mexico (1997), South Africa (1999) and Chile (2002)[10], and is in discussions with the MERCOSUR[11] countries and the Gulf Cooperation Council of six Arab states[12].

Partly as a result of FTA obligations and partly to address the obvious need to update copyright laws for the digital age, the past few years have seen changes being made to various national copyright laws. Most recently, in the Asia-Pacific region, there have been changes to copyright legislation for these reasons in Singapore, Australia,

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viewed at http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf (WIPO Document Number SCCR/15/2, July 31st, 2006 (page last accessed February 11th, 2007.)

[9] The US also has more limited Bilateral Investment Treaties (with Uruguay) and Trade and Investment Agreements (some with its FTA partners.)

[10] In addition to the 2000 Contonou Agreement with seventy-seven African, Caribbean and Pacific (ACP) countries and the various Mediterranean Association Agreements with twelve such countries, commencing in 1995.

[11] Argentina, Brazil, Paraguay and Uruguay.

[12] Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

Japan and China, just to name a few. To the extent that bilateral FTAs remain a priority of many governments, it is likely that their successful conclusion will lead to necessary and consequent changes to national copyright legislation in those countries. Similarly, as more countries accede to the WIPO Internet Treaties (possibly as part of their FTA obligations), updates to national copyright legislation, with respect to digital copyright issues, will also continue to occur.

AN ONGOING CHALLENGE: INFORMATION TECHNOLOGY AND OTHER DEVELOPMENTS THAT INFLUENCE (OR COULD INFLUENCE) CHANGES TO COPYRIGHT LAW & POLICY

Thirteen years ago, John Perry Barlow (cofounder of the Electronic Frontier Foundation (EFF), currently an active nongovernmental organization (NGO) on the international IP scene) wrote that "everything you know about intellectual property is wrong", in arguing that the nature of digital information and cyberspace necessitated a new framework for IP, including a lesser reliance on IP laws [13]. Although much of Barlow's Utopian-like vision has not come to pass[14], new technology that enables new forms of collaboration, creation and distribution continues to challenge copyright law – its scope, applicability and limitations. Other challenges that have arisen are quite different, however; in recent years, a growing call for a new paradigm for copyright law – one that moves away from property/ownership rhetoric and towards considerations of human rights, development policy and ensuring access to knowledge. At the same time, certain problems that have dogged copyright law for a very long time continue to present difficulties, primarily in the realm of copyright piracy and enforcement.

(a) Technology Challenge #1: The Rise of Web 2.0

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[13] John Perry Barlow, "The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age", in WIRED Magazine, Issue 2.03, March 1994 (available online at http://www.wired.com/wired/archive/2.03/economy.ideas.html; page last accessed February 10th 2007.)

[14] He articulated this most clearly and influentially in his 1996 "Declaration of Independence of Cyberspace", available online at http://homes.eff.org/~barlow/Declaration-Final.html (page last accessed February 10th 2007.) For a review of the various "stages" and philosophies surrounding the issue of cyberspace regulation, see Michael Geist, "Cyberlaw 2.0", 44 B. C. L. Rev. 323 (2003.)

The challenge that advances in information technology presents to copyright law is not a new one, but where use of the Internet and the World Wide Web (WWW) is concerned, it is possible to divide the last ten years of technological development into two phases: "Web 1.0", which gained momentum in the 1990s, particularly with the growth of electronic commerce and the rise in Internet usage; and "Web 2.0", which can be described generally as the "second generation" and current incarnation of information technology. Where John Perry Barlow's declaration and views can be viewed as a marker of the "first generation" of Web 1.0 users, applications, uses and tools[15], it is as yet unclear what the world of Web 2.0 might mean for IPR policy. Indeed, there is some uncertainty and disagreement over what, exactly, is covered by the term "Web 2.0"[16]. An influential view is that provided by Tim O'Reilly, founder of O'Reilly Media, Inc., which besides being a well-known publisher, nowadays also organizes conferences on cutting-edge technological issues. Its third annual Web 2.0 Summit 2006 – the series itself serving as a benchmark for the birth and rise of Web 2.0 – was a high-profile, sold-out event that attracted the top names in the technology industries as speakers and sponsors[17]. In O'Reilly's view[18], the term "Web 2.0" can be viewed as a set of principles and practices that link a wide array of websites, applications and services that each demonstrates, to varying degrees, some of those principles and practices. First, while many technology companies have always viewed the WWW as a platform, a key difference lay in the perception of the function that platform served. To the extent that Netscape represented Web 1.0 in its focus on the web browser as an application/product, Google represents Web 2.0 in its use of the web browser as part of a service. Similarly, software in Web 2.0 has moved beyond a single-user

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[15] The mid-to-late-1990s saw the initial public offerings of Netscape (1995), Yahoo (1996), Amazon.com (1997) and eBay (1998.) Google went public in 2004, and Baidu.com – the leading Chinese search engine – followed in 2005.

[16] A Google search on February 12th, 2007, for the phrase "What is Web 2.0" turned up over 341 million "hits"; a Google search for the phrase "Web 1.0 vs Web 2.0" turned up over 22 million "hits". A substantial number of these search results point to articles and blog posts debating the nature and scope of these terms.

[17] See http://www.web2con.com/ (page last accessed February 12th, 2007.)

[18] Tim O'Reilly, "What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software" (September 30th, 2005), available online at http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html?page=1 (page last accessed February 12th, 2007.)

device/platform; it has become part and parcel of the leveraging of the web platform to connect devices, people and content.

Web 2.0 companies tend to understand and capitalize the "long tail" of e-commerce and the Internet, viz. the "collective power" of the myriad small websites that make up the bulk of the WWW; they also harness "network effects" and the collective intelligence of its user base and communities. Where hyperlinking is (and continues to be) key to the WWW, new technology has enabled interaction and engagement through blogs, wikis and Wikipedia, content feeds (such as through podcasts and Really Simple Syndication, or RSS), tagging (such as through del.icio.us) and social networking websites (such as myspace and flickr.) Technology has also enabled a richness of user experience and creativity that was not possible in the days of Web 1.0.

It is possible to view Web 2.0 as a phenomenon somewhat broader than the companies and technology that make it possible and whose business models and development will ensure that technology does not remain static; a "Web 3.0" wave must surely be on its way[19]. Looking beyond the individual companies and their products or services, it is possible to identify certain features about what Tim O'Reilly and others have highlighted as the core principles of Web 2.0. For example, from the websites, companies and technology most often cited as examples or embodiments of Web 2.0, it is possible to extract the following observations: (1) social, bookmarking and networking software and websites are facilitating an openness toward and sharing of information; (2) technology that permits the making of "podcasts", "remixes" and

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[19] To some technologists and journalists who follow such developments, Web 3.0 may have already arrived. For example, on November 12th, 2006, the New York Times published an article on the "Semantic Web", which was described as the growing efforts by companies, scientists and others to develop intelligent systems to mine data: http://www.nytimes.com/2006/11/12/business/12web.html?ex=1320987600&en=254d697964cedc62&ei=5088 (page last accessed February 12th, 2007.) There is an increasing amount of research and literature being produced on the Semantic Web, its challenges and possibilities; for a brief overview and resources, see http://en.wikipedia.org/wiki/Semantic_Web (page last accessed February 12th, 2007.) Some see Web 2.0 as merely a "staging post" to Web 3.0: see, e.g., Phil Wainewright, "What to Expect from Web 3.0", a blog post on the industry publication website for ZDNet (November 29th, 2005, available online at http://blogs.zdnet.com/SAAS/?p=68 (page last accessed February 12th, 2007.)

"mashups" of audio, visual and textual content achieve similar outcomes; and (3) these trends and outcomes are also facilitated by the rise of free and open source software[20].

Given their potential uses, it is obvious that these new forms of technology will present enormous challenges to copyright law. Such challenges will take the form not only of the more "traditional" questions such as what constitutes copying and distribution in the online environment, but also raise broader social and cultural issues. For example, if Web 2.0 technology consists of tools that enable easy, convenient and widespread collaborations (e.g. Wikipedia), and if the Web 2.0 ethos is centered on user-generated content and creativity, it seems awkward to continue to require that these users seek permission from the relevant copyright owner before using pre-existing protected content in their "mashups" and "remixes". The argument here is that the change in focus from mass media content (generated and controlled, in large part, by the copyright industries[21]) to much more "personal and participatory" media[22] necessitates a change in one's perspective on copyright law, in a number of ways: (a) exceptions and limitations to copyright law, particularly weak fair use provisions and principles, have to be reviewed in order to facilitate the creation of user-generated content[23]; (b) allowing copyright holders to maintain existing their forms and extent of

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[20] On the impact and implications of free and open source software, see the discussion in the next section of this paper.

[21] There are countless articles that expound upon this theme; among the most well-known, and certainly most-cited, are the views of Professor Lawrence Lessig of the Stanford Law School, described in detail in his book "Free Culture: How Big Media Uses the Law to Lock Down Culture and Control Creativity" (Penguin Press, 2004), the full text of which is downloadable without charge (through a Creative Commons license) at http://www.free-culture.cc/freecontent/ (page last accessed February 12th, 2007.)

[22] The April 20th, 2006, edition of The Economist carried a detailed survey of what it termed the "new media" revolution, including an examination of Web 2.0 activities such as blogging and the use of "wikis": see http://www.economist.com/surveys/displaystory.cfm?story_id=6794156 (page last accessed February 12th, 2007.) In December 2006, Time Magazine nominated "You" (meaning the people responsible for user-generated online content) as its Person of the Year.

[23] See, e.g., Ruth Okediji, "Givers, Takers and Other Users: A Fair Use Doctrine for Cyberspace", 53 Florida L. Rev. 107 (available online at http://www.flr.law.ufl.edu/pdf/okediji.pdf) and Anne LePage, "Overview of Exceptions and Limitations to Copyright in the Digital Environment", UNESCO e-Copyright Bulletin (January-March 2003), available online at http://unesdoc.unesco.org/images/0013/001396/139696E.pdf (both pages last accessed February 12th, 2007.) For some proposals with a focus on developing countries and development policy, see Ruth Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries", a paper prepared for the UNCTAD-ICTSD

control over access to and user of copyrighted content risk losing their markets and should actively seek new business models that complement the rise of Web 2.0 technology, norms and user practices[24]; and (c) as with the initial growth of the Internet, governments should be hesitant to rush in with new regulations; rather, where copyright policy is concerned, they should be concerned with assessing whether and how existing copyright laws sufficiently balance the competing policy interests of copyright owners and copyright users[25].

Unquestionably, the next ten years will see the continued evolution and development of Web 2.0 technology. The issues and challenges outlined above are only just beginning to be played out. Copyright policymakers have the opportunity to review both international copyright norms (e.g. the limitations and exceptions to copyright found in the Berne Convention and TRIPS) and national copyright laws (e.g. the extent of fair use or fair dealing provisions, and other user exceptions such as private copying in the digital environment[26]) to take into account the technological, social and cultural changes being wrought by Web 2.0.

Project on Sustainable Development (March 2006), available online at http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf (page last accessed February 12th, 2007.) For an exploration of users' rights (in terms of publishers' duties) see David Vaver, "Publishers and Copyright: Rights without Duties?", (May 16, 2006). Oxford Legal Studies Research Paper No. 24/2006 (downloadable from the Social Sciences Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902794 (page last accessed February 12th, 2007.)

[24] Perhaps as a sign of the times, this issue was the topic of one of the sessions at the recent (January 2007) Annual Meeting of the World Economic Forum in Davos, Switzerland, as was the question of how (not if) Web 2.0 would shape the future: see http://www.weforum.org/en/events/AnnualMeeting2007/index.htm (page last accessed February 12th, 2007.) See also James Bessen & Eric Maskin, "Intellectual Property on the Internet: What's Wrong with Conventional Wisdom?" (2004; available online at http://www.researchoninnovation.org/iippap2.pdf (page last accessed February 12t, 2007.)

[25] See Michael Geist, "Time's Choice Could Prove Inspired", in the LawBytes column of the Toronto Star (January 8th, 2007), available online at http://www.thestar.com/Business/article/168762 (page last accessed February 12th, 2007.)

[26] Notable recent attempts in this regard include the passage of the Australian Copyright Amendment Bill on December 5th, 2006, and the issuance of the findings of the UK's Gowers Review on Intellectual Property in the same month. The Australian legislation had been closely watched, in part due to the fact that certain of its provisions (e.g. relating to digital rights management) were changes consequent to the Australia-US FTA, despite the Digital Agenda Act of 2000. The Australian amendments included expanded private copying and fair dealing exceptions, although the Australian Government declined to adopt the US-style doctrine of fair

(b) Technology Challenge #2: The Emergence of Free & Open Source Software & the Spread of the Creative Commons & Open Access Movements

In recent years, free and open source software (FOSS) has gained rapidly in acceptance and adoption in the Asia-Pacific region[27], for reasons such as cost (low relative to using proprietary software)[28], ease of modification (again, relative to proprietary software), the relative lack of restrictions on redistribution (being one of the principles of FOSS) and the assurance that, with FOSS, a user is not tied to a particular developer or product (a point particularly attractive to government users.) In addition, it has been suggested that adopting FOSS could permit developing countries to "sidestep" TRIPS requirements and compliance thereof[29]. Other benefits of FOSS include

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use. The Copyright Amendment Act 2006 can be viewed at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/72A2989B7B9A2287CA25726000146EFA?OpenDocument (page last accessed February 12th, 2006.) In the section dealing with copyright, the UK Gowers Report recommended similar steps be taken to update UK copyright law, including the creation and extension of exceptions relating to (among others) copying by format-shifting, educational and research uses, and parodies and transformative uses. The Report can be viewed at http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf (page last accessed February 12th, 2007.)

[27] Much recent research has focused on the benefits and success of FOSS adoption in developing countries generally, spanning Africa, Eastern Europe and Asia: see, e.g., Nah Soon Hoe, "Breaking Barriers: The Potential of Free and Open Source Software for Sustainable Human Development", UNDP-APDIP ICT4D Series (2006), available online at http://www.apdip.net/publications/ict4d/BreakingBarriers.pdf (page last accessed February 10th, 2007.) The point being made is not singling out the Asia-Pacific region as unique in this respect, nor indeed to imply that developing countries and the Asia-Pacific region are identical (since, e.g., Japan and Australia – amongst other countries – certainly belong to that region and are hardly "developing"); rather, it is that the benefits of FOSS seem to accrue substantially to developing countries, of which the Asia-Pacific region has a number (e.g. India, Pakistan, Indonesia, to name a few countries in which FOSS has gained momentum and attracted much government, academic and media interest.)

[28] While it is possible that some users view proprietary software as "almost zero-cost" because of the availability of pirated software, the point is that deploying FOSS does not attract the initial licensing costs usually associated with proprietary software. Furthermore, as international enforcement efforts are stepped up and pressure brought to bear on those countries with poor enforcement and high piracy records (a large number of which are developing and/or Asian countries), the "practically free" perspective on illegitimate proprietary software is thus inextricably linked to the effectiveness of policing and copyright enforcement efforts.

[29] See, e.g., Christopher May, "The Deployment of Free and Open Source Software in Developing Countries: Sidestepping the Problems of TRIPS Compliance", IPEG Papers in Global Political Economy, No. 9, May 2004; available online at http://www.bisa.ac.uk/groups/ipeg/papers/9%20Christopher%20May.pdf (page last accessed February 11th 2007); arguing that promoting FOSS can free up developing countries to establish

facilitating democratization (through its principles of openness and transparency), poverty alleviation (through provision of training and job opportunities), and education (through collaborative learning, community sharing and access to source code)[30].

Underscoring the prevailing view that FOSS is a vital part of development policy in Asia[31], the International Open Source Network (IOSN) was established under the auspices of the Asia-Pacific Development Information Program (APDIP – itself an initiative of the United Nations Development Program (UNDP).) The UNDP had initiated APDIP through its Bangkok regional office, with the aim of promoting "the development and application of information communications technology (ICT) for sustainable human development in the Asia-Pacific region … through [programs in] three core areas: policy development and dialogue, access and content development and knowledge management"[32]. APDIP encourages private-public sector strategic partnerships, technical cooperation and capacity-building programs, and promotes advocacy and dialogues to facilitate equitable access to tools and technology. The IOSN has a Secretariat in Bangkok, and regional centers in Manila, Suva and Chennai. Like APDIP, besides providing information and resources relating to FOSS on its website, the IOSN runs training seminars and issues publications in support of its mission to assist developing countries in the region "achieve rapid and sustained economic and social

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more effective IPR enforcement mechanisms for proprietary software while simultaneously benefitting from the advantages of FOSS.

[30] Niranjan Rajani, Juha Rekola & Timo Mielonen, "Free as in Education: Significance of Free/Libre and Open Source Software for Developing Countries", a 2003 study for the Finnish Ministry of Foreign Affairs, available online at http://www.itu.int/wsis/docs/background/themes/access/free_as_in_education_niranjan.pdf (page last accessed February 10th, 2007.)

[31] A staggering number of online and offline resources is increasingly available, including web portals provided by international organizations. Besides those mentioned in the main text, the United Nations Educational, Scientific and Cultural Organization (UNESCO), an active participant in creating these resources, maintains an information portal at http://portal.unesco.org/ci/en/ev.php-URL_ID=12034&URL_DO=DO_TOPIC&URL_SECTION=201.html (page last accessed February 11th, 2007.)

[32] See http://www.apdip.net/ (page last accessed February 11th, 2007.)

development by using affordable yet effective FOSS ICT solutions to bridge the digital divide"[33].

All this activity points to a continuing and increasing use of FOSS in Asia. There is some evidence to suggest, however, that, in terms of FOSS development, Asia still lags somewhat behind the US and Western Europe (e.g. in the relative number of FOSS developers)[34]. In other words, Asia is currently in largely user mode. To the extent, however, that some of the perceived human resource benefits of FOSS are realized, this will surely change. Such a change will not occur uniformly across Asia, as factors such as economic development, literacy levels and Internet infrastructure will affect the rate of both adoption of FOSS and the training and education of FOSS developers. Where the principles of FOSS originated in the West (their proponents including Richard Stallman, Eric Raymond and Linus Torvalds, to name a few), they have clearly spread to Asia (as they have to Africa and Latin America), where the economic realities have led to their being intertwined with development policy[35].

Just as the FOSS movement espouses open source, collaborative work, sharing and redistribution of software code, the Creative Commons movement emphasizes community and cooperation in relation to non-software copyrightable works. Working within the existing boundaries of copyright law, Creative Commons seeks to "build a layer of reasonable, flexible copyright in the face of increasingly restrictive default [copyright] rules"[36] by promoting a variety of licenses where "some rights [are] reserved". Since the first license releases in 2002, Creative Commons has grown to include licenses in some 35 countries, including several in Asia: China, Japan Korea, Malaysia and Taiwan. It has also spawned Science Commons, an initiative

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33 See the IOSN website at http://www.iosn.net/ (page last accessed February 11th, 2007.)
34 See, e.g., David Lancashire, "The Fading Altruism of Open Source Development", and Hiroyuki Shimizu, Jun Iio & Kazuo Hiyane, "The Realities of Free/Libre Open Source Software Developers in Japan and Asia", both papers published in the online journal First Monday, in Volume 6, Number 12 (December 2001) and Volume 9, Number 11 (November 2004) respectively. The papers are available online at http://firstmonday.org/issues/issue6_12/lancashire/index.html and http://firstmonday.org/issues/issue9_11/shimizu/index.html#s5 (pages last accessed February 12th, 2007.)
35 FOSS principles form part of the proposed WIPO Development Agenda: see discussion *infra*.
36 See the Creative Commons website statement of its mission at http://creativecommons.org/about/history (page last accessed February 12th, 2007.)

that aims to facilitate information-sharing in science research through appropriate licenses and educational tools[37].

In the case of research, particularly scientific and academic research, the concept of "open access" evolved and gained momentum with the issuance of the Budapest Open Access Initiative in December 2002[38]. This was followed by the Bethesda Statement on Open Access Publishing in June 2003[39] and the Berlin Declaration on Access to Knowledge in the Sciences and Humanities in October 2003[40]. Essentially, the open access movement seeks to facilitate and provide free online access to scholarly material, such as peer-reviewed scholarship. Since its inception, the movement has developed along two primary tracks: the "green" route, whereby authors self-archive their work (in the form of pre-prints or post-prints), and the "gold" route, whereby access is provided to and by open access journals immediately upon their publication[41]. Open access principles are compatible with copyright law, as their implementation requires either the consent of the copyright owner or involves materials already in the public domain. As with the emergence and spread of FOSS, open access principles and practices were largely developed by non-Asian nations, libraries and publishers. Recently, however, it would seem that several Asian countries, particularly Korea, China, Taiwan and India (in particular), led by libraries and researchers based in those countries, have begun contributing to the literature and policy discussions over open access[42].

Many of the principles and objectives of FOSS and open access were expressly recognized by and included in the Declaration of Principles issued at the conclusion of the first World Summit on the Information Society (WSIS) in Geneva in 2003[43], a high-level conference convened by the United Nations[44]. Since then, however, subsequent[45] WSIS reports and statements have lacked specific references to FOSS and open access, although in their express references to the importance of

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[37] See http://sciencecommons.org/ (page last accessed February 12th, 2007.)
[38] See http://www.soros.org/openaccess/ (page last accessed February 12th, 2007.)
[39] See http://www.earlham.edu/~peters/fos/bethesda.htm (page last accessed February 12th, 2007.)
[40] See http://oa.mpg.de/openaccess-berlin/berlindeclaration.html (page last accessed February 12th, 2007.)
[41] The best informational resource and news update website for open access news, principles and developments is the website and blog maintained by Peter Suber, at http://www.earlham.edu/~peters/fos/fosblog.html (page last accessed February 12th, 2007.)
[42] See, e.g., the topics and speakers listed for the 2006 World Library & Information Congress, held in Seoul, Korea, in August 2006: http://www.ifla.org/IV/ifla72/Programme2006.htm, and the Keynote Address to the Asia & Oceania section of the conference by Professor Peter Jasco of the University of Hawaii: http://www.ifla.org/IV/ifla72/papers/157-Jacso-en.pdf (pages last accessed February 12th, 2006.)
[43] See http://www.itu.int/wsis/docs/geneva/official/dop.html (page last accessed February 12th, 2007.)
[44] The second phase of WSIS took place in Tunis in 2005.
[45] See, e.g., the official documents from the Tunis phase: http://www.itu.int/wsis/documents/index2.html (page last accessed February 12th, 2007.)

information and communications technology for development, it seems clear that FOSS and open access principles and initiatives will have a part to play in furthering the WSIS goals. Moreover, the United Nations has, through various agencies, clearly indicated that FOSS is a significant tool for education and development[46]. These developments add to the likelihood that FOSS and its related initiatives, such as open access and Creative Commons projects, will continue to take hold in Asia and elsewhere.

To the extent that these initiatives stand for a greater openness of content (as opposed to strict control over access by copyright holders) and emphasize the public interest and benefit in information sharing and collaborative creation, they complement the features of Web 2.0. Except for certain philosophical issues with the "copyleft" position of some free software[47], however, FOSS (for the most part), open access and Creative Commons operate within existing copyright frameworks (particularly in the latter two). They utilize contracts, licenses and permissions rather than challenge basic copyright principles (again, with the exception of free software which is "copyleft"); it is the preferences and practices of copyright owners that they challenge. As such, given the support of United Nations organizations and initiatives for FOSS and open access, and the rapid growth of Creative Commons internationally, there is no reason to believe that they will not continue their rise in Asia.

(c) The Growth of an Access to Knowledge (A2K) Movement & the Fate of the WIPO Development Agenda

Against the commonly-held view that strong IPR laws (and correspondingly effective enforcement thereof) are essential and important components of economic growth and development[48], there has been a growing backlash, led generally by commentators and advocates of a less IPR-focused global regime, which views the international IPR landscape as having "ratcheted up" IPR protections at the expense of

[46] See the list compiled by David Boswell at the O'Reilly Media website in July 2006: http://www.onlamp.com/pub/a/onlamp/2006/07/20/un_and_foss.html (page last accessed February 12th, 2007.)
[47] See http://www.fsf.org/licensing/essays/free-software-for-freedom.html (page last accessed February 12th, 2007.)
[48] There are many papers and resources that reflect this view, of which one of the most well-known is probably Keith Maskus' "Intellectual Property Rights in the Global Economy" (2000; published by the Peter G. Peterson Institute for International Economics.) A general and brief overview is provided by Dr. Kamil idris, Secretary-General of WIPO, in a WIPO brochure dated June 2003 and titled "Intellectual Property: A Power Tool for Economic Growth", which pointed to Singapore as an example of a country that has embraced IPRs as essential tools for building up national resources and attracting foreign investment.

development[49]. In the last few years, a loosely-allied group of advocacy groups and various individuals concerned over the implications of expanding IPR protections for freedom of expression and access to knowledge (on the basis that increased IPRs will negatively impact public access to education, information and knowledge) has coalesced around a general call to promote greater access to knowledge (A2K) by drawing public and international attention to the potential reach of pro-DRM laws and the ominous gap between greater copyright protection and weak (and unchanged) limitations and exceptions to copyright. The "A2K movement" (as these activists have come to be known) rallied over a proposal for an international A2K treaty[50]. The proposed A2K Treaty (of which the latest draft is dated May 9th, 2005)[51] aims to create an international framework of principles to enhance A2K and facilitate technology transfer, for example through the adoption of principles relating to preserving and clarifying limitations and exceptions to copyright, and to the establishment of a "knowledge commons" with respect to publicly-funded research. Other copyright-related provisions of the draft Treaty include clarifying the relationship between DRM legislation and copyright protection, and compulsory licensing regimes for developing countries. Because of the introduction of the proposed WIPO Development Agenda in 2004, however, which made reference to the possibility of an A2K Treaty, specific developments on the treaty proper have since taken a back seat to the international discussions over the Development Agenda.

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[49] Peter Drahos, "The Global Ratchet for Intellectual Property Rights: Why It Fails As Policy and What Should Be Done About It", a 2003 paper written for the Open Society Institute and published by the Australian National University's Centre for Governance of Knowledge and Development (available online at http://cgkd.anu.edu.au/menus/PDFs/IPRatchet_Drahos.pdf (page last accessed February 11th, 2007).) In this paper, Professor Drahos first broaches the proposal for a treaty on A2K. See also Peter Drahos & John Braithwaite, "Information Feudalism", (W.M. Norton & Company, 2003) and Carlos Correa, "Intellectual Property Rights, the WTO and Developing Countries", (Third World Network, 2000.)

[50] Judging by the recent number and geographical scope of A2K-related activities, it would appear that the A2K movement is clearly growing. For example, the Information Society Project at Yale Law School launched an A2K initiative which hosted its first major conference on A2K in April 2006; shortly thereafter, an Asian Commons conference focusing on the link between IPRs and A2K was held in Bangkok (in June 2006). Both conferences used technology such as "wikis" to complement the conference proceedings; on this point, see note ___, *infra*, and accompanying main text.

[51] See http://www.cptech.org/a2k/consolidatedtext-may9.pdf (page last accessed February 11th, 2007.)

In late 2004, a group of countries (led by Argentina and Brazil and which group came to be known as the "Friends of Development"[52]) presented a proposal for a WIPO Development Agenda to the Thirty-first WIPO General Assembly meeting. Referring to the Millennium Development Goals (MDG) adopted by the United Nations (UN) in 2000[53], the proposed Development Agenda centered on the need to integrate development policy into WIPO's mandate and work. Specifically, in relation to WIPO's norm-setting, technology transfer and technical cooperation activities, the proponents of the Development Agenda called on WIPO to adopt a broader approach instead of focusing on the strengthening of IPRs, for example by considering amending the WIPO Convention to reflect more accurately WIPO's status as a UN organization[54], and by enlarging the scope of civil society participation[55]. The General Assembly decided to convene Intersessional Intergovernmental Meetings (IIMs) to discuss the proposal prior to its next meeting in 2005. At that (Thirty-second) General Assembly meeting, the General Assembly agreed to continue the discussions, in the process establishing a Provisional Committee on Proposals relating to a Development Agenda (PCDA.)

The PCDA met in February and June 2006. By the first meeting, over fifty proposals had been tabled and the meeting ended with a recommendation that these proposals be clustered under five headings, to facilitate discussions at the June meeting. As it happened, the clustering resulted in one hundred and eleven proposals[56]. Not surprisingly, given the number and variety of proposals, and a number of significant disagreements as to priorities and process, the meeting ended without any consensus or real progress. The lightning rod was the controversial initiative by the meeting Chair

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[52] The final countries numbered fifteen; they are Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, Uruguay and Venezuela.
[53] See http://www.un.org/millenniumgoals/ (page last accessed February 11th, 2007.)
[54] The WIPO Convention states, *inter alia*, that WIPO's role is "to *promote the protection of intellectual property* around the world, and, *where appropriate*, in collaboration with any other international organization" (emphasis added.)
[55] WIPO Document Number WO/GA/31/11, August 27th, 2004 (available online at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf (page last accessed February 11th, 2007).)
[56] See WIPO Document Number PCDA/1/6, July 3rd, 2006 (available online at *http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_6.pdf* (page last accessed February 11th, 2007).)

to put forward only those proposals that seemed to enjoy a high level of consensus amongst member states. In the end, the Chair's text, reintroduced virtually word-for-word by the Kyrgyz Republic at the last minute – which thus gained the text the status of a country submission – was sent to the full WIPO General Assembly meeting for its consideration and decision. In October 2006, the General Assembly – at the same meeting in which it agreed conditionally to convene a Diplomatic Conference for the proposed Broadcasting Treaty – decided to extend the mandate of the PCDA for another year.

The PCDA is scheduled to meet from February 19th to February 23rd, 2007, and again from June 11th to June 15th, 2007, after which the WIPO General Assembly is expected to take up the matter again (though the form and scope of its deliberations will depend almost entirely on the outcome of the PCDA meetings). As of this writing, the only official document that has been published for the PCDA's February meeting is the draft agenda[57].

The backdrop for the A2K Treaty and the WIPO Development Agenda is, of course, the perception that international copyright policy, norms and treaty obligations have to take into account the development needs of countries and the public interest in maintaining a healthy balance between IP protection (which are given in the form of exclusive rights) and free access to information that will benefit the wider society. The two concerns are related but not identical. In both respects, however, the 2000 report of the UK Commission on Intellectual Property Rights provides a timely reminder of the dangers of adopting a "one size fits all" approach to IP policymaking[58]. As such, if, moving forward, future negotiations over international copyright – or, indeed, in the use of standard template obligations in bilateral treaties – are conducted with this

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[57] A singularly unhelpful (not unexpectedly so, given the usual nature of such documents) one-page document, available online at http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_3/pcda_3_1_prov.pdf (page last accessed February 11th, 2007.)

[58] See the Final Report of the UK Commission on Intellectual Property Rights, "Integrating Intellectual Property Rights and Development Policy" (2002), available online at http://www.iprcommission.org/graphic/documents/final_report.htm (page last accessed February 11th, 2007.)

awareness in mind, some measure of success can then be claimed for the A2K movement and development concerns.

Recent studies seem to indicate that the minimum standards set by TRIPS do not play a large part in determining the rate of growth or the acquisition of strong technological and innovative capabilities in low income countries, although strong IPR protection directly benefits high income, developed, countries as well as those developing countries with "IPR-sensitive" industries (such as pharmaceuticals)[59]. A "middle" position has been suggested by a recent studies which show that strong IPRs contribute positively to growth for low (in the form of technology flow) and high (in the form of innovation) income countries, but not for middle income countries[60]. Studies of this nature thus point toward the rationality and appropriateness of abandoning the "one size fits all" IPR model, in favor of more flexible and country/need-specific IPR policies and laws[61].

Another observation that can be made about the A2K movement and the discussions over the proposed Development Agenda is the growing role and importance of nongovernmental organizations (NGOs) and civil society groups in high-level international policy debates. As was pointed out by a recent study[62], since these entities do not possess the legitimacy of representing constituents in the way government representatives do, they have focused their resources and energies on

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[59] *Ibid*.

[60] Rod Falvey, Neil Foster & David Greenaway, "Intellectual Property Rights & Economic Growth", Research Paper 2004/12 in the University of Nottingham Research Paper Series on the Internationalization of Economic Policy, available online at http://www.nottingham.ac.uk/economics/leverhulme/research_papers/04_12.pdf (page last accessed February 11th, 2007.)

[61] The reality may be somewhat starker, however, in that the actual process of norm-setting tends to be dominated by developed interests and intense lobbying by powerful transnational corporations. See, e.g., Jerome Reichman, "Managing the Challenge of a Global Intellectual Property Regime", a paper prepared for the ICTSD-UNCTAD Dialogue, 2nd Bellagio Series on Development and Intellectual Property (May 2003), available online at http://www.wipo.int/members/en/admission/observers.html (page last accessed February 11th, 2007.)

[62] Duncan Matthews, "NGOs, Intellectual Property Rights and Multilateral Institutions: Report of the IP-NGOs Project", December 2006 (Queen Mary Intellectual Property Research Institute), available online at http://www.ipngos.org/Report/IP-NGOs%20final%20report%20December%202006.pdf (page last accessed February 11th, 2007.)

enhancing the negotiating abilities of developing countries, awareness raising and coordination of efforts. It should not be assumed, however, that NGOs form a homogenous group: not only are the lines between international and other groups difficult to draw, there remains some distinction between the more well-known international groups and some organizations engaged in similar work that are based primarily in the Global South, and who are less influential due to factors such as their lack of a public profile[63]. Groups also exist that may not fit the traditional perception of what constitutes an NGO. As the nascent A2K movement and work on the Development Agenda has shown, however, the link between NGOs (defined broadly) and developing countries has already been fairly firmly established and is likely to grow further. It remains to be seen whether the lesser-known NGOs, particularly those that remain so for reasons of lack of funding, infrastructure or publicity, will also find their niche on the world stage. In this regard, almost ironically, greater A2K – to the extent that it should also include access to the Internet and related infrastructure as well as minimization of language and other barriers – can only work to increase the profile of these groups and their work.

(d) The Prevalence of Piracy

It is perhaps timely at this juncture to note that, even as the technological developments described above have presented challenges and created changes to copyright law, there is one issue that continues to haunt copyright law: the problem of copyright piracy.

Section 182 of the US Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (1994) directs the US Trade Representative (USTR) to identify US trading partners which do not provide adequate and effective protection for IPRs. Countries so identified may be placed on the Watch List, indicating that particular problems exist in that country (such as enforcement measures). Alternatively, countries may be placed on the Priority Watch List, which triggers increased focus concerning the problem areas. A yearly report containing the lists and detailing problems with various countries is prepared by the

[63] *Ibid*.

USTR[64]. Much of the concerns center on the high piracy rates in various countries, including a number of Asian countries[65]. Despite the Special 301 list, however, piracy continues to be a problem for copyright holders, in Asia and elsewhere (such as Russia and Latin America). The Chinese government estimates that counterfeiting in China accounts for about 8 percent of its gross national product; IPR owners add that piracy rates in China are at around 90%[66]. Although – at least where software is concerned – the leading countries in piracy are those in Central/Eastern Europe (69%), Latin America (68%) and Africa/the Middle East (57%), the Asia-Pacific region scored 54% (compared to 34-35% for Western Europe/the EU and 22% for North America)[67]. Lack of effective laws and enforcement, different government priorities and poverty are some reasons for high rates of piracy in developing countries; as long as these factors continue to exist, it would seem that piracy will continue to be a significant problem for copyright holders.

What this seems also to show is the need to highlight development policy in crafting, refining and adapting IPR protections. As mentioned previously, recent advocacy and debate on development needs has indicated that a "one size fits all" IPR model may not work in either the subject country's or the copyright holders' interests. The next ten years offers an opportunity for rights holders and policymakers to reconsider the appropriate legislative model for copyright law.

SUMMARY AND LOOKING AHEAD: THE NEXT TEN YEARS IN COPYRIGHT LAW

The foregoing discussion of events, issues and trends in copyright law over the past ten years has been an attempt to provide useful starting points for a discussion of likely developments in the international copyright landscape for the next ten years, to 2017. It has attempted to examine the following issues:

1. How likely is it that these developments will trigger legislative and policy changes in the next ten years?

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[64] The 2006 report can be viewed at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf (page last accessed February 13th, 2007.) China was placed on the Priority Watch List in 2005, and remains there for 2006.

[65] The Special 301 Reports dating from 2002 can be viewed at http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Section_Index.html (page last accessed February 13th, 2007.)

[66] The International Intellectual Property Alliance (IIPA)'s 2007 report to the USTR on sixty Special 301 countries contains a chart showing industry estimates of losses from pirated software, entertainment and other copyrighted content: http://www.iipa.com/pdf/IIPA2007301PRESSRELEASEFINALwithchart02112007.pdf (page last accessed December 13th, 2007.)

[67] See http://www.bsa.org/globalstudy/upload/2005-2006%20Global%20Piracy%20Study.pdf (page last accessed February 13th, 2007.)

2. To the extent that many recent changes to copyright law resulted from the challenges presented by new technology, how will evolving technological developments (such as "Web 2.0") and their "spin-off" effects (such as growing consumer disaffection with overly-strong efforts to enforce copyrights) affect the copyright landscape?

3. From an Asian perspective[68], how should international policymakers in the copyright field proceed?

For the present moment and for the sake of generating discussion, the following general predictions can (in the opinion of this author) be made:

WIPO Broadcasting Treaty. As mentioned previously, the convening of a 2007 WIPO Diplomatic Conference on the proposed Broadcasting Treaty will determine, in large part, the scope and future direction of copyright protection in various ways. Assuming sufficient progress is made in the SCCR this year and a Diplomatic Conference convened, if agreement should be reached during the Conference on the extent to which broadcasting organizations may claim rights over their material (however narrowly restricted by the hard-won mandate to limit discussions to signal theft) those advocates who had wished for a broader scope to the negotiations may be emboldened to rekindle their calls for high-level discussions – and another WIPO-sponsored meeting leading to yet another Diplomatic Conference – to include webcasting and the other matters currently left out of the 2007 Diplomatic Conference agenda. Granted, given the current scope of disagreement and lack of certainty as to next steps, a Diplomatic Conference is nowhere near confirmed at the moment. Regardless of that uncertainty, it can be said that the process leading up to the present SCCR deliberations has already resulted in a renewed focus, at least on the international stage, not only on the nature and extent of protection for

[68] It should be said, obviously, that to claim to represent an "Asian perspective" is at best overly ambitious and at worst risking inaccuracy. The fact is that, due to substantial differences in legal systems, cultural histories, national priorities and varying stages of economic and social development, it is likely impossible to have a single, integrated "Asian perspective", particularly in the area of intellectual property policy. Much of the observations offered in this paper are thus

broadcasters, but also on the relationship between such rights and those covered by traditional copyright as well as those for which current levels of protection are less, or minimal, e.g. the 2000 Diplomatic Conference on audiovisual works that is widely recognized to have failed. A Diplomatic Conference will, of course, serve to focus further international attention on those issues and their appropriate resolution.

Role of NGOs and Reliance on ICT for Action. The past few years of discussion over the proposed Broadcasting Treaty, the Development Agenda and A2K have highlighted two noteworthy trends: the growing voice and role of NGOs and civil society activists in international copyright policymaking, and the effectiveness of media such as the Internet and associated technology (e.g. the use of "listservs", "wikis" and "blogs" to report, update, collaborate and provide feedback on issues of concern[69]). The latter, of course, played and continues to play an important part in the success of the former. To the extent that the existing slate of NGOs and activists continue their participation, and perhaps increase their numbers, the type of "multi-stakeholder" dialogue and discussions we have seen at WIPO for the last several years is likely to continue and to increase. This will be further facilitated should WIPO accredit more such entities, which currently number about two hundred and fifty[70].

WIPO Development Agenda. The outcome of the two PCDA meetings scheduled for 2007 regarding the proposed Development Agenda will also be notable. It has already signaled an extent of regional cooperation outside the Group Two countries that many observers consider a positive development, in that it has empowered smaller and developing countries to band together to agitate for changes to WIPO's overall mandate as well as its focus. It has also firmly placed development policy on the discussion table; whether or not the Development Agenda – in part or

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necessarily general, although the author hopes that they will provide useful starting points for a stimulating and fruitful discussion.

[69] For example, the Electronic Frontier Foundation provided a daily blog of the WIPO meetings relating to the Development Agenda, and the Consumer Project on Technology provided regular updates on the Broadcasting Treaty.

whole – goes further at WIPO, the fact is that from now on it will be politically difficult for international policymakers to continue to emphasize strong IPRs (and strengthening enforcement thereof) without also making some accommodation for development policy needs. The "one size fits all" IPR model may be on its way out.

Relationship Between WIPO Activities and General Copyright. Taken together, the activities and results thereof at WIPO during the coming year or so could have an impact on policy discussions over other copyright issues such as the nature of the limitations and exceptions to copyright. Through the growth of the A2K movement, the expansion of FOSS and the claims made in the Development Agenda, it seems likely that the next issue to move to the forefront of copyright policy review could be a review of the limitations and exceptions, and the meaning and scope of the Berne "three-step" test. This is so particularly given recent legislative changes such as those to the Australian Copyright Act, and proposals and discussions over specific exemptions, such as the Section 108 review currently underway in the US and the recommendations in the Gowers Review in the UK.

A2K and FOSS Issues. It is also likely that A2K and FOSS advocates will gain further momentum in the next few years. By emphasizing the logical and necessary ties between A2K and development policy, and through the success of specific initiatives such as open access publishing, the A2K movement can ensure its continued role in copyright policymaking. The success of FOSS in the commercial world and its adoption in developing countries has also cemented the role of FOSS principles in influencing debate over the nature of copyright, thus potentially affecting future discussions on expansion of its scope. The pending release of the new GPL version 3[71] is likely to affect contracting practices, and initiate another round of debate over the nature of such licenses, and the consequences of utilizing contracts to enforce and expand a licensor's copyright protection.

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[70] The WIPO Accreditation Rules can be viewed at http://www.wipo.int/members/en/admission/observers.html (page last accessed February 11th,

Greater Involvement of/with Asia. Asian countries have not, in the history of copyright law, taken the lead in pushing international copyright reform. This has been said to be because of historical factors[72] and realities such as Asia's relative lack of content-producing entities[73] and a lack of coordination amongst its governments when it comes to multilateral negotiations[74]. Whether or not that will change is likely to depend on factors having nothing to do with copyright or IP; as trade becomes an ever more important player on the IP field, it will be the growth of Asia's economies – led, most likely, by China and India, and fueled also by increasing innovation in places such as Japan, Korea and Taiwan – that could tilt the balance of interests, both in terms of a greater economic (and hence negotiating) power in the hands of Asia, and also in terms of compelling Asian governments to decide if and whether a regional grouping in areas of common interests might provide greater leverage on the international stage. The ASEAN FTAs with China and Japan, as well as a continued commitment to an ASEAN Free Trade Area and collaborative initiatives through APEC and other for a could provide excellent practice and opportunities for such collaboration.

FTAs to Continue Gaining Ground. At the individual national level, FTAs and trade pressures such as the US Trade Representative's (USTR) annual Special 301 Report[75]

2007.)

[71] The latest draft is posted at http://gplv3.fsf.org/ (page last accessed February 13th, 2007.)

[72] The original signatories of the Berne Convention were a handful of mostly Western European countries, and it has been said that the Berne Convention (and hence TRIPS) thus represents the cultural perceptions of that region and time. As TRIPS is also viewed by many as an agreement lesser-developed (and therefore primarily non-Western European) nations made to obtain trade concessions under the broader WTO umbrella, these factors support the idea that Asian (and, for that matter, lesser-developed) countries did not have the background or history to lead in this field.

[73] Compared to, e.g. the US, where the copyright (i.e. entertainment, software and related areas) industries account for 5.24% of annual GDP, or $535.1 billion.

[74] Many countries (not just in Asia) do not have specialized IP negotiators representing them at international meetings, and may not even maintain more than a small representative diplomatic office in Geneva to deal with matters arising at WTO and WIPO, all of which are increasingly complicated due to technological developments and the nexus between trade, IP, economics, technology and development.

[75] As well as continued lobbying and pressures from industry associations and interest groups such as the Business Software Alliance (BSA), the International Federation of Phonographic Industries (IFPI), the International Intellectual Property Alliance (IIPA) and others.

are likely to continue to influence the nature and pace of copyright law changes. On this score, it is thus more than likely that the issue of enforcement of IPRs, particularly as regards rampant piracy, will remain paramount, since many Asian countries are on the USTR's Special 301 Watch Lists. There may also be pressure to include or heighten criminal sanctions for willful acts of commercial copyright infringement.