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THE WIPO COPYRIGHT TREATY: A TRANSITION TO THE FUTURE OF INTERNATIONAL COPYRIGHT LAWMAKING?

Graeme Dinwoodie†

In recent years, the process of international copyright lawmaking has become quite different from that which gave birth to the Berne Convention.1 If asked to identify the moment at which the international process changed, most commentators might highlight the Agreement on Trade Related Aspects of Intellectual Property

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Rights (TRIPS)\(^2\) as an era-defining event.\(^3\) And, to be sure, TRIPS did radically change the institutional structure of the international intellectual property system as well as some of the assumptions underlying the system.\(^4\) But I would like to suggest that the WIPO Copyright Treaty (or WCT)\(^5\) also represented a watershed moment in international copyright law. Critical analysis of the debates leading up to and during the conclusion of that treaty in 1996 highlights a number of the challenges that we need to confront in shaping the future of international copyright lawmaking.

The WIPO Copyright Treaty radically changed the international copyright lawmaking environment for two reasons. First, it was in the 1996 Diplomatic Conference that one begins to see the most widespread explicit discussion of the concept of "balance" being integral to international instruments. Indeed, this led to recognition of that concept in the preamble to the treaty. Of course, the importance of balance in the international copyright system had been discussed before 1996. For example, the Stockholm revision of the Berne Convention in 1967 clearly sought to reflect a new balance that more explicitly recognized the concerns of developing countries about access to copyrighted works.\(^6\) But the rhetoric or language of balance came to the forefront in 1996 with the WIPO Copyright Treaty, and this rhetoric increasingly frames the current debate.

Second, the WCT was a watershed moment for international copyright law in that the process that led up to the conclusion of the two Internet treaties (both the WCT and the WIPO Performances and Agreements on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round of Multilateral Trade Negotiations, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement]. See generally DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (3d ed. 2008).


\(^6\) See Ruth L. Okediji, Sustainable Access to Copyrighted Digital Information Works in Developing Countries, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 142, 148 (Maskus and Reichman eds. 2005); 2 RICKETSON AND GINSBURG, supra note 1, at §§ 14.16-33. Likewise, article 7 of the TRIPs Agreement clearly embodies a concern for balance, albeit in quite abstract terms. See TRIPs Agreement, supra note 2, art. 7 ("The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.").
Phonograms Treaty) and the conduct of the diplomatic conference at which they were considered were quite different in several respects from that which had been seen heretofore. In particular, on some of the issues addressed in the treaty, the contracting states relied much less extensively on prior national experimentation than had been the norm in prior copyright agreements. For example, on the crucial issue of prohibiting the circumvention of technological protection measures (TPMs), contracting states sought an international solution at a very early stage in the development of norms. Moreover, the 1996 Diplomatic Conference was populated by a wide range of non-governmental organizations (NGOs) in numbers never before seen at international copyright events. And (perhaps because of these first two changes in process), the debates that took place nationally and internationally were substantially assimilated. These features of the process that led to the WCT remain with us today.

This brief essay addresses both the concept of balance and these changes to the lawmaking process. On the question of balance, I suggest that balance is a much more complicated concept than we assume. Even in the domestic environment, the phrase is used somewhat too glibly. But in the international context, it becomes even more complex. In particular, we need to take into account the multidimensional nature of balance (or what I call the various vectors of balance) before we try to insert internal substantive balance directly into treaty instruments. This is true whether we are talking about new authors' rights or the development of users' rights.

I am also concerned by some aspects of the changes that occurred to the lawmaking process in 1996. In particular, there is often a failure to appreciate fully the difference between national lawmaking and international lawmaking. To be sure, in a dynamic, integrated lawmaking process, one is a constituent part of the other; that is, national lawmaking contributes to international lawmaking and vice versa. But these processes involve different institutions with different democratic and political structures; those urging further reform of international copyright law need to be aware of these differences.


I. BALANCE

For quite some time, few discussions of domestic copyright law have failed to address the need to preserve a balance (or, commonly, a "delicate" balance) between incentivizing creation by authors and ensuring that others can access and use works thus created. But it is increasingly common to hear participants in international copyright lawmaking also talk about balance. Indeed, of late, it appears that neither the World Intellectual Property Organization (WIPO) nor the World Trade Organization (the WTO) is allowed to issue a press release that doesn't mention the word "balance."

The term "balance" is found in the language of the preamble to the WIPO Copyright Treaty, which was the most explicit acknowledgment of the concept on its own terms then found in a global copyright agreement. The language in question was first advanced by India during the discussions in Geneva, and in the final text the preamble makes reference to a "balance between the rights of authors and the larger public interest, particularly education, research, and access to information."

This reference has been celebrated by many commentators as a change in the tone of international copyright law. And it certainly reads quite differently from the language in the documents that had been produced early in the process leading up the WIPO Copyright Treaty. By way of comparison, consider a 1988 preparatory document that WIPO produced for consideration by a forum whose deliberations about norm-setting later fed into the work of the Committee of Experts that (eventually) led to the 1996 treaty:

The objective [of the proposals for the setting of norms in the field of intellectual property law] is to make the protection of

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9 See Dinwoodie, supra note 7, at 164–66 (discussing difficulties of balance in the domestic context). Although there are other metrics according to which we could develop copyright law, such as economic efficiency, social utility or ends-means proportionality, few are as rhetorically pervasive as "balance."

10 WIPO Copyright Treaty, supra note 5, preamble.

11 See id.

12 See, e.g., Pamela Samuelson, The U.S. Digital Agenda at WIPO, 37 VA. J. INT'L L. 369, 375 (1997); Neil W. Netanel, The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement, 37 VA. J. INT'L L. 441, 442 (1997); David Nimmer, A Tale of Two Treaties, 22 COLUM.-VLA J. L. & ARTS 1, 1 (1997) ("It was a far better copyright treaty than the world had ever attempted before."). In light of the national legislation implementing the WCT, see infra note 32, the language may seem less significant. Indeed, as Professor David Vaver commented in his contribution to this symposium, the "balancing" exercise contemplated in the preamble may be skewed in advance through the characterization of copyright owner "rights" and public "interests." See David Vaver, Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?, 57 CASE W. RES. L. REV. 731, 736 (2007); id. at 747 (suggesting a "way out of this linguistic hole").
intellectual property rights more effective throughout the world. "More effective" means that the norms and standards of protection are raised, where necessary, to the required level, and that enforcement of intellectual property rights will be easier and the sanctions for infringement stricter. This objective may be achieved by creating new treaty obligations or by persuasion.13

This is very different language from what ended up in the preamble to the 1996 treaty. In fact, during the debates at the Diplomatic Conference, the concept of "balance" was ubiquitous. According to notes taken contemporaneously, Bruce Lehman, the head of the U.S. delegation, "led off the discussion with a short and highly generalized statement of support for the treaties, recognizing the importance of 'meaningful and balanced protection.'"14 The same sentiment was expressed in interventions by the European Communities and a number of Asian countries. Likewise, most delegates from "developing countries in Africa and the Middle East emphasized the need for a balance among right holders, affected industries and public interests."15

Implicit in this celebration of balance is the fact that international copyright treaties historically had not made explicit reference to substantive balance. The classical international copyright system (in the sense of the network of treaties, at the center of which stood the Berne Convention) did not of itself try to achieve substantive balance. But this was not because the classical system was pursuing imbalance. Rather, it was because the international system was trying both to do more and to do less with respect to balance than the domestic copyright system.

It was doing less in the sense that the international system did not articulate positive copyright law. Instead, it established parameters within which national political processes created the substantive balance appropriate to the circumstances of each different domestic order. By the same token, the international system was doing more than the domestic system with respect to balance because in addition

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13 See MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET 11 (2002) (quoting the relevant document, and describing activity around this time as an "important step" toward the treaty making that culminated in the adoption of the 1996 treaties).

14 Day-by-day reports on the Diplomatic Conference were prepared by Seth Greenstein for the Home Recording Rights Coalition, which could be found at <http://www.hrrc.org/newswipo.html> until they were taken down from this website some time after the conference ended. Copies of these reports [hereinafter Greenstein Report] are on file with the author. See Greenstein Report, December 5, 1996.

15 See id.
to considering (to some extent) the appropriate outside levels of protection to be mandated internationally, it also sought to reflect an additional balance. That is, the balance between national autonomy on the one hand and universal standards on the other.\textsuperscript{16}

One might argue that the restrictions that the international copyright system imposed on national lawmakers were inherently imbalanced in that the international copyright system on the whole simply articulated minimum levels of protection. It established very few ceilings on protection.\textsuperscript{17} This feature of the system to some extent simply reflected the context in which the classical system arose. The Berne Convention was concluded at a time where countries were trying to create basic protection against rampant piracy (as well as to negotiate protection for foreigners). As a result, Berne Convention contained very little by way of explicit commitment, in those terms at least, to balance.

But there was plenty of room for balance. Because the mandated standards in the Berne Convention were relatively unobtrusive, nations retained a great deal of flexibility to achieve in their own domestic law the substantive balance they wanted. There was no real enforcement mechanism for contracting states that sailed too close to the wind, as the U.S. attitude to compliance with article 6bis highlighted.\textsuperscript{18} And the international system was primarily a codifying device. It tended to consolidate norms on which most of the world already agreed, based upon positive experience in national law.\textsuperscript{19} As a result, balance could be achieved on the ground, not through a substantive balance mandated in the international treaty but through conceiving of the "international copyright system" in broader terms that encompassed regard for national law.

Fast forward to 1994 and the TRIPS Agreement; this was the moment when many commentators think the international intellectual property system changed. At this time, the WIPO Copyright Treaty was still in the early stages of debate (though its precursors go back some years earlier). The TRIPS agreement, like the Berne

\textsuperscript{16} See Dinwoodie, \textit{supra} note 7, at 165 ("Discussion of international copyright policy thus extends . . . to [include] whether certain norms should be allowed to evolve differently at the national level in lieu of articulating an international rule.").

\textsuperscript{17} The classical system imposed limits largely by way of floors below which national levels of protection could not fall. See Graeme B. Dinwoodie, \textit{A New Copyright Order: Why National Courts Should Create Global Norms}, 149 U. PA. L. REV. 469, 491 (2000). Ceilings were rarer, though some arguably do exist. See Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, \textit{Patenting Science: Protecting the Domain of Accessible Knowledge, in THE FUTURE OF THE PUBLIC DOMAIN} 191, 220–21 (Guibault & Hugenholtz eds. 2006).


\textsuperscript{19} See Dinwoodie, \textit{supra} note 17, at 492–94
Convention, contains important flexibilities and limitations. Obviously those flexibilities have drastically been reduced by more effective enforcement mechanisms and, especially in the patent area, some greater detail on substantive obligations. But the basic conceptual framework was kept in place. Substantive balance in applicable intellectual property law was to be achieved in large part by relying on national political processes.

In fact, if one is to find balance embedded in the TRIPs Agreement itself, it can only be found by situating the Agreement in its broader context of the WTO Agreements. In return for accepting restrictions on their national autonomy to maintain unduly low levels of intellectual property protection, developing countries secured benefits in terms of market access. That is, the WTO Agreements contained a balance not simply between right holders' interests, on the one hand, and user groups' interests on the other, or between national autonomy and universality. Rather, they also embodied a balance between intellectual property obligations and nonintellectual property commitments. There was, in effect, another vector of balance introduced into the calculus underlying TRIPS.

The concept of balance explicitly introduced in the preamble to the WIPO Copyright Treaty (and its significance) has to be understood in this broader context. Indeed, one could complexify the vectors of balance further. The balance that policymakers pursue might be achieved not only internally through copyright law alone, but also through the relationship between copyright, on the one hand, and contract law and competition law, on the other. Or, one could argue that real balance is achieved through a combination of legal rules and enforcement or compliance, a dynamic which is obviously affected by

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22 This "bargain" narrative of the TRIPs Agreement is not universally accepted as complete. See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003).

23 See Joined Cases C-241/91 P & 242/91 P, Radio Telefis Eireann v. Comm’n, 1995 E.C.R. I-743; ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (finding that a cause of action to enforce a contractual obligation prohibiting acts of copying permitted by the Copyright Act was not preempted). The bodies of law external to intellectual property that might become relevant to lawmakers continue to expand. For example, what is the balance to be struck between intellectual property rights and potentially conflicting human rights such as free speech? See Laurence Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT’L L.J. 1 (2008).
both easy digital reproduction and the application of technological protection measures.\footnote{24} In short, balance is a more complex organism than we might expect or might assume.\footnote{25}

II. PROCESS

Let me turn now to the process that led to the WIPO Copyright Treaty. I will focus on three aspects of that process: the speed with which the question of copyright protection in the digital arena (and, in particular, protection against circumvention of TPMs) became a matter of international regulation; the increased involvement of NGOs in the international lawmaking process; and, the assimilation of national and international lawmaking.

A. Speed

Normally, it takes an appreciable period of time for countries to move from proposals (and, indeed, national laws) to a concluded international treaty. The Diplomatic Conference took place during December 1996. The so-called "digital agenda," which the Conference was to address, was only considered as such by the WIPO Committee of Experts in September 1995.\footnote{26}

\footnote{24} Cf. Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5(2)(b), 2001 O.J. (L 167) 10 (noting connection between levy-style exceptions to copyright and application of TPMs). This dimension to balance is raised both by copyright owners and user groups. Thus, some advocates of a strong public domain have suggested that the loss of copyright occasioned by non-compliance with U.S. copyright formalities should be figured into any assessment of the historical balance that contemporary copyright should, it is argued, preserve. See Christopher J. Sprigman, Reform(alizing) Copyright, 57 STAN. L. REV. 485, 487 (2004); David S. Olson, First Amendment Interests and Copyright Accommodations, 50 B.C. L. REV. 1393, 1419 (forthcoming 2009), available at www.ssrn.com/abstract=1534968 (arguing that judges interpreting copyright law post-Eldred are obligated to make greater accommodation of First Amendment interests in light, \textit{inter alia}, of the alleged contraction of the public domain that comes from the elimination of formalities). Likewise, copyright owners often emphasize the increased capacity for unauthorized reproduction in the digital environment to support calls for greater legal rights.

\footnote{25} Indeed, if one wanted to explore even more fully the different balances appropriate to copyright lawmaking, the inquiry could be extended to encompass consideration of institutional balance between legislative and judicial development of copyright law, to name but one additional complication.

\footnote{26} See \textit{FICSOR}, \textit{supra} note 13, at 33 n.105. The copyright proposals that WIPO had been developing during the previous three or four years were less digitally oriented, albeit no less controversial (for example, adoption of a copyright term of life plus 70 as an international standard); \textit{cf. id.} at 33–34 (noting that some digital issues, such as the protection of software or databases, had been on the WIPO work programme for some time, but that they had not been seen as part of any broader "digital agenda"). The order of work for international copyright policymakers from 1995 on was quite different for the five or six years that preceded the onset of the digital agenda.
Moreover, classically, international copyright law had in large part involved consolidation of laws that were already enacted at the national level, at least by some of the contracting states.\textsuperscript{27} But the models for digital copyright law that countries were considering during the WIPO Copyright Treaty deliberations were no more than proposals at the national level. The U.S. White Paper on the National Information Infrastructure was published only in the autumn of 1995.\textsuperscript{28} The parallel Japanese and EU proposals can be traced to the same time frame.\textsuperscript{29}

Thus, the WCT was not a consolidation of national laws; it was an international consolidation of national proposals (within a year of those proposals being first floated in detail). And the speed with which the WCT was concluded was very different from that at which the classical international copyright system moved. The WCT can be seen as an attempt to create an international norm that would then be used to structure then-nascent national models (particularly with regard to prohibitions on circumvention of TPMs).\textsuperscript{30} Indeed, one of the primary motivations for the United States to push international action was the resistance being encountered domestically to proposals pending in the Congress; those international obligations could then be used to reframe the domestic debate.\textsuperscript{31}

If speed has changed the nature of the lawmaking process in ways that affect the substantive content of copyright law, perhaps scholars and policymakers need to develop constraints that prevent this procedural change from having adverse substantive consequences? Of course, to the extent that one is less than enamored of this lawmaking process, one response is simply to emphasize the virtues of the deliberate character of international lawmaking. That is, one might simply reverse this change. But that may be too facile a response. Interdependence of nations may have increased to such an extent that,

\textsuperscript{27} The core copyright treaty, the Berne Convention, certainly fitted within the category of "consolidating treaties." However, WIPO had on rare occasions pursued "pioneering" treaties, such as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, where the international convention moved beyond national models. See FICSOR, supra note 13, at 4 (describing the Rome Convention in these terms).


\textsuperscript{29} The Commission of the European Communities had published a Green Paper on Copyright and Related Rights in mid-1995. But it was the Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society that was the basis for the positions taken by the EC at the Diplomatic Conference. That document was published only just before the Conference. See FICSOR, supra note 13, at 27–29.


\textsuperscript{31} See Samuelson, supra note 12, at 429–30.
on occasion, international lawmaking might be an avenue of more ready resort in case domestic initiatives would prove futile. However, if countries accelerate international lawmaking, they must do so fully aware of the costs of a lack of national experimentation. The WCT (at least, as nationally implemented) altered the substantive balance of copyright protection on an international scale in very short order.\textsuperscript{32} If pursued with greater deliberation, a quite different system might have ensued, learning from the lessons of different national models. Adopting the international norms in softer form, as has been done in trademark law, might have preserved greater flexibility to review the situation as experience at the national level accumulates.

Another response to the suggestion that the accelerated international lawmaking process is skewing the substantive balance of copyright law, as some have suggested,\textsuperscript{33} is to guarantee users’ rights as part of an international instrument. Increased discussion of this lawmaking strategy may reflect doubt that national political processes can secure balance on the ground, especially in the context of an integrated national/international lawmaking dynamic.\textsuperscript{34} Indeed, at the WCT Diplomatic Conference, a variety of countries, including Australia, South Africa and Tanzania, suggested that the Conference consider adopting mandatory exceptions. Those proposals were not pursued in 1996, but discussion of mandatory exceptions (or users’ rights or substantive maxima)\textsuperscript{35} is likely only to intensify.\textsuperscript{36}

In his contribution to this symposium, Professor David Vaver suggested a further alternative device to ensure a substantive balance in copyright law. Professor Vaver argued that international law might impose a “reverse three-step test,” which would permit the creation of

\textsuperscript{32} In fact, the WCT itself afforded substantial room for different countries to adopt different approaches to the regulation of TPMs. See J.H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works, 22 BERKELEY TECH. L.J. 981 (2007). The balance has been more dramatically altered by national implementation in the EU and the United States that has been extended internationally through bilateral trade agreements. See id. This phenomenon can only be addressed through other reforms. See infra text accompanying note 33.

\textsuperscript{33} But see supra note 32.

\textsuperscript{34} See Ruth L. Okediji, The Regulation of Creativity Under the Internet Treaties, 77 FORDHAM L. REV. 2379, 2404–08 (2009) (discussing the institutional capacity of developing countries to exercise effective design choices at the national level). The importance of viewing the international copyright system in a holistic fashion, taking full account of the characteristics of national regimes, is understood not only by advocates of users’ rights. Thus, copyright owners sought to bring questions of enforcement to the international table in part as a result of dissatisfaction with reliance on national judicial and administrative systems. See 1 RICKETSON & GINSBURG, supra note 1, at § 4.08.


\textsuperscript{36} See Dinwoodie & Dreyfuss, supra note 17, at 220–21.
any new rights under national law only if the nation in question could show a demonstrated need for such rights. In some respects, if embodied in a treaty, this device would resemble what might be called a substantive maximum, a ceiling on protection. And certainly, the device is already being deployed rhetorically.

B. Non-Governmental Organizations

A second difference in the process that led to the WCT was the role of NGOs. At the Diplomatic Conference at which the WCT was concluded, there were seventy-six NGOs acting as observers. In contrast, twenty-six NGOs participated in the Stockholm revision of the Berne Convention. This changed the lawmaking dynamic quite substantially. Some of these changes were good; increased participation ensured that a greater range of perspectives were aired at the Conference. But there were costs. At some point, when you have several hundred people in the conference chamber, the deliberative process becomes unwieldy, to put it mildly. It becomes difficult to engage in the kinds of open negotiation and meetings that previously typified WIPO proceedings, and which would be the form of transparent lawmaking that enhanced democratic accountability. Instead, during the last week of the WCT Diplomatic Conference—when all the most contested substantive decisions were made—the delegates frequently retreated into informal groups in order simply to accommodate practical logistics. Thus, despite the physical proximity of representatives from a greater range of organizations, many

37 See Vaver, supra note 12, at 736 ("If user rights were truly to be balanced against owner rights, one would expect to find a provision that owner rights should be enacted or enforced only in (1) certain special cases that (2) demonstrably encourage the production of the work, and that (3) do not unreasonably prejudice the legitimate interests of users. That feature of balance does not yet appear on any WIPO or TRIPS agenda. It should.").


39 See Samuelson, supra note 12, at 432-33.

40 See FICOR, supra note 13, at 46-47 (stressing the importance of informal consultations); REINBOTHE & VON LEWINSKI, supra note 38, at 14-15 (discussing the nature of the negotiations at the WCT occasioned by physical space constraints).

41 See REINBOTHE & VON LEWINSKI, supra note 38, at 14 (noting that negotiations in formal, open meetings with all participants present was "a distinctive feature of negotiations within WIPO . . . as opposed to negotiations in the former GATT (now WTO), where no intergovernmental or non-governmental organisations are admitted as observers to the negotiations").

42 This is not to say that proceedings at WIPO meetings were always conducted in plenary session. Even with smaller NGO representation, some progress depended upon discussions among smaller groupings of nations and upon side consultation with interested parties from industry. See generally GRAEME B. DINWOODIE ET AL, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY (2d ed. 2008).
decisions were made without the direct input of all the diverse groups actually present in the main conference chamber.43

This is not just a copyright issue. Recent discussions surrounding reform of the process by which the Internet is governed suggest that debates will be taking place more generally about how best to structure inclusive international lawmaking in an era where national interests are more directly implicated by that lawmaking.44

C. The Assimilation of National and International Lawmaking

Finally, the WCT was an early example of the assimilation of national and international copyright lawmaking processes, where the substance of the debate in both contexts focused on the internal substantive balance in copyright law. This may flow naturally from the first two process-based changes I have mentioned. As international norms become less dependent upon prior national experimentation, and national interests are more directly represented by NGOs on the international stage, the lines between the national and international debate inevitably are blurred. And it might not be wholly inappropriate, because increased national interdependence means that the vindication of national policy objectives becomes crucially influenced by international developments.

The trend toward this assimilation was facilitated by changes in WIPO’s (already liberal) policy toward accreditation of observers. Formerly, only international NGOs would be accredited as observers at WIPO meetings. Not long before the WCT, WIPO decided that even purely national groups could be accredited (both those representing intellectual property owner interests as well as those representing users).45 These national organizations have long been involved in domestic lawmaking, and are well versed in the forms of debate and legislative compromise that surround the adoption of

43 See Reinbothe & von Lewinski, supra note 38, at 10 (noting that NGOs were excluded from certain informal consultations). Of course, given the critique of the process by which an institution becomes accredited as an observer at WIPO, see infra text accompanying note 45, it is by no means obvious that direct involvement of every such group would be warranted as a matter of democratic ideals. See Steve Charnovitz, Accountability of Nongovernmental Organizations (NGOs) in Global Governance (George Washington Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 145, 2005), available at http://preprodpapers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=257095.


45 The distinction between national and international NGOs has in any event been challenged by the rise of transnational networks of activists. See Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (1998) (discussing conditions that cause the emergence of such networks).
national legislation. When they arrived in Geneva to discuss topics also being considered domestically, the national NGOs naturally advanced arguments similar to those that they would have made at home. But the international process is different. Despite changes in the lawmaking process and arguable convergence in global markets and norms, the international instrument must cohere with a broader range of legal traditions and permit contracting states to develop diverse national solutions appropriate to their own local situation. International policymakers seek to achieve a general commitment by a large number of parties to basic standards, ideally through consensus; immense, negotiated detail can impede each of these objectives.

The WCT Diplomatic Conference also took place at a time of shifting international political relations. In 1996, EU institutions were becoming central to multilateral international copyright negotiations. These institutions had just spent several years engaged in intensive harmonization of European copyright law. The process by which copyright harmonization directives had been concluded might have been seen by some as a model for international lawmaking. But the EU consists of relatively homogenous nations committed to a single market, and was even more obviously of this complexion in 1996. The EU is founded on an extensive institutional infrastructure, to which member states have ceded sovereignty. None of this is true at the multilateral level. It is dangerous to assume that what happens in the EU lawmaking process should be replicated at the multinational level. But this supposition might have informed the climate at the time.46

Finally, the assimilation of the national and international processes might also have reflected changes in WIPO itself. From 1971 through 1996, with the multilateral norm development process at an impasse, WIPO had engaged in so-called “guided development,” a process that

46 Cf. Ricketson & Ginsburg, supra note 1, at § 4.41. International relations generally were in flux at this time. These broader developments undoubtedly feed into the international copyright dynamic. The leading international copyright treaty had existed without the United States for one hundred and two years. See Ricketson and Ginsburg, supra note 1, at §§ 4.43--4.46. But the United States had recently become the only global superpower. The deletion of the audiovisual component of the WIPO Performances and Phonograms Treaty, negotiated at the same Diplomatic Conference, reflected the need to assuage America: despite the history of the Berne and Rome Conventions, contracting states concluded that they could not possibly have an audiovisual treaty without the involvement of the United States. See Ficsor, supra note 13, at § 2.48. Likewise, the most significant vindication of U.S. objectives with respect to TPMs came not so much through the text of the WCT, but through influencing national implementation in later bilateral trade negotiations. See id. at §§ 4.54--55. In that context, political power may be more outcome-determinative.
included advising member states on the content of national laws. As part of that process, WIPO started developing a model law on copyright. Such a law contains a level of detail quite different from that which would be found in a treaty. But developing model laws was a more dominant part of the WIPO agenda for the quarter century preceding the WCT than had perhaps been the case earlier in the organization’s history. And that model law was used internally by WIPO in preparing documents laying the groundwork for later international agreements.

For all these reasons, the WCT saw an assimilation of the national and international debate. And this has only become more so in the years since. Discussion now too often appears to operate on the assumption that lawmaking in Geneva is the same as would occur in Washington or Brussels, except in many more languages. But the international lawmaking process differs from national lawmaking, both in its role in defining applicable norms and in the democratic accountability that informs its legitimacy. Moreover, when a norm is adopted at the international level, it is entrenched with an almost quasi-constitutional status and becomes very hard to revise. That is very different from a domestic statute.

For all these reasons, although much was gained from the process that was pursued in Geneva in 1996, I think we may have lost many things that are valuable.

2010 POSTSCRIPT

In the four years since the symposium, many of the aspects of international copyright lawmaking discussed above have indeed become the norm. Thus, substantive balance remains a central concern in international debates, with the supposition increasingly being that the international instruments should ensure that result. Occasionally, voices are raised questioning whether international regulation of a particular issue is appropriate, although often this stems from opposition to the particular substantive rule being considered at the international level. The distinct values of national autonomy or comparing different legal approaches to common problems, as independent lawmaking objectives rather than useful strategic arguments, do not seem to excite quite the same passions.
The pressure for the development of users' rights at the international level, noted in my original remarks, has only intensified. In part, as suggested above, this can be seen as an antidote to the political power imbalance that might skew bilateral trade agreements (and in turn national copyright laws) or to the lack of national political infrastructure that renders the notion of preserved flexibilities less than meaningful for some countries. But it might also be an inevitable product of assimilating national and international processes. And, of course, it might be an appropriate response to the growing interdependence of nations. Regardless of the explanation, debates about users' rights will continue to dominate the international copyright conversation in the near future (at least at the truly multilateral level). Recent discussions in the WIPO Standing Committee on Copyright and Related Rights regarding exceptions and limitations for persons with print disabilities appear to confirm this prediction.

In contrast, the speed at which the WCT was concluded appears unlikely to be a characteristic of the next round of global copyright lawmaking. Since the WCT, international norm-setting at WIPO has moved (if at all) extremely slowly. The possible explanations for this substantive impasse are varied. But one byproduct has been further forum-shifting by some developed countries to ensure faster progress on certain enforcement issues than they thought likely under the aegis of WIPO or the WTO. These (approximately forty) countries have

2 [hereinafter U.S. December 2009 WIPO SCCR Statement], available at www.uspto.gov/ip/global/copyrights/wipo_sccr_19session.pdf (noting the importance of the "thorough comparative work we must always do as a foundation for the development of new norms in international copyright law" and extending that sentiment to consideration not only of legal rules, but also of best practices in affected industries). The statement of the United States to the SCCR at the Nineteenth Session of the SCCR in December 2009 is a pithy encapsulation of many of the issues addressed in this essay. It suggests an openness to different forms of international lawmaking (including mandatory exceptions) fully cognizant of the distinct role of the international treaty instrument (along with other institutions such as national laws and market practices) in establishing an appropriate copyright landscape.


separately commenced negotiation of an Anti-Counterfeiting Trade Agreement (ACTA). The precise scope of the draft ACTA is unclear because the text has thus far been kept secret, but it would appear (from leaks) to address enforcement issues beyond what might be regarded as core problems of counterfeiting.

Does the ACTA represent the new form of international copyright lawmaking? Certainly, the (relatively secret) process by which the treaty is being developed resembles that by which many bilateral trade agreements—an increasingly important component of the international copyright policy of both the United States and the European Union—have been pursued. However, at some point, in order to make the treaty fully operational, the negotiating parties will have to expose its terms to the scrutiny of their respective national lawmaking processes (which may vary depending, among other things, on the lawmaking power of the executive branch). The ability to persuade national lawmakers of the merits of the proposals will surely be enhanced if the legitimacy of the international process is unimpeachable; open multilateral discussion, of the type seen at the WCT, is more likely to provide that endorsement.

But given the reasons for the commencement of separate ACTA negotiations in the first place, developed countries might view a return to WIPO as futile. An intervention by the United States at a recent meeting of the WIPO Standing Committee on Copyright and Related Rights suggests not. Thus, in a statement indicating receptivity to exceptions and limitations for persons with print disabilities under international copyright law, the United States noted its commitment “to both better exceptions in copyright law and better enforcement of copyright law. . . . This is part and parcel of a balanced international system of intellectual property.”53 Balance is, indeed, a complex notion—and maybe “linkage” is a further component of balance that we need to (re-)consider.