ACTA: A Copyright Story

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Copyright, which originated 300 years ago in Great Britain[1] to protect publishers from competitors who copied books without permission, has grown into an international network of national legislation guided by a series of international and transnational agreements generally under the guidance of the World Intellectual Property Organization[2] (WIPO). The history of copyright reform offers a unique view into how our society deals with technological advancements in markets and uses of cultural, knowledge and information products. From the printing press to the internet, copyright has been the battleground of business models, artistic production and the needs of civil society. A recent initiative, dubbed the *Anti-Counterfeiting Trade Agreement* (ACTA), offers a new chapter in this story. As with all stories, some context is required to better understand the characters and the setting, before getting to the intrigue and (hopefully) the denouement.

Context

By their very nature, intangible assets pose certain problems in economics: they require sizable investments before they are brought to market; they are expensive to produce but easily copied or replicated by others. This is the case for books, songs and movies, as well as trademarks, industrial designs or industrial production processes, all of which represent some kind of intellectual property (IP). IP legislation seeks to provide incentives to engage in the creation of intangible assets. As with all types of intellectual property, copyright is a government-backed monopoly on certain uses of particular intangible assets.

Broadly defined, copyright is both a commercial right and an artistic right. It is an industrial system whereby governments grant a monopoly on the commercial exploitation of specific kinds of cultural, information or knowledge products. At the same time, original creators are granted certain artistic rights that protect their interests down the line.

Each country is called upon to pass copyright laws that reflect their own imperatives. For example, the *Canadian Copyright Act*[3] grants the creator of an original and distinctive literary, dramatic, musical and artistic work rights to produce, reproduce, perform in public, publish, translate, adapt, etc. the work. The creator may, in turn, license (lease) or transfer (sell) this exclusive right in part or as a whole to third parties, know as "rights-holders", who may wish to produce plays, reproduce art work as posters, publish books or perform movies in public. As well, "moral rights" protect the integrity of a work while ensuring that the creator is given proper attribution. On that last point, the United States does not grant "moral rights" to its creators.

As with any kind of monopoly, be it government-backed or *de facto*, one has to be very attuned to inherent power asymmetries. This is especially true when the monopoly is applied to cultural, knowledge or information products. For example, copyright was originally granted to the creator in the hopes of providing some negotiating leverage with the content industry. At the same time, certain users in civil society were granted limitations and exceptions[4] in copyright for specific cases, such as making copies in braille for persons with disabilities when a document is not available commercially in that format. After all, if the monopolistic right over copyrighted works was unlimited, a copyright owner wielding this power in a market could impose higher fees than are warranted for such a good.

Fortunately, the copyright regime exists to correct power asymmetries, not create them – or so would claim economic theory. Unfortunately, the innocent observer of the copyright reform process over the past few decades is instead confronted with the weight given to the needs of certain parties over the needs of others when new copyright legislation is drafted.

Characters

If copyright were a real story, it would be a dramatic plot involving a love triangle. Creators (artists, authors, sculptors, programmers, visual artists, etc.) would be placed at the top with the industry (publishers[5], music labels[6], movie studios[7], distributors, retail stores, etc.) and users (citizens[8] and heritage institutions like libraries[9], archives, museums, etc.) at the two bottom edges.

It is interesting to note that most if not all creators are a specific kind of user. Authors read, musicians listen and filmmakers watch. They are distinct inasmuch as they create new copyrighted works and they need the industry to invest in their creations in order to bring them to the market, so that users can access them. Copyright thus becomes the necessary fuel that makes this cultural machine work.

Setting

Because copyright is enshrined in legislation, the branches of the state -- the government, the legislature and the courts -- offer the setting in which the characters evolve. Each group of characters has specific needs with regards to balancing power asymmetries in the markets for copyrighted works.

The emergence of digital technologies and the internet has radically transformed the assumptions under which they operate. In that sense, the characters assess the current market situation and attempt to mediate their situation with key stakeholders by devising new business plans, suing each other or advocating and lobbying[10] elected and government officials to change the laws.

Although the industry seems to be engaged in each of these activities, the latter is the setting for recent copyright reform activities, especially ACTA.

To understand copyright reform, one should ideally focus on the international rather than the national setting. In fact, this has been the case since the late 19th century with the Berne Convention.[11] This international treaty was established to structure the international trade in culture. It has since been placed under the aegis of the WIPO, an agency of the United Nations. It is quite natural, then, that the content industry turned to WIPO after it unsuccessfully lobbied the U.S. government for new rules to regulate content on the internet in the mid 1990s. This resulted, in 1996, in the WIPO *Copyright Treaty*[12] and the WIPO *Performances and Phonograms Treaty*.[13] The World Trade Organization's (WTO) *Trade-Related Aspects of Intellectual Property Rights*[14] (TRIPS) also impacts users[15] of copyrighted content.

These multilateral negotiations (between many states in relatively open forums) are but the backdrop of the reform process. In fact, the United States has been negotiating bilateral trade agreements which include provisions dealing specifically with copyright reform with many countries. The *North American Free Trade Agreement* (NAFTA)[16] is but one example. The United States, driven by its highly lucrative and exportable content industry, has been pursuing these bilateral agreements with at least 17 countries.[17] Easier access to U.S. markets is traded for more favorable intellectual property enforcement in these countries.

In that sense, understanding where Canada is going with its copyright reform really means understanding the needs of those who can afford to be present at international trade negotiations.

Intrigue

In light of these developments, the emergence of ACTA should pose little surprise. After all, how could one blame proactive multinational corporations for looking after the value of their intangible assets to the benefit of their shareholders by advocating through their respective governments at multinational or bilateral negotiations? More to the point, how could one be against an anti-counterfeiting trade agreement? The answer lies both in the content of such an agreement and in the process under which it is created.

Since 2004, representatives from Australia, Canada, the European Union, Japan, Jordan, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore, Switzerland, the United Arab Emirates, and the United States have met to draft ACTA in secret. Following pressure from the public, Canada[18] and other countries released a preliminary version of the treaty on April 22nd 2010. Although this addresses the transparency issue in part, participation in the process is shrouded in a veil of secrecy. The International Federation of Library Associations and Institutions (IFLA) released the following statement one month before the release of the draft treaty:

> IFLA understands and respects the role that copyright plays in information creation and dissemination around the world. IFLA recognizes that copyright grants creators and content providers certain rights to the commercial exploitation of information and cultural expression, but also believes that these exclusive economic rights must be balanced by fair limitations and exceptions as well as access to the public domain in order to allow for a vibrant civil society. Copyright must provide for a fair and profitable balance between the needs of information users and society at large and the commercial imperatives of creators and content providers. In this spirit, IFLA is concerned that the recent non-transparent negotiations regarding the Anti-Counterfeiting Trade Agreement (ACTA) pose a threat to the balance of copyright. IFLA believes that the best forum for these discussions is the World Intellectual Property Organization (WIPO) to ensure the participation of a wide range of stakeholders in this important issue.[19]

Being aware something is afoot is one thing, being able to intervene to advocate for one's interests is quite another. Bringing the ACTA negotiations to WIPO would mark another step in making the process more equitable to all the characters in our story, like Canadian citizens.

With respect to its content, it is difficult to deconstruct the text of the draft treaty, but a few items seem to be permanently on the order paper. One issue aims to create new legal logic to forbid tampering with "digital locks" placed on cultural products. For example, trying to circumvent protection software or any other Technological Protection Measure (TPM) placed on a cultural product like a DVD or a music file can be made illegal, even for legitimate uses like criticism or news reporting. This increased control on the use of cultural products is seen as a way to fight counterfeiting, but may have dire consequences if it is too broad. As well, it seems that Internet Service Providers (ISPs) are seen as a group capable of tracking and acting upon digital piracy. Economic imperatives are being touted as the reason to make ISPs the sword of rights-holder's discontent. Again, this added control may have dire consequences on civil society's use of digital technologies if not implemented correctly. There are more issues at play, but these two examples illustrate that a proper balance of interests must be present in devising new IP rules. This balance of interests is best achieved when all interested parties in an international legal instrument are present at the table. Only then can we achieve both a thriving marketplace of digital culture as well as a vibrant civil society.

With the introduction and wide appropriation of digital technologies and the internet, copyright has become a legal regime that touches the lives of anybody who has access to these tools. In a sense, the digital world has the potential to eliminate the distinction between users and creators. Now, one could wonder what really happens when a teenager records herself practicing a few cover songs to post on a video-sharing website; when a fifth grade class uses short clips from movies to create a new short film to post on the school's website; or when a graduate Fine Arts student criticizes a gallery's *Vernissage* on his blog using pictures from a cellphone. Are these people criminals or simply engaging in culture? ACTA clearly points to the former.

ACTA could impose a system where a rights-holder may have content pulled down from the internet on a mere accusation, even if the use is fair in the first place. As well, protecting digital locks may not be an effective method to ward off hackers, only a way frustrate honest consumers.

Denouement?

The main problem with ACTA is that it runs the risk of imposing a definition of our future digital culture that is drafted by the content industry. You will be allowed to use cultural, knowledge and information products in line with a strict contract established by a major corporation and any deviation from such will place you in harm's way. This could include being disconnected from the internet and lawsuits. Also, the digital cultural goods you will consume (forget about owning them) will be locked down by software that will, for example, forbid you from migrating your music collection to a new listening device.

Canada's legal environment offers many interesting alternatives to ACTA's goals. For example, Charlie Angus, of the New Democratic Party recently proposed[20] two simple reforms. Firstly, broadening the application of the private copying regime could allow for legal file sharing by introducing a new levy through the Copyright Board of Canada. As well, structuring the application of fair dealing by opening its definition while imposing constraints on its application, such as those proposed by the Supreme Court of Canada,[21] could also ensure fair non-commercial uses of digital content. Alas, these suggestions are framed with the needs of creators and users in mind, not the commercial imperatives of the industry.

Policy makers in Canada and elsewhere need to understand that the government-granted monopoly called copyright is but partial, designed to provide some scarcity for works that are easily copied, and should be balanced against the needs of civil society and future creators. Intangible assets are not real assets and should not be protected by full property rights. ACTA would have our governments protect the content industry's business models without allowing some wiggle room for a possible shift in cultural market.

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[1] "Copyright and wrong: Why the rules on copyright need to return to their roots" The Economist, April 8th 2010 http://www.economist.com/opinion/displaystory.cfm?story_id=15868004 (subscribers only)

[2] http://www.wipo.int/

[3] R.S.C. 1985, c. C-42 http://www.canlii.org/ca/sta/c-42/

[4] "Limitations and Exceptions" WIPO http://www.wipo.int/copyright/en/limitations/

[5] International Publishers Association (IPA)'s copyright page: http://www.internationalpublishers.org/index.php/copyright-main

[6] Recording Industry Association of America (RIAA): http://riaa.com/physicalpiracy.php

[7] Motion Picture Association of America (MPAA): http://www.mpaa.org/contentprotection/copyright-info

[8] Consumers International's A2K Network: http://a2knetwork.org/

[9] International Federation of Library Associations and Institutions' (IFLA) Copyright and other Legal Matters Committee: http://www.ifla.org/clm

[10] Landes, William M. et Richard A. Posner, "Indefinitely Renewable Copyright", (2003) 70 University of Chicago Law Review 471-518; University of Chicago - John M Ohlin Law & Economics Paper No 154 (2d series) http://ssrn.com/abstract=319321

[11] http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

[12] http://www.wipo.int/treaties/en/ip/wct/

[13] http://www.wipo.int/treaties/en/ip/wppt/

[14] http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

[15] Myra J. Tawfik, "Is The WTO/TRIPS Agreement User-Friendly?" (2005) Canadian Library Association http://www.cla.ca/AM/Template.cfm?Section=International_Trade_Treaties_Working_Group&Template=/CM/ContentDisplay.cfm&ContentID=2553

[16] See NAFTA's Part Six (Intellectual Property), Chapter Seventeen, articles 1701 and following: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/chap17.aspx?lang=en

[17] Free Trade Agreements, Office of the United States Trade Representative: http://www.ustr.gov/trade-agreements/free-trade-agreements

[18] Foreign Affairs and International Trade Canada: http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx

[19] IFLA Position on the Anti-Counterfeiting Trade Agreement: http://www.ifla.org/en/publications/ifla-position-on-the-anti-counterfeiting-trade-agreement

[20] See http://www.charlieangus.net/newsitem.php?id=551 or http://www.culturelibre.ca/2010/03/18/merci-pour-la-copie-privee-mais-ou-est-lutilisation-equitable-mr-angus/

[21] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339 http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html