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The Consumers International IP Watch List 2009

*Jeremy Malcolm**

Abstract

The Consumers International (CI) IP Watch List is a global survey that rates national copyright laws and enforcement practices from the perspective of how well they promote access to knowledge for consumers, by allowing them fair access to the fruits of their society's culture and science.

The IP Watch List is based on research conducted by CI members and partners worldwide, using a set of criteria developed by an external advisory group of experts. Amongst the sixteen countries studied, those whose IP policies and practices are most harmful to consumers are identified. A range of best practices of fairness and balance in copyright law are also highlighted.

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* Project Coordinator for IP and Communications with Consumers International (CI). CI is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, it is building a powerful international consumer movement to help protect and empower consumers everywhere. For more information, visit <http://www.consumersinternational.org/>.

1. Introduction

This paper provides a summary of the inaugural edition of the Consumers International IP Watch List, a survey that examines the intellectual property (IP) laws and enforcement practices of a range of countries, from the perspective of the world's only global consumer advocacy body, Consumers International (CI).¹

The first IP Watch List focuses on copyright, because of all the forms of monopoly rights that are commonly described as IP, it is copyright that has the most immediate impact on consumers' access to knowledge, and thereby on their educational, cultural and developmental opportunities.

The intent of the IP Watch List is to assess how well the copyright laws and enforcement policies of the surveyed countries support the interests of consumers, by allowing them fair access to the fruits of their society's culture and science. The results of this survey illustrate that strict copyright laws, enforced rigidly, can seriously harm the interests of consumers.

The survey finds that what is more important than a strict copyright system is a fair copyright system; one that balances the economic interests of rights holders with the compelling economic, social and cultural interests of consumers. As will be seen, such systems can be found in countries that one might not expect.

2. Highlights

The 2009 Consumers International IP Watch List covers sixteen countries from around the world (with more planned for coverage in the next edition in 2010). The results will be presented in more detail below, but a few highlights stand out.

Best rated countries	Worst rated countries
1. India 2. South Korea 3. China (PRC) 4. United States 5. Indonesia	1. United Kingdom 2. Thailand 3. Argentina 4. Brazil 5. Chile

First, the list of countries that best support the interests of consumers is dominated by large Asian economies. They are, however, in odd company with the United States, which has regularly criticised those same countries for failing to adequately protect and enforce intellectual property rights. As we explain below, this reflects the fact that US policy makers apply double standards when comparing their own copyright system to systems from abroad. Together, this group accounts for almost half the

¹ The original summary report of the IP Watch List 2009 may be found at <http://A2Knetwork.org/watchlist> (accessed 1 July 2009). This paper adds additional information about Australia's positioning in the Watch List.

world's population and over a quarter of its nominal GDP.² The countries whose copyright regimes most disregard the interests of consumers are also an odd grouping. Ironically the worst, by far, is the country in which copyright law first developed in the sixteenth century: the United Kingdom. It is joined by a number of developing and transitional economies, whose outdated copyright laws fail to take advantage of all of the flexibilities that international law allows them in order to benefit local consumers. Regrettably this is characteristic of the copyright laws of many developing countries, as CI has previously found.³

Also highlighted in this year's IP Watch List is the fact that in the following three areas covered by the survey, no countries adequately took account of consumers' interests, as none of them scored the highest available rating:

- **Freedom to access and use by content creators.** One of the hallmarks of the Internet age is that consumers are no longer passive consumers of information and entertainment, but rather vital contributors to its production through blogs, online video sharing, wiki entries, mashups, remixes and more.

None of the countries surveyed adequately supported consumers' interests in expressing their creativity in such forms. This includes the expectation of being able to make reasonable use of the resources of their surrounding culture in their own works.

- **Freedom to share and transfer.** Similarly, consumers have an interest in being able to access information and entertainment in a variety of ways, including purchasing it at a fair price, renting it and downloading non-commercial content freely – as well as sharing such content with their peers.

None of the jurisdictions in this year's IP Watch List took adequate measures in domestic law and policy to respect these interests – for example by fostering the development of a vibrant ecosystem of public domain and freely-licensed material.

- **Administration and enforcement.** One of the greatest concerns to consumers is that copyright law is being enforced in ever more intrusive ways, including the use of Technological Protection Measures (TPM) such as copy protection devices and by enlisting Internet Service Providers (ISPs) to suspend the Internet accounts of those who share files.

None of the countries surveyed this year took adequate measures to ensure that due process will continue to be observed in copyright enforcement and that new enforcement measures will maintain consumers' abilities to exercise their rights of fair use or fair dealing.

² Statistics from the 2008 CIA World Factbook, available at <https://www.cia.gov/library/publications/download/download-2008/factbooka.zip> (accessed 1 July 2009).

³ Consumers International, *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws* (Kuala Lumpur: Consumers International, 2006), available at <http://a2knetwork.org/sites/default/files/a2k-report.pdf> (accessed 1 July 2009).

3. Best Practices

On a more positive note, a number of best practices also emerged, illustrating innovative measures that countries can take to balance the interests of consumers with the expectations of copyright owners. Here are three examples taken from this year's IP Watch List country reports.

First, when copyright material is protected by a TPM, no judge – in fact, no human being at all – determines whether or not the restrictions enforced by the TPM conform to copyright law. For example, when a consumer attempts to copy a documentary film protected with the Macrovision copy protection scheme, their equipment does not care that they are attempting to make the copy for educational purposes that would amount to fair dealing in their jurisdiction – it simply refuses to make the copy. Worse, in many countries the consumer cannot circumvent that restriction without breaking the law.

In Spain, the law compensates for this limitation, by requiring the holders of rights in works protected by TPM to provide consumers the means to enjoy those works for purposes that the law permits. Whilst not a complete solution – it may require the consumer to take the rights holder to court to enforce his or her rights – it is a commendable attempt to redress the unfairness of TPM for consumers that more countries around the world could follow.

Second, the main reason why the United States is placed highly in the IP Watch List as a country that supports the interests of consumers is that its copyright law includes a broad exception for the “fair use” of copyright material.

In most other jurisdictions, piecemeal exceptions exist for the use of copyright material for particular purposes such as research, criticism and reporting current news. In contrast, a broad fair use exception allows copyright material to be used for any purpose, so long as it satisfies a balancing test that includes factors such as whether the use is commercial or non-commercial and its effect on the market for the copyrighted work.

In 2007, Israel introduced a broad fair use exception into its own copyright law; a welcome development for Israeli consumers, who now have access to copyright materials for a broad range of fair uses, including novel uses that no legislature could be expected to foresee.

Unfortunately, Israel has drawn criticism for this from a US-based copyright owners' lobby group, which asserts that Israeli consumers are not entitled to the same flexibilities as US consumers because Israel lacks the same “carefully-honed jurisprudence” as the US, and thereby “risks creating gaps in protection”.⁴ CI rejects this hypocritical slight on the capacity of the Israeli judiciary and holds up this provision of Israeli law as a best practice that other countries should also consider.

Third, in 2006, Australia reformed its Copyright Act to include new provisions to legalise the common practices of time, space and format-shifting of copyright material. An example of time-shifting is the recording of a television broadcast to

⁴ International Intellectual Property Alliance, *Israel – 2009 Special 301 Report on Copyright Protection and Enforcement* (2009), available at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf> (accessed 1 July 2009).

watch at a more convenient time. Space-shifting includes making a copy of a music CD for personal purposes, so that a user can listen to the music they have purchased both at home and in their car. Format-shifting is similar, but involves, for example, copying the music from a CD to an MP3 player such as an iPod.

These are eminently reasonable amendments that have modernised Australian copyright law to recognise practices that form a part of many consumers' everyday lives. These do no harm whatever to the economic interests of rights holders. This best practice example is one that other countries should seriously consider introducing into their own copyright laws.

4. Development of the IP Watch List

The genesis of the Consumers International IP Watch List can be traced to discussions in 2005 amongst the founders of what has become known as the Access to Knowledge (or A2K) movement. They took the view that a consumer-focussed survey of global copyright laws and practices was needed.

Three years later, a number of these leaders came together to form an expert advisory group to develop the criteria to form the basis for the Consumers International IP Watch List. These criteria, which were finalised in January 2009, included over sixty questions on national copyright laws and enforcement practices, falling into the following categories:

1. Legal background
2. Scope and duration of copyright
3. Freedom to access and use
 - (a) By home users
 - (b) For education
 - (c) Online
 - (d) By content creators
 - (e) By the press
 - (f) By libraries
 - (g) By disabled users
 - (h) In public affairs
4. Freedom to share and transfer
5. Administration and enforcement

The expert advisory group weighted each of the questions to account for its relative importance to consumers, and reports were then completed for sixteen countries in a collaborative effort by CI's members and partners worldwide.

5. A Response to the USTR Special 301 Report

The original motivation behind the development of the Consumers International IP Watch List was to respond to the one-sided analysis of the state of global intellectual property protection embodied in a similar list: the Special 301 Report that is issued each year by the office of the United States Trade Representative (USTR).

The Special 301 Report is a global survey, conducted pursuant to section 182 of the Trade Act of 1974 of the United States. It takes the nature of a 'report card', rating other countries on how closely to they adhere to the USTR's standards of protection and enforcement of intellectual property law. Those countries that the USTR

considers to fail its standards most egregiously are highlighted on a 'Priority Watch List'.

The USTR's standards are not based on the treaty obligations of the countries concerned. For example, in 2008 Israel was condemned for failing to accede to the WIPO Internet treaties,⁵ Thailand chastened for issuing compulsory licences for patented pharmaceuticals, and Mexico urged to criminalise camcording in movie theatres – none of which were legal obligations of those countries.

Ironically, the benchmark of intellectual property protection that the USTR urges upon other countries even exceeds that applicable in the United States, where consumers enjoy a fairly liberal policy of fair use of copyright materials, as well as constitutional guarantees that most of its trading partners lack.

In consequence of condemnation and pressure from the United States (both through the Special 301 Report and through bilateral channels) consumers – particularly in developing countries – have suffered as those countries have been forced to abridge provisions of their domestic law that had been passed for consumers' benefit.

6. Why Are Flexibilities In Copyright Law Important?

To take just one example, for two decades the law of the Philippines provided: “Whenever the price of any textbook or reference book duly prescribed by the curriculum ... has become so exorbitant as to be detrimental to the national interest ... such book or other written material may be reprinted by the government or by a printer,” on terms which included the payment of royalties to the copyright owner.⁶

In 1997, this provision, which represented a balance between the national interest of the citizens of the Philippines and the economic interest of rights holders, was repealed. As even the Special 301 Report acknowledges, the result has not been to the benefit of rights holders. Rather, the copying of textbooks has simply been driven underground and become a “pirate” activity.

Thus it is often the case that by “strengthening” intellectual property law and enforcement, heedless of the interests of consumers or of national circumstances, consumers and rights holders alike suffer harm. In contrast, the introduction of flexibilities into copyright law, including exceptions and limitations for personal use of copyright material, along with provisions that promote the development of the public domain, benefit not only consumers, but society as a whole.

For example, a 2009 report from the Netherlands found that file sharing, partly in reliance on the personal use exception in Dutch law, has strong positive economic implications for welfare in the Netherlands over the short and long terms. This substantially outweighs the loss of revenue by rights holders.⁷

⁵ That is, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

⁶ Presidential Decree 1203 of 1977, available at http://www.lawphil.net/statutes/presdecs/pd1977/pd_1203_1977.html (accessed 1 July 2009).

⁷ A. Huygen, P. Rutten, S. Huveneers, S. Limonard, J. Poort, J. Leenheer, K. Janssen, N. van Eijk, and N. Helberger, *Economic and Cultural Effects of File Sharing on Music, Film and Games* (2009), available at

Similarly, studies have found the economic value of the public domain⁸ and of the “fair use” exception in American copyright law to be extremely high. The latter contributes an incredible \$4.5 trillion to the US economy in annual revenue.⁹ In fact, there is a case that the monopoly rights granted to copyright and patent owners actually harm rather than foster economic growth.¹⁰

Copyright flexibilities, together with innovative non-commercial licensing models, can also spur the production of new content – driven by users rather than multinational corporations – as found in the burgeoning digital ecosystem of mashups, remixes and user-generated content that is transforming cultural expression as we know it. The OECD has acknowledged the potential of such content to “provide citizens, consumers and students with information and knowledge.”¹¹

7. Challenging Powerful Rights Holder Interests

Why then has the USTR disregarded these developments in pushing through its Special 301 Report for uniformly strong global protection of the interests of rights holders, whilst ignoring provisions and innovations that could benefit consumers? This can largely be attributed to the influence of lobby groups representing rights holders, who advocate for levels of intellectual property protection that, if adopted worldwide, would severely damage consumer interests.¹²

This is a symptom of the larger problem that rights holders possess undue influence over US policy makers to the detriment of consumers. One recent example is the snub to consumers who had been barred from the closed-door negotiations over a new Anti-Counterfeiting Trade Agreement (ACTA). The world's largest and richest industry lobby group,¹³ the United States Chamber of Commerce, was permitted to host an exclusive luncheon for delegates during the Washington DC round of negotiations in July 2008.

United States policy makers are not alone amongst developed countries in privileging the interests of rights holders over consumers. During 2008 negotiations at the World

http://www.tno.nl/content.cfm?context=markten&content=publicatie&laag1=182&laag2=1&item_id=473 (accessed 1 July 2009).

⁸ R. Pollock, *The Value of the Public Domain* (2006), available at http://www.rufuspollock.org/economics/papers/value_of_public_domain.ippr.pdf (accessed 1 July 2009).

⁹ T. Rogers and A. Szamoszegi, *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use* (2007), available at <http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf> (accessed 1 July 2009).

¹⁰ M. Boldrin and D. K. Levine, *Against Intellectual Monopoly* (New York: Cambridge University Press, 2008).

¹¹ OECD, *Participative Web: User-Created Content*, 2006, available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf> (accessed 1 July 2009).

¹² Most notably the Pharmaceutical Research and Manufacturers of America (PhRMA) and International Intellectual Property Alliance (IIPA), whose submissions in 2008 ran to a total length of over 800 pages.

¹³ During the decade 1998 to 2008 it expended over USD\$460 billion, more than twice as much as the second-ranked lobbyist, according to data from the Center for Responsive Politics available at <http://www.opensecrets.org/lobby/top.php?indexType=s> (accessed 1 July 2009).

Intellectual Property Organization (WIPO) over the development of copyright flexibilities for the blind, France sought to end further consideration of a proposal brought by the World Blind Union (WBU) for the introduction of uniform global copyright limitations and exceptions for the benefit of vision-impaired users.

The USTR Special 301 Report is not the only annual national survey of copyright laws and enforcement practices that betrays partiality to the interests of rights holders. Two private surveys, the Global Intellectual Property Index (GIPI)¹⁴ and the International Property Rights Index (IPRI),¹⁵ do the same. Thus it comes as no surprise that the three countries ranked lowest in the GIPI – China, Russia and India – also feature in the Special 301 Report's Priority Watch List.¹⁶ Amongst the countries common to the GIPI and the IP index of the IPRI, those same three are ranked lowest again.¹⁷

It is in this context that CI considers its IP Watch List as having a vital role in contributing a note of balance from a consumer perspective into global debates on intellectual property law reform and enforcement, which are currently dominated by powerful rights holder interests.

8. Results of the 2009 Consumers International IP Watch List

The complete results of the Consumers International IP Watch List are the country reports that have been completed for sixteen countries. For brevity, these are not included in this paper, but are presented in full on the website of CI's A2K Network at <http://A2Knetwork.org/watchlist>.

The table below summarises the findings of this year's survey. For each of the dozen categories of questions covered in the survey,¹⁸ the weighted answers for each country were used to construct a global report card. Like many report cards, the results rate, from 'A' to 'D', how well the country in question observes consumers' interests in its national copyright law and enforcement practices. It assigns an 'F' if the country abjectly fails to observe those interests. An overall rating for each country is also provided.¹⁹

[See Table1 at the end of the article]

¹⁴ Taylor Wessig, *Global Intellectual Property Index* (2008), available at http://www.taylorwessing.com/ipindex/register.php?file=Global_IP_Index_-_Report.pdf (accessed 1 July 2009).

¹⁵ A Dedigama, *International Property Rights Index 2009 Report* (Washington, DC: Property Rights Alliance, 2009), available at http://internationalpropertyrightsindex.org/atr_Final1.pdf (accessed 1 July 2009).

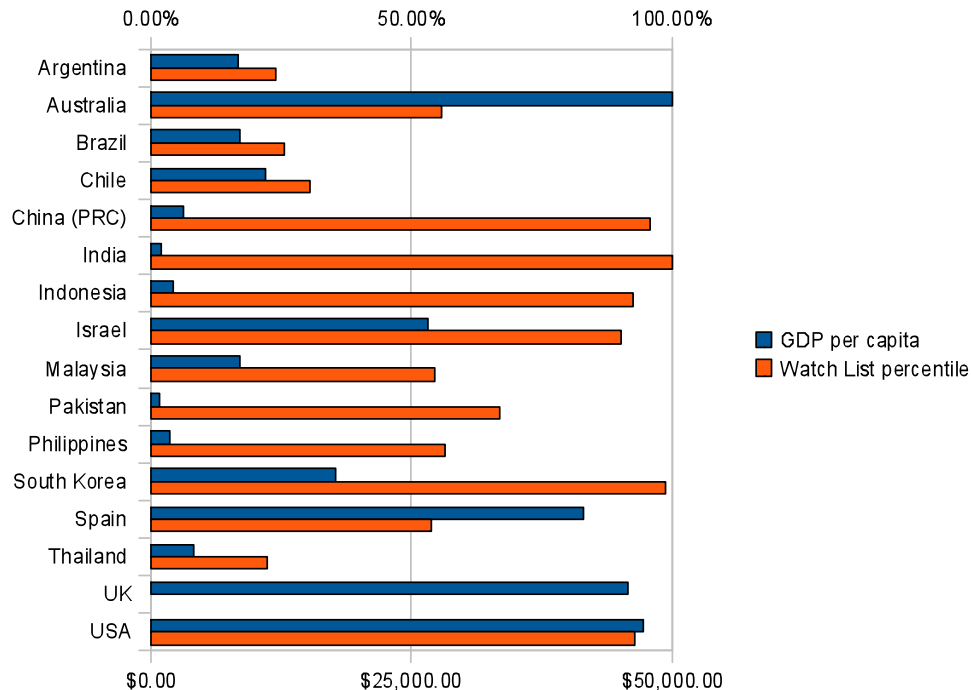
¹⁶ The USTR Priority Watch List does not include a strict ranking of countries, but China and Russia are listed first, with the other countries following in alphabetical order.

¹⁷ Save that Mexico and Brazil are ranked below India – however those countries both also rank in the Special 301 Report, and the latter was included in the Priority Watch List until 2007.

¹⁸ See “Development of the Consumers International IP Watch List” above. The table does not summarise the answers given in the “Legal background” category, nor the quantum of damages specified in answers in the “Administration and enforcement” category.

¹⁹ Overall scores have been scaled. Source material is available from CI.

This year's results, as highlighted above, are both interesting and instructive. They clearly show that a country's level of development is not a major factor in determining how well its copyright regime supports the interests of consumers. This is illustrated by the graph below, which plots the nominal GDP per capita of each of the sixteen countries against their percentile ranking on the 2009 IP Watch List.²⁰



The results also show that respecting the interests of copyright owners and those of consumers need not be mutually exclusive objectives. The United States itself is the clearest example of this, being at the same time a forceful protector of intellectual property rights, but also a country in which consumers enjoy relatively broad rights to access and use copyright material.

9. Australia's placing in the Watch List

Australia's placing in the IP Watch List is ninth of sixteen countries; ahead of Malaysia but behind the Philippines, or a very average "C". Our particular weaknesses compared to other countries are in the categories of scope and duration of copyright, use in public affairs and use by the press – in each of which categories we placed twelfth.

One of the principal reasons for the poor showing in the "scope and duration" category was Australia's capitulation to the United States in its Free Trade Agreement negotiations with Australia, which resulted in 2004 in the extension of Australia's copyright term by twenty years. This occurred in spite of the government's own Intellectual Property Review Committee having earlier recommended against any

²⁰ Statistics from the 2008 CIA World Factbook, above at note 2.

such extension.²¹ Our strong common law copyright protection for the arrangement of databases was another factor weakening Australia's showing in this category.

As for our facilitation of the use of copyright material in public affairs and by the press, Australia was let down by the fact that copyright extends to material produced by the government or under its direction or control. In many other countries including the United States, no domestic copyright subsists in such works, thus producing a flow of content into a public domain that would otherwise be rather stagnant, due to the succession of copyright term extensions.

On the other hand, Australia's report in the IP Watch List also notes a few positive indicators. The 2006 Copyright Act amendments in which Australia introduced exceptions to allow for the time, space and format shifting of copyright works were particularly highlighted. These have reoriented copyright law somewhat toward the real world in which consumers rip music from their own CDs, record broadcasts on VCRs and DVRs, and share music with family members. Whilst far from comprehensive, these provisions do set a minimum baseline that the rest of the world could follow.

Unfortunately, the same slate of amendments included a stronger prohibition on the use of circumvention devices to bypass Digital Rights Management (DRM) technologies, even for purposes that would otherwise be permitted under copyright law – this was another area in which Australia was let down by its servility to the US political lobby.

The lesson is that Australia does best when it listens to its own citizens in crafting copyright flexibilities tailored to its national interests, but tends to fail when it reflexively adopts punitive enforcement measures and inflexible TRIPs-plus protections for rights-holders that place the interests of local consumers behind those of large multinational corporations.

10. Conclusion

CI's hope is that this inaugural IP Watch List will serve to offer a useful and timely counterbalance to the contention of multinational rights-holders – as put forward in the Special 301 report and its ilk – that anything less than the highest levels of copyright protection is to be associated with piracy and criminality.

CI strongly denounces this notion and maintains instead that a balanced copyright regime, in which the importance of copyright flexibilities and of the maintenance of a vibrant public domain are upheld, is the ideal to which all countries should strive.

In short, equity should not be confused for weakness. Quite the contrary, in fact; any country that can maintain a balanced copyright regime, against the lobbying of powerful multinational media and publishing interest groups, and the censure of other governments that have been captured by those groups, has demonstrated its strength and deserves to be held up as an example of global best practice. That is what the Consumers International's IP Watch List seeks to do.

²¹ Intellectual Property Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement* (2000), available at <http://www.ipaustralia.gov.au/pdfs/ipcr/finalreport.pdf> (accessed 1 July 2009).

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