Introduction

In most countries, the rules that regulate access to our society’s culture and learning place big business first and consumers second. That is the overall finding of this second Consumers International IP Watchlist, which endeavours to rate countries on how well they uphold their citizens’ rights of access to knowledge – or A2K, for short. It’s complicated to assess the state of a country’s support for A2K; in this survey we use a composite measure of 60 criteria, developed and weighted by experts from around the world. But in simple terms, we are interested in how balanced the country’s copyright law is, whether it is enforced in ways that impact consumers’ interests, and whether the country fosters the exchange of knowledge in forms that are not encumbered by exclusive rights.

Using these measures, Consumers International (CI) is unable to report any overall improvement in the global state of access to knowledge for consumers in 2010. Rather, we see consumers’ interests still being sidelined as lawmakers rush to meet the never-ending demands of lobbyists for the entertainment and media conglomerates, who shape domestic and international laws with their hyperbolic talk of piracy, theft and organised crime. Whilst CI does not doubt that copyright infringement is a real problem, causing loss of income within the publishing and entertainment industries, there are many other problems with the distribution of knowledge that affect consumers much more acutely.

To pick a handful of real life examples, there are millions of blind consumers who are unable to lawfully access books in accessible formats such as Braille, which were legally produced in another country. There are libraries whose collections of rare audiovisual materials are crumbling, and who lack the means to legally preserve them for future generations. There are families in Europe who have been cut off from the Internet – often their communications lifeline to relatives and friends – because of unproven allegations of copyright infringement. And there are thousands of films and music, along with millions of pages of books, which will never be seen, heard or read again because their copyright owner cannot be found and the law does not allow their works to be reproduced without permission.

CI does not disagree that the copyright laws in force in a given country should be enforced, and that the rights of authors should be respected and upheld. We would simply like to see more balance into the equation. For every country’s legislation that is amended to prevent consumers from bypassing copyright locks, we would like to see another country adopting a new ‘fair use’ exception into its copyright law. For every new law enforcement initiative to seek out and destroy pirated CDs or DVDs, we would like to see an educational initiative promoting the benefits of open access learning materials and open source software. And for every country in which Internet Service Providers (ISPs) collaborate with rights holders in tracking infringements, we would like to see new measures to enshrine the rights of consumers to access information over the Internet.

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This year's results

Highlights

For 2010, we have obtained reports on the state of access to knowledge in 34 countries around the world – almost twice as many as last year. The results are consistent with those of our inaugural survey, but with more countries included, the results are even more interesting. First, let’s look at the top ten countries – those whose laws and enforcement practices offer the best support for consumers' access to knowledge – and the bottom ten, who perhaps seem to have forgotten about consumers altogether.

At first glance, there seems to be nothing connecting these countries... but let’s pick out some patterns. Most of the best rated countries (but none of the worst rated countries) have copyright exceptions that are broad and general... in other words, they allow consumers to copy material for a range of purposes, rather than just for narrow ones like private study or news reporting. In the United States and Israel, this exception is called ‘fair use’ – which will be discussed in much more detail. In Lebanon and Sweden it’s called ‘private copying’ – as this implies, it only applies to individuals for their own use, but it isn’t limited to education; it extends to the use of material for leisure purposes. In both cases, it gives consumers in these countries a lot more flexibility to utilise cultural and educational materials than those in the worst-rated countries enjoy.

What about income, is that a pattern? Not at all – and that’s interesting in itself. Both the richest country in our survey (the United States) and the poorest country (Bangladesh) are in the top 10. Another of the richest (the United Kingdom) is next to the second poorest (Kenya) in the bottom 10.1 This means that a country’s level of development does not have much impact on the shape of its copyright law. However, research suggests that it should. It has been found that stronger copyright and patent laws are not, as often claimed, conducive to the growth of developing countries.2 For this reason, it would be better for the strictest laws to be reserved for the countries that have the most to gain from a bulletproof copyright regime – but too often, that is not the case. Much of Zambia’s law, for example, is taken up with provisions about copyright collecting societies – whereas it has only one section detailing copyright exceptions. Are these the appropriate priorities for a poor African nation?

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<thead>
<tr>
<th>Best rated countries</th>
<th>Worst rated countries</th>
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<td>1. India</td>
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<td>2. Lebanon</td>
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<td>5. Indonesia</td>
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<td>7. Bangladesh</td>
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<td>10. Pakistan</td>
<td>10. Japan</td>
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More patterns can be found when you look at the categories of Watchlist criteria in which countries scored best and worst.

*In the table below, A represents a good score, that shows that consumers’ interests are being observed in this area. B, C and D are progressively not so good... and F is a fail.*

<table>
<thead>
<tr>
<th>Country</th>
<th>Scope and duration of copyright</th>
<th>Freedom to access and use</th>
<th>Freedom to share and transfer</th>
<th>Admin and enforcement</th>
<th>Overall</th>
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<td>Chile</td>
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<td>Japan</td>
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Whilst it might not be immediately obvious due to the volume of data in the table, the category in which most countries bombed out was in ‘Freedom to share and transfer’. This means that no countries are doing very much to promote consumers’ freedom to share information and knowledge with their neighbours. They could do better if they devoted resources towards maintaining and promoting public domain material (to which no copyright applies), encouraged the take-up of Creative Commons licences and open source software, and helped to unlock the value of ‘orphan works’. All of these ideas are explained and discussed in more detail later.

The category in which most countries did best, on average, was in freedoms to access and use by the press. Whilst that’s certainly nice to know, it must be said that this is the probably the single category which has the least direct relevance to consumers. The ability for journalists to access and use copyright material is important, but they are also more likely than consumers to have the means to pay for it. So although CI applauds the fact that the press are being treated quite well in copyright law, we can’t help but fear that this reflects an overall higher priority that most countries give to corporate interests than to the direct interests of consumers.

Lots more detail can be found in the country reports themselves, which are found on our website at http://A2Knetwork.org/watchlist. Take a look at your country’s report, and compare it to others. In what respects is your country doing well for consumers, and how is it doing not so well? Are there any best practices discussed later in this report that consumers in your country could benefit from? If so, don’t hesitate to let your representatives know – and why not send them a link to this IP Watchlist at the same time?

How the survey has been refined

Designing the criteria for our IP Watchlist has been an ongoing process. It’s relatively simple for copyright owners to assess how well a country’s laws and enforcement practices protect their interests – for example, does the country offer the maximum term of copyright protection; are technological protection mechanisms (TPMs) legally protected; and are there suitable enforcement mechanisms to combat infringement. To analyse how well a country’s copyright system protects the interests of consumers is a little more difficult, and involves more than simply reversing the criteria that a copyright owner would use (such as assessing whether the country provides the minimum term of copyright protection – though we do ask that too).

One of the new ways in which our second IP Watchlist looks at how well the copyright system serves the interests of consumers is to ask whether there is a general exception for the fair use of copyright material, for any purpose that satisfies a set of balancing criteria. This goes beyond our 2009 Watchlist, which only looked at the existence of copyright exceptions for certain, specific purposes such as education or library use, or by specific groups of individuals such as users with disabilities. Whilst both types of exceptions are important, our reasoning for advocating for the inclusion of a general ‘catch-all’ fair use exception is explained in more detail in the section on best practices revealed by the survey.

Going beyond copyright law, we have also added a couple of new questions that explore whether the broader legal and policy environment fosters cultural and scientific expression outside of the copyright paradigm. Besides our existing questions on whether a country promotes the use of open source software and open access publications, we now ask whether it specifies or gives incentives for the use of open document formats (such as the eponymous OpenDocument Format for office documents). When open formats are not used, it is often necessary for libraries to ‘break into’ protected media in order to archive them, so we ask a new question about the legality of this. We also ask whether the results of publicly-funded research are required to be published under an open access licence.

Along with these additions, we reworded some questions, and pruned others. Amongst the questions that our expert advisory panel decided should not make the cut in 2010 were some that did not relate closely enough to the interests of consumers (for example, on Web caching, compulsory licences for musicians, and copyright exceptions for professional advisors). We also cut some esoteric questions about copyright collectives, registration of copyright, and the right of ‘making available’, as well as some questions which might have been a little ahead of the curve – such as a file sharing right, and the ability to copy any number of complete works under an educational exception. Finally, our experts couldn’t agree whether recognition of traditional knowledge or folklore was a good or bad idea for consumers – so this question was dropped (and another question from this year’s survey is headed the same way, as will be explained below!).

Another very important change to this year’s survey is that the results are no longer scaled to fit along a standard normal distribution. This means that the country that performs best will not automatically receive an ‘A’ grade. An apparent downside of this is that this year sees a narrower distribution of scores from the worst performing country to the best. But we prefer to see this as a positive, in that the mediocre performance of all countries surveyed underscores that they all still have work to do in ensuring that their laws and policies support an adequate level of access to knowledge for their citizens.
Best Practices

We intend the IP Watchlist to go beyond a simple checklist assessment of how a country stacks up against our standards of access to knowledge, by also highlighting some of the global best practices that we encounter in conducting the survey. Our hope is that these will be taken up by activists at a national level, who will promote them as ideas for positive law reform in their country – balancing out the pressure that those countries receive through other channels (such as the Special 301 Report discussed below) to provide a maximum level of IP protection.

Fair use

International law circumscribes the limits of the copyright exceptions that a country can adopt. A provision called the ‘three-step test’ requires that any exception be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.1 Most countries have implemented the three-step test by enacting piecemeal copyright exceptions for specific purposes or specific classes of consumer, such as the educational, library and disability exceptions described above.

But there is an alternative approach, first and most famously found in the copyright law of the United States, which stretches the three-step test almost to its limit. It allows for any use of a copyrighted work that can be described as ‘fair’, considering the purpose and character of the use, the nature of the work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the work.

There are many uses of copyright materials that are allowed under US law as ‘fair use’, that would not be allowed under the more specific exceptions of other countries. These include new and innovative uses of copyright works, such as the production of audio and visual collages or ‘mash-ups’, as well as more prosaic uses such as transferring music to an MP3 player, or recording your favourite television show to watch later. Businesses, too, can benefit from fair use – for example, the way in which an Internet search engine operates, by providing short excerpts from websites and thumbnail pictures of images, relies on this exception.

The fair use exception of US law is not perfect. Because it is by nature so imprecise, it is difficult to be certain whether a given use falls within the exception or not (in fact, fair use rights have been more cynically described as ‘the right to consult a lawyer’). For this reason CI advocates the adoption of a fair use exception as a supplement to existing more specific exceptions, not as a substitute for them. Fair use, in other words, should operate as a ‘catch-all’ exception, to ensure that consumers do not become unwitting infringers when copyright laws fall behind.

The only other countries in our survey that have adopted a fair use exception modelled on that of the US are Israel (highlighted in last year’s IP Watchlist) and the Philippines. However, evidence of movement towards the adoption of a broader ‘fair use’-style exception is found in a few more countries in this year’s Watchlist, including Australia, India, Lebanon, Spain and Sweden. CI would like to see this trend continue, and for those exceptions to be further broadened and strengthened.

Innovative business models

One of the most common justifications from copyright owners for new measures to toughen copyright laws and enforcement practices is that their businesses are taking huge losses from Internet file sharing. We will assume this, for the sake of argument, to be true (though as a matter of fact the revenues of the movie industry reached record levels again in 2009,4 and the causal link between file sharing and recent music industry losses has been disputed).5 Even so, clamping down on Internet file sharing is only one possible solution to the problem. Another is for copyright-reliant industries to embrace innovative business models, to which file sharing does not pose so much of a threat.

Experiments with such business models are underway in several of the countries featured in this year’s IP Watchlist. For example, the Songwriters Association of Canada has put forward a proposal for a voluntary blanket licence, issued for a monthly fee to be determined by a regulatory or judicial process, which would legalise the non-profit sharing of music files by consumers. The Association writes:

The plan we propose would not change or interfere with the way Canadians receive their music. No one would be sued for the online sharing of songs. On the contrary, the sharing of music on Peer-to-Peer networks and similar technologies would become
perfectly legal. In addition, Music Publishers and Record Labels would be fairly compensated for the crucial role they play in supporting Canadian music creators.6

China is another country in which industry has experimented with creative solutions to endemic content piracy. For example, Warner’s Chinese subsidiary has been offering movies on DVD days after their debut in theatres, for less than a couple of dollars.7 Content owners have also demonstrated a pragmatic approach in licensing their content for free streaming on Chinese websites, supported by advertising revenues.8 Similar digital distribution platforms in the West, such as Spotify for audio, and Hulu for video, show promise, although they are yet only available in a small number of developed countries.

Another alternative, which piracy can never beat, is to release content for free download. The Nine Inch Nails and Radiohead are two well-known musical acts who have profited from this innovative approach, though independent artists on ‘netlabels’ have been doing the same for years. Artists, authors and even filmmakers have also been experimenting with the release of their content for free.9 Whilst it may be a curse for multinationals, the free copying and distribution that the Internet fosters is a boon for smaller content creators, who can achieve significant exposure for their works at no or minimal expense.

Of course, although they are freed from the need to control digital copying, copyright owners must find a way to replace the royalties that they would have received under the old business model. Amongst the options to explore are follow-on sales of physical merchandise and services, public or corporate patronage, and licensing the work for commercial use. Creative Commons licensing can be useful in this regard; it allows authors to place conditions on the free use of their work, such as requiring that it is only reused non-commercially or that any other work into which it is incorporated is also released for free.

Amongst the countries featured in this year’s IP Watchlist, those offering the best support for such alternative business models for the production of cultural and scientific works are Brazil, Indonesia, Malaysia, South Africa and Spain. You can consult their country reports for more details at http://A2Knetwork.org/watchlist.

Orphan works

Orphan works are those that are still protected by copyright, but for which the copyright ownership cannot be ascertained, perhaps because the work was published anonymously, or the author died without heir, or they simply cannot be found. Under copyright law, such works continue to be protected for a minimum of 50 years after the author’s death (longer, in many countries), which means that there is no way in which they can be legally used. This locks away much historically significant newsreel footage, photographs, sound recordings and documents that could be of immense cultural and educational value.

The solution to this problem is not straightforward, because one must balance the public value in the availability of these orphan works, against the fact that there will inevitably be cases in which works are treated as orphaned, although the copyright owner is still around and could have licensed the use of their work. The complexity of this issue has resulted in a plethora of different approaches to orphan works in the countries covered by the IP Watchlist.

One approach, followed in Argentina, Brazil and Chile, is for orphan works to pass into the public domain, making them free for use by anybody – but there is no clear standard of how much effort must have been taken to locate unknown authors before treating a work as orphaned. (Mexico, at least, explicitly provides for the work to come back out of the public domain should the author ever come forward.) Another approach, followed in Bangladesh, Canada, India (for certain works) and South Korea, is to allow orphan works to be licensed from a central authority, normally upon proof that all reasonable measures to locate the author have been taken without success. The copyright owner can normally come forward to claim royalties from the authority within a given time (in Canada, five years).

But the most common approach, and the least satisfactory one, is to make no provision for orphan works at all. For example, despite various failed proposals for legislation over the years, this remains the case in the United States – with the result that Google has in effect attempted to deliver a ‘privatised’ orphan works regime through its well-publicised Google Books settlement, still pending judicial approval.10 CI believes that a privately-negotiated licence is not the appropriate answer to the broader orphan works problem. Rather, we would like to see more countries addressing this complex issue through legislation, to make more orphaned
works available to the public while still respecting the rights of authors.

Concerns

Above we have highlighted three areas of best practice that are exemplified by some of the countries featured in this year’s Watchlist. Inevitably, there are also some areas of concern to consumers, that are common to a number of the countries surveyed. Here we examine three of these, all of which principally relate to the digital environment:

- private copying levies
- graduated response campaigns against Internet users, and
- digital rights management (DRM) technologies.

Private copying

One of the questions on this year’s IP Watchlist asked, ‘Does a collective licensing scheme permit the copying or sharing of copyright material by consumers in exchange for a media or equipment levy?’ This single question provoked the most disagreement amongst the experts who reviewed and weighted the questions. (In fact, in the end, the negative and positive weightings our experts gave almost cancelled each other out, with the result that the answer to this question had minimal effect on a country’s placing in the 2010 Watchlist.)

The basic idea of a private copying law is to make provision for the copying of copyright material that consumers make for their own personal use. There is a certain amount of such private copying that we think consumers should be entitled to for free. For example in Australia, copies can be made by way of time, space or format shifting; that is, for example, to move copyright material that the consumer is already authorised to use, into a different format (such as from a CD to an MP3 player), or to a different place (such as from the home to the car), or to receive at a different time (such as when recording a television broadcast). No levy is paid for the privilege of making such copies, and nor should it be; we disagree with the assertions of industry lobby groups such as the UK’s Music Business Group to the contrary.11

Beyond this, some countries featured in the IP Watchlist, including Canada, Spain, the Ukraine and Sweden, require users pay a surcharge on blank media (such as writable CDs and DVDs), and in some cases on equipment that is used to write to those media (such as computers), to recompense copyright owners for copies that consumers make from other sources, including downloading from file sharing networks.12 This was also the case in Japan until January 2010, when a new amendment was passed to reduce the scope of such private copying rights, so that now as in France, private copying of material downloaded from file sharing networks is illegal.13

There is a strong argument that where a private copying levy has been paid, the source of a copy made for private purposes should be immaterial. At a CI event held in Paris in October 2009, Canadian songwriter Eddie Schwartz explained that far more recordings are available on file sharing networks than are available through commercial channels – even including recordings that the record labels have destroyed. Therefore, to require that private copies be made from an original obtained through commercial channels, largely defeats the purpose of the levy, as well as making double-charging almost inevitable.

One of our members from Italy, Altroconsumo, has recently written about this issue on its blog:

Private copying levies take their toll on Italian families: In the course of a year, an average family will spend more than €100 more thanks to a new government Decree fixing copyright levies. Unbeknown to them, consumers buying electronic goods such as blank CDs, USB keys, memory sticks or multimedia mobile phones will be forced to pay a levy for the right to make private copies. This levy is applied to compensate the authors of music, audio and video content for the alleged economic harm due to private copying. Altroconsumo believes the current rules on private copying are an aberration, because consumers pay up to three times for using the same content even only once. For example, someone legally downloading a song from iTunes, will be paying a copyright levy on the song downloaded. Then another copyright levy applies on the purchase of the PC. Finally, he or she will incur a further fee for the use of an iPod as a listening device. The cost of pleasing copyright holder associations is too much for Italian families, argues Altroconsumo.14

CI agrees, and contends that if consumers are to pay for the privilege of private copying – which can be a good idea,
when administered fairly – it is important that they receive value for money.

Graduated response

One of the top items on the wishlists of the music and motion picture industry lobbyists has been for ISPs to implement a ‘three strikes’ code for file sharers – with legislative backing, if they can get it. Such a code, which in its generalised form has become known as a ‘graduated response’ mechanism, would require ISPs to warn their customers when they are accused by a copyright owner of having downloaded a copyright-infringing file. A second warning would be given if the offence is alleged to have been repeated, and following a third alleged offence, the customer’s Internet access would be terminated for as long as one year.

The main problem with such a regime is that, even if the allegations against the Internet users are proved true, the remedy granted is quite disproportionate to the offence. The results of a global BBC survey, released last month, reveal that almost four in five people around the world believe that access to the Internet is a fundamental right.¹⁵ To suspend this basic right of access to modern communications infrastructure from a person who has infringed a private copyright, is akin to withholding access to water or sanitation from a consumer who hoses down their neighbour’s cat.

France is the most notorious of the countries which has pushed ahead with a legally-backed graduated response regime, despite a successful constitutional challenge to a previous version of the law which would have allowed sanctions to be applied against alleged copyright infringers, before any judicial authority had ruled on such allegations. The revised version of this HADOPI law, which requires such a ruling, remains in force.¹⁶ However France is not, unfortunately, alone. Amongst the countries covered in this year’s IP Watchlist that either have introduced, or are considering the introduction of a graduated response regime are New Zealand, South Korea, and the United Kingdom. New Zealand’s original provision passed into law in 2009, but following a public outcry never came into force. A replacement law is currently before the parliament.¹⁷ South Korea adopted a fully fledged three strikes system in July 2009, the government claiming that it: differs from the ‘Three Strike Out Rule’ being pursued both in France and England in the fact that it does not suspend the infringer’s all Internet access … [but] only affect the infringer’s account in the particular online service provider where the infringement occurred, and would not affect the infringer’s use of other online service providers … [or] the infringer’s email services …¹⁸

These dubious distinctions have never been tested, since although about 15,000 warnings have been issued, no users’ accounts have yet been suspended.¹⁹ The UK, too, has sought to differentiate its proposed graduated response mechanism from the draconian French model, on the equally dubious basis that it provides only for the “temporary suspension” rather than the ‘termination’ of user accounts.²⁰ The Digital Economy Bill by which the UK’s graduated response regime is to be enacted is due to pass into law this month.

A much more enlightened perspective on graduated response has recently come from the Australian Federal Court, which in February ruled against a movie industry body that sued an Australian ISP who refused to participate in a voluntary graduated response scheme. Justice Cowdroy wrote in his judgment:

One need only consider the lengthy, complex and necessary deliberations of the Court upon the question of primary infringement to appreciate that the nature of copyright infringements within the BitTorrent system, and the concept of ‘repeat infringer’, are not self-evident. It is highly problematic to conclude that such issues ought to be decided by a party, such as the [ISP], rather than a court. Copyright infringement is not a simple issue.²¹

CI agrees, and only hopes that the parliaments that are still considering legislated graduated response mechanisms will come to the same conclusion, before it is too late for their citizens.

Digital rights management

Digital rights management (DRM) is the practice of controlling the uses that consumers make of copyright digital material, using technological protection mechanisms (TPMs). It includes the use of proprietary file formats that won’t work when you try to shift them from one device to another (for
example, Microsoft’s WMV media files), equipment that refuses to allow content to be copied (for example, any high-definition video equipment with an HDMI plug), and media which is designed to make it impossible for consumers to make copies for private use or backup (such as Blu-Ray discs).

Worse, often DRM systems are used for purposes that are quite extraneous to copyright law. For example, almost all DVDs come with a region code that prohibits them from being played on DVD players from another region. It is not a breach of copyright to play DVDs from one region in another, yet for patently anti-competitive reasons, the movie industry uses technology, in conjunction with a quirk of copyright law, to prevent consumers from doing so.

This quirk comes from the implementation in many countries of the 1996 WIPO Copyright Treaty (WCT), which requires parties to enact laws against the circumvention of TPMs. The implementation of the WCT in the United States, in its much-criticised Digital Millennium Copyright Act (DMCA), is particularly troubling. It prevents users from circumventing TPMs even for purposes that copyright law otherwise allows, under exceptions such as fair use. Whilst a few acts of circumvention are allowed by regulation, a public hearing must be held every three years to confirm the maintenance of these exceptions. If only a similar hearing were held every three years to confirm the DMCA itself!

Other countries from this year’s IP Watchlist that have signed the WCT include Argentina, Australia, Canada, Chile, China, Indonesia, Japan, Jordan, Kenya, South Korea, Mexico, Nigeria, the Philippines, South Africa, Spain, Sweden, the Ukraine and the United Kingdom. Not all of the countries that have signed have yet ratified or implemented the WCT’s obligations ahead of actually signing it; Cameroon, Fiji and New Zealand are examples, and India is expected to follow this year.

Whilst it seems too late to roll back the WCT in the short term, it is possible to implement its provisions in a much more consumer-friendly way than in the DMCA. CI urges countries that have not yet implemented the WCT to do so, if at all, in accordance with the following guidelines:

1. Ensure that no legal backing is given to the use of TPMs to control acts that aren’t covered by copyright, such as viewing of content.
2. The circumvention of TPMs for any purposes that the law allows, under fair dealing and fair use exceptions, should be permitted.
3. The production or distribution of circumvention tools that have any significant legal use should not be restricted.
4. Any article that incorporates TPMs must include a notice to this effect, including contact details for the party who has implemented it.
5. The implementing party must cooperate with any person wishing to bypass TPMs for a legally permitted purpose.

Looking forward

In the same month that this IP Watchlist is released, the United States Government, through an office called the US Trade Representative (USTR), will be releasing a Watchlist of its own. Its Special 301 Report is an annual publication released under the Trade Act of the United States, which is intended to identify countries that deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to US persons who rely on intellectual property protection.
Unfortunately the USTR’s standard of “adequate and effective” protection has reached absurdly high levels, that bear no relation to standards set in international law, and would be impractical and even dangerous for developing countries to meet. These standards have been shaped by the written submissions of the world’s most powerful lobby groups of copyright and patent owners – the Pharmaceutical Research and Manufacturers of America (PhRMA) and the International Intellectual Property Alliance (IIPA). Their submissions, respectively 224 and 496 pages long in 2010, are full of extravagant ambit claims, crafted solely to maximise industry profits. In past years, the USTR has often adopted these overreaching claims directly into its report.

Many examples can be given, and the worst of them relate to the pharmaceutical industry — an industry to which CI’s IP Watchlist does not currently extend (but might in future editions). For example, in the past the USTR has castigated developing countries for issuing compulsory licences for the production of generic drugs that are needed to address pressing local health needs, and for failing to provide additional protection for the results of pharmaceutical tests on human subjects, that could be used to obtain regulatory approval for the sale of such generic drugs.

Beyond the pharmaceutical industry, the USTR commonly criticises countries for failing to extend their copyright terms from a minimum of 50 to 70 years after the author’s death, for failing to accede to the problematic WIPO Copyright Treaty, for failing to criminalise or the use of camcorders in movie theatres (which is already an infringement of copyright, unless covered by an exception), and for not establishing enforcement processes dedicated to copyright and patent infringements. None of these criticisms have any basis in international law.

This year, the IIIPA has been particularly bold in its submission, by criticising developing countries such as Indonesia for endorsing the use and adoption of open source software, claiming that this “encourages a mindset that does not give due consideration to the value of [sic] intellectual creations”. Needless to say, CI rejects this false and self-serving claim, and sincerely hopes that is not reflected in the 2010 USTR Special 301 Report. In our own brief submission to the USTR this year, CI pointed out that:

the USTR [has] the flexibility to consider other factors in its Special 301 Report, such as the level of development of the countries surveyed (given that stronger IPR protection is not conducive to the growth of developing countries), whether those countries are taking advantage of all appropriate flexibilities available under the TRIPS agreement, and in general the equity of a country’s IPR laws and enforcement practices for consumers.

By omitting such factors from analysis, the recommendations of the Special 301 Report lack balance and cogency. Nevertheless, press reporting on the Special 301 Report, particularly in the developing world, has tended to treat its pronouncements as authoritative. This is unfair, because a country’s ‘deficiencies’ are often evidence that it has struck a culturally and developmentally-appropriate balance between the demands of IP owners and the needs of local consumers.

CI’s IP Watchlist was developed in part with the intention of redressing these deficiencies in the Special 301 Report. We believe that by presenting an alternative perspective of the state of global copyright laws and enforcement practices, based on the effect that those laws and practices have on consumers including those from developing countries, the limitations of the Special 301 Report will become more widely appreciated. However, we also hope that over time, successive Special 301 Reports will be more balanced, with the result that CI’s IP Watchlist eventually becomes superfluous.

There are signs that the 2010 Special 301 Report, the first such report to be produced under an Obama appointee, may bring us closer to that day. The US President’s 2010 Trade Policy Agenda includes the following promising resolution:

In 2010 we will introduce a more far-ranging public hearing to assure that Special 301 decisions are based on a robust understanding of complicated issues involving intellectual property. Our commitment to public engagement will contribute to the development and implementation of sound, well-balanced trade policies to ensure the protection and enforcement of intellectual property rights. And we reaffirm our commitment to preserving developing countries’ ability to protect public health and, in particular, to promote access to medicines for all, consistent with the principles laid out in the WTO Doha Declaration on the TRIPS Agreement and Public Health.

Also contributing to our hopes for a more balanced Special 301 Report, hundreds of public submissions have been made this year – far more than ever before – helping to balance out the one-sided submissions of well-funded industry lobby groups.

But regardless of how balanced the USTR’s 2010 Watchlist may or may not be, CI’s IP Watchlist stands alone. With the help of our members and partners from over 30 countries, we have demonstrated that there is much work to be done in improving access to knowledge for the world’s most needy consumers. Many of these same members and partners are working on the ground in those countries, helping to make this vision a reality.
Endnotes


3 Amongst other places, it is contained in Article 13 of the TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights), available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm


6 At http://www.songwriters.ca/studio/proposal.php


8 Tudou.com Releases Open Beta Version Of High-Definition Channel, JLM Pacific Epoch, 18 September 2008, available from http://www.jlm pacificepoch.com/newsstories?id=132164_0_5_0_M

9 In fact, a DVD full of free software, movies, music, photography and books will be released at the launch of this publication, and included with CI’s 2010 project report.


12 Though not uploading to such networks, which is a problematic distinction, as most file sharing protocols automatically upload and download at the same time. See Geist, Michael. The State of File Sharing and Canadian Copyright Law, Toronto Star, 6 June 2005, available from http://www.michaelgeist.ca/res/html_bkup/june62005.html


14 See http://www.altroconsumo.it/prezzi/ben-100-euro-a-famiglia-in-piu-per-accontentare-la-siae-s264713.htm

15 BBC. Internet access is ‘a fundamental right’, 8 March 2010, available from http://news.bbc.co.uk/2/hi/technology/8548190.stm


Contributors

Many people have contributed to the development of the 2010 Consumers International IP Watchlist.

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The criteria on which the Watchlist is based were developed and weighted by CI’s Expert Advisory Group on A2K, comprising the Project Coordinator Jeremy Malcolm, Andrew Rens who is a Fellow of the Shuttleworth Foundation, Gwen Hinze of the Electronic Frontiers Foundation, Joel Kelsey from our US member Consumers Union, Manon Ress of Knowledge Ecology International, Michael Geist from the University of Ottawa, and Sunil Abraham from the Centre for Internet and Society, Bangalore.

The bulk of the work in compiling the individual country reports has been led by a CI member or partner in each country, listed individually below (with the principal author, if known, shown in parentheses). Their full biographies can be found on our website at http://A2Knetwork.org/watchlist. Some of these members and partners worked voluntarily, for which we are especially grateful. However, since most of the country reports have been edited after submission by the Project Coordinator, none of the opinions found in them should be attributed to any specific contributor.

Argentina – Consumidores Argentinos (Beatriz Garcia Buitrago)
Australia – Consumers International (Jeremy Malcolm)
Bangladesh – Consumers Association of Bangladesh
Brazil – IDEC (Diogo Moyses)
Cameroon – RACE/ECAN (Dieunedort Wandji)
Canada – Dr Michael Geist
Chile – ONG Derechos Digitales (Claudio Ruiz)
China – Dr Hong Xue
Egypt – Dr Bassem Awad and Dr Perihan Abou Zeid
Fiji – Consumer Council of Fiji (Premila Kumar)
India – Centre for Internet and Society, Bangalore (Pranesh Prakash)
Indonesia – YLKI and ICT Watch
Israel – Dr Nimrod Kozlowski and Nati Davidi
Japan – NCOS (Michelle Tan)
Jordan – Rami Olwan and Ziad Maraqa
Kenya – Consumer Information Network (Emma Wanyonyi)
Lebanon – Consumers Lebanon (Mohamad Al Darwish)
Malaysia – FOMCA (Mohana Priya)
Mexico – Colectivo Ecologista Jalisco (David López-García)
Morocco – Atlas-Sais
New Zealand – Cherry Gordon
Nigeria – Consumer Awareness Organisation (Felicia Monye)
Pakistan – Bytes for All (Shahzad Ahmad)
Philippines – IBON (Jennifer del Rosario-Malonzo)
South Africa – Tobias Schönwetter, Priya Chetty and Jenna Cuming
South Korea – Consumers Korea and Heesob Nam
Spain – P2P Foundation (Celia Blanco)
Sweden – Mathias Klang
Thailand – Foundation for Consumers
Ukraine – eIFL (Iryna Kuchma and Oleksiy Stolyarenko)
United Kingdom – Consumer Focus (Saskia Walzel)
United States – Electronic Frontiers Foundation (Gwen Hinze)
Vietnam – VINASTAS (Dinh Thi My Loan)
Zambia – Chris Zielinski

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About Consumers International

Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries we are building a powerful international consumer movement to help protect and empower consumers everywhere.

Consumers International is a not-for-profit company limited by guarantee in the UK (company number 4337865) and a registered charity (number 1122155).

For more information, visit www.consumersinternational.org

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