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# Comment on “Lessons From Studying the International Economics of Intellectual Property Rights”

*Paul Goldstein\**

Copyright is the “dog that didn’t bark” in Keith Maskus’s paper, “Lessons from Studying the International Economics of Intellectual Property Rights.”<sup>1</sup> Like virtually every other economic study of intellectual property and trade, the Maskus paper confines its examples and analysis to the industrial side of intellectual property—mainly patents and know-how—and leaves the authorial side—copyright—untouched. As a small step toward repairing this imbalance, and toward opening a corner of policy inquiry that has so far been largely unexamined, I would like here to make a few observations on copyright and trade in developing economies.

The regular omission of copyright from economic analyses of international trade parallels the comparatively limited treatment copyright has received in analyses of single economies, and probably for the same reason: the quaint but surprisingly tenacious view that the conditions surrounding the production and distribution of literary and artistic works are more closely connected to untethered creative genius than to the dour calculus of economic incentives, costs and revenues. The omission may also stem from another fact, one that deserves to be taken more seriously and that, indeed, frames the remainder of my remarks: more so than the conditions surrounding technological innovation, the conditions affecting the production and distribution of literary and artistic works ramify

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1. Keith E. Maskus, *Lessons from Studying the International Economics of Intellectual Property Rights*, 53 VAND. L. REV. 2219 (2000).

widely into the domain not only of economics but of national cultural and political life, the conditions of civil society.

Even apart from copyright's connections to a nation's cultural and political life, copyright's practical economics separate it from other intellectual properties, underscoring the danger of applying to copyright the economics-based policy prescriptions formulated for patents in the developing world. To take just one example, the costs of plant and infrastructure differ markedly between patent industries and copyright industries. Few new pharmaceuticals are cooked up in the course of a week's work or produced in the back of a garage. Yet, modestly priced digital equipment, along with some measure of talent, are all that it takes today to produce a high-quality music CD; thanks to the Internet, distribution costs of digitally encoded content have fallen by orders of magnitude. It is only a matter of time before audiovisual works enjoy these same digital economies, and we can count in years rather than decades the time that will pass before creators (and pirates) in every country in the world have the technical means to distribute the full range of entertainment products. This difference in capital requirements between the patent and copyright industries explains why the standard riposte to rigorous international patent norms—that it is cynical to claim that they will enable the world's poorest countries to develop vibrant patent industries—has less force against the claims for rigorous international copyright norms.

Widespread digital facilities for producing and distributing creative works will in many places be seen to threaten entrenched local cultures. The European Community's misguided 1989 Broadcast Directive, requiring member states to impose a 49.9 percent ceiling on non-European (mainly American) broadcast content, ostensibly in the interest of preserving "European" culture, echoes today in warnings that globalized entertainment markets will obliterate diverse local cultures and lead to a worldwide dominance of American-style mass culture. It is likely that entertainment, and information generally, will in the future play a larger role in daily life than it does today; but, while mass culture may become more abundant in daily fare, so, too, will more localized offerings. From a policy perspective, it is significant that these localized offerings will probably require a regime of copyright to sustain them. In any event, there is no reason to believe that a weak copyright in the developing world is a prescription for defeating the importation of mass foreign culture. The history of American importation of British books, free of copyright, throughout the nineteenth century argues otherwise.

On the political front, it is a truism—but I suspect not entirely true—that copyright and democracy are inextricably linked. A more modest—and accurate—version of this claim is that copyright supports the production of texts and other tools for learning, and that these in turn foster the educational advancement essential to a functioning democracy. But even this claim becomes vexed when we ask, *whose* copyright? A developing country that is more interested in promoting local education than local culture may well conclude that a robust copyright will disserve its overall goals. (Foreign-produced texts cost more with copyright than without.) The fact that it may take a strong copyright to promote local culture, but a weak copyright to advance education, indicates how complicated copyright policy can become in the trade arena. But, to keep these developments in perspective, it is important to observe that the transmission of all sorts of information on the Internet—copyrighted or not—will dwarf any of copyright's specific implications for political life, particularly its potential to destabilize existing political arrangements.

Finally, what will law's role be in mediating economic, cultural, and political interests? Here, I think the emergence of technological protection measures in the copyright sphere—and the enactment of anti-circumvention bars—may alter the impact of legal rules in unpredicted ways. In the case of patents (at least since TRIPS), it is possible to identify a rough proportionality between law in the books and law in action: industry practice and the variety and price of goods that reach the consumer roughly mirror the TRIPS Agreement's broad subject matter scope and sweeping rights. By contrast, with increases in the encryption of literary and artistic content—and with legislation prohibiting disencryption—copyright law may recede worldwide in its role of guiding the production and use of literary and artistic works. Technological protection measures will certainly alter the balance between producers and users within single economies; producer incentives will increase and, so too, may prices, for it is costly both to build fences and to tear them down.

More dramatic consequences may play out on the global stage. Will one or more states set themselves up as disencryption havens, retransmitting disencrypted content worldwide? The prospect may force legislatures to consider departing from the territoriality principle in copyright, or to reconsider safe harbors for Internet service providers, since these may be the only channels through which importation of foreign transmissions can be effectively controlled. These questions suggest the need for a certain modesty

about copyright law's role nationally and internationally in the coming years.