

# Copyright norms in treaties & trade agreements

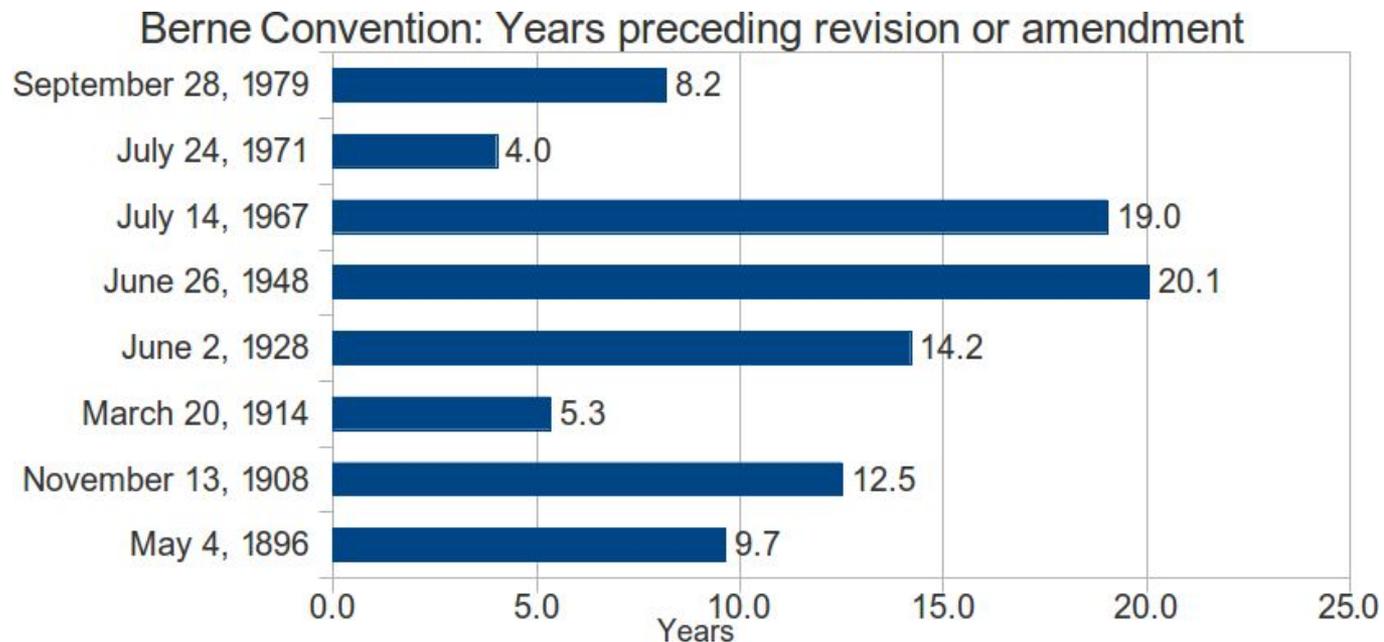
*what possibly can go wrong?*

James Love  
Knowledge Ecology International (KEI)

November 4, 2015, IX CODAIP, Curitiba, Brazil

Treaties and trade agreements vs. democracy

Before decolonization of Africa and Asia, the Berne Convention was modified every few years



<http://www.keionline.org/BerneConventionExceptions>).

# Post WWII decolonization

There was a period after the second world war when newly independent states considered creating their own copyright norms.

WIPO was created in part, and aligned with the UN, to prevent the development of separate standards for copyright that promoted access to knowledge over right holder interests.

Bern 1968 Stockholm protocol, 1971 Annex to the Berne and 1976 Tunis model law on copyright for developing countries were last serious efforts to create separate copyright norms for developing countries.

WIPO development agenda has yet to propose update of Berne Annex or 1976 Tunis Model Law

Today WIPO and the WTO are the leading multilateral fora for intellectual property norms.

Bilateral, regional and plurilateral agreements are used to create new norms that expand, extend and enhance the enforcement of intellectual property rights.

# Multilateral vs. non-multilateral negotiations

## Multilateral IP negotiations

Generally transparent, open to participation by public interest, consumer and development interest NGOs, inclusive participation by governments, more balanced outcomes

## Non-multilateral negotiations

Industry capture model featuring: asymmetric secrecy (industry has access to texts, public does not), exclusion of participation by public interest, consumer and development NGOs, strategic inclusion/exclusion of governments. asymmetric power in negotiations, outcomes that favor high income countries and politically active right holders.

Now treaties and trade agreements are used to lock in norms

# What do publishers/right holders want from treaties and/or trade agreements?

1. Introduce new rights
2. Require expanded terms (life+70 years, longer copyright for photographs in WTC, etc)
3. New standards for enforcement
4. Regulate and restrict exceptions to rights (three step test, etc)
5. Enforcement of norms by states (DSU, etc)
6. Enforcement of norms by right holders directly (ISDS)

# The 3-step test versus democracy

First introduced in 1968 as a standard for flexible copyright exceptions when a particular exception was not set out in the Berne Convention, to protect authors.

<http://www.keionline.org/BerneConventionExceptions>

Featured in WTO/TRIPS, also as flexible exception when a particular exception was not set out in the Berne Convention, to protect right holders.

Later included in WCT, many trade agreements, EU Directive, national laws, etc, as a general standard to regulate all exceptions.

Now applied in modified and sometimes limited ways to exceptions for patents, trademarks and various related and *sui generis* rights.

# 3-step test is designed to block democratic norms for copyright exceptions

3-step test is designed to prevent parliaments, congresses, from passing laws that publishers don't like.

# Academic effort to push back on 3-step test

A Balanced Interpretation of the “Three-Step Test” in Copyright Law.  
Published on September 1, 2008 at the ATRIP Conference in Munich (see also IIC 2008, 707 – 713)

DECLARAÇÃO UMA INTERPRETAÇÃO EQUILIBRADA DO “TESTE DOS TRÊS PASSOS” DO DIREITO DE AUTOR

Possible trade negotiation push back

## TRIPS Article 1

### Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

# Introduce paper in TRIPS Council

Present interpretation regarding

1. when (and when not) the 3-step test is relevant
2. how the 3-step test should be interpreted and used when it is relevant

# Liability rules

1. Limitations on remedies do not depend on 3-step test in the Berne or the TRIPS
2. Article 44.2 of TRIPS gives great flexibility for liability rules
3. TPP standards for damages are highly problematic

# Orphan works issue

## Problems:

- Extended terms make things worse
- Lack of formalities make things worse
- Massive damages make things worse.

## Fixes

- Require registration for effective remedies, and/or TRIPS+ terms
- Limit remedies for infringement

# WIPO SCCR

Protect SCCR from right holder efforts to eliminate the standing committee

Propose updates of Berne Annex and/or 1976 Tunis model law on copyright for developing countries

Block Broadcast treaty or anything else that creates rights in works that someone does not create or license from authors/performers