Access to Global Media in Middle and Low Income Countries: A Responsible Study

Author : Michael W. Carroll

Date : November 14, 2011

***Media Piracy in Emerging Economies* (Joseph Karaganis, ed., 2011).**

For those of us who study intellectual property law or the relationship between law and the Internet, these are interesting times. So interesting, in fact, that it is difficult to keep up and to have a real sense for how the activities regulated by intellectual property law are evolving around the world. Now, thanks to Joseph Karaganis and the team of researchers whose efforts he has coordinated to produce Media Piracy in Emerging Economies ("MPEE"), we have a much clearer picture about how interesting, and puzzling, the times in which we live really are.

A little background. It is no secret that economic globalization and developments in digital technologies are interrelated but independent forces shaping the character and quality of human life around the globe. These forces have pulled the industries in the United States, Europe and Japan that produce capital-intensive film, music, software, video games and related media in different directions. Globalization has led to increased market access for media goods produced by these industries, but the growth of digital networks and related technologies have undermined these industries' traditional production and distribution practices. To manage these divergent forces, media industry executives have invested heavily in influencing intellectual property law and policy.

Modern developments started with investments in the "harmonization" agenda, which focused on establishing minimum threshold intellectual property rights around the world without also harmonizing limitations and exceptions to those rights. This effort successfully produced the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), appended to the agreement forming the Word Trade Organization. TRIPS laid the groundwork for media companies to enter emerging markets armed with exclusive rights enforceable against those who would might reproduce or distribute these goods without license. Achieving "harmony," however, required compromise by the delegations representing the U.S., E.U., and Japan. More recently, these delegations have responded to the media industries' dissatisfaction with this compromise by adopting a two-pronged strategy: (1) demand changes in trading partners' substantive law to increase rights through bilateral and plurilateral "free trade" agreements; and (2) pressure public officials at home and abroad to invest a greater share of scarce public resources in the enforcement of these exclusive rights to increase these companies' revenues, or, in some cases, to provide public cover through the criminal law or otherwise for private investments in enforcement. This latter effort is the centerpiece of the modern media and proprietary software industry enforcement agenda.

One of the most effective ways to shake loose public resources is to scare public officials. So, it should be no surprise to learn that these industries have invested significantly in a campaign to do just this. First, they argue that they are one of the few export industries that we have left, an argument with greater purchase in the United States than elsewhere. (Message: The country is economically vulnerable; you need us, and every lost sale abroad contributes to the U.S. trade deficit.) Second, we're losing substantial sales to "piracy". (Message: help us out because you need us to increase our sales, particularly exports.) Third, these pirates are also harming U.S. interests by undermining the rule of law and by supporting terrorists or organized crime. (Message: you wouldn't want to be accused of turning a blind eye to terrorism, would you?)

Seeking data to support their alarmist rhetoric, these industries have invested substantially in surveys and studies that purport to show — wait for it — that U.S. media and software producers are losing billions of dollars in revenue every year to "piracy". Until recently, these data were accepted uncritically and repeated by various public officials ranging from members of Congress, the United States Trade Representative, and the Federal Bureau of Investigation, notwithstanding the obvious concern about bias in industry-sponsored research, exacerbated by industry's unwillingness to share the data or even the methodology in some cases. Many of us have been discouraged by this failure to take a responsible look at the claims and the data that purport to support them. This is finally starting to change. From the be-careful-what-you-ask-for department, the Government Accountability Office responded to a congressional requirement in the PRO-IP Act that it assess some of these data. GAO did, finding that "[t]hree widely cited U.S. government estimates of economic losses resulting from counterfeiting cannot be substantiated due to the absence of underlying studies."

This is not to say that claims about the scale of unauthorized reproduction, consumption and reuse of copyrighted media are wholly without substance. Of course, there are many around the world who avail themselves of the opportunities and power afforded by digital technologies and networks and globalized trade channels to acquire or engage with media goods on terms other than those offered by the copyright owners. But, what is the extent of these activities? Does it vary by country and by sector? Industry-sponsored studies generally paint with a broad brush.

The MPEE, in contrast, digs in provide the reader with a much richer sense for the demand for both imported and local media goods in a number of emerging economies. This study, funded by the International Development Research Centre and the Ford Foundation, reports the results of considerable quantitative and qualitative research of a type rarely seen. I will make three general observations and then offer a quick set of highlights from the individual contributions.

First, the study accepts the characterization of "piracy", at least in its title, to describe the range of unauthorized uses of media goods in countries under study. While this was understandably done to meet the industry studies on their own terms, the reader may overlook the quick qualification of the term offered in the opening essay and some of the important findings about how there is no real alternative to unauthorized consumption in the countries studied because copyright owners have chosen to price their media products as luxury goods in emerging markets even when these goods are designed for mass consumption in their high-income economies. As Joe Karaganis writes, "[o]ne person's piracy has always been someone else's market opportunity, and the boundary between the two has always been a matter of social and political negotiation." (P. 3.)

Second, the study importantly disaggregates the data and shows how unauthorized use affects different media industries differently, particularly the software industry. These real sectoral differences should be taken into account for anyone offering policy proposals that generalize to all works covered by copyright.

Third, the study calls attention to the social and legal diversity in the environments in which copyright law operates on the ground, even among countries that have "harmonized" their laws. Enforcement initiatives vary depending on the general institutional environments for the rule of law as well as the specific legal environment in which copyright operates, particularly in Russia. These data not only should inform our understanding of the world as it is, but should also inform our imagining of how the world might be even as digital technologies become more powerful and pervasive and as the scale of globalized trade increases. Local differences will continue to persist and to matter for how media goods are produced, distributed, and used.

With respect to the individual contributions, Joe Karaganis makes a number of important contributions in the opening chapter, "Rethinking Piracy". He carefully and critically reviews the "empirical" studies of piracy done to date, showing how little we reliably know about the breadth and economic effects of unauthorized use of copyrighted mass media works. He also generalizes from the specific findings to show how intellectual property rights generally are enforced extra-judicially through raids in emerging economies, that this enforcement has little effect in deterring unauthorized uses, and that the relationships between pricing of authorized and unauthorized copies of media goods shape or reflect the markets in the countries studied.

There is not space here to call attention to the many interesting findings in the country studies of India, Brazil, Russia, South Africa, Mexico, and Bolivia, nor in the interesting coda on the book trade and the United States' role as a "pirate" nation up through the end of the nineteenth century. Suffice it to say that each supplies its own reward. The reader is grateful for the researchers' efforts. By getting an overall, and a street-level view, one appreciates the nuances about the degrees to which the enforcement policy agenda of multinational media and software companies has and has not found local adherents in each place, and finds interesting the varied responses from local media producers and distributors to the workings of the informal market. As a significant bonus, while at one time a study, this document also offers a range of telling anecdotes to illustrate the human dimension of the market actors and makes for interesting armchair travel!

Cite as: Michael W. Carroll, *Access to Global Media in Middle and Low Income Countries: A Responsible Study*, JOTWELL (November 14, 2011) (reviewing ***Media Piracy in Emerging Economies*** **(Joseph Karaganis, ed., 2011).**),
https://ip.jotwell.com/access-to-global-media-in-middle-and-low-income-countries-a-responsible-study/.