

DIGITAL AGE COPYRIGHT LAW IN ASIA: DMCA-TYPE PROVISIONS IN CHINA AND INDIA

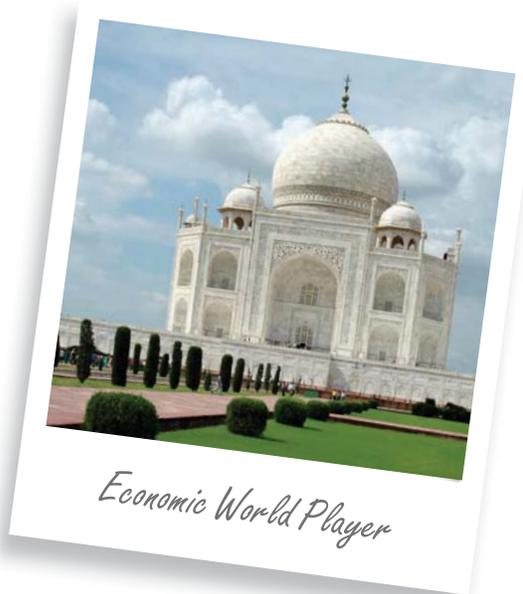


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Computer, internet and related digital technology are the functional platform upon which many of the largest and most robust economies across the globe now operate. Further, these services are vital for the continued operation and integration of the global economy. Accordingly, legal liability relating to actions (or failures to act) in cyberspace and other media, now greatly affects decisions by governments, companies, and individuals across the globe.

Computer, internet and related digital technology are the functional platform upon which many of the largest and most robust economies across the globe now operate. Further, these services are vital for the continued operation and integration of the global economy.

In the ten-plus years since the Digital Millennium Copyright Act (DMCA) took effect in the United States, many of the jurisdictions topping rankings of annual GDP lists have enacted similar laws or provisions. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) generally require that treaty signatories provide copyright protection concerning technological measures used to protect copyrighted works, as well as regarding rights management information. Thus, the signatories to these treaties are more likely to have enacted laws similar to the United States'



Digital Millennium Copyright Act than non-signatory countries.¹ However, non-signatory countries may also have laws providing limited similar protections, and a review of the law in the individual jurisdictions would be necessary to confirm the extent of such protection.

In order to determine the extent to which these provisions have been implemented and the specific embodiment these provisions take in a given country, one must analyze the specific laws in each given jurisdiction. Analysis of individual laws is necessary because, while many of the countries analyzed herein are signatories to common copyright treaties such as the Berne Convention and the WIPO Copyright Treaty,² each possesses significant freedom regarding *how* to implement specific provisions of these treaties within the framework of their existing laws.³ **MORE▶**

³ For example, Article 11 of the WIPO Copyright Treaty provides the following broad guidance regarding obligations concerning technological measures:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

(The WIPO Performances and Phonograms Treaty contains a similar provision in Article 18.)

Similarly, Article 12 provides the following broad guidance regarding obligations concerning rights management information:

Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(The WIPO Performances and Phonograms Treaty contains a similar provision in Article 18.)

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Two countries that continue to be of significant interest with regard to changes and developments in their respective intellectual property laws are China and India. The following is a brief synopsis of the Digital Millennium Copyright Law in the United States and a review of some of the key “DMCA-type provisions” implemented in China based on its implementation of the WIPO Copyright Treaty and/or the WIPO Performances and Phonograms Treaty. While India is not a member of either treaty, India has nonetheless implemented some DMCA-type laws, which are briefly discussed.

BACKGROUND ON THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

Enacted in October of 1998, the DMCA implements two 1996 World Intellectual Property Organization treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁴ The DMCA is divided into five titles: (1) Title I—*WIPO Copyright and Performances and Phonograms Treaties Implementation Act*; (2) Title II, *Online Copyright Infringement Liability Limitation*; (3) Title III—*Computer Maintenance Competition Assurance Act*; (4) Title IV—miscellaneous provisions relating to the functions of the Copyright Office, “ephemeral recordings,” “webcasting,” and collective bargaining agreements; and (5) Title V—*Vessel Hull Design Protection Act*.

TITLE I, among other things, creates two prohibitions in Title 17 of the United States Code: one prohibiting circumvention of technological measures used by copyright owners to protect their works and a second prohibiting tampering with copyright management information.

TITLE II, in adding new section 512 to the Copyright Act, creates a “safe harbor” by



placing limitations on liability for copyright infringement by online service providers. These limitations are based on four primary categories of conduct by “service providers”: (1) transitory communications, (2) system caching, (3) storage or transmission of information at the direction of users, and (4) information location tools. Titles I and II, taken together, are typically considered the “heart” of the DMCA.

TITLE III expands exemptions relating to computer programs allowing an owner of a copy of a program to make reproductions or adaptations when necessary to use the program in conjunction with a computer. For example, this title permits an owner of a computer to make (or permit making of) a copy of a computer program in the course of maintaining or repairing that computer.

TITLE IV includes a number of miscellaneous provisions. Among the miscellaneous provisions is confirmation of the Copyrights Office’s authority regarding policy and international functions and an exemption under the Copyright Act for making “ephemeral recordings” (e.g., recordings to facilitate a transmission). Title IV also expands the Digital Performance Rights Act (DRPA)

⁴ The Digital Millennium Copyright Office Act of 1998—U.S. Copyright Office Summary, December 1998, pg. 1 (<http://www.copyright.gov/legislation/dmca.pdf>)

to include webcasting as a new category of “eligible nonsubscription transmissions,” revises the criteria for an entity to be eligible for a license, and creates a new statutory license for making ephemeral recordings. Lastly, Title IV also addresses the assumption of contractual obligations upon transfer of rights in motion pictures.

TITLE V adds a new chapter 13 to Title 17 of the United States Code and, along with it, creates a new system for protecting original designs of certain useful articles (i.e., hulls of vessels no longer than 200 feet).⁵

This article principally discusses Titles I and II—circumvention of technological protections and the “safe harbor” provisions for service providers—and whether various foreign jurisdictions provide similar types of protection.

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DMCA-TYPE PROVISIONS IN CHINA AND INDIA

CHINA: China’s laws in accordance with the WCT and WPPT went into force on June 9, 2007. In China, “computer software” is specifically identified as one of the “forms of expression” protectable by copyright.⁶ Chinese law also provides anti-circumvention protection of computer technology. China’s first anti-circumvention provisions were set forth in 1998 in the form of ministry regulations (“Interim Regulations”). Article 18 of the Interim Regulations prohibits “production of pirated software, software for deciphering secrets and software with the main function of removing technology-protection measures.”⁷ Further anti-circumvention

regulations were later introduced in the Copyright Law of 2001, which prohibits “intentionally avoiding or destroying the technical measures” taken by copyright owners or obliges without permission or unless otherwise authorized under the law.⁸ These same anti-circumvention rules were also promulgated by the State Council in 2002 in the Regulations on the Protection of Computer Software.⁹

More recently, on June 1, 2006, the State Council set forth further anti-circumvention rules explicitly authorizing an owner to adopt “technical measures” to “protect the right to network dissemination of information.”¹⁰ These rules prohibit organizations or individuals from purposely avoiding or breaking the technical measures (often in an attempt at reverse engineering) or purposely

manufacturing, importing or providing to the general public devices or components that are mainly used to avoid or break the technical measures unless otherwise provided for in law or regulation.¹¹ Thus, China has adopted several provisions in the spirit of the DMCA related to the “anti-circumvention” provisions of Title I of DMCA.

These recent developments in Chinese law are generally believed to have expanded the scope of protection available to copyright holders (and adjacent right holders) utilizing encryption software and various other technical measures to protect copyrighted subject matter and content.¹² However, it has been suggested by some that the **MORE>**

⁵ Vessel Hull Design Protection relates to a *sui generis* provision outside the topical scope of this article and is merely mentioned to provide an accurate and complete description of the Act (DMCA).

⁶ Copyright Law of the People’s Republic of China, Article 3 (2001). (“For the purposes of this Law, the term “works” includes works of literature, art, natural science, social science, engineering technology and the like which are expressed in the following: ... (8) computer software...”)

⁷ Interim Regulation on Administration of Software Products, Article 18 (1998).

⁸ Copyright Law of 2001, Article 47.

⁹ Order of the State Council of the People’s Republic of China, No.339, Regulations on the Protection of Computer Software, Article 24 (effective January 1, 2002) at (http://english.gov.cn/laws/2005-08/24/content_25701.htm).

¹⁰ CoOrder of the State Council of the People’s Republic of China, No.468, Ordinance on the Protection of the Right to Network Dissemination of Information, Article 4 (effective July 1, 2006) at (http://fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/AdministrativeRegulations/P020060713308299373030.pdf)W

¹¹ See *id.*

¹² Song Haiyan and Xu Yuezhu, *Computer Software Protection in China*, (March 2007), at www.kingandwood.com



Literary Works Protection

current anti-circumvention laws need to be improved because the current provisions: (1) are “too simple and vague” including a lack of limits on the scope of protection; (2) make no distinction between the varied technical measures utilized; and, (3) fail to account for or explicitly exempt legitimate or potentially desirable circumvention activities (e.g., research and academic arenas) as is done in many other countries.¹³

recommended that China amend its laws to be in conformity with its obligations under the TRIPS Agreement.¹⁷ As a result, expect additional changes to China’s intellectual property laws in the future.

INDIA: India has been a little slower and less comprehensive in its implementation of DMCA-type laws. Indeed, India has not signed either the WCT or WPPA. However, India continues to contemplate implementation of DMCA-type provisions. As a result, India may continue to revise its copyright laws to include further provisions that resemble the DMCA. For example, some believe India’s laws will soon be amended with the introduction of anti-circumvention provisions as well as protections for rights management information.¹⁸

After a dispute initiated by the United States, a panel of the World Trade Organization determined in January 2009 that certain provisions of China’s intellectual property

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laws were not in compliance with the Berne Convention and TRIPS Agreement.¹⁴ Specifically, the panel determined that China’s copyright laws do not provide the same efficacy to non-Chinese nationals as they do to Chinese citizens, as is required by the Berne Convention.¹⁵ The panel also determined that China’s copyright laws do not provide enforcement procedures so as to permit effective action against any act of infringement of intellectual property rights, as required by the TRIPS Agreement.¹⁶ Based on these findings, the panel concluded that China’s copyright laws nullify or impair benefits accruing to the United States, and

In India, like most other jurisdictions that provide copyright protection of computer programs and related subject matter, computer programs are considered “literary works.”¹⁹ Despite being considered “literary works,” computer programs receive special consideration under Indian Law based on a right “to sell or give on commercial rental or offer for sale or for commercial rental any copy” of a computer program, regardless of whether such copy is sold or rented previously. This right specific to computer programs contrasts with other types of “literary works” under Indian law, which provides a right “to issue copies of the work to the public” provided the copy is “not

¹³ See *id.*

¹⁴ DS362: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, World Trade Organization, January 26, 2009, p. 134.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ayan Roy Chowdhury, *The Future of Copyright in India*, *Journal of Intellectual Property Law & Practice*, volume 3, number 2 (2008).

¹⁹ See, *Int’l Copyright Law and Practice, India*, §8[1][b][iii], at pg. IND-42.

already in circulation.”²⁰ Accordingly, computer programs are exempt from what resembles the United States’ “first sale doctrine” limitation on the distribution rights of the copyright owner even though the “first sale doctrine” applies to other forms of literary works in India.

Currently, Section 52(1) of the Indian Copyright Act sets forth several provisions specifically limiting the rights of copyright owners in relation to utilization of computer programs, making of back-up copies, interoperability between computer programs, and reverse engineering.²¹ First, the “making of copies, or the adaptation, of a computer program” by the lawful possessor of the program is allowed “(i) in order to utilize the computer program for the purpose for which it was intended or (ii) to make back-up copies purely as a temporary protection against loss, destruction, or damage.”²² Second, “any act necessary to obtain information essential for assuring the interoperability . . . with other programs,” provided that the information is not otherwise readily available, is also allowed under the Indian Copyright Act.²³ Lastly, “observation, study, or test[ing] of the functioning of a computer program,” in order to determine “the ideas and principle that underlie any elements of the program” while performing such acts as necessary for which the program was supplied is also permitted.²⁴

CONCLUSION

Since 1998 digital technology has continued exponential growth in importance, complexity, and breadth. Very few locales on the planet have not been influenced by digital media and technology. Accordingly, in the time since the U.S. passed the Digital Millennium Copyright Act (DMCA) as the manner in which the United States governs copyright and related issues relating to the facets enumerated in that Act, many other countries have also amended or added to their body of law relating to digital media, technology and related issues. After reviewing DMCA-type provisions currently implemented by two of the larger players on the world economic stage, China and India, it is evident that many factors influence each nation’s approach to addressing the expanding challenges introduced by new and evolving technologies. While many issues must be worked out in order to have a sense of harmony or universal approach to the use of copyright laws in this age, similarities in the approaches are apparent. This is an arena that will continue to develop and, although perhaps never reaching full harmonization, the significance of such laws is clear. ■

²⁰ *Id.*

²¹ *See id.* at pg. IND-48.

²² Section 52(1), Clause (aa).

²³ Section 52(1), Clause (ab).

²⁴ Section 52(1), Clause (ac).