

Introduction

The past few months have capped off a year of consumer revolt against overreaching copyright laws and enforcement practices. In February 2012, thousands of protesters took to the streets of Europe to voice their outrage against the Anti-Counterfeiting Trade Agreement (ACTA), an instrument privately negotiated by rich countries in an effort to raise the baseline of intellectual property (IP) protection and enforcement once again.¹

On 18 January 2012, large portions of the World Wide Web, including Wikipedia's English language site, were taken offline in protest against proposed US legislation that would have authorised censorship measures against websites

accused of harbouring copyright-infringing content.² Both ACTA and SOPA were negotiated in secret and raised wider issues about how large copyright owning corporations drive copyright policy while the interest of consumers and creators are ignored.

Such discontent could have been avoided if only government policy-makers and big business had paid more attention to the legitimate needs of consumers for access to knowledge. A global survey of national IP laws and enforcement practices, rating them according to how well they promote consumers' interests, could be an invaluable tool for such policy-makers. Thankfully, such a survey exists, and you are reading it now. Consumers International (CI) is proud to present its fourth annual IP Watchlist.

This year's results

Top 5		Bottom 5	
1. Israel	▲ 3*	1. Jordan	▲ 2*
2. Indonesia	▲ 5*	2. Argentina	▲ 6
3. India	= 3	3. United Kingdom	= 3
4. New Zealand	▲ 5	4. Thailand	▼ 1
5. United States	▼ 2	5. Brazil	▼ 4

*2010 Result

Shown here are this year's five best and worst countries at promoting access to knowledge for consumers, from amongst 30 nations covered in this year's survey of IP laws and policies around the world. The table also notes the position in which each country was placed in the last list in which it appeared, either in 2011 (if available) or 2010. The changes to this year's questions and their weightings have made little difference to the rankings of these countries, which continue to hover around the same level as in previous lists.

Interestingly, the top and bottom countries are neighbours. Israel is almost unique in the world for its adoption of a broadly-interpreted, US-style 'fair use'-right for consumers of copyright works.³ Conversely, Jordan has always had much more narrowly-crafted limitations to copyright. In fact, in 2000 Jordan signed a Free Trade Agreement (FTA) with the US requiring it to increase its IP protection to still more stringent levels than required by the Agreement on Trade Related Aspects of Intellectual Property Rights, or TRIPS, of the World Trade Organisation (WTO).⁴

Shamefully, the least developed world regions – Africa and Latin America – were those with the harshest IP laws for consumers, whereas the most developed regions – North America and Oceania – had those most favourable to consumers.⁵ This is largely because African and Latin American countries based their IP laws on those of the colonial powers,

and have since only continued to strengthen them in favour of IP owners without introducing concomitant flexibilities for consumers as developed countries have done. Examples of this are given in the reports from two first-time entrants on our list this year: Malawi and Costa Rica.

Malawi is a politically-troubled, least-developed country where more than half of the population lives below the international poverty line of \$1.25 per day.⁶ One would have thought that IP enforcement should take a back seat in such a country, in favour of measures designed to ensure the satisfaction of the population's basic needs of food, water, clothing, shelter, and medical care.

Yet Malawi was one of four poor countries in which Interpol chose to conduct an anti-counterfeiting campaign in 2009,⁷ and in which the local police often join IP-holder organisations in conducting copyright raids against local traders.⁸ Is this no-holds-barred, developed-country model of IP protection and enforcement truly the most appropriate model for countries like Malawi?

Costa Rica was one of five developing countries that signed the Central America-Dominican Republic-United States FTA (DR-CAFTA) under pressure from the Bush Administration, ratifying it in 2007. This required it to significantly overhaul its IP laws, to provide extended periods of protection, stronger penalties, and, most recently (as reported by our Costa Rican Watchlist contributor), the opening of a new building dedicated to IP protection.

Just like Jordan and many other countries, Costa Rica was promised that its economy would receive a major boost on the back of increased trade with the US following its entry into the FTA. Indeed, Costa Rican consumers deserve a substantial benefit in exchange for their loss of access to public domain works for another 20 years, and their submission to digital lock rules and astronomical new penalties. Whilst it is difficult to assess the benefit actually received, if any, the World Bank has acknowledged that the FTA "by itself is unlikely to lead to substantial developmental gains".⁹



Assessment

This year, countries were assessed against 49 criteria, each of which received a 'Yes', 'No' or 'In part' answer. (On our website, <http://A2Knetwork.org/watchlist>, these answers are colour-coded to make it easy to spot the problem areas at a glance.) The criteria were weighted according to how important they are in promoting access to knowledge for consumers, and the weighted answers fed into a calculation which determined the country's rating in the report.

In this summary report, the results are simplified still further by dividing the questions into four categories: scope and duration of rights; freedom to access and use (which is further sub-divided into eight types of use); freedom to share and transfer; and administration and enforcement. For each category, the country is awarded a grade: from the top score of 'A' down to 'D', and 'F' for an abject fail.

An overall score is also given which averages out the scores received in the four categories. As such no country received

an overall 'F' this year, but by the same token neither did any country perform well enough to deserve an 'A'.

Each country report contains an additional nine questions which do not have 'Yes' or 'No' answers and do not reflect directly in the country's ranking, but are made available on our website for your information; for example, what treaties a country has signed, what maximum penalties for infringement apply, and – new this year – what changes have been introduced (or are upcoming) since the last report for that country.

The answers to some questions are somewhat subjective, so we also provide references to the original sources such as statutes and case law which you can check yourself. If you disagree with anything in the country reports, or simply have something to add, you can do so on the website.

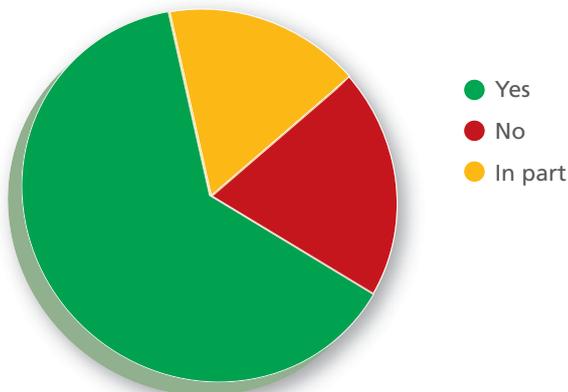
	Scope and duration of copyright	Freedom to access and use								Freedom to share and transfer	Admin and enforcement	Overall
		By home users	For education	Online	By content creators	By the press	By libraries	By disabled users	In public affairs			
Argentina	D	F	D	C	F	B	F	C	A	C	D	C-
Armenia	D	B	C	B	C	B	A	C	A	C	F	C
Australia	D	B	B	A	C	B	B	C	F	D	C	B-
Belarus	D	B	B	B	D	C	A	A	A	F	F	C
Brazil	F	F	F	C	A	B	F	A	A	B	D	C-
Cameroon	C	D	C	A	B	D	D	C	A	F	D	C
Canada	D	C	B	B	C	C	A	A	F	D	C	B-
Chile	D	F	B	A	A	B	A	A	D	C	C	B-
China (PRC)	C	C	A	B	C	B	B	C	A	D	C	B-
Costa Rica	F	C	B	A	B	A	B	C	C	C	C	B-
Egypt	D	B	B	B	F	B	B	F	A	D	F	C-
France	D	B	B	C	B	B	C	A	A	D	D	B-
India	B	C	B	B	A	A	B	C	B	C	C	B
Indonesia	C	A	A	A	C	A	A	A	A	D	D	B
Israel	C	C	A	B	B	A	B	C	A	B	C	B
Japan	F	C	B	C	F	B	B	A	B	C	D	C
Jordan	D	D	B	C	F	B	C	F	C	F	F	D
Lebanon	D	B	C	A	B	A	B	C	A	C	C	B-
Malawi	F	B	A	B	F	B	B	F	A	C	D	C
Malaysia	D	C	A	D	D	A	B	C	F	B	D	B-
New Zealand	B	C	C	C	C	B	B	A	B	C	B	B-
Philippines	C	B	D	A	F	A	B	F	A	F	D	C
Romania	D	B	C	A	C	A	D	A	B	D	D	C
Slovenia	F	A	D	A	B	D	C	A	B	D	D	C
South Korea	F	C	A	C	D	B	B	C	C	C	F	C
Spain	C	B	D	A	C	C	D	C	A	C	C	B-
Thailand	D	A	B	F	D	A	D	F	F	D	F	C-
Ukraine	F	B	D	B	C	C	A	C	A	F	C	C
UK	D	F	D	A	C	C	D	A	D	D	F	C-
USA	C	B	C	A	B	C	A	A	A	C	D	B-



New questions

Two other new questions this year deserve mentioning. The first is whether libraries are required to pay public lending rights fees (PLR). These are fees that libraries in some countries are required to pay to compensate authors for the supposed loss in sales of their books that occurs when libraries lend them to borrowers. In some countries the fees are part of copyright law, and in others they have an independent legal basis.

Do lending libraries operate without incurring PLR fees?



As the graph illustrates, most countries do not impose these fees, but they are widespread in Europe, as well as in several other countries covered by the Watchlist: Australia, New Zealand, Israel and Canada.

The motivation for the imposition of public lending rights fees is economically dubious, after all, libraries are the main purchasers of certain types of book and periodicals, especially in academia, and authors are the direct beneficiaries of this.¹⁰ But apart from that, the simple fact is that libraries are increasingly cash-strapped, and that a further impost on lending of existing books is likely to come at the expense of new book acquisitions.

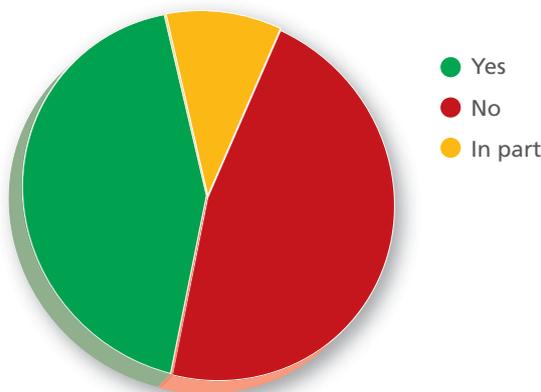
This is why the International Federation of Library Associations opposes PLRs, particularly their extension to developing countries – a position with which CI has to agree.¹¹



CC Reading in the Digital Age, Matt Katzenberger: flickr.com-photos-matthileo-5448890428

The second new question in this year's IP Watchlist concerns whether the public can raise an objection to the grant of a patent before the patent is issued. Such pre-grant opposition can be an effective way of screening out low-quality or obvious patents that have slipped through the net of the patent office examiners. As the graph shows, the number of respondents to our survey that do or do not have a pre-grant opposition procedure are about equal.

Does the patent system allow for pre-grant opposition?



Because pre-grant opposition procedures make things harder for would-be patent owners, the US government has criticised countries that offer them in its annual Special 301 Report, and has sought to outlaw them in its recent FTAs such as those with South Korea and (according to reports) the forthcoming Trans-Pacific Partnership Agreement.¹²

The motivation for the imposition of public lending rights fees is economically dubious

Why is this relevant to access to knowledge for consumers? One of the reasons is that low-quality patents over the software that runs on computers, smartphones and websites can impede access to those technologies. Often the patent owners do not even exploit their patents until someone else comes along and commercialises the same ideas, at which time the patent owner will cash in by threatening to shut the competitor down unless royalties are paid.

This issue reached mainstream attention last year, with coverage on US National Public Radio¹³ and in the *Economist*¹⁴ and *Forbes*¹⁵ examining how software patents are actually stifling innovation, reducing competition and raising prices for consumers. Whilst limited patent reforms did make it through the US Congress last year, these are too narrow to prevent the continued issuance of such trivial patents as "System and method for providing and displaying a web page having an embedded menu".¹⁶ Pre-grant opposition may be a better approach, and for this reason countries that have such a procedure will do better in our IP Watchlist.

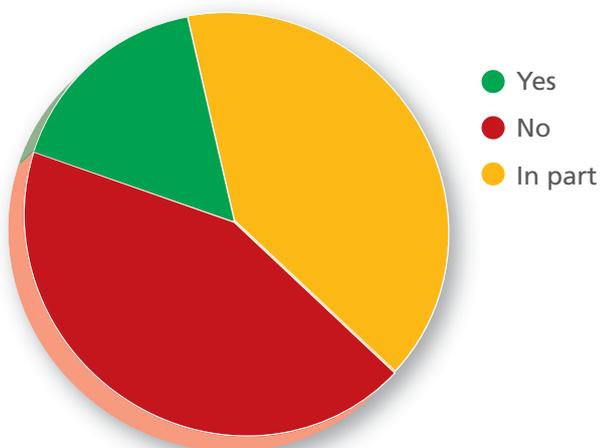


Best and worst practices

As well as rating countries' IP laws and policies according to how well they serve consumers' interests, in each year's IP Watchlist we also like to pick out some of the best (and worst) practices in areas that the survey covers. This year we have selected two best and two worst practices, illustrated by the results of particular questions from the Watchlist.

Best: Consumer protection law

Are rights holders prohibited from excluding user rights under copyright law?



The first best practice is the use of consumer protection law against the abuse of IP rights. There are a few questions that touch on this in the 'Scope and duration of rights' section of our IP Watchlist.

In this section we ask whether a court or tribunal has ever limited the exercise of IP rights under competition law, or under a bill of rights or similar human rights instrument. We also ask whether rights holders are prohibited from excluding user rights under copyright law, for example, by using the fine print of a licence agreement to take away your legal right to make backup copies or quotations.



CC XO laptop, One Laptop Per Child, Wayan Vota: flickr.com/photos/dcmetroblogger/3875947429

The results of this last question, shown in the graph, reveal that in most countries there is no or only partial protection against such abuses. Published in early 2011, the UK's Hargreaves Review of IP and Growth recommended that all copyright limitations be immunised from contractual override.¹⁷ We hope that this will soon become the case in the UK, and that other countries will follow suit.



© Children's Lending Library, Ginigasmulla, Matara, LK, Urbangarden: flickr.com/photos/urbangarden/264139999

As this is a serious problem which deserves more attention, CI recently commissioned an international expert on IP abuse, George Yijun Tian, to write a research report on it.¹⁸ His conclusions were that the TRIPS agreement, which sets minimum standards of IP protection that all WTO member countries must meet, also provides ample scope for those countries to curb the abuse of IP rights using consumer law.

He also reveals that some countries, such as Australia and Brazil, already possess consumer laws that would enable them to act against big companies that use their IP to infringe upon consumers' rights. For example, such laws might nullify unfair terms of use or disclaimers, or prohibit the use of Digital Rights Management (DRM) technology to stop consumers from making lawful backup or personal use copies. Tian writes:

*It is imperative that each country, particularly developing countries, should adopt more flexible approaches at both international and domestic levels to address IP abuse issues and to protect legitimate rights of their citizens in using new technology products and services.*¹⁹

Increasingly, the importance of protection against such abuses through consumer law is now being recognised at a political level. The European Greens/European Free Alliance (Greens/EFA), which holds 57 seats in the EU Parliament, released a position paper last year stating: "It must always be legal to circumvent DRM restrictions, and we should consider introducing a ban in the consumer rights legislation on DRM technologies that restrict legal uses of a work."²⁰

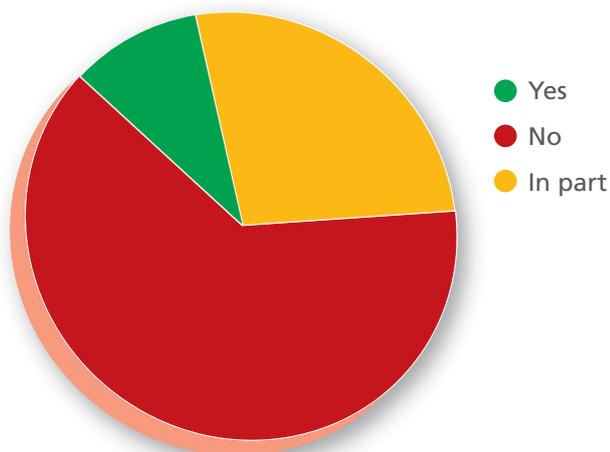
Beyond the EU, CI wants to see better protection for consumers' access to knowledge embedded in a global



instrument. It is for this reason that we have proposed new provisions to the United Nations Guidelines for Consumer Protection to promote the interests of consumers in the digital age.²¹

Best: Alternatives to DRM

Must the effect of TPMs distributed with copyright works be disclosed to consumers?



As noted above, DRM (or Technological Protection Mechanisms (TPMs) or 'digital locks') are often used by content owners to prevent consumers from having full access to content for all of the purposes that copyright law allows. This is a consumer protection issue, particularly when the effect of these digital locks is not fully explained to consumers. The graph shows the number of countries that require DRM restrictions on digital products to be disclosed to consumers before purchase, and here the proportion of 'No' answers is worryingly high.

This is another area in which stronger consumer protection is needed. The EU has recognised this by including a provision in its 2011 Consumer Rights Directive²² that requires consumers of digital content to be provided with information about its functionality, including any applicable TPMs, and interoperability information. One of the suggested amendments that we are putting forward to update the United Nations Guidelines for Consumer Protection has been modelled on this clause of the Directive.

Research published in 2011 reveals that removal of DRM restrictions can actually decrease music piracy. The researchers found that while these restrictions make piracy more costly and difficult, the restrictions also have a negative impact on legitimate users who have no intention of doing anything illegal.²³

One of the main problems with digital locks for consumers is that they offend the deeply-ingrained notion that when we purchase a book, album or movie – whether as a physical product or a download – we should own it and use it however

we wish within our social and family circles, without the oversight of the copyright owner. We feel this way and, at the same time, respect the right of the copyright owner of a protected work to control its distribution outside our circle of family and friends.

This insight underlies the mission of the IEEE P1817 Working Group, which is creating a Standard for Consumer-ownable Digital Personal Property (DPP), that will allow consumers complete freedom to lend, copy, sell, or give away the digital works that they have purchased, whilst inhibiting them from sharing with strangers. In order to achieve this, the work is encrypted – which is just what DRM does.

But unlike with DRM, the encryption does not prevent the work from being copied, nor does it allow its use to be tracked or controlled by the copyright owner. It simply enforces two simple functions of every DPP-protected work: a 'give' button and a 'take' button. The 'give' button ensures that every DPP-protected work can be shared, both by the original purchaser and by everyone with whom it has already been shared. The 'take' button ensures that each and any of those individuals can take the work back from all the others, 'collapsing' it into the single unit that it was when purchased.

More detail of this intriguing proposition is given in a paper by Paul Sweazey, chair of the IEEE Working Group, that was presented this year at the same CI global meeting, *Consumers in the Information Society: Access, Fairness and Representation*, at which Tian presented his own paper.²⁴

Worst: Copyright term extension

Moving on to worst practices, CI deplores the EU's extension of the term of protection of the rights of performers and record producers from 50 to 70 years.²⁵ Although colloquially spoken of as a type of copyright, the rights of remuneration of performers and producers is more strictly a 'related' or 'neighbouring right', as opposed to an 'author's right'.

The term extension makes little sense except as a measure to bolster the flagging balance sheets of big record companies. Certainly, very little of the benefit will flow to performers,





most of whom are paid a fixed fee for their performances, and never see a penny of royalties. Music recordings that would have fallen into the public domain and been free for consumers to use in home recordings, mix tapes and amateur films, will now remain locked away for two more decades.

This latest term extension follows on the heels of the 1993 Directive that lengthened the exclusive rights of authors to their lifetime plus 70 years.²⁶ On the other side of the Atlantic, the infamous 'Sonny Bono Act' in 1998 brought the US into parity with this term. Since then, many other countries around the world have followed suit in increasing their own copyright terms, usually as part of an FTA deal with the US in which access to knowledge is traded off as a *quid pro quo* for trade concessions on agricultural or manufactured goods.

A much more sensible voice in Europe is that of the Greens/ EFA, who, in their position paper last year, wrote:

*Today's protection times — life plus 70 years — are absurd. No investor would even look at a business case where the time to pay-back was that long. We want to shorten the protection time to something that is reasonable from both society's and an investor's point of view, and propose 20 years from publication.*²⁷

Such a suggestion may seem unthinkable, as it would mean rewriting the Berne Convention, which is often seen as copyright's Holy Grail. Yet, as we will see in the following section, such a prospect has recently been put on the table, and not just by radical activists, but by a major world government.

Worst: Intermediary liability

As alluded to in the introduction, furore erupted across the Internet in January this year over the US government's proposed Stop Online Piracy Act (SOPA) and PROTECT IP Act (PIPA), which were directed against websites alleged to be engaging in, enabling, or facilitating the infringement of copyright. To combat this, such websites could have been blocked from the Internet at the level of the Internet's Domain Name Service (DNS), as well as being removed from search listings, and blacklisted from payment processors and advertisers.

As history now tells, the SOPA and PIPA bills have both been put on ice, following a groundswell of opposition from free expression activists, Internet technologists, and websites hosting user-generated content, who together exposed the scheme's many flaws. It was pointed out that to allow one country to tinker with the Internet's plumbing in order to suppress a particular type of undesired content could only open the door for other countries, including autocratic regimes, to do the same.²⁸ It was also noted that holding websites liable for the content they host would likely result in the disappearance of online communities that host user-contributed content.²⁹

Although not as well known as SOPA and PIPA, India's Information Technology (Intermediaries Guidelines) Rules 2011 also seek to make intermediaries such as website operators and cybercafé owners directly liable for the content posted by users. But they go even further in some respects: besides IP-infringements, the Rules also target a wide range of other content, including content that is blasphemous, defamatory, harmful to minors, or threatening to the unity of the country.³⁰

Russia would go still further, and take the rest of the world down the same path. In an address that is by turns visionary and horrifying, the Russian President of the G20 outlined a plan for the amendment of the Berne Convention, stating:

*If found guilty, information intermediaries on the Internet (communications service providers, Internet website and domain name owners, etc) should be held responsible for violation of copyright and neighbouring rights on general grounds, except for specifically established cases (eg, if they were not aware or were not supposed to be aware of the illegality of content).*³¹

This is a prospect that makes SOPA and PIPA look positively friendly to Internet intermediaries by comparison.



CC A slide for a talk in Karlsruhe at the LEARNTEC 2008, Martin Memmel: flickr.com/photos/pavel1998/2214276680



CC Brett Solomon, Executive Director of the NGO "Access" responds at Panel Discussion on Internet Freedom at the United Nations, Friday, March 4, 2011, US Mission Geneva: flickr.com/photos/us-mission/5496888619



Conclusions

The Russian proposal, despite its scary implications overall, also contains one or two grains of good sense. The President writes:

High Internet penetration inevitably affects [the] mentality and expectations of web-users. Their majority is not ready to accept 'legal restrictions' on access to the Content that has become the main source of knowledge for a big part of [the] population.

To this end he further suggests:

*... to specify directly in the Convention the quasi-free personal use by Internet users of any Content placed on the Internet by any person. At present, in a number of countries users are prosecuted for personal use of the Content, which has been illegally published on the Internet by third parties. This approach is too harsh.*³²

To this, CI says: "amen". Too often anti-piracy measures do no more than hurt innocent consumers, and may even backfire on the industry itself. For example, a ban on the sale of CDs at outdoor markets in Malaysia, introduced as an anti-piracy measure, is estimated to have caused a 30% drop in legitimate music industry revenue.³³ It is also a misplaced priority, particularly for developing countries with limited judicial and law enforcement resources.

Governments would do well to remember that what is commonly called 'content theft' by industry is more correctly

known as copyright infringement, and is not really theft at all. A better analogy for such infringement is the act of walking through someone's garden without permission. It's technically an actionable infringement of their property rights, since if permission had been sought first, the owner might have been able to extract a small amount of money in exchange for allowing entry to their garden. However, it is not theft, either legally or in the common-sense usage of the word, after all, they still have the garden. A new book points out that such non-market sharing can even be seen as legitimate and useful, and need not threaten the sustainability of cultural industries.³⁴

CI looks towards a future in which creators and consumers support each other in a mutually beneficial ecosystem of content production, consumption and reuse. Some of the insights highlighted in this report – such as stricter measures against IP abuse, the introduction of a consumer-friendly alternative to digital locks, and a review of the Berne Convention – may play a part in that future.

In any case, an important lesson from the past year is that consumers will not take it lying down when their rights and interests in access to knowledge are ignored in an obsessive quest to extinguish infringement. A first step for governments to take towards better understanding these rights and interests is to consult their country's ranking on the IP Watchlist, and to address the problem areas that it highlights.

Contributors

CI thanks all our contributors to this year's IP Watchlist, who are listed below and whose full biographies are available on our website: <http://A2Knetwork.org/watchlist>. In addition, we thank Andrea Carter for the design of the Watchlist, B-Lingo Communications for its translation into Spanish and French, and the Open Society Foundations (OSF) for financially supporting our work. This report was written by Jeremy Malcolm, who also updated the country reports that are not listed below.

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United Kingdom – Consumer Focus (Saskia Walzel)

United States of America – Public Knowledge
(Rashmi Ragnath)



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- ⁵ Seven world regions were given a percentile score, based on the average of the percentile ratings of the countries in that region, which were in turn based on their assessment against 49 criteria. A positive result to each criterion would have resulted in 100%, and a negative result to each, 0%. Africa's percentile score this year was 43%, and North America and Oceania's 56%.
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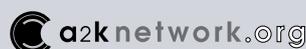
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