INTELLECTUAL PROPERTY AND COPYRIGHT LAW IN THE EUROPEAN UNION: A BIRD’S EYE VIEW

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In 1950, Lord Denning gave a remarkable lecture in Stroud- upon-Avon on 'theatre and law'. He described the theory that the law is like a stage play. In his view, lawyers are similar to actors. Both speak in old-fashioned language in traditional costumes on a stage while the audience never knows whether it is listening to a tragedy or a comedy. In any view, Denning is perfectly right. His comparison between law and theatre can be verified especially by taking a glimpse at the features of European copyright law. Therefore, let us look at the European copyright play.

Dramatic personae: The European Commission and the national legislators

The description of all plays traditionally begins with a dramatic personae, a list of figures involved in the play. Therefore, let me start with a short illustration of the institutions which take part in the development of a European copyright system.

National legislators

The essence of our play are legal roles set up by legislators. Up to now, copyright law has been governed by national legislatures. Each country has its own copyright acts, with different levels of protection and a bewildering range of divergent exemptions. It is common knowledge that these differences result from two different copyright traditions. The Latin countries follow the concept of the author's personality while the Anglo-Saxon countries have adopted the concept of the economic value of the copyrightable work. The differences between these systems centre around three main points:

- the Latin system emphasizes the importance of the author's moral rights, that is especially the right to oppose any undermining of the integrity of his work;
- the tradition in the Latin countries is to hold that unfair use of the work does not in any way detract from the rights accorded to authors;
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the standard of originality seems to be very high in Latin countries because of the fact that only works of literature and art are traditionally protected by copyright.

In a multimedia area, these differences in the legal regimes tend to become severe obstacles for the multimedia trade. Multimedia works are international works, leveraging the creativity of authors from many countries and being distributed worldwide. In the face of the internationalisation of the film market, copyright needs further harmonisation.

In the past, several attempts have been made to harmonise international copyright law. The first international convention was concluded in 1886, the Berne Convention for the Protection of Literary and Artistic Works. Even today, it is still the most important international instrument in the field of copyright law. However, the Berne Convention only gives a very broad legal framework. In addition, it has not been adapted to the needs of the twenty-first century. Therefore, I will not refer to the Convention and the WIPO as its guardian.

The European Commission

Instead I will introduce another person, Thomas Erom, the most important actor in the play. In 1987 this actor entered the stage: the European Commission. The Treaty of Rome establishes the European Economic Community aims to provide freedom for movement of goods and services within the Community. The Treaty guarantees freedom by prohibiting discriminatory actions between member states and the absence of national policies. The Treaty therefore bans all restrictions on free movement and all measures having equivalent effects. In addition, restrictions based on the existence of intellectual property rights are allowed and conversely, the exercise of these rights may depend on the laws enacted by the provisions of the Treaty.

Until 1991, the new actor remained mute. But then, a strange thing happened. He changed the story of the old play and finally forced all European Countries to take part in a new play he had written. In fact, the Commission has the legal competence to do so. The European institutions have regulatory tools at their disposal and can enact Community law: regulations and directives that have to be implemented by the Member States. Not only does the commission have the power, it also has the support of the audience to change the play. It is a very vivid and interactive audience which tries to give its vision, especially in the light of the information society. There are, of course, the lobbying organisations of authors and creative industries. Furthermore, there are holders of related rights: the performers, the producers of phonograms and film works, broadcasting organisations and the collecting societies.

Opposite to these groups, there are organisations representing the interests of users or consumers. Finally, there are totally new players, specifically involved in the multimedia context as the network operators and access providers. All these divergent groups are part of the fascinating new play entitled 'The European copyright law'.
Private International Law

In the paper, the Commission places the crucial question of private international law at the forefront. The question of the applicable law arises whenever a situation contains some foreign element. In a trans-national system like the information society the problem is especially acute, and special solutions will have to be found. The Commission proposes to set the parties duty to observe the national law of the country where the service originates.

This proposal is in no way dubious. Firstly, the parties of international contracts are not free to choose the relevant copyright law. In general, the parties' choice only applies to the contractual obligations. It does not apply to the transfer of rights necessary to fulfill these obligations. In this respect, the principle of territoriality has to be applied. Copyright laws are governed by the law of the state where the work is performed.

The Commission wants to replace this through the principle of the country of origin. But this alternative concept contradicts the Berne Convention where the principle of territoriality has been implemented. In addition, copyright is a question of national legislation. Therefore, the validity of copyright ends at the state border. Furthermore, the country of origin principle would lead to a different situation for publishers. Take for example a British publisher who wants to integrate Russian photographs, American music and French texts in a CD-ROM product. Now, the Commission wants to have to apply Russian, American and French Copyright law for the marketing of this product in Britain.

The Commission however refers to the EC Satellite Directive which is in its view using the country of origin principle. This is wrong. The EC Satellite Directive is not dealing with problems of private international law at all. As the Commission itself has declared in a position paper on the Satellite Directive, the Directive only contains principles on the interpretation of licence agreements as to the extension of the satellite rights. The problem of the applicable law may only be solved by establishing a principle of European territory (the so-called 'geographic principle').

Digital dissemination or transmission right

The Commission dealt with the transmission of works over networks, such as the Internet or CompuServe. With reference to the EC Directive on Rental and Lending Rights, it held that lending and rental rights may be applied by extension to these digital transmissions. This proposal is wrong. The Directive does not apply to the transmission of digital works, such transmission cannot be regarded as rental or lending. These terms are defined in the Directive with reference to copies in fixed form. The use of transient formats is not mentioned in the Directive. There has been a discussion in the Council whether the Directive should also apply to the so-called electronic rental or lending, that means video on demand. At the end, the Council refused the extension of the Directive to such methods of dissemination.

Some authors in literature still hold that the rental or lending rights might be applicable by extension to video-on-demand. But their questionable approach does only apply to video on demand as the transient equivalent to the rental of fixed-form videocassettes. It cannot be used as an argument for the extension of the rental right to any online service. Most online services provide information for an extended period of time that their services are equivalent to the selling of books and not to the rental of videocassettes. The classification of digital transmission as rental or lending, therefore, has detrimental consequences for publishers. According to the Rental Directive, public libraries are allowed to lend works without the permission of the rightsholders. If digital transmission has to be regarded as lending, public libraries would get a right to offer copies.
of a copyrightable work via online. This scenario is already a reality in Germany and has been forbidden by several courts as copyright infringement.

The US Working Group on Intellectual Property Rights has tried to find another solution. In their White Paper, published in September last year, they proposed that the distribution right can be exercised by means of transmission. I am not sure whether this is an adequate solution, at least from a European perspective. The distribution right traditionally refers to fixed forms and not to the transient dissemination of works. In addition, the distribution right is also linked to the doctrine of exhaustion which states that the right is exhausted when a copy has been made public. Applying distribution rights to online services implies the exhaustion of the distribution right. Everybody could take their Internet copy of a work and sell it everywhere in Europe.

These legal uncertainties have led to proposals for the introduction of a new right of electronic access or digital transmission.

Although the copyright laws of the EU member states are in general open for the establishment of new rights, the international copyright treaties refer to a traditional, restricted catalogue of rights. Thus, a new international treaty would be necessary for electronic rights including the use on demand. It would take a very long time to draft and settle such a new international treaty. The problem can only be solved by analogy. In my view, the regulations on communication to the public should be applied mutatis mutandis. Communication to the public and use on demand only differ technically. On the one hand, works are transmitted to a unlimited number of users; on the other, an unlimited number of users are allowed to access to a collection of works.

In both cases, the public gets the chance to use copyrightable works.

Neighbouring rights

Let us have a look at a third aspect of the Green Paper: the question of neighbouring rights. In the Green Paper, the Commission strongly insistence on an extension of neighbouring rights for phonogram producers. Holders of related rights ought to have an exclusive right to broadcast, rather than merely receiving equitable remuneration. I will not consider the adequacy of this proposal. It is more interesting to see that the Commission has forgotten a very important group of rightsholders, the publishers. In most European countries, a publisher is not protected qua publisher. He can only refer to his licence to the underlying works. If he is working as non-exclusive licensee, he has no direct rights of action against piracy. This is based upon the concept of the publisher laid down in the 19th century where the compulsory and marketing of written works has not been regarded as worth protecting in itself. The role of publishers has changed in the digital era. The electronic publisher has a creative role in compiling information and publishing it in forms suitable for network dissemination. These preparatory, logistic and technical efforts need a protection similar to that of producers. Authors are not the only people on earth worth protecting. As Charles Clark, has already stated, the electronic edition "will carry the fingerprint of the publisher in the same way as a work may bear the imprint of the personality of the author". In the face of the new century, the European copyright acts have to be amended in favour of the publishers as well.

One stop shopping

Finally, the Commission expresses its strong support of the concept of one stop shopping. In a digital era, it is in fact a necessity that collecting societies offer a voluntary copyright clearance system to facilitate access to works and other protected matter. Collective administration is justified wherever a right cannot be exercised practically on an individual basis. In general, multimedia and digital delivery of works requires a generalised and coordinated collective administration of rights. Otherwise, the user has to bear immense costs for finding the licensor. The rightsholders, especially writers and artists, are themselves often in a weak position where they cannot explain their rights without the aid of a collective society. Voluntary collective administration increases the payments to rightsholders at least in those cases where they have no bargaining power. Several collecting societies are already trying to extend their contracts with the rightsholders with regard to digitisation. The German collecting societies have established the "Clearing Center Multimediak" (CCM) which provides information on licences and tariffs for digital rights administered by collecting societies. I am not aware of British situation, but as a matter of fact, the British societies will have to charge their policy towards one stop shopping in the long run.

"There is a World Elsewhere" - Great Britain, Europe and the end of copyright tradition?

To summarise the main elements of the European Copyright Play: a play dominated by the European Commission. It will yet not be a play where each actor has the same role and the same words to speak. There will still be variety in copyright law and a strong emphasis on traditional sources of law, but the actors will, perhaps, wear clothes which look similar to a certain extent. Acting as a prophet I would describe these clothes as follows:

1. The multimedia industry will need a system of voluntary collective licensing, a system of one stop shopping.

2. The concept of "neighbouring rights" will need revision, especially with regard to publishers.

3. The problem of use on demand and electronic delivery of materials needs further consideration to the extent that the rules on communication to the public can be applied by analogy so that a new right of electronic access will be created.

All these aspects will of course change the British copyright system to a similar extent as the German one, but I hope that English lawyers are no longer afraid of acting on the European stage.

Four years ago, in 1992, Sir Thomas Bingham described the changing perspectives of English law in a remarkable essay. He reminded his English colleagues of the fact that there is a world elsewhere. He then described the nineties as this decade, "when England ceased to be a legal island, bounded in the north by the Tweed, and joined the mainstream of European legal tradition".

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