

POLICY REVIEW: TRENDS IN GLOBAL COPYRIGHT

1. The Berne Settlement (1886)

Norms of attribution and norms of copying have governed human communication throughout recorded history. They evolved into a formal body of rules recognisable as progenitors of Copyright with the appearance of Renaissance man and the invention of the printing press (ca 1450). The story can be told from multiple disciplinary perspectives: political science may locate the early regulation of printers' guilds (such as the London Stationers) in the context of censorship; economics may point to the incentive rationale of rules fostering creative production (cf. the English Statute of Anne, enacted in 1709 "for the encouragement of learning"; and the copyright clause of the US Constitution, 1787, promoting "the progress of science and the useful arts"); aesthetic theory may identify the emergence of the concept of Abstract Works in 18th century German Idealism, or the genius obsession of Romantic literary circles.

The modern settlement of Copyright Law derives from the Berne Convention of 1886¹. In the Berne Convention, the full value of "every production in the literary, scientific and artistic domain" is awarded to the author (in practice: successors in title, i.e. corporations). Translations, reproductions, public performances and adaptations remain under exclusive owner control for a term derived from the lifetime of the author, plus at least 50 years (in the US and the European Union where *post mortem auctoris* terms of 70 years are provided, this can easily amount to a copyright duration of 120 years).² Exceptions to exclusive rights are only permitted

¹ The latest version of the Berne Convention is the Paris Act 1971, as amended in 1979. The US acceded to Berne only in 1989. In 1994, the Berne Convention was integrated into the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), that is all 148 members of the World Trade Organization (as of 16 February 2005) are now bound by it. The exception is Art. 6bis, the unwaivable *droit moral* that was excluded at the behest of US negotiators following lobbying pressure from Hollywood. Art 6bis specifically protects the author's right to claim authorship (paternity right), and to object to changes that would be prejudicial to his honour or reputation (integrity right), even after the transfer of all exclusive copyrights. Thus the *droit moral* somewhat limits the freedom of corporations to exploit works without recourse to the author.

² The European Copyright term was harmonized to life plus 70 years with the 1993 Council Directive (93/98/EEC). The US Sonny Bono Copyright Extension Act (1998) extended the term by 20 years to life plus 70 years, or 95 years for "works for hire" (works created under employment by corporations, for example sound recordings). In Europe, sound recordings, broadcasts and performances are only protected as neighbouring or "related rights", that is for a term of 50 years from the end of year of the recording or broadcast.

[i] “in certain special cases”, provided that “such reproduction [ii] does not conflict with the normal exploitation of the work and [iii] does not unreasonably prejudice the legitimate interests of the author”, the notorious three-step-test (Art. 9(2) Berne Convention).³

User rights or freedoms are not independently conceptualized in Berne, nor is there any recognition that all creative activity draws on other cultural production. Berne works are self-contained and original, not derived from a common cultural domain.

Following Berne, the doors were open to adopt a purely technological perspective to the evolution of copyright law. Since the full value of copyright unquestionably should go to the owner, the advent of gramophone, radio, television, audio-tapes, video-tapes, photocopying, satellite, cable, computer and Internet technologies necessitated a string of copyright amendments, usually extending the scope of protection to a technologically unforeseen activity. Only where exclusive protection was deemed to be unenforceable, as for music performances and broadcasting, photocopying by libraries, cable re-transmission or in private copying, was a mechanism of licensing via collecting societies adopted in many countries.⁴

2. The technological reflex: WIPO Internet Treaties (1996)

In 1996, two Internet Treaties were negotiated under the umbrella of the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty, a special agreement within the Berne Convention; and the WIPO Performances and Phonograms Treaty. They provide a good example of the technological reflex in copyright law making. To re-call, Netscape’s Navigator browser had only been released in 1994 and the MPEG compression family for digital files was under development. Nobody had any clue how the Internet would eventually be used (cf. algorithmic search technologies, peer-to-peer networks, auctions). Still, on the Berne premise of full copyright value, information control remained the immediate option of choice. The time honoured strategy of simply extending the scope of copyright to cover a technologically unforeseen activity (i.e. Internet up-loads) was used again: “making available to the public ... in such a way that members of the public may

³ Note that under Berne, the three-step-test does only apply to the reproduction right. However, Art. 13 of the TRIPS Agreement (1994) and Art. 10 of the WIPO Copyright (Internet) Treaty (1996) make the test applicable to all copyright limitations and exceptions.

⁴ The principle of collective licensing is still “pay-for-play” but at a rate that is not negotiated individually. In effect, it substitutes owner exclusivity with a right of remuneration.

access these works from a place and a time individually chosen by them”, a new exclusive right (Art. 8 WIPO Copyright Treaty)⁵. In addition, an entirely new provision was drafted, protecting the technology that might protect the new exclusive right: circumvention of copy-protection measures (Art. 11) and tampering with rights management information (Art. 12) would become illegal, regardless of purpose and function.⁶ There is also a general clause on the “enforcement of rights”, insisting on laws permitting “effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement.” (Art.14)⁷

The US Digital Millennium Copyright Act (DMCA 1998) implementing the WIPO Internet Treaties responded by creating draconian criminal measures, covering not only commercial competitors but also consumers. European translations of the Information Society Directive (2001/29/EC) into national laws similarly increased criminal sanctions, for example in the UK where a prison sentence of up to two years is threatened for circumventions or communications to the public that “affect prejudicially” the copyright owner’s interests.⁸

In summary, these are the three pillars of digital copyright law, as it is taking global shape:

- (i) extended exclusive rights
- (ii) technological locks
- (iii) consumer sanctions

3. Current policy issues

The negotiation and implementation of the WIPO Internet Treaties was controversial. Perhaps they mark a high water mark of copyright control. An attempt by WIPO to negotiate a new broadcasting treaty “for the digital age” (broadcasts were left out of

⁵ Also Arts. 10 & 14 WIPO Performances and Phonograms Treaty.

⁶ Also Arts. 18 & 19 WIPO Performances and Phonograms Treaty.

⁷ Also Art. 23 WIPO Performances and Phonograms Treaty. The concept of sanctions that are effective, proportionate and dissuasive is taken from Art. 41 of the TRIPS Agreement.

⁸ Sections 296ZB and 107(2A), UK Copyright, Designs and Patents Act 1988 (Copyright and Related Rights Regulations 2003 SI 2003 No. 2498, implementing the Information Society Directive). Note that in some countries (e.g. Canada and Germany), using file sharing services may be permitted as private copying (as a levy on carriers and equipment is processed through collecting societies).

the 1996 Internet Treaties) is making little progress. Countries of the South, led by India and Brazil (and supported by Western consumer groups), have at last adopted a more assertive stance.⁹ Internationally, there is clearly a backlash against the provisions of digital copyright, although the agenda remains dominated by American and European entertainment and software industry interests. In the following, I summarise briefly some recent developments from the US and the EU.

In the US, tensions may have eased slightly as Apple's iTunes record store is proving that legitimate Internet distribution could make money if the service was right. Prosecuting alleged pirates therefore is slipping down the policy agenda, and proposed legislation (for example, introducing liability for "inducing" copyright infringement; or forcing ISPs to routinely turn over user information) is unlikely to make it to the statute book.¹⁰

Of great interest is a current case taken by the US Supreme Court: *MGM v Grokster*, an attempt by 28 of the world's largest entertainment companies to set a precedent against P2P technology. In 2004, the 9th Circuit Court of Appeals had ruled that Grokster, a file-sharing network, was not responsible for copyright infringement by its users, confirming the 1984 Supreme Court decision ("Sony Betamax" case) that a distributor of a copying tool (such as a video recorder) cannot be held liable for users' infringement if the tool is capable of "substantial non-infringing" uses (e.g. time-shifting).

In Europe, a review mechanism was built into the Information Society Directive, examining the application of the new legislation every three years "in the light of the development of the digital market" (Art. 12). This process is currently under way with a consultation also including the five "first generation" Directives of EU copyright law (91/250 Computer Programs; 92/100 Rental/Lending Right; 93/83 Satellite and Cable; 93/98 Term of Protection; 96/09 Legal Protection of Databases).

⁹ Contrast WIPO's optimistic press release of 22 November 2004 (http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_400.html) with first hand accounts of participants: (<http://www.ipjustice.org/WIPO/release20041118.shtml>). Significant is also an attempt by countries of the South and various civil society NGOs to force WIPO to incorporate development objectives into all its activities (<http://www.cptech.org/ip/wipo/futureofwipo.html>).

¹⁰ Following *RIAA v Verizon* (US Supreme Court, December 2004), a cheap one-page *sub poena* procedure under Section 512 of the DMCA cannot be used to force ISPs to reveal copyright infringers. On liability for inducing infringement, Senators Hatch, Leahy, Daschle and Frist unsuccessfully introduced the Induce Act, S. 2560 in the last session of Congress.

Recital (3) of the Information Society Directive acknowledged fundamental principles of law, “especially of property, including intellectual property, and freedom of expression and the public interest.” However, the current review does not undertake a principled re-examination of the effects of digital locks on freedom of expression and public interest (underpinning the traditional copyright exceptions that can now be technologically prevented by the right owner). Instead, there is some limited fine-tuning of inconsistent wordings of little consequence (for example introducing a temporary reproduction exception for computer programs).

The review also has given an opportunity to the record industry to ask again for an extension of the term for sound recordings and performers rights to the US level of 95 years. The consultation paper of the Commission indicates that this demand is likely to fall on deaf ears: “It is feared that an extended term of protection would only diminish the choice of music on the market by enforcing the flow of revenues from a few best-selling recordings, while at the same time not providing any real new incentives for creation of new recordings or motivating new investment... Some would even argue that the term should be reduced”.¹¹

These are refreshing sentiments that should be applicable to other provisions. Interesting to watch will be the response of the Commission to the review of the 1996 Database Directive that created a *sui generis* right for unoriginal compilations of facts that were the result of “substantial investment” (the review report is three years overdue, and announced for summer 2005). European database laws, protecting for example telephone directories and sports fixture lists, evidently have failed to increase Europe’s competitive position compared to the US where such a sweeping right does not exist (cf. 1991 *Feist* decision of the Supreme Court, rejecting copyright protection for sheer effort or “sweat of the brow”).¹²

The last issue where there is European policy movement is the area of collective administration. From the perspective of Berne, copyright collecting societies are often seen as operating for the benefits of right holders only: Where the transaction costs of individual licensing are too high, it appears advantageous for copyright owners to

¹¹ Commission Staff Working Paper “on the review of the EC legal framework in the field of copyright and related rights” SEC(2004) 995; p. 11

¹² In a recent landmark decision, the European Court of Justice (*British Horseracing Board v William Hill*, November 2004) already has narrowed the protection of databases under the Directive.

inject exclusive rights into a collective organisation that monitors use, issues licenses and distributes royalties to its members. Almost inadvertently, collective licensing also can deliver important user benefits. A radio station, for example, gets easy access to the world repertoire of music; libraries may offer generous dissemination arrangements. However, troubles start here. Market prices for these licences cannot form; royalty distribution is contested between authors and investors (such as publishers); bureaucratic overheads are high. In short, governance of these societies is a nightmare. The European Commission is drafting a Directive on “the management of copyright”, while some academics in the US and Europe have promoted collecting societies as a solution to digital downloading.¹³ This is a difficult but important policy arena.

4. Summary

Legislative pressures are likely to persist regarding:

- Piracy
 - Liability of consumers (up-loading, down-loading, participating in file-sharing services)
 - Liability of Internet Service Providers (ISPs); liability of file-sharing services
- Fair use
 - Conflicts between digital rights management (DRM) and copyright exceptions
 - Transformative use (sampling, mixing, adapting)
- Artists’ earnings
 - Copyright contracts
 - Collecting societies

I believe there is an opportunity to influence copyright policy to become more permissive (in encouraging critical and transformative use), and more equitable (in recognizing the different interests and needs of creators and investors). The more ambitious goal, abandoning the Berne paradigm and conceiving copyright law as part of innovation policy in culturally diverse societies, may be harder to reach. Lawyers are likely to tell you that it is impossible to re-negotiate the Berne Convention

¹³ Communication from the European Commission on *The Management of Copyright and Related Rights in the Internal Market* (COM(2004) 261 final). In his recent book *Promises to Keep: Technology, law and the future of entertainment* (2004), Harvard professor Terry Fisher proposes a government administered reward model for the digital distribution of music and films.

without collapsing the global trade structure. Be that as it may. International law has its own logic, but over longer periods it tends to respond to the political imperative of the possible. We all have a part to play here: in archiving our papers on-line; in supporting alternative digital engagement and distribution schemes; and in alerting policy makers that copyright rules matter.

For anybody seeking copyright policy information beyond the headlines, there are some excellent websites:

Consumer Project on Technology: www.cptech.org

IP Justice (civil liberties NGO): www.ipjustice.org

EDRI (digital civil rights in Europe): www.edri.org

Electronic Frontiers Foundation: www.eff.org

References to academic literature, and some of my papers can be found on the website of the Centre for Intellectual Property Policy & Management, Bournemouth University (www.cippm.org.uk).

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