Intellectual Property and Copyright Law in the European Union: a bird's eye view

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This article traces the evolution of copyright law within the European Union, and highlights some of the problems.

In 1950, Lord Denning gave a remarkable lecture in Stratford-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 my 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.

Dramatis personae: The European Commission and the national legislators

The description of all plays traditionally begins with a dramatis 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 rules set up by legislators. Up to now, copyright law has been governed by national legislators. 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 emphasises the importance of the author's moral right, 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 salaried status does not in any way detract from the rights accorded to authors;

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the standard of originality tends 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 international trade. Multimedia works are international works, integrating the creativity of authors from many countries and being distributed worldwide. In the face of the internationalisation of the rights market, copyright needs further harmonisation.

In the past, several attempts have been carried out 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, the most important actor in the play. In 1957 this actor entered the stage: the European Commission. The Treaty of Rome establishing the European Economic Community aims to provide freedom for movement of goods and services within the Community. The Treaty guarantees this freedom by prohibiting concerted practices between undertakings and the abuse of dominant positions. The Treaty therefore bans all restrictions on free movement and all measures having equivalent effects. Prohibitions and restrictions based on the existence of intellectual property rights are allowed and conversely, the exercise of these rights may depend on the bans 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 'laws': 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 raise its voice, especially in the light of the information society. There are, of course, the lobby 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 the 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 - a play in five acts and one long epilogue'. Open the curtain.

First Act: Directive 91/250 on software protection

The first act leads us to the software protection directive of May 1991. We must take into consideration that software is the fundamental component of the information superhighway. In addition, it has been the first digital product; thus rules on software protection are prototypes for any copyright regulation in the new digital era. The Software Directive provides that computer programs are now protected by copyright as literary works. Through the Directive, the member states have harmonised the exclusive rights conferred on the right-holder of software. The directive also defines acts which are necessary to the use of a program and which may be performed without authorisation.

Second Act: Directive 92/100 on rental rights

Eighteen months later - the second act. In November 1992, the European Council adopted the Directive on rental rights. The Directive establishes exclusive rental and lending rights for all works and all matter protected by copyright. Member states are required to make

provision for a right to authorise or to prevent the rental and lending of originals and copies of copyrightable works. 'Rental' means making available for use for a limited period of time. The rental right belongs:

- to the author in respect of the original and copies of the author's work,
- to the performer in respect of fixations of the performance,
- to the phonogram producer in respect of the phonograms, and
- to the producer of the first fixation of the film.

The rental rights may be transferred or assigned, or subject to the granting of contractual licenses. Pursuant to the Directive, authors or performers have an unwaivable right to receive equitable remuneration. The administration of this right to obtain equitable remuneration may be entrusted by authors or performers to a collecting society. The member states may regulate whether and to what extent collecting societies may administer the right. The rental right is without any prejudice to any public lending rights provided for in any legislation.

In the past months, all member states have engaged in implementing the Directive. They all had similar problems with the implementation. For instance, it remained unclear whether the right to administer an author's rental right can be transferred under a copyright assignment. In addition, it had to be decided how the equitable remuneration mentioned in the Directive is to be calculated. Finally, the question of assertion is still open. According to the Directive, the rights to equitable remuneration will apply in contracts entered into before 1 July 1994 only where authors or performers or those representing them have submitted a request that it should apply before 1 January 1997. It will be important to determine who has the right to submit the request, and who has the right to receive the income.

Third Act: Directive 93/83 on satellite and cable transmission

The third act deals with the difficult problems of cross-border satellite broadcasting and cable transmission. Because of different national rules of copyright it was unclear whether several national laws should be applied cumulatively to one single act of broadcasting. The Directive has implemented new rules for this case. These rules are not only relevant to the film sector. As I will prove later on, the Commission tends to apply the regulation on satellite and cable transmission to online services. According to the Commission, communication to the public by satellite occurs where the programme-carrying signals are introduced under the control or responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth. Normal technical procedures relating to programme-carrying signals are not considered as interruptions to the chain of broadcasting. The directive requires member states to provide that the author of a copyright work will have the exclusive right to authorise or prohibit communication to the public by satellite. In addition, the member states have to ensure that copyright owners may grant or refuse authorisation to a cable operator for cable retransmission of a broadcast only through a collecting society. This concept of collective licensing is important for my further considerations on digital rights.

Fourth Act: Directive 93/98 on harmonising the term of protection of copyright and certain related rights.

The fourth act is related to the question of time. The legal protection of the works and services can only be harmonised where the term of protection is the same throughout the whole of Europe. The Terms of Protection Directive of October 1993 establishes a high level of protection where copyrightable works are protected for seventy years after the death of the author, and related rights for fifty years after the termination of the service. The terms of protection apply to all works still protected in at least one member state on 1 July 1995. If a work protected in one member state is no longer protected in another, the Directive allows that work to be protected again in the latter country by reviving the monopoly of exploitation. The Directive reserves acts of exploitation

completed before the date of entry into force, and member states must take the necessary measures to protect rights acquired by third parties. It is likely that the implementation of these provisions will change the conditions for the exploitation of certain works, such as, for example, a multimedia product incorporating works that were not protected when first marketed on CD-ROM.

Fifth Act: The Directive on the legal protection of databases

The fifth and final act is still going on. It is the act in which the Commission wants to establish a common standard of protection for databases. In July 1995 the Council of Ministers reached a common position on a future directive on database protection; the European Parliament has accepted this position in December with minor changes. This regulation will be applicable to any collection of information, either automated or non-electronic. These collections can be protected by copyright where they represent the personal intellectual effort of their author. This standard of originality may yet be interpreted in the member states, especially by German courts, in a way that most databases will be excluded from copyright. Therefore, the Commission has established a new economic right to protect the substantial investment by a database maker. A database can often only be created with a high investment of human, technical and financial resources. At the same time, electronic databases can be copied at a much lower cost than that of their development. Therefore, the European Commission introduced a sui generis right against extraction and re-utilisation. The right applies to the whole or a substantial part of a database. The protection will last for fifteen years, and that period may be renewed if there has been substantial new investment. The Directive defines exceptions which are generally limited to the right of extraction. Since sui generis right is not only covered by existing multilateral conventions upon the subject, it is not subject to the national treatment rule.

Coming from Germany, I do not, of course, like the idea of this sui generis right. In my view, the limits of this rule are unclear. The sui generis right refers to the extraction or use of a substantial part of a database without stating which parts are substantial. Furthermore, the right will revive with each investment made by the database producer; it is likely to become an eternal right. Finally, the new right creates monopolies in information which has been a common heritage of mankind. Take for instance the Dow Jones Index. This Index contains a collection of information on the stock exchanges and it can therefore be classified as a database. According to the Directive, the actual Dow Jones Index is protected against extraction and re-utilisation for fifteen years. So, if you want to use the Dow Jones Index, you have to ask for permission. Otherwise, you have to prove that you have calculated the Index yourself.

Epilogue: The Green Paper on 'Copyright and Related Rights in the Information Society'

Well, this is the play written and performed by the European Commission. Five acts - future acts are in preparation, such as a new directive on private copying. But what do you think about this play? If you were a theatre critic, you would say that it has been a poor performance. Of course, the Commission's interpretation of copyright had individuality in it, and offered a sufficient contrast to the indifference displayed by the national legislators towards the needs of the European market. However, the limits of the stage did not permit any large spectacular effects. The play represented a trifle of little substance but lively and in key, and full of good lines and diverting situations. Up to now, only a few, singular problems have been solved, but the main line, the red thread, namely a European reform of copyright in the face of the new digital millennium, is missing.

In July last year however, the European Commission published its *Green Paper on Copyright and Related Rights in the Information Society*, the first attempt to present a new concept of European copyright law. I will not present all the details of this very comprehensive paper. Instead I will describe some matters which may be of interest to you.

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 wherever a situation contains some foreign element. In a trans-frontier system like the information society the problem is especially acute, and special solutions will have to be found. The Commission proposes to let the parties choose the applicable law by contract. If no contractual choice has been made, "the applicable law ought to be the law of the member state from which the service originates."

This proposal is in my view 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 fulfil these obligations. In this respect, the principle of territoriality has to be applied. Copyright problems are governed by the law of the state where the work is or shall be used. Now, 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 disastrous 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. Up to now, he only has to consider British law if the CD-ROM is going to be distributed in Britain. According to the Commission, the publisher will 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 (lex loci Europeani protectionis). To the extent that the national copyright acts in the EU member states have been harmonised, the rightholders enjoy the same rights in every member state. Therefore, it does not matter in practice that the applicable copyright system depends on the national law.

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[1], 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 format. 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 held that the rental or lending rights might be applicable by extension to video on demand. But this questionable approach does only refer to video on demand as the transient equivalent to the rental of fixed-format videocassette. 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 unlimited period of time; 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 would, too, have 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 formats 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 where a copy has been made public. Applying distribution rights to online-services implies the exhaustion of the distribution right. Everybody could take his 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 acts 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 an 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 insists on an extension of neighbouring rights for phonogram producers. Holders of related rights ought to have an exclusive right to broadcasting, 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 publishers laid down in the 19th century where the compiling and marketing of written texts 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 next 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 licensors. The rightholders, especially writers and artists, are themselves often in a weak position where they cannot exploit their rights without the aid of a collective society. Voluntary collective administration increases the payments to

rightholders at least in those cases where they have no bargaining powers. Several collecting societies are already trying to extend their contracts with the rightholders with regard to digitalisation. The German collecting societies have established the 'Clearing Center Multimedia" (CCM) which provides information on holders and tariffs for digital rights administered by collecting societies. I am not aware of the British situation, but as a matter of fact, the British societies will have to change 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; s 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 or 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 the decade, "when England ceased to be a legal island, bounded in the north by the Tweed, and joined the mainstream of European legal tradition".

Reference

1 *Official Journal of the European Communities*, Legislation and Competition, 1992, L/346 (27 November) p.61