

EDWARD HUMPHREYS (ed.)

International Copyright and Intellectual Property Law

Challenges for Media Content Producers

Media Management and Transformation Centre



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International Copyright and Intellectual Property Law: Challenges for Media Content Producers
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Foreword

Copyright and related rights are central factors in media businesses and, in many cases, represent the largest assets of firms. Globalization and digitalization have increased the means of exploiting those rights, but those factors have simultaneously produced threats to the abilities of companies to financially benefit from their content.

Recognizing the importance of international law on the subject, the Media Management and Transformation Center (MMTC) organized an invitational summit on the topic in Stockholm during October 2007. It brought together leading intellectual property scholars, policymakers, and company experts to explore contemporary issues and challenges involving copyright and related rights.

This book includes presentations and summaries of discussions held during that meeting. It is edited by Edward Humphreys, a lecturer in commercial law and intellectual property at Jönköping International Business School and a researcher in MMTC. He is a solicitor in the United Kingdom, holds a postgraduate diploma in intellectual property law and practice, and has practiced law in the fields of intellectual property, e-commerce and commercial contracts.

The Media Management and Transformation Centre is Europe's leading centre for media business studies and offers doctoral studies and research fellowships, conducts research projects funded by industry associations, governmental organizations and foundations, and hosts conferences and workshops for researchers and media personnel that are designed to improve knowledge and understanding of media business issues.

*Prof. Robert G. Picard, Director
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Introduction: International Copyright and Intellectual Property Law – Challenges for Media Content Producers

Edward Humphreys

The interaction between national and international laws, and the realities of contemporary global trade in media content in a predominantly digital environment, raise challenges, uncertainties and opportunities for media companies. When it comes to licensing, protecting and enforcing copyright and other intellectual property rights, media companies and their advisers need to understand and make use of not only national but international legal rules – a far from simple task. Legal analysis and application becomes a multi-layered process, in which the law needs to be seen in terms not only of its content (and gaps), but also its context in policy, economics and varying legal systems and traditions.

The chapters in this book offer a variety of perspectives on the relevance of international copyright and other intellectual property regimes to media businesses. What do these international rules mean in reality, how are they taken into account in national systems, what challenges do they pose, and what sort of future development are we likely to see? The answers to these questions address the implications for media businesses and how these businesses can benefit from their content production in the international arena.

The book is comprised of papers and transcripts of talks delivered at a symposium of the same name which took place in Stockholm, Sweden in October 2007. The symposium, organised by the Media Management and Transformation Centre and the Institute of Foreign Law at Jönköping International Business School, Jönköping University, gathered together speakers from across Europe representing legal practice, academia, policy-making and media content production and distribution. The book, reflecting the symposium, is divided into two main themes: the extent to which national laws comply with international treaty obligations and how this affects media companies; and the effect which international law and policy has on international media trade.

The first of these themes is discussed in the context of the UK and Sweden. In the former case, the question taken up for discussion by Jeremy Phillips is whether the UK properly complies with the Paris Convention requirement for a law of unfair competition, when it has no law of that name – and what are the implications of the position for media businesses. There then follow four chapters looking at the position of Sweden and at why that nation's copyright laws and social traditions have attracted media attention in recent years amidst suggestions that it represents some kind of 'Deadwood' – a safe haven for illegal file-sharers. Jan Rosén addresses this last point by specifically asking whether Sweden really is such a place. Monique Wadsted and Kristina Lidehorn then discuss the respective positions of international media companies and local creators in Sweden. The last chapter on this theme records a debate between these three speakers, joined also by Johan Axhamn, on the overall 'Swedish question' and its effect on media content production and distribution.

The second theme takes a naturally broader international perspective. Gillian Davies discusses the historical development of the key international treaties in the field, and how they impact on national interpretation – in particular in the UK, France and the USA. I then identify some of the varying specific interpretations of one of these treaties – the Berne Convention on copyright – in the context of the highly successful and growing trade in international television programme formats, and look at the effects this has for format producers. Dimiter Gantchev from the World Intellectual Property Organization adds a wider perspective on the policies and economics behind and potential development of these treaties, before the book concludes with Martyn Freeman of BBC Worldwide presenting a picture of the broad, varying and changing legal environment in which an international content producer trades and some of the implications of these changes.

As a book addressing legal issues, it should perhaps be emphasised that these chapters reflect the position as seen by the authors as at 26 October 2007, except where specific updates have been noted in the text.

**SECTION I:
NATIONAL COMPLIANCE WITH
INTERNATIONAL OBLIGATIONS**

I. Compliance with international treaties: does the United Kingdom have or need a law of unfair competition?

Jeremy Phillips

This chapter is an edited transcript of the talk that Jeremy Phillips delivered to the symposium on International Copyright Law on 26 October 2007

Introduction

I am talking about compliance with international treaties: does the United Kingdom have or need a law of unfair competition? This looks, *prima facie*, like a subject that does not have anything at all to do with copyright and media – and to some extent that is fair comment. It is a broad topic, but I am going to throw out one or two ideas about why, perhaps, unfair competition is a more important subject than many people appreciate – particularly for the United Kingdom – and to look at a few ‘what if’ scenarios. We can try to exercise a little imagination as well as simply talking about what has actually happened, and see if we can’t throw up a few interesting ideas that we can go away and think about and launch some dissertations and theses at a later stage.

The paper will cover bits of law, bits of policy, bits of practice, and will look at the psychology of ‘judicial legislation’, and I think it will unearth some interesting perspectives.

The agenda for today, to give you a brief idea, is: first to say a little bit about what on earth unfair competition law has to do with copyright at all, then to ask the question which has raged within the United Kingdom in recent years as to whether unfair competition law is actually a good thing or a bad thing. Then, putting the horse back before the cart again, to ask what actually is unfair competition: where does unfair competition law come from, do we have unfair competition law in a legal sense, and who says what unfair competition law is? I will then look at the various attempts that have been made in the United Kingdom just to establish what is and what is not unfair competition law. Then I am going to give you an insight – along the lines of the film *Being John Malkovich* – from inside the head of Lord Justice Jacob, to try to view the world

as one particular judge sees it. Finally we are going to take a little look at the perspectives of innovators – people that create markets and opportunities; their competitors – the people who say, ‘hey, that’s a good idea – if they are doing it, we should be doing it too’ (and of course the European Commission is going to agree, that if somebody is doing something well then you ought to have at least one competitor); and parasites – people who ‘hang on’ to business ideas which are not theirs and try to exploit them unfairly. We are going to see how each of these groups would respond to the notion of unfair competition – and this is on the basis that, whether you have unfair competition law or not, the same people always tend to win all the same battles in the same situations because people do not tend to sit back and think ‘hey, there’s an unfair competition law, I can’t do unfair competition any more’. What they actually say is: how do I make sure that despite the law my business can make a profit?

Does unfair competition have anything to do with copyright?

So, the first question is: does unfair competition have anything to do with copyright? Historically, yes. In the United Kingdom, the copyright law of 1709 (or 1710, depending on how you count the years) was a response to effectively an unfair competition plea. In the days when there was only one medium – and that was print – we had an organisation in England which was a guild of publishers, called the Stationers’ Company, and their principal authors were great bestsellers. Most of them wrote in Latin, so they could get a good edition out of Cicero’s speeches or something like that, and copyright for authors just was not an issue. But what the publisher wanted to make sure was that if they were spending time and effort setting, printing and publishing a particular dead author’s work then no member of the same guild could come along and use the same work in publishing its own work. That worked very nicely, until some bright publishers in Scotland got the idea that they, who were not members of the guild, could print dead authors’ works themselves. They did not have to worry about the restrictive practices down in England, and they could print the cheaper works and then sell them into England. The publishers therefore decided that they needed help and protection. The response of Parliament to this was quite interesting: they did not take the view that this was unfair competition, because you have gone to the trouble of establishing a medium and putting works through that medium; they said, what about people who write: in fact they are entitled to something as well. So we can see that, if we go back to the beginning of our copyright laws, we saw an element of unfair competition law lurking in there: it was business versus business, rather than author versus business.

And theoretically there is a strong connection between unfair competition and copyright. If you look at the way in which we analyse ‘restricted acts’ in

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copyright – things which you are not supposed to do when somebody else has got a right – then lots of these things we are looking at are types of free-riding, taking unfair advantage of something, even in a situation in which the person who owns the copyright may not themselves be suffering as a result of what that action. And legally, if you look at the three-step test for defences to infringement, the notion that a copyright owner has a reasonable expectation arising from the fact that he owns the copyright – he is going to be able to get something out of it – indicates that he has a right, not only in his work, but in the expectation that that work will bring him in something, and that is protected too.

So we can see that there are a few points of contact, although nowadays it is not so easy to see exactly where those points of contact actually are between unfair competition as a concept and copyright law as a set of clearly-established laws.

Is unfair competition law a good or a bad thing?

Why unfair competition is the best thing since sliced bread

We can see that there are three big reasons for why unfair competition law is the best thing since sliced bread. First, and this is the English view, almost every other European country has a law of unfair competition: some have it as a civil edict, some have it as an Unfair Marketing Act, but they have all got a basic concept of a law which traps and delegitimizes certain actions which may not specifically be caught by legislation. If you are running a multinational company, or at least a European-wide company, you want to know that the same unfair act is going to be legitimate or illegitimate in every country, and knowing that there is at least a law which can trap these acts and that you are potentially able to get a remedy against it in every country is a good thing.

Secondly, it enables the courts to achieve justice in every individual case. Unfair competition, by definition, only makes unauthorised acts which are unfair. Therefore acts which are fair are not going to be covered by it. This is something to turn to later.

And unfair competition does not have that arbitrary notion to it. With copyright, trade marks and patents, either you are an infringer or you are not infringing: it does not matter whether you have a particularly strong moral justification for doing it or not, or a genuine legitimate business reason for doing it – the law defines whether what you are doing is lawful or not. There is a moral basis to unfair competition: it de-legitimises certain types of business conduct – it says these types of business conduct are just not right.

Why unfair competition is the worst thing since sliced bread

Now we have seen three reasons why competition law is good; let us look at three reasons why unfair competition law is bad. And you can see that there is a remarkable similarity between them.

Looking through English eyes, every country has a doctrine or a law of unfair competition, but every country seems to have different provisions or different parameters. Some people say that acts of unfair competition are a subset of intellectual property infringement and if you look at people suing in court they tend to allege copyright infringement *and* unfair competition, or trade mark infringement *and* unfair competition; whereas other countries take the view that it is only going to be unfair competition if it *is not* covered by intellectual property rights. And certain countries have broad notions of unfair competition that include things like giving free samples of grown-up goods to children to induce them to become customers, which would not fit within an English notion of unfair competition at all. So what you have done is not produce a general impression of whether or not a certain type of act is stopped; what you have produced is a general type of uncertainty.

Secondly, it enables the courts to achieve justice in every individual case. This is terrible, because you do not know whether an act is going to be an act of unfair competition or not unless you go to court. And what you want, ideally, is a law which tells you in advance what you can do and what you cannot do, rather than a law which says 'sue first, and then we'll tell you whether you can do it or not'. This is unlike intellectual property laws which are clear, which have got restricted acts which are spelled out: you can't do this, you can't publish, you can't transmit.

Thirdly, do not tell me that it is a good idea to have a law which is based on a firm and unassailable moral basis, because commercial morality changes from generation to generation. The notion of what one business should be able to do, to or in respect of another, is not something that is objectively verifiable. Morality is a place of shifting sands in which you can sink.

So this is the basis for which at least part of the debate about unfair competition continues in the United Kingdom.

What is 'unfair competition law'?

The Paris and Berne Conventions

The Paris and Berne Conventions¹ are the two twin pillars on which intellectual property protection is built. The Berne Convention, which deals with the

¹ The Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886)

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protection of literary and artistic works, does not actually say anything about unfair competition. It was left to the Paris Convention, which deals with industrial property rights – patents, signs, trade marks – to put in a provision regarding unfair competition.

Paris Convention, Article 10 bis: Unfair Competition

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

- 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;*
- 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;*
- 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.*

And what it says, in Article 10bis is a lovely catch-all: ‘any act of competition, contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition’. That is incredible: it would capture all acts of free-riding, all siphoning-off of other people’s media, techniques – it looks like an absolutely fantastic provision. But because it is in the Paris Convention and not in the Berne Convention, it looks as though it is to do with industrial property and not artistic property. It gives examples: acts which cause confusion, false allegations, acts which are liable to mislead – and in each case the examples of acts of unfair competition are unfair because they change somebody’s state of mind, not because they are objectively unfair in commercial terms. So the fact that unfair competition ended up in the Paris Convention rather than the Berne Convention is crucial in our way of looking at it.

Why Paris, not Berne?

Why did it end up in Paris and not Berne? I don’t know, but I have a few possible suggestions. The lobbyists behind the two conventions had different aims. The Berne Convention was inspired by articulate authors such as Victor Hugo, who were looking at particular types of wrong between commercial enterprises and authors, rather than looking at a commercial world in which people tried to take advantage of each other’s businesses.

I think there was also a failure to appreciate the potential relevance of unfair competition in respect of technological developments which had not yet occurred. So in the 1880s, if you were a writer or something of that ilk, your principal way of getting money was from people buying copies of your work. The idea of cable transmissions, satellite distribution, internet distribution, CDs, DVDs, getting it on your phone, just had not cropped up at that stage.

And it is also possible that some of the countries which were signatories to the Paris Convention were already using their own civil law provisions in relation to unfair competition as 'stop-gaps' to plug deficiencies in their own industrial property laws and therefore it seemed a natural way to continue. But this is just speculation.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) is very important because, when I ask English audiences, 'are we actually obliged to have an unfair competition protection in the United Kingdom because of Article 10*bis* of the Paris Convention?', they look at me blankly. It may be that they have not read it at all. I ask them, 'was it on any of your syllabuses?'; no hands ever go up. So I ask, 'are we actually bound by TRIPs?' and I get a sort of awkward silence.

Now, we are doubly bound by TRIPs: it is something to which not only the United Kingdom but all the member states of the European Union subscribe to individually, as well as the European Union in its own right. And one of the obligations that we have under TRIPs is to implement, in our own national jurisdictions, the substantive provisions dealing with protection of copyright and industrial property under the Berne and Paris Conventions. This means, if I read the documentation correctly, that we are actually required to have a protection against unfair competition. And the European Court of Justice has said on at least three separate occasions that the substantive legal provisions of TRIPs are effectively part of the law of the European Union. So I think it is something that, in the fullness of time, we are going to have to take much more seriously.

Two particular articles of TRIPs are relevant:

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

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Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

European Union law

From a quick look at European Union law we can see that we have various pan-European, harmonising laws which appear to create a notion or to support a principle of unfair competition, but we do not have anything which really hits the nail on the head – which says ‘this is our law of unfair competition’ outside of intellectual property rights. We have Directive 97/55/EC on misleading advertising, which includes comparative advertising, and it lists certain acts which if they are misleading and not honest commercial practices shall be unlawful, but it does not say that things which are contrary to honest commercial practices which are not misleading commercial practices shall be unlawful. Then we have Directive 2001/29/EC on harmonisation of aspects of copyright in the information society, which has all sorts of provisions which have a flavour of unfair competition. An interesting example is Article 6 which prohibits various forms of interference with technological protection measures because they facilitate and enable unfair competition, but it does not actually say ‘thou shalt not commit acts of unfair competition’.

We also have – which sounds more promising – Directive 2005/29/EC on unfair commercial practices, signed by the European Parliament and the Council on 11 May 2005. It aims at enhancing consumers’ rights and boosting cross-border trading by harmonising divergent national rules on business-to-consumer commercial practices and outlines certain ‘sharp practices’ which will be prohibited throughout the EU, and touches on things like pressure selling, misleading marketing and unfair advertising. It looks at this more from the point of view of regulatory control rather than from the point of view of giving a business an enforceable right against somebody else who is competing unfairly with it.

The UK experience – what does unfair competition mean to the British?

United Kingdom law

In terms of United Kingdom statute law there is nothing: no unfair competition act, or statutory rules hidden away. We have a country with a huge volume of legislation, growing rapidly, but we are reluctant – despite our

passion for legislation – to legislate into English law basic principles which other countries seem to be happy to do. The history of moral rights protection for authors is a case in point. For years and years we said that since we had signed the Berne Convention and the UCC² we protected the moral rights of the author – but if you looked at English law you would not find it anywhere. Although we protected against defamation, for example, there was not actually a proper right – and even now there is arguably no proper right – of protection of moral rights of the author. Another example is privacy: most countries are happy to say that they will have a right of privacy, and they call it a right of privacy; we have lots of different rights which, if you add them up together, look quite similar to a right to privacy, but we do not actually do that.

But in the United Kingdom what we do have is a tremendous tension; battles which go on through case law. The case law of England and Wales is developed on a case-by-case basis, and we have what is effectively judicial legislation. Traditionally, we protected parts of unfair competition through the regular law of passing off – which embraces situations where you made your business look or sound like somebody else's. In other words, unfair competition can be restrained or remedied when a competitor's misrepresentation, by deceiving consumers, damages another's proprietary goodwill.

We extended that a little bit to cover situations in which you are making the subject of your business like somebody else's, even though you are not suggesting that your business is theirs. This embraces situations in which a competitor's misrepresentation damages the shared goodwill in a protected name or even a generic term.

And we have also protected businesses against malicious falsehoods, which covers trade libels, but these are rare events and are of little real-world significance. This applies when you say that somebody else's business or their products are rubbish and that if you take them that they will kill you, even though that might not be the case. But that is as far as, in general, we have got. (As for Scotland, this has a civil law system, which is in some respects closer to that of continental Europe than to England, but it hasn't developed a stand-alone tort or 'delict' of unfair competition as far as I can establish.)

What our common law does teach us is this: our own case law is not incapable of further development. The courts themselves have recognised that situations crop up in which the law has to address problems which statute does not. A lot of people like case law: the judges give better reasons than Parliament does and it is fine-tuned towards the sorts of problems that litigants have. But the problem with case law as a form of legislation is that you only get changes in the law when people take the trouble to litigate. Every case which is settled by amicable resolution, by mediation, by arbitration, or by the parties just deciding not to go any further, is an opportunity for judicial legislation which is

² Universal Copyright Convention 1952

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missed. Every case which is decided but which nobody notices is another opportunity which is missed as well.

Examples of 'recent' developments in passing-off case law (i.e. over the past 50 years)

We can see some examples of how our law of passing off has developed and encouraged people to think this law can be taken into a law of unfair competition which will protect everybody in every situation in which there is unfair competition. There used to be a doctrine of common field of commercial activity (i.e. common law recognition of 'dilution' and 'tarnishment'), which meant that if you wanted to sue somebody for using your reputation or goodwill, and you were not alleging fraud, you could only do it if they were directly competing with you. That has gone now.

It has taken the courts a long time, but they finally recognise protectable interests of intellectual property licensors through character licences, character merchandising and sponsorship. So if you buy a sweatshirt with the Teenage Mutant Ninja Turtles on it, nobody assumes that the turtles have actually made the shirt, but they will assume that the company which owns the rights to the Teenage Mutant Ninja Turtles has had some degree of input, possibly in terms of quality control, possibly in terms of just getting money from the manufacturer of the shirt.

And in the internet age – which is now almost historical – we have seen how passing off law has developed to protect businesses against 'instruments of fraud' in the situation of 'reverse passing off'. If you go around registering domain names that have nothing, in commercial terms, to object to because you are not using them – you are just sitting on them; but if you wanted to use them, your use could be stopped. The courts have categorised this as an instrument of fraud, because it can only be used for fraudulent purposes – and therefore merely to have it can be a sufficient basis on which to bring legal action.

Imitation of TV and other programme formats

So we have seen how passing off law can be pushed out, but when it comes to copyright it has not done so well. The question of imitation of TV and other programme formats is an example. There is no 'format right' as such in the United Kingdom which protects a person who creates, in business, a television format against other people who use the same format. So if you want to sue somebody else who is using the same format you are left with two options. One is copyright infringement: they are taking something which constitutes a protectable work; or, passing off: they, by putting up something with the same format are suggesting that they are somehow connected to us, and they are diverting advertising revenue, audiences and other key things which we depend

on to their business, because people think that they might be associated with us. We have not actually had a situation in which this has succeeded in a common law jurisdiction³, but in Denmark in the *Who Wants to be a Millionaire* case⁴, where the copyright claims failed, an action brought in respect of the local marketing practices legislation for an act of unfair competition succeeded. So you can see how there is scope, had the common law been ambitious to move in that direction, to say 'let's develop passing off law into an unfair competition law, and so we can protect TV formats too'.

The basis upon which this could be done involves a notion of something called the 'misappropriation doctrine' – an Americanised form of jurisprudence based on passing off. It is not on the basis that you are doing a wrongful act by pretending to be associated with somebody else, but that you are taking, without paying for, something that somebody else has developed, in a situation where you are taking unfair advantage.

Will passing off ever become unfair competition?

We have two answers on this in the United Kingdom from case law. One is from Lord Justice Aldous in the case of *Arsenal v Reed* [2003] EWCA Civ 696, who said passing off has already become unfair competition law, but that in true English fashion we just haven't called it unfair competition⁵. He cited a number of cases involving people selling products such as British Sherry⁶ and Spanish Champagne⁷ where the law of passing off was used to protect the owners of rights in words like sherry or champagne, in situations in which the public was not confused – but by somebody else manufacturing, for example, in Spain that which was inherently a French product, they were diluting the business asset of the manufacturers of wine in the Champagne area. He approved earlier case law expressing the view that the average Englishman may well not know that Champagne wine comes from France, but he would at least think if he sees the word 'Champagne' on the bottle that he is getting the real thing, and he won't be getting the real thing if it says 'Spanish Champagne'.⁸

³ It failed for example in *Green v Broadcasting Corporation of New Zealand* [1988] 2 All ER 490, [1989] RPC 700 (Privy Council)

⁴ *Danmarks Radio v Celador Productions Limited* (1999) UfR 1762, [2000] ECDR 158

⁵ He referred to '... the cause of action traditionally called passing off, perhaps best referred to as unfair competition'

⁶ *Vine Products Ltd v Mackenzie & Co Ltd* [1969] RPC 1

⁷ *Bollinger, J. and others v Costa Brava Wine Coy. Ltd* [1960] RPC 16 and [1961] RPC 116

⁸ Aldous LJ in *Arsenal v Reed* (71) cited with approval the analysis of Cross J in *Vine Products Ltd v Mackenzie & Co Ltd* who in turn cited the Spanish Champagne cases (*Bollinger, J. and others v Costa Brava Wine Coy.*). 'A man who does not know where Champagne comes from can have not the slightest reason for thinking that a bottle

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He cited with approval that, ‘the decision [to protect champagne against Spanish Champagne] went beyond the well-trodden paths of passing-off into the unmapped area of “unfair trading” or “unlawful competition”.’⁹

Lord Justice Jacob, to whom I will return very soon, took a totally different view. Whereas Lord Justice Aldous said, ‘you’ve already got unfair competition – what are you worried about?’, Lord Justice Jacob said, ‘we haven’t got it and we never will!’ This was in a very recent case, *L’Oréal v Bellure*¹⁰ which dealt with lookalike (or, rather, ‘smell-alike’) perfumes. L’Oréal were producing fancy perfumes, such as *Trésor*, and other people were producing very downmarket perfumes which indicated that they smelled the same, but at rock-bottom prices. The question was whether you could actually stop this: was it a trade mark infringement, was it a passing off, or was it an act of unfair competition? There was a small degree of trade mark infringement, there was no passing off, and Lord Justice Jacob said there isn’t any unfair competition – not because what they are doing is necessarily not unfair, but because there is no law of unfair competition. He said, ‘If Aldous LJ was indeed contemplating a general “unfair competition” tort at common law, I have, with respect, to say that I do not think it open to the courts to legislate in this way. And most certainly not at this level.’¹¹ In other words, Parliament will have to do it because the courts will not.

labelled “Spanish Champagne” contains a wine produced in France. But what he may very well think is that he is buying the genuine article – real Champagne – and that ... was the sort of deception which the judge had in mind. He thought ... that if people were allowed to call sparkling wine not produced in Champagne “Champagne”, even though preceded by an adjective denoting the country of origin, the distinction between genuine Champagne and “champagne type” wines produced elsewhere would become blurred; that the word “Champagne” would come gradually to mean no more than “sparkling wine”; and that the part of the plaintiff’s goodwill which consisted in the name would be diluted and gradually destroyed’.

⁹ Aldous LJ continued to quote with approval at 71: ‘... If I may say so without impertinence I agree entirely with the decision in the *Spanish Champagne* case – but as I see it uncovered a piece of common law or equity which had till then escaped notice – for in such a case there is not, in any ordinary sense, any representation that the goods of the defendant are the goods of the plaintiffs, and evidence that no-one has been confused or deceived in that way is quite beside the mark. In truth the decision went beyond the well-trodden paths of passing-off into the unmapped area of “unfair trading” or “unlawful competition”.’

¹⁰ *L’Oréal v Bellure* [2007] EWCA Civ 968, 10 October 2007

¹¹ Jacob LJ in *L’Oréal v Bellure* [2007] EWCA Civ 968, para 159. He also said, at para 158, ‘I am far from clear what Aldous LJ was contemplating. He does not say expressly that he had in mind the abandonment of the requirement of a misrepresentation. The passage he quotes from Cross J in the Sherry case does not support such a suggestion – for Cross J was simply articulating a different sort of misrepresentation from that which had been recognised before, a misrepresentation which would lead to dilution.’

What about the misappropriation doctrine – the idea that you are taking someone else’s labour: they have developed a market, they have developed a scheme or system of distribution, a network – and you are parasitically cashing in on it? Lord Justice Jacob had nothing to say about that at all. He regarded the misappropriation doctrine as quite alien:

Some commentators, generally those who support some wider tort, use the word ‘misappropriation’ of goodwill to designate it, see e.g. Hazel Carty, The Common Law and the Quest for the IP Effect [2007] IPQ 237. I am not sure where I first saw the word used in this context, though I believe it to have come from the USA. I wish to state that I think it very unhelpful. We are all against misappropriation, just as we are all in favour of mother and apple pie. To use the word in the context of a debate about the limits of the tort of passing off and its interface with legitimate trade is at best muddling and at worst tendentious.¹²

So, will passing off become unfair competition? Not if Lord Justice Jacob has a say:

...I think the tort of passing off cannot and should not be extended into some general law of unfair competition. True it is that trading conditions have changed somewhat over time – but I cannot identify any particular change which makes a general tort of unfair competition desirable, still less necessary. If the courts (or indeed Parliament) were to create such a tort it would be of wholly uncertain scope – one would truly have let the genie out of the bottle. Accordingly I would dismiss the ‘unfair competition’ appeal.¹³

As for whether it is ‘necessary’, the fact there does seem to be a provision in the Paris Convention requiring that we have a law of unfair competition is a different matter, not one which troubled his Lordship – for reasons which will also become apparent.

Smell-alike perfumes are only an example. It could equally have been any number of other products: different types of cola, hamburgers, or biscuits – or it could have been Abba versus an Abba tribute band, or something like that.

Smell-alike perfume: another copyright connection

While we are on the subject of smell-alikes, it is interesting that in the Netherlands and France, where their unfair competition laws are far more flexible than the non-existent one in the United Kingdom, they have used copyright – the traditional author’s right – as a way of trying to protect the smell created by a perfume. In the Netherlands the question went all the way

¹² *L’Oréal v Bellure* [2007] EWCA Civ 968, para 160

¹³ *ibid*, para 161

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up to the Supreme Court, in *Kecofa BV v Lancôme Parfums et Beaute et Cie*¹⁴. The Dutch copyright law protects the rights of authors, but it does not have limited types of categories like the United Kingdom does (e.g. a work has to be a literary, or artistic, or musical work) – and so a scent can be an author’s work as well.¹⁵ That is a remarkable triumph for the owners of perfume, using copyright in this way, because it is an unfair competition sort of situation. Interestingly they relied directly on the French, who had protected through copyright the scents created by a *parfumeur* – but in the case of *Bsiri-Barbir v Haarmann & Reimer*, at the Cour de Cassation in Paris, the court said we are not actually protecting scents through copyright law after all, because it is not so much the work of an author but the application of professional know-how.¹⁶ I don’t see why one necessarily excludes the other, but that is another issue for discussion.

An overall perspective: into the mind of Lord Justice Jacob

Let us go into the mind of Lord Justice Jacob. His philosophy is espoused in the notion of all competition being allowed unless it is clearly prohibited. We can see an example of this in the case of *Hodgkinson & Corby Ltd v Wards Mobility Services*¹⁷. This was a case involving cushions, that were used for people who were incapacitated and used to get bedsores – and the company who made these had had a patent, which had expired, and a design registration, which had also expired, but they carried on making the cushions and another company began making them as well. The original manufacturers said this is unfair competition, it is wrong, this other company is cashing in on the fact that we have served, selflessly, the community of sick people for all these years, and now they are getting a free ride on our product. Lord Justice Jacob said the law of the United Kingdom – certainly the English part of it – is that you can copy anything you want, unless there is an absolutely crystal-clear reason why you cannot. Those crystal-clear reasons might be that somebody else has a patent, or a trade mark, or a design right. If there is no such right, you can go ahead and copy. You also find that in intellectual property legislation there are defences –

¹⁴ *Kecofa BV v Lancôme Parfums et Beaute et Cie*, Court of Appeal, den Bosch, 8 June 2004, [2005] ECDR 5; Supreme Court [2006] 26, 16 June 2006

¹⁵ Editor’s note – see chapter 7 of this book: Edward Humphreys, ‘International copyright and the TV format industry’, where the issue of exhaustive and illustrative definitions of copyright works in, amongst others, the Netherlands and the UK is discussed further.

¹⁶ *Bsiri-Barbir v Haarmann & Reimer*, Cour de Cassation, Paris, 13 June 2006 [2006] ECDR 28

¹⁷ *Hodgkinson & Corby Ltd v Wards Mobility Services* [1994] 1 WLR 1564

so even if it looks as though you are infringing, you might have one of those defences to rely on.

If the general principle is that you can copy whatever you want, intellectual property rights should be construed narrowly, because they are an exception to the basic rule. And defences, being an exception to the exception, should be construed widely.

The other thing he says is that the words ‘unfair competition’ must be taken literally. This is a very English thing: you do not look at the concept of unfair competition as a legal concept, you look at it as a verbal concept. Unfair competition consists of two words, ‘unfair’ and ‘competition’. If it is unfair, but it isn’t competition, then the law doesn’t prohibit it anyway. If it is competition, but it isn’t unfair, the law doesn’t prohibit it either. It has to be (i) unfair and (ii) competition. So if, for example, in the smell-alike perfume case there was no competition between L’Oréal and Bellure because nobody wanting a fancy scent to make them feel really great would go for one of these grotty little things in a cheap cardboard box, then they are not competing with each other: the sale of one does not mean a loss of sale of the other. Therefore even if it was unfair – an act of free-riding – it was legitimate free-riding.

If you start looking at his cases you will see everything I have said reflected, pretty well. In trade marks he takes a very narrow view of what constitutes a trade mark monopoly¹⁸; in design rights he takes an even narrower view as to what is covered by the monopoly¹⁹; in patent claims, although there may be some cases to the contrary, his general view seems to be a very narrow, *contra preferentem* one²⁰. His view is that if you have the chance to stake out what your patent monopoly is then you must be assumed not to have claimed things that you forgot to claim.

But, paradoxically, he is quite kind to copyright. We can look at a case involving technological prevention measures – putting in ‘Messiah chips’ into your Playstation enabling you to play the Sony software from each of the three geographical areas into which they have divided – quite wrongfully in my opinion – their market²¹. The defendant said that all they were doing was enabling people to use legitimate software that they had bought in one country but can’t play on their Sony Playstation in another country: so they were facilitating legitimate use (as well as facilitating illegitimate use). Lord Justice Jacob took a very tough line on this, saying no, copyright must be protected – it is exactly against people like you that copyright laws are there. So we can see

¹⁸ See *Reed Executive v Reed Elsevier* [2004] EWCA Civ 159; and *L’Oréal v Bellure* (note 10)

¹⁹ See *Procter & Gamble v Reckitt Benckiser* [2007] EWCA Civ 936 (registered design law only protects the design as registered)

²⁰ See most recently *Novartis v Ivax* [2007] EWCA Civ 971, 18 October 2007

²¹ *Sony Computer Entertainment Ltd v Paul Owen* [2002] EWHC 45 (Ch)

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that, while he is a hardliner on all the other areas, when it comes to copyright he might be a bit of a 'softie'.

For another view into his Lordship's mind: he says that we already comply, or do not need to comply, with the Paris Convention, because if you look at the examples under Article 10*bis* it says that you have got to have a law which stops unfair competition. It gives examples of things which change people's minds: things which confuse or mislead, false allegations which people act upon; and therefore, since we have laws which deal with all those situations, and the Paris Convention does not specifically say that we have to cover others, we've done all we need to do. He also gives a highly selective view of what other European countries have done: they have done the same – so we have done no more than we need to do, and no more than other people have done. We are therefore not in derogation of any of our Paris Convention obligations.

How do businesses regard 'unfair competition'?

What happens if you are a business in the United Kingdom and somebody seems to be free-riding on you, whether you are a manufacturing company, a retailer, a media company, or anything else: what do you do?

If you have got an action for an infringement of a regular intellectual property right – somebody is interfering with the distribution right of your copyright, somebody is uploading quantities of works in which you own recording rights – then adding a claim that this is also an act of unfair competition is never really going to add anything. And if you have not got the chance to assert the infringement of an intellectual property right, then it looks as though you are saying 'we have got no case at all, but we feel we ought to sue' – a last-hope plea which will not get you very far. Even if you can find an earlier case which looks as though it supports your contentions that there is an unfair competition law, that somebody else is being unfair (like the Champagne case), you cannot rely upon it because judicial and commercial perspectives keep shifting. The fact that there is a precedent may not be of any use to you at all, because it may be confined to its own facts and its own historical period. So what do you do? You could sue and hope that your case, however weak it is, is sufficiently strong to persuade the courts to grant you interim injunctive relief pending a trial, and that the other side might just go away and annoy somebody else in the meantime – and hope that your action is not struck out for not disclosing a cause of action.

If you are a legitimate competitor, and you are free-riding or cashing in on somebody else's business, the first thing you have to do – if you are not actually physically infringing somebody else's intellectual property right, you are merely taking advantage of the fact that they have an intellectual property right – is to capitalise on the fact that what you are doing is not illegal. Emphasise the fact

that nobody owns a market; you do not actually own your customers, or the expectation that people will go to you and only you; and therefore in a Europe in which competition is beautiful, that is a very important point. In the *Cadbury Schweppes*²² case, an Australian case which came to the Privy Council in England, the plaintiffs had heralded the way in marketing lemon squash in such a way as to make it popular with Australian beer-drinking males (the Australians being known for their affection for cold, refreshing alcoholic beverages which come in beer cans) by using a rugged, masculine theme. Cadburys tried to cash in on this and did the same thing, and the plaintiffs said, this was our idea, we got there first, and you are simply leaning on our market – to which the answer was: too bad, and nobody will confuse the two products, and there is no passing off, and you do not know your market.

Thirdly, if you are a real parasite, really leeching on somebody else's intellectual property rights, and you are being as unfair as you can, then try to minimise the cost of defeat and always be as keen to submit to alternative dispute resolution as possible. You could suggest becoming a licensee, or propose some way of mixing your business model with theirs to the parties' mutual benefit. If you keep looking very willing about this and it seems very good, it might help to keep the costs down. And if all else fails, find another host to feed off.

The real reason why the United Kingdom doesn't have an unfair competition law

We have heard that in the first place, we have already enacted the Paris Convention Article 10*bis* provisions; secondly we did not need to; thirdly there is no such thing as unfair competition. But the real reason is that it is not British – it is not an English concept, we like our own concepts, we can deal with them and control them more easily. We take a long time to adapt comfortably to the situation of the European Union, to harmonisation, and are always suspicious of these imported concepts.

One final thought: why do we keep getting English and continental companies like moths against a candle? They keep bashing themselves against this door of unfair competition and asking the courts, will you let us have an action for unfair competition; will you tell us that there *is* an action for unfair competition? Why do they keep doing it, and why do they keep losing? They keep doing it because they are always asking for more than they are entitled to under the law, and they keep losing because they keep asking in the wrong sorts of cases. I am wondering whether, if they could have picked more copyright type, rather than trade mark and passing-off type cases, to push their

²² *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 WLR 193 (PC)

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arguments, they just might have had a slightly better chance of either succeeding or not being beaten quite as badly.

2. Copyright control in Sweden and internet uses: file sharers' heaven or not?

Jan Rosén

Introduction

It has recently been stated in the international press that modern forms of illegal internet uses, such as file sharing and downloading of the entertainment industry's most valuable repertoires without due consent from right owners, can go on in Sweden without the legislator's or the legal authorities taking much notice or action. In fact it has been said that Sweden could be named a place where the rule of law leaves barely a footprint in this area!²³ This would be thanks to a combination of bleak national copyright laws, laissez-faire social attitudes, and inexpensive and superior bandwidth - Sweden had hereby become a file sharing fortress in which 10 percent of its population "trade digital material".²⁴

A somewhat more sombre analysis would lead to less dramatic wording. Still, it is realistic to assume that as much as some 12% of the whole population of Sweden have used a file sharing tool during the last few months. A more cautious figure is that some 500,000 persons have done that at least once during the last months, which amounts to slightly more than 5% of the whole population. But not every act of file sharing is illegal *per se* – there are many sites trading protected material on the basis of full consent from the rights owners to the file sharing tool being used. However, there seem to be no secure figures indicating whether file sharing actually done is legal or illegal.²⁵ But a fair amount of this 5-12 % of the population using the tool is probably doing so illegally. By international comparison this is quite a lot – hence high figures relative to the number of individuals living in Sweden.²⁶

²³ Steven Daly, Pirates of the Multiplex, Vanity Fair, March 2007.

²⁴ See Office of the United States Trade Representative; 2006 National Trade Estimate Report.

²⁵ See the Mediavision Report "Bredband, fildelning och nedladdning, Q 3 2007;

²⁶ There may not be any secure figures on the worth of those potential violations. But, certainly, piracy is terribly costly and naturally not an isolated Scandinavian problem – In the U.S.A. piracy during 2005 was estimated to a worth of some 58 billion dollars, according to figures in Dagens Industri 2007-10-08; see www.di.se.

The basic reason for those high figures is that Sweden obviously enjoys, as often indicated by analysts, a fairly well developed system for public broadband access, reasonably priced for the ordinary man. From this probably follows comparatively heavy portions of net uses that do not comply with existing norms of the copyright legislation. But is this the full explanation for the assumptions given above? And are they valid as they stand? We shall have a somewhat closer look at this in what follows.

As a starting point it should be stressed that neither file sharing nor downloading – totally different but often mixed phenomena – are illegal *per se* from a copyright perspective. But *file sharing* as an act of communication to the public will always fall within the frames of copyright, and so due consent of the right owner is thus needed as a matter of principle, whereas *downloading*, if falling within the frames of private copying, is not, with some simplification, at all embraced by copyright, unless by use of an illicit original for that copying, which follows from explicit rules in article 12 paragraph 4 of the Swedish Copyright Act (SwCA). To bring home a copy of something found on the internet, illicitly placed there, does not amount to a lawful act of private copying. Still, it is basically true to say that private copying can go on outside the frames of copyright, also as far as digital media are concerned, but must relate to materials lawfully published or reproduced.

The harsh judgement on the Swedish situation, indicated initially above, is probably very much a result of the debacle connected to the Swedish Pirate Bay web site. It is true that Pirate Bay is a prime destination for anyone looking to download, unrestricted, the very latest in Hollywood movies, video games, TV shows, music, software and pornography. Probably, there is no-one else in cyber space offering a more comprehensive 'repertoire' than the Pirate Bay does, and this without any acceptance from those who own the rights in the materials offered. Hence, it is probably fair to actually call them pirates – they do themselves! – and to conclude that up to now such pirates are having the time of their lives in Sweden as little has been done to bring them to court or to legalise their business.

However, almost two years ago the Swedish police took a much publicised action against the Pirate Bay, seizing its computers and powerful servers, thus paving the way for a forthcoming trial on a potential violation of copyright law. Some 50 police officers were active in that action, raiding eight locations related to the Pirate Bay.

Since then not much has happened, although the defendants have been prosecuted and the actual trial will probably be held in the summer or early autumn of 2008. The Pirate Bay seems to have found a new earthly home in the Netherlands, at least in the sense that its computer equipment is kept there. It is true, though, that not only has this action been pursued slowly, but more generally rights owners have found it difficult to get support from the authorities when they have reported to the police quite obvious cases of violation of copyright law on the internet. Only this year has the Swedish

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Group of IFPI reported more than 30 cases of net abuses of their rights to the police, but only in one instance has such a report led to a judgement of a court. It seems fair to say that there is considerable hesitation among attorneys and the police when it comes to taking action against file sharing and downloading and other forms of internet piracy.

Both Pirate Bay and BitTorrent will be replaced as leading facilitators of internet piracy. File sharers will probably gravitate toward delivery methods that are more powerful and more problematic for law enforcement. For example file sharing programs that will grant even more anonymity to its users. From that perspective copyright cannot be defined as a problem, paradoxically accused of being too strong and overpowered, but at the same time called useless, practically sidestepped and surpassed by time.

Copyright posed as a problem by news media

Two questions are often raised in the wake of the above mentioned phenomena or, rather, initiated by them: Is copyright at all adequately designed in Sweden to offer protection to meet its obvious goals? Is copyright at all necessary or possible in the digital age?

To start with the latter question we may note that contemporary copyright, as a target for criticism, often has to struggle with a very blurred 'debate'.

This is due to the fact that legal matters, on the one hand, seem often to be confused with existing business models and price policies on the other. The two groupings are not necessarily linked, although this is often contended. At a closer look it is normally given that the lawmaker can rarely by legal rules establish a dynamic market or define its contracting parties and actual terms of agreements employed. What the lawmaker can do, generally speaking, is to offer a sound basis for the market concerning copyright materials, for orderly licensing to come about, for real offers to be made to consumers, hence by launching an adequate and updated level of protection for copyright works and related rights. But this cannot be done in terms of selecting co-contractors, distribution facilities, quantities and technical qualities and financial terms. Those phenomena have always been dealt with by the actual market actors.

Obviously there are numerous complicated market conditions pertaining to the internet and what can be retrieved from it, relative to analogue availability of copyright works. Take for example the relation between the distribution of film via downloading on the internet and the sale of DVDs in retailers' stores. The Wal-Mart retailers in the U.S.A. alone sold some 40 % of the \$17 billion worth of DVDs sold in 2006. Generally, retailers are not interested in web distribution of films that compete with the potential sales of film as physical objects. Even if the rights owners in films were very interested in the internet market, their deals with the retailers may prevent them from broad scale internet availability. Or maybe they simply strive for a balance between

different media forms in order to maximise profits – a very normal and generally accepted ambition in any market economy. Competition law may be a remedy against the negative effects of such ambitions, but copyright as such is rarely the target.

We may also note that the different technologies available may stray far beyond what the lawmaker can handle. The internet may therefore be more split up than some would find suitable, however not due to a specific legal design. As an obvious example some movies can be viewed only on Windows devices, hence no video iPods are invited to that context.

Further, market complexity follows from the fact that movie downloads, just like music files, are generally priced lower than physical DVDs or CDs, but the former cannot be burned onto blank recordable materials and the security techniques used often mean that downloads self-delete in 24 hours. The lawmaker's copyright instrument has little or nothing to do with such preferences and strategic moves of market actors.

However, there also seems to be a lot of sheer irrationality in the public debate when posing copyright as a main target – a number of phenomena are blurring people's view(s).

First, we often meet what may be called Digital Maoism, i.e. the recognition of unstoppable (digital/net based) technological changes that will sweep away any established legal logic built on pragmatism. Probably, that approach could be classified as pure nonsense, as it is pretty obvious that copyright protection and its functions are more relevant in digital networks than ever before in history. Still, man's fascination for strong technological endeavours seems somewhat to disturb sound legal thinking – at least momentarily – among those dazzled by the digitized global network.

Another nearby phenomenon feeding Digital Maoism seems to be a quite often found but still strange common *schadenfreude* or pleasure in seeing a major industry sinking or really going down the drain.²⁷ Why is it so enjoyable that the recording industry, perceived as built on a few enormously rich conglomerates or international entities, is badly hurt by internet piracy? Is it merely a result of small entity romanticism? Well, if so we should stress that the sound recording industry, just as film-making and book publishing, is based on numerous small entities, possibly relating to major international media industries for a worldwide distribution of production results.²⁸ For sure, the individual author is typically running a (small) business upon his or her own creative results. But there is really no point in society allowing only small

²⁷ See the recent debate on (keyword) *file sharing* in Swedish newspapers; www.expressen.se; www.svd.se; www.dn.se.

²⁸ It is often recognized that those who consider file sharing to be more or less a free facility would normally still agree that the 'authors' have a right to have a fair remuneration for uses of copyright works, but would often refuse publishers' or major recording companies' share in the incomes.

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business entities to act on the global media market, let alone the fact that such a restriction simply can't be had in a market economy.

To the contemporary 'criticism' of copyright we may also add a portion of a biblical fight between good and evil, between the greed of a few multinational entities and teenagers purely interested in film and music. Lawrence Lessig's much observed books at the turn of the last century have fuelled such attitudes. But his Creative Commons idea of 'sharing' – a wonderful word – is at least formally respectful to copyright, and his reasoning is pretty much directed merely towards the major media companies in the USA and relates, on closer inspection, to potential unfair or anti-competitive behaviour, antitrust in American law, rather than to IP law matters.

Further, copyright applied to the internet environment is often confronted, by those supporting piracy, with a not very well digested element of freedom of expression or freedom of information, merely indicating that anybody shall have access to absolutely everything potentially/technically available on the web – for free! Surely, the development of authors' rights are fundamental also for freedom of expression, both groupings are intertwined and recognized as human rights.²⁹ But the delicate values of freedom of expression, just as its sister freedom of information, should not be misused so as to purport that the common man should always have free access to films, video games and hit music from the entertainment industry.

As an annex to this, we may also meet assumptions indicating available sanctions against criminal actions or violation of copyright as harmful to individual integrity. This reflects a wider contemporary discussion, relatively strong in Sweden, concerning the use of e.g. surveillance cameras in public places, bugging of on-line traffic (not only aerial waves for military reasons) and other acts against potential criminality. The sanctions system of copyright has recently been caught in that context, although criticism on general surveillance matters has little or nothing to do with copyright protection as such and its application in a modern internet environment.

Every criminal is overly concerned with privacy and the need to be anonymous – a perfect tool to throw suspicion on authors' rights if copyright sanctions were generally extended to every man, describing such sanctions as a general and brutal surveillance system to control every man's communication habits or personal preferences in media consumption. As if the ordinary man's integrity would be really hurt by a focus on those who repeatedly and on a grand scale misuse protected works on the market. The legal instruments now available or just proposed, further to be elaborated below, place the focus on those who are deeply involved in criminal actions.

²⁹ Cf. *Rosén*, Copyright and Freedom of Expression in Sweden – Private Law in a Constitutional Context, in *Torremans* (ed.), *Copyright Law – A Handbook of Contemporary Research* (Edward Elgar Publishing, 2008).

Is copyright adequately designed in Sweden to offer protection to meet its obvious goals?

Qualities and deficits of Swedish enactments and proposed amendments to the Copyright Act.

a) Qualities

In spite of all the negativism described above, mostly furnished by journalism and public debate in the daily press and by some politicians and pressure groups outside the media industry, there is definitely another side of the matter, looking at the lawmakers' attitudes and endeavours of the last decade, in Sweden and elsewhere. Obviously, for example, the WIPO Treaties of 1996 did set forth a movement of world wide enforcement of copyright in national law, quickly embraced in particular in the USA. And in Europe we recognize the launching of successive EU Directives on copyright matters, not least the so called Infosoc Directive³⁰ with its distinct internet focus. Over the last decade also the European Court of Justice (ECJ) has of course added considerably to a more manifest copyright structure. All in all the general tendency of global copyright has been to enforce it so as to cope properly with modern digital media formats and uses. Accordingly, the courts must also be said to have generally responded to the needs of copyright owners, in common law countries as well as in continental Europe or elsewhere.

The last remark is valid also as far as Swedish courts are concerned, even if the police and district attorneys may be reluctant to enter the field of copyright enforcement. The Supreme Court of Sweden has very willingly tried copyright issues over the last decades, which has generally led to a strengthening of authors' rights. Its decision on e.g. hypertext linking of MP3 files as a form of communication to the public is a landmark case.³¹ It has also comparatively early decided clearly on immediate and unaltered transmission of works as a new act of copyright use if addressed to the public.³² Hereby the court is adding to the wording of the Copyright Act by distinctly holding re-transmission, irrelevant if accomplished without any delay or any other form of interruption, i.e. also 'immediate and unaltered', as defined in Section 42 (f) SwCA, as a new act of disposal of the exclusive rights within the frames of copyright, provided of course that the transmission contains protected works or related rights and that it addresses the public.

³⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

³¹ See NJA 2000 p 292, MP3 files.

³² See NJA 1980 p 123, Mornington.

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By those decisions, and several others, the Supreme Court of Sweden has in a sense paved the way also for the ECJ's recent decision in the Rafael Hotels case on individual TV viewing in hotel rooms by guests as constituting an act of communication to the public by the hotel.³³ The ECJ found that guests in hotel rooms were a public grouping in spite of the private nature of every single hotel room from the individual guest's perspective. Further, the ECJ indicated, programme content is communicated to this public grouping irrespective of the technical means by which the hotel achieves TV signals being brought to the hotel guests. This dimension of copyright has also been demonstrated by the Swedish Supreme Court at earlier points.

An important conclusion from the aforesaid is that the Supreme Court is generally striving for technology-neutral evaluations. It is often assumed that technology shifts would lead to differing legal evaluations, but court practice denies this. This is also stressed by the Swedish legislator.³⁴ Recent court practice on e.g. public performance of TV-broadcasts in sports bars has defined the display on a screen of simultaneous broadcasts communicated publicly to be a new act of public performance.

Against this background file sharing would really not cause discussion of its domicile in copyright. As a matter of principle it is pretty irrelevant whether Grid, BitTorrent or some other contemporary device is used to accomplish copying or communication to the public of protected works. As for the use of the BitTorrent technology in the context of the Pirate Bay, the following can be noted. From the Pirate Bay website you may download a file list indicating how many segments a certain work – of interest to the visitor – has been cut up into, the name of those segments and the IP-address to a so called 'Tracker', the software keeping track of all those computers which at a certain moment are downloading or delivering a specific work. The user simply has to call the Tracker, the latter furnishing the user's computer with the IP-addresses to all other computers in that momentarily established network relating to the specific work chosen by the interested visitor. Then all the segments are collected by the user from all participants. There may be no immediate or automatic connection between the home page of Pirate Bay and the Tracker, but the whole process comes about as a service to those who visit Pirate Bay's website and who respond to its offer to continue into the file sharing it is actually facilitating.

In sum, I see no problem with placing this behaviour within the frames of a copyright use, i.e. communication to the public, as a direct violation or, maybe, a contributory crime. Clearly, an attorney may prosecute also for assistance to a crime even if the primary culprit or perpetrator is not known.

³³ See C-306/05, Sociedad General de Autores y Editores de Espana (SGAE) vs. Rafael Hotels SA

³⁴ Cf. Government's prop. 2004/05:110 p 56 and 69

b) Deficits

In spite of the aforesaid the Swedish copyright legislation certainly demonstrates some deficits, these probably being the actual source, aside of hesitant police authorities, of the conception of Sweden as a file sharers' heaven.

First there is the positioning of the liability of intermediaries and access providers for the making of copies or making works available or communicated to the public. As for such copying we may ask whether it amounts to a direct violation or a contributory act – or no violation of copyright at all?

We should observe in this context that there is a general exception from liability for intermediaries to be found in articles 16–19 of the Swedish E-Commerce Act,³⁵ implementing the so called E-Commerce Directive³⁶. Article 16 of the E-Commerce Act states that intermediaries are not liable for *mere transmission* of information supplied by others, provided they do not initiate the transmittance, or choose recipients of the information or select or alter the content of the information transmitted. Further, Article 17 of the E-Commerce Act indicates that an intermediary is not liable for *proxy caching*, i.e. of automatic, intermediate and temporary storage of information, only accomplished to make the transmission more effective to the recipient, provided information is not altered etc. by the intermediary. This leeway for intermediaries is naturally to be found also in the other EU countries.

The rules on non-liability for this kind of reproduction, accomplished by mere transmission and proxy caching, are naturally relevant in cases when the Copyright Act itself does not offer limitations to the reproduction right of interest for intermediaries.³⁷ In fact, the SwCA certainly does. By the implementation of the Infosoc Directive in 2005 Sweden introduced the only mandatory limitation of that Directive to the basic reproduction right, i.e. given in its Article 5:1, indicating that temporary copies would be exempted. This came to be formulated in Article 11 a) of the SwCA as follows:

Article 11 a) SwCA:

Temporary forms of copies of works may be made, if the making of the copies is an integrated and essential part of a technological process and if the copies are transient or have only a secondary importance in that process. The copies must not have any independent economic importance.

The making of copies under the first Paragraph is permissible only if the sole purpose of that making is to enable

³⁵ Lagen (2002:562) om elektronisk handel och andra informationssamhällets tjänster.

³⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

³⁷ Cf. prop. 2004/05:110 p 90, 98 et seq.

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1. a transmission in a network between third parties by an intermediary,
or
2. a lawful use, that is, a use that occurs with the consent of the author or his successor in title or another use that is not un-permissible under this Act.

The provisions under the first and second Paragraph do not confer a right to make copies of literary works in the form of computer programs or compilations.

The exits for intermediaries of the E-Commerce Act as well as those following from the Copyright Act's rules on temporary copies are accordingly relevant for copying typically carried out by access providers. What differs in Swedish law, as compared to some other EU countries, is the subtle, yet very important, framing of the rules on private copying.

An access provider may of course generally be said to produce temporary copies of protected works, thus falling within the frames of Article 11 a SwCA, and, accordingly, not a violation of copyright, naturally not even as a contributory crime. A novelty introduced by the 2005 amendments to the SwCA in order to implement the Infosoc Directive was, however, that Article 12 of the SwCA came to state expressly that every copy made within the frames of private copying must be drawn from a *lawful* master copy:

Article 12 para 4 SwCA

This article does not confer a right to make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of Article 2.

This was a major breakthrough for an action against the surfer's propensity for downloading anything found on the internet, irrelevant if posted there with the consent of the rights owner or not. But this limitation about an *illicit master copy* does not concern temporary copies falling within the exception in Article 11 a) SwCA! Normally, transmission of protected works produces copies in access providers' servers, routers etc., but there is nothing like a criminal act of the intermediary even if those copies stem from pirated master copies.

This is not so in several other countries, such as among Sweden's Nordic neighbours. For example in Denmark the Copyright Act states that those provisions forbidding the use of an illicit 'real master' apply to any *temporary copy*, not merely to private copying, and also to any statutory limitation to the exclusive rights of the copyright owner offered by the legislator. Accordingly, mere transmission of third party materials would then also amount to a violation of copyright when temporary copies are made by such traffic, which normally happens when assisted by an access provider. Such an intermediary must then, upon the request of a rights owner, stop such transmission, which

courts have decided in Denmark, also as an interim measure, or it may otherwise be considered as a perpetrator.³⁸

This fundamental connection between distinct copyright uses and the intermediary in Denmark (and Finland) is definitely absent in Sweden.

Improvements - new sanctions proposed

Like other EU members Sweden should already have implemented the so called Enforcement Directive.³⁹ In the early autumn of 2007 there was an official report proposing an amendment to the SwCA primarily to involve access providers and to make them provide information on those customers who may infringe copyright by their use of their telecom connection to the internet.⁴⁰ In short, the access provider must provide the so called IP-number, thereby indicating the actual customer/user potentially liable for an infringement. The Swedish proposal on an obligation to provide information is expressed in a new Article 53 c) SwCA, and is meant to be effective on 1 July 2008. It can be summarised as follows:

If an infringement or a violation referred to in the basic Article 53 (which defines various forms of violations of authors' rights) has been committed, the Court may order anyone among those referred to in the next paragraph, on penalty of a fine, to *provide information* to the claimant on the origin and the distribution networks for the physical or digital goods in respect of which the infringement or the violation has been committed.

An order to provide information can be issued against any party that:

1. has committed, or contributed to, the infringement or the violation;
2. has on a commercial scale been exploiting the goods in respect of which an infringement or a violation has been committed;
3. has on a commercial scale been exploiting the service in respect of which an infringement or a violation has been committed;
4. has on a commercial scale made available a service, for instance an electronic communication service, that has been used in connection with the infringement or the violation; or

³⁸ There certainly is a strong contemporary trend to connect copyright owners with other stakeholders of the media industry. See e.g. the EU Commission's communication 03.01.2008, COM(2007) 836 final, Creativity Content Online in the Single Market, forwarding a "Content Online Platform", whereby content providers, right holders, telecom and technology organisations as well as consumer interests should meet to improve availability of content as well as respect of copyright.

³⁹ See Directive 2004/48/EC.

⁴⁰ See Ds 2007:19, Civilrättsliga sanktioner på immaterialrättens område – genomförande av direktiv 2004/48/EG.

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5. has been indicated by a party referred to in items 2 to 4 as being involved in the production or distribution of the goods or the making available of the service in respect of which an infringement or a violation has been committed.

Obviously, it is the category covered by item 4 that is of great significance in this context, thus targeting access providers. The proposal demands virtually nothing more, nor anything less, than an access provider's supportiveness when it comes to identifying, at least formally, those who allegedly have committed or contributed to a violation of copyright, by indicating, among the access provider's customers, who is the owner of the IP-address used. As already said, this is done with direct reference to the Enforcement Directive.

At a closer look several EU countries have for many years already been offering sanctions of this nature, and thus will not need to implement the Enforcement Directive. Some, among them France (on 17th October 2007), have recently implemented the Enforcement Directive, meaning that an internet access provider shall, upon a court's request, offer identity data for those users who unquestionably have infringed someone else's copyright. Sweden is to some extent lagging behind when it comes to the pursuit of potential criminals among file sharers, adding to the overall impression of Sweden initially referred to in this text. If the proposed amendment becomes effective that distance is obviously somewhat lessened.

However, for the moment, some would argue that this improvement may not be given, considering the deliberations in the so-called Telefónica case recently decided by the ECJ.⁴¹ In fact, the Swedish proposal would probably already have been finalised and delivered to the Parliament in December 2007, were it not for the fact that the ECJ might shortly thereafter alter the basis for the amendment.

The question for the ECJ to decide was whether the confidentiality principle found in, amongst other places, the Directive on Privacy and Electronic Communications⁴² may limit the right to information according to article 8 of the Enforcement Directive, and thus whether the latter Directive is subordinated to both the former Directive and the somewhat older Data Protection Directive.⁴³ The Advocate General had come to the conclusion that this was the case. From this she concluded that traffic information on individuals is only permitted to be disclosed upon request from public authorities, but could not be requested by a private copyright owner interested in pursuing private law measures against those who infringe copyright. Accordingly, her findings seemed to declare, that the type of clause now found

⁴¹ C-275/06, *Promusicae vs Telefónica*.

⁴² Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

⁴³ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

in the proposed article 53 c) of the SwCA may obstruct overall valid EU norms on privacy, and therefore not acceptable in civil proceedings.

However, the ECJ decided that the answer to the national court's question must be that Directives 2000/31, 2001/29, 2004/48 and 2002/58 *do not require* the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. Community law nevertheless requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

In short, the ECJ advises that a Member State may, but is not required, to offer rules requiring a communication of personal data in civil proceedings. The Swedish proposal is accordingly possible, though not mandatory for the implementation of the Enforcement Directive.

Still, we must observe that a reference may often be adequately made to Article 8 of the European Convention on Human Rights, indicating that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any individual person constitutes also a general principle in Community Law. The Community legislature must therefore be deemed to have taken account of that principle when enacting secondary Community legislation, such as the Enforcement Directive. It is concerned with protecting individuals against interference by public authorities. But the legal boundary between the private and the public is not necessarily the same in the area of copyright protection.⁴⁴ Further ECJ decisions are awaited to clarify this.

⁴⁴ Cf. the ECJ's decision in C-306/05, referred to in note 33 supra.

Even more pressure on access providers proposed

Paradoxically, during autumn 2007 a somewhat parallel official report was published in Sweden, also proposing a new sanction targeting access providers, but not related to the Enforcement Directive. It focussed particularly on film and music on the internet.⁴⁵ Also in this proposal a new Article 53 c) would be added to the SwCA, in order thus to update the SwCA to meet internet challenges to copyright and to offer rights owners adequate instruments to better control the telecom oriented uses (abuses) on the web.

This proposal suggests that an internet access provider, merely enabling the transmission of traffic, must immediately *terminate* a contract with a customer for the use of its services, if the service concerned repeatedly has been used to violate or to infringe the rights of an author, his successor-in-title or those who have a right to use a work upon a transfer of rights - if it is shown to be plausible that violation or infringement is likely to continue and that the termination would not be unfair considering the circumstances. Upon the request of a rights owner a court may then order, on penalty of a fine, the service provider to take due action.⁴⁶

It should be stressed that at least the proposal to implement the Enforcement Directive has been very well received generally by those entities to whom it has been submitted (numbering some 85), except for a few telecom and broadband providers and the Data Inspection Authority, however often with a reservation for the then-pending ECJ decision in the Telefónica case, and therefore succumbing to general objections based on privacy and integrity protection of a potential mandatory nature.

Concluding remarks

To conclude, at the moment there are in fact some objective reasons for labelling Sweden, if not a file sharer's heaven, a country somewhat less supportive to copyright owners than most of its neighbours are. In the main this is due to some holes in the grid of sanctions, although this is something probably soon to be remedied. If those positions are moved forward a second

⁴⁵ See Ds 2007:29, Musik och film på Internet – hot eller möjlighet?

⁴⁶ The Danish Supreme Court has tried the question of whether it is proportionate to order an intermediary to cut off telecom customers who communicate materials protected by copyright, and found that this is the case; the rights owners were considered to have a very qualified interest to uphold copyright protection and see to it that violations would stop and that an obligation for the access provider to stop the access of the abuser was not disproportionate; see Højesterettens kendelse i sag 49/2005 of 10 February 2006, Ugeskrift for Retsvidenskab, U2006.147H.

reason for the Swedish situation – weak activity on the part of the police and public prosecutors in pursuing violations of copyright – will probably be improved. In this case the recent years' harsh and unwarranted criticism of the copyright system, supported by heavy media exposure, will probably fade away, which will certainly have a positive impact on the authorities' willingness to deal with factual infringements.

If the integrity of copyright is not maintained, thus failing to make creative work interact with media production, financing and communication facilities, then, for example, who is going to do carry out the expensive and skilled work of advanced newsgathering if the conventional press can't make money from it? Likewise in the world of film: who is going to do the expensive and skilled work of making movies if the studios can't make money from them? This list of questions of the same nature could go on indefinitely.

In both cases, I think it is fair to say that the people who are most enthusiastic about dismantling the old are those who care more about novelty as such, maybe also spontaneity, and unconventionality, than they do about *quality*. They are people who don't particularly like the products of either Hollywood or the mainstream media. I suspect the public at large is a little more fond of those products. Certainly the average consumer can't be seen as a winner if copyright is dismantled, unless we find it acceptable to settle merely with a recording backlist, of what has been accomplished so far by the media industry, to be the eventually diminishing offer to the public for future consumption.

3. Protection and enforcement of international copyright in Sweden: the perspective of creators

Kristina Lidehorn

This chapter is an edited transcript of the talk that Kristina Lidehorn delivered to the symposium on International Copyright Law on 26 October 2007

Introduction

I think I should start by explaining why the Chief Legal Counsel at TV4 is here to talk about the creators' perspective on things. When I got the request to speak here, I was in another situation: I was not working for TV4. I have been a consultant for 8 years or so: a legal consultant to creators and copyright owners, and I think has been rather 'niched' towards the creative side. So people might think it is strange now that I am on the side of the 'enemy', but that at least is why I am here and going to talk about the perspective of Swedish creators.

Reasons for Sweden's reputation as a 'safe haven' for illegal file-sharers

I should also start by saying that I agree in general with what Jan Rosén was saying here before me⁴⁷; I will talk only briefly about why I think that Sweden has a bad reputation when it comes to copyright and illegal file-sharing. In general in the legal sense, I think that Sweden actually complies with its international obligations – maybe a little late sometimes – but still, it does so. I think that there are other reasons for Sweden being looked at as a 'safe-haven' for illegal file-sharers, and not the strict sense of us not having an adequate legal system or structure.

One issue is that of course we have a very high level of access to computers at home, to broadband, to the internet in general; and of course our country, as a high-technology country, will be looked upon by others interested to see what is going on here – for example, how are our consumers behaving? So this is one

⁴⁷ Editor's note – see chapter 2 of this book: Jan Rosén, 'Copyright control in Sweden and internet uses: file sharers' heaven or not?'

thing which I think is why people are looking at Sweden and not, for example, Ukraine.

I think we have in our culture a very non-litigious way of acting. We have a long history before the internet which we can tend to forget about: it's as if we were just born into the internet world, and copyright and digitalization are suddenly something that we have to change all our laws to take account of. But we're still looking at Sweden where, compared to other countries with a lot of consumption of entertainment, such as America and the UK, we are just not a litigious people. We usually handle conflicts in other ways: we have collecting organisations, we have unions, we have a political system that is structured in such a way as to make us feel safe that someone else is handling our problems; we are not born with a sense that we have to fight personally and individually for all our rights – this is something that is there and someone has done that for us. However, I think this also creates a sense that we maybe don't care about the rights that we have.

We also have a little 'problem', I would say, if you are frequently representing copyright owners, traders and media companies in that we have low damages in Sweden – in general, and specifically when looking at intellectual property. It is hard to get fair compensation for the damage that has been suffered when you have an infringement case. This also has something to do with why people look at Sweden and say, 'Well, why aren't you suing each other more? Is it because there are no legal grounds for it? What's wrong with you?' This is something that has to be taken into account: why sue when it is going to cost you a lot of money and will take you a couple of years, and you will maybe only really end up with being right in principle. There is something to be said about the effect of real damages.

Also from the perspective of creators, of course, is that they might not have the means to sue and to go through the whole process of finding evidence, and so this needs to be considered. In other countries' legal systems you might have lawyers who work on a contingency fee basis (i.e. a kind of 'success fee', where they only bill their time when they have been successful in a case); we don't have that in Sweden, and that also has an effect on how creators see their chances of upholding their rights.

One of the reasons for Sweden's success internationally, when you look at what a tiny country we are, our position far away from everything, and the fact that we speak a language that nobody else even needs to know or understand – is that in order to have some meaningful existence in the world, we are pretty good at taking in other cultures – at being aware of what's going on in the world. When it comes to design, technology and music, Sweden is actually quite far ahead of what you might think if you look at our size, language and position. This, as well as the English and US influences on our culture means that we as consumers *like* American and British culture: and if we have the means through technology, we will consume it. That's something that's been seen since early on, even when we didn't have the internet, and it's always been

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something that we strive for in Sweden: to know and to consume other cultures – as I have interpreted it, so as not to be forgotten!

So the fact that we crave other cultures and other content, together with what Jan Rosén was talking about – the confusion between what is copyright, and what are business models that don't work any more – means that if you simply analyse the market, and see that demand is higher than supply, consumers will want other ways to find what they are looking for. If they face the problem of slow availability, or they simply cannot get what they are trying to get, then it is perhaps not so strange that they are going to look for an alternative, underground route to get or find what they want. But I am not going to blame *copyright* for the situation we are in.

Possibilities or problems? The example of copyright levies

I think it could be interesting to think a little bit about the digital revolution and internet from another perspective, even as a lawyer: not merely to look at it from the problem perspective, but also to consider the possibilities. I am going to be very brief, but one example of where I think we could look at the possibilities instead of the problems with the challenges posed by digitisation is that of copyright levies. This is a system we have for ensuring that creators and copyright owners should have some right to fair compensation for a private use. This is not something universal: the US does not know what this is, and there are a lot of countries that don't have it – but as a part of the European Community it is at least something to think about. Historically the reason for this system was the availability of cassette decks and the resulting possibility for private people suddenly to make copies of copyright works. It was, of course, invented in an analogue era and so was not such a big deal: it was pretty easy to see what was the copyrighted work and what was the device used for copying and what was the copy. Now it is not so easy any more, and some people see this as a huge problem: how can we have an analogue system in a digital era and apply something that was used for cassette to memory sticks, to USBs, to mobile phones and MP3 players – is this something that is legally correct?

Why not look at it as a possibility? I sense in the media discussion some suggestion of unfairness that the consumer should be the one paying for the use of material while the telecom industry is making so much money from our private use – and this is just the lawful copying; I am not talking about the illegal copying. Does this not raise the question: shouldn't we think about other ways of getting paid for private use? Within a couple of years we won't be able to say what was the original, what is the copy, as everything will be coming through one hole in the wall via one available stream of digital media. Since everything will be connected into one and the consumer may not even really know when they are making a copy – it won't even be relevant to the way we consume things – then perhaps the answer is to sidestep the problem, and

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ensure fair compensation by a levy on the broadband and other infrastructure services enabling access.

4. Protection and enforcement of international copyright in Sweden: the perspective of international copyright owners

The example of the MPA and Pirate Bay

Monique Wadsted

This chapter is an edited transcript of the talk that Monique Wadsted delivered to the symposium on International Copyright Law on 26 October 2007

Introduction

The Motion Picture Association is a business organisation for the big Hollywood movie companies and they were, of course, shocked when they came into contact with the Swedish legal system. They were shocked for several reasons, but the main reasons were that firstly at this time, in 2004, there was no clear provision in the Swedish Copyright Act that prohibited copying from an illegal copy. It had not been tried by a court, but almost all copyright owners in Sweden said the same thing, and this was that we believed that, to make a copy for private use from an illegal copy was not a crime under Swedish law. The other very shocking news was that the police in Sweden were not at all interested in trying to catch copyright infringers – and, not only were they not interested, they didn't have any resources available to carry out any meaningful enforcement in this area. This was how my work in this regard began; the matter subsequently ended up in the Justice Department and, with the help of a number of letters and meetings and combined efforts, resulted in a raid – against the biggest BitTorrent site in the world, the Pirate Bay. What I want to do today is to explain what the Pirate Bay is, how it works, and how the prosecutor intends to prosecute this case.

Pirate Bay

The Pirate Bay includes something called 'torrents'. There are possibilities here to search for torrents, according to the name of the work and other essential information. Here we have the top 100 movies at the Pirate Bay at this specific

moment – this is live!⁴⁸ – so we can see for instance that a very new movie, *Ratatouille* is already here; we can see that by now the volume of it – there are 4623 ‘seeders’ and 3079 ‘leechers’. What, then, does this mean? A torrent is not the actual work: it is a kind of link to places or personal computers of seeders and leechers that have the work loaded on their computers.

What the Pirate Bay provides is a website where you can search for several movies, searchable torrents, and it also includes information on how you should proceed in order to be able to download these movies to your own computer. The second thing that they provide is a ‘tracker’. The tracker does not have to be, but is probably not located at the same server as the website. It is a kind of system for getting everybody to connect with each other via the web. The BitTorrent system in itself is some kind of an invention that is built on the idea that you could divide a work into many, many small pieces, and that by downloading just a small piece at a time and specifically from different computers, you will get a better ‘copy’ of the work than if you download it from one source.

So, firstly we have one person who connects to the Pirate Bay and who informs the Pirate Bay that they have a work here, for instance the movie *Ratatouille*, downloaded on their computer; they fill out a form where they write the title of the movie and what it contains and so on, and that form will also contain information about that person’s computer. This information will then be sent to the Pirate Bay site and to the tracker. What then comes up is that I, as a ‘leecher’, can go to the Pirate Bay site, download the torrent; the torrent will then start to activate the tracker; the tracker will then tell me and my computer that the work is at this moment available here, here and here, for instance. My computer will then start to download pieces from each computer shown there, and the tracker will keep track on which pieces I have collected. So in the end – this can take sometimes an hour, or only a short time, depending on how many computers that are connected and that comprise the work – the file is downloaded.

The interesting thing is that this is not the only thing that happens here, because you can also have several persons downloading at the same time, and as soon as one piece is downloaded that same piece can be downloaded by another party. So there is a ‘carousel’ of downloading going on.

The prosecutor has two possibilities under Swedish law. What the Pirate Bay does not do is download the whole work on their sites. The work is not available at all on the website: the Pirate Bay is only providing access to it, so is not the actual infringer – it is only contributing to the infringement. So what the prosecutor will do (probably) is to prosecute for contributory infringement. This contribution consists of providing a website, information on how to get a copy of the work, and the provision of the tracker. This *might* be considered sufficient to be considered enough of a contribution to amount to contributory

⁴⁸ The Pirate Bay website was being demonstrated on the conference screen

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infringement. ‘Contribution’ under Swedish law does not demand a lot of activity: there is for instance a Supreme Court case where someone was found guilty of contributory infringement to some kind of assault by holding a jacket belonging to the assailant while he committed his crime – this was considered to be enough for him to be a contributor to that crime. The other thing that the prosecutor will try is ‘preparation’ for copyright infringement. As far as I understand, the preparation consists of the provision of the torrent on the website: this is a continuous preparation for the downloaders’ copyright infringement.

Questions

[*Question from Professor Jan Rosén, Stockholm University: ‘If the Pirate Bay is contributing, who then is the main culprit?’*] The main culprit is the downloader. In all these cases we can assume that it is an illegal copy that is distributed in this way. Now that it has been made clear in law, and also in the preparatory works to the Swedish amendment to the Copyright Act, it is also clearly stated that the presumption is that a copy is illegal if it is not clear that it is a legal copy. This is what the court will have to assess when they come to try this kind of case.

[*Question from Professor Robert Picard, Media Management & Transformation Centre, Jönköping International Business School: ‘Can you try someone for contribution if you are not simultaneously trying someone else for an illegal act?’*] You have to show that there has been a main crime, but you don’t also have to prosecute that person. In some other countries this may not be possible, but in Sweden it is.

What will happen now?

Hopefully, although there is still some work going on within the police department, there will be a prosecution before Christmas, or at least in January⁴⁹. So 2008 will be ‘trial year’ for the Pirate Bay, and what we also know now is that the prosecutor has also find evidence that the people behind the Pirate Bay have collected at least 1.3 million Swedish crowns in advertising revenue from their website. Even if from our point of view that does not amount to so much money, in the Swedish criminal legal system 1.3 million crowns is a very large amount. We believe that these people will therefore go to prison.

Further, of course, work is still going on. We still have the problems with the Enforcement Directive not being implemented. We also have the very

⁴⁹ Editor’s note: charges were brought against four of the individuals behind the Pirate Bay on 31 January 2008

happy news with the Renfors proposal⁵⁰ regarding the possibility to order ISPs to shut down certain persons who are consistently carrying out illegal activities or copyright infringements on the internet, and this is something we hope to see coming into law.

⁵⁰ Editor's note: see *Musik och film på Internet – hot eller möjlighet?* Ds 2007:29. Regeringskansliet, Justitiedepartementet, available (in Swedish) on the Swedish Government website <<http://www.regeringen.se/sb/d/8588/a/86944>>

5. Swedish perspectives on complying – and being seen to comply – with international copyright law: panel discussion

Jan Rosén, Monique Wadsted, Kristina Lidehorn and Johan Axhamn

This chapter is an edited transcript of a panel discussion at the symposium on International Copyright Law on 26 October 2007. The session was chaired by Jan Rosén, and the discussants were Monique Wadsted, Kristina Lidehorn and Johan Axhamn. Since the first three of these speakers had already presented talks at the symposium, Jan Rosén began by inviting Johan Axhamn to introduce himself, specifically with regard to his work on the Swedish Ministry of Justice investigation in 2006-7, 'Music and Film on the Internet – Threat or Opportunity?'⁵¹, in which he assisted Cecilia Renfors as consultant to the investigation and secretary to the final report.

Johan Axhamn:

I agree with Jan Rosén and Kristina Lidehorn that the issue with file-sharing on the internet relates to cultural issues and rights-holders. Our starting point with the Renfors investigation was the explicit requirement introduced in 2005 that so long as the master copy of a work was legal, then further private distribution of that work should also be legal, with which the legislature wanted to stimulate consumer-friendly, legal uses of copyright works on the internet. However, by 2006 it was clear that these legal alternatives had not developed at the pace wished for. The main findings of the investigation were that nothing needs to be done to the copyright law as it is, but that as far as the rights-holders are concerned, they need to stimulate lawful internet alternatives. For example, rights-holders can seek an injunction to force internet service providers (ISPs) to shut down unlawful uses. As an overall conclusion, however, in the best of worlds, if consumers are offered good, legal alternatives for accessing content on the internet, there would be no need for Pirate Bay.

⁵¹ *Musik och film på Internet – hot eller möjlighet?* Ds 2007:29. Regeringskansliet, Justitiedepartementet. This is the so-called 'Renfors' investigation, chaired by Cecilia Renfors and assisted by Johan Axhamn. Further information (in Swedish) is available on the Swedish Government website <<http://www.regeringen.se/sb/d/8588/a/86944>> .

Jan Rosén then moved into the discussion proper:

Are the market actors comfortable with copyright? We can start with Kristina Lidehorn, lawyer at the biggest single TV channel in Sweden, TV4. What do you think about the development of TV on the internet and via mobile communication from a copyright perspective?

Kristina Lidehorn:

Coming from a music industry background, I do not see the same panic in TV4's eyes; maybe this is because we have been given longer to think and to really consider the question of how we can compete for our customers. The music industry became lazy, and lost out on customers. For us, it is not a question of stopping the likes of YouTube, but rather on how to get its users to be our users. But ultimately, where our rights are being infringed, we would have to hit hard. We see the question of mobile TV as important, but again for us it is not just a case of what we are going to put onto different TV platforms, but how we can attract more consumers in the first place.

Jan Rosen:

But what do you think about the threat from multiple 'windows' and platforms when it comes to TV content?

Kristina Lidehorn:

We are not really looking at it from a copyright perspective, but rather in terms of a business model; a strategic way of making content available.

Jan Rosén:

From your point of view it seems to be 'copyright as usual': that is the basis of distribution of content.

Monique Wadsted:

The difference between my clients⁵² and Kristina's company, is that TV4 is both a content provider and distributor, whereas the MPAA just delivers

⁵² Editor's note: Monique Wadsted acts for amongst others the Motion Picture Association of America, including in its action against the Swedish BitTorrent site, The Pirate Bay – see chapter 4 of this book, 'Protection and enforcement of international copyright in Sweden: the perspective of international copyright owners'

5. Swedish perspectives on complying with international copyright law

content. This has an effect when it comes to things like sponsorship and product placement, where they demand high numbers of audience.

Johan Axhamn:

We believe that the movie industry's use of separate release windows in different jurisdictions does not stimulate lawful use. Why do they not just release everything simultaneously?

Monique Wadsted:

As a lawyer I cannot really answer that, but it is at least partly a question of money.

Kristina Lidehorn:

We all need to think differently to even a couple of years ago. Things have not changed yet, but we have the opportunity to change, and to not make the same mistakes as the music industry. I can draw even on my own experience as a DJ when I have needed to get hold of exclusive new music that has not yet been released in Sweden. Since I am also a copyright lawyer, I have followed the path of ordering and waiting for three weeks for it to be delivered from the USA, but this is not what most people will do.

Monique Wadsted:

I was involved in the licensing of a big new video game, which was to feature songs from unsigned bands, for whom it would be a great advantage to appear on the game. In other words they really wanted to appear there – and were even prepared to pay for this. But the collecting societies' starting point was that if we wanted to do this, they would have to collect quite a large amount of money. Their view was that they cannot change their business model (although in the end we did come to some sort of solution, showing that they can make exceptions).

Jan Rosén:

So it seems that copyright is not being used so much for prohibition as for the basis of availability.

Johan, you have analysed the actors and made some criticism as a result. Do you consider that content providers need to make available much larger numbers of films in order to outweigh illegal file sharing?

Johan Axhamn:

If the movie industry considers piracy to be a problem, then why does it not simply change the release windows?

Question from the audience – Jakob Heidbrink, Assistant Professor in Private Law, Jönköping International Business School:

The problem here seems to be one of enforcement. If copyright owners cannot realistically enforce their copyrights, then what is the point of having the right in the first place?

Kristina Lidehorn:

I don't think that changing the distribution model means losing the right; we are just proposing to use it in a different way – we still decide what to make available and where.

Jan Rosén:

(To Monique Wadsted): What major deficits are there in contemporary copyright in Sweden from a right owner's perspective?

Monique Wadsted:

The main problem is that we have still not implemented the whole of the Enforcement Directive⁵³ - and it will not be unless or until the Renfors proposal is implemented⁵⁴. We lack the ability to get ISPs to shut down widescale infringement. We should have done this, and done it a lot sooner, and then we would not have the problems we face. We have been very, very kind to the access providers.

Jan Rosén:

Does being a right holder mean that you are associated with bad will, for example when enforcement involves pursuing teenagers?

⁵³ Directive 2004/48/EC on the enforcement of intellectual property rights

⁵⁴ See the proposal contained in *Musik och film på Internet – hot eller möjlighet?* Ds 2007:29, referred to in note 51 above, and chapter 2 of this book: Jan Rosén, 'Copyright control in Sweden and internet uses: file sharers' heaven or not?'

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Monique Wadsted:

I think this is something not just connected to the big companies. Take the case of Petter, the Swedish rap artist who was much criticised after pleading with the public not to illegally download/share his material, saying that this was his livelihood and that he does actually suffer from not receiving income. The level of criticism against him was astonishing.

Johan Axhamn:

One of the solutions lies in being able to obtain the internet protocol numbers and related information about illegal distributors. If we give more responsibility to the access providers, since they are the ones supplying the connections and therefore benefiting, they should be able to assist more with this process and make the enforcement more effective. It shouldn't have to be necessary to go after individual end users in the first place.

Conclusions – Jan Rosén

It seems obvious that right owners and content providers are more than willing to deliver their repertoires on the web, but that deficits of law – weak sanctions – together with non-supportiveness of the telecom industry, a still pending search for reliable technical standards and considerable political dissonance in the copyright arena have delayed the establishment of a mature web market for films, music and other products of the entertainment industry. Obviously, effective business models will thrive in a legally secure context.

**SECTION 2:
INTERNATIONAL RULES,
POLICY AND PRACTICE**

6. The impact of international treaties on national interpretation of copyright

Gillian Davies

This chapter is an edited transcript of the talk that Gillian Davies delivered to the symposium on International Copyright Law on 26 October 2007

Introduction

The subject I have been asked to talk to you about – the impact of international treaties on national interpretation of copyright – is a subject which is very dear to my heart, something I am very interested in. I have been given 45 minutes for my talk, and so can only give you a bird's eye view (or a 'Gillian's overview') of what is really a very big subject indeed.

Relationship between international treaties and domestic law

First of all I want to talk about the relationship between the international treaties and the domestic law, and here we have two approaches at work. Firstly there is the approach of many countries, where treaties are self-executing and the domestic courts interpret treaties directly; this approach is that of many countries of the civil law tradition. In these countries the courts will take into account not just the domestic copyright legislation, but also look directly at the copyright treaties. In the second group of countries, which is mainly common law countries, domestic legislation is required in order to implement treaty obligations. The UK follows this second approach along with many countries throughout the world because of the Commonwealth. However, the requirement that treaty obligations must be implemented specifically by domestic legislation only dates from 1911. Prior to that, for example, in the short period between the adoption of the Berne Convention and 1911, the courts in England did interpret the domestic law so as to give effect to the Berne Convention. I was looking at early editions of 'Copinger and Skone James on Copyright' (of which I am one of the editors now) and in 1893 the then sole editor – Mr Copinger himself – said that it was not the Act of 1886,

which should have been considered by the court in the case of a foreign author claiming copyright in England, but the Berne Convention, when he was commenting on some case law which he thought had been wrongly decided.

I am going to talk first about the international copyright treaties and the general rules they establish and the development of the treaties, and then in the second part of my talk I will discuss the relationship between the international treaties and the domestic law of the UK, the USA and France – in that order, because that is the order in which their copyright legislation originated.

Part I – International copyright treaties

Historical impact of copyright treaties

Coming to the historical impact of the copyright treaties, in my analysis there have been three stages in the history of the copyright treaties. In the first stage, of which the original Berne Convention was the prime example, the aim was to achieve basic protection of foreign works in the states party to the treaty. The treaty which emerged in 1886 was a consensus based on the common rules of the various domestic laws – that is to say the countries said, ‘ok, what can we all agree to?’ They were not attempting to make ‘new’ law – they were saying, ‘what have we all got in common? What are the points of agreement that we can put in this treaty?’ So the text represented the lowest common denominator, which everybody could accept, based on their current domestic law.

Then as time went on, the copyright treaties started to set minimum standards. The successive Acts of the Berne Convention are a good example: they responded to developments in national legislation and to developments in case law, and gradually established standards which everybody was then expected to adhere to. The countries with direct application could then apply the Convention straight away, whereas the other countries had first to legislate to bring their domestic law into line with the new Acts. Other examples of minimum standards are the Rome Convention and TRIPS. Finally, the most recent conventions – the World Copyright Treaty (WCT) and the World Performers and Phonograms Treaty (WPPT) – also have set new standards, and the main objective of these last conventions has been what Paul Goldstein has described very charmingly as ‘playing catch-up with new technology’.

Then finally we come to what I consider to be stage three, which is harmonisation of domestic laws based on the standards set by the various treaties. This harmonisation has come about partly because as a result of the various treaties – the Berne Convention, the UCC and the Rome Convention – an international classification of rights has evolved based on those treaties. WIPO, for example, in its technical assistance work with model laws and giving assistance to national governments on the drafting of their laws, promotes a

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certain international classification of rights: copyright on the one hand and related rights on the other hand, and so on. The other big motor for harmonisation is the European Union, so far as its 27 Member States are concerned, because its copyright harmonisation programme is also based on the international treaties and the consensus expressed in the international conventions.

Stage 1: Berne Convention 1886

Let us go back a little bit in time, to the adoption of the Berne Convention in 1886. Prior to that time, international copyright throughout the world was regulated by bilateral treaties. Of course, there were not that many countries that actually entered into such bilateral treaties, but for those who did the situation had become very complicated. In the United Kingdom there were many bilaterals in place, and I think the same went for France and Germany, and so it was very complicated to work out whether a certain foreign work was protected or not in a given country. As a result, there was a movement, prompted mainly by France and the United Kingdom – and Germany to a certain extent – to seek some international copyright instrument. At that time, international piracy of books had become a problem, and that was also another impetus for the Berne Convention.

Even then, at that early stage, the Berne Convention was based on the principle of national treatment, although it had a caveat on the question of the term of duration.

To remind you of what the basic principle of national treatment is (in Article 2 of the Berne Convention): *‘authors of any of the countries of the Union...shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives’* (they said, in 1886). So that was the basic principle, but even then in Article 2 they provided for reciprocity in respect of the term of protection.

Stage 2: treaties setting minimum standards

So, coming to stage two – which, as I said, concerns the treaties which set minimum standards: we have already discussed the successive Acts of the Berne Convention briefly, and these date from 1896 to 1971, and then came to a halt for reasons we shall discuss later; the Universal Copyright Convention from 1952; the Rome Convention; TRIPS; the WCT and the WPPT – and we will come to all of them in a moment.

1899 Augustine Birrell

‘Having established the principle of mutual protection of foreign works, it became necessary and desirable to set the minimum standards.’ This is another quote that I like from Augustine Birrell, who wrote a really masterly, early and inspirational work on copyright in 1899: ‘The great thing still to be done is to labour for uniformity of copyright law in all parts of the world...’ – and there were not very many people calling for this at that time – and then ‘Some general consensus as to duration would be eminently desirable’.

He did not have that long to wait, because in Berlin in 1908 the idea of 50 years PMA (*post mortem auctoris*) was introduced – although, as I have said already, it was not obligatory at that time.

Successive acts of the Berne Convention

If we look at the successive Acts of the Berne Convention, which aimed to set new minimum standards to keep the Berne Convention up-to-date, we see that the various revisions took account of new technologies, new uses of copyright works, and political, economic and social changes.

These revision Acts of Berne were separate instruments. Some amendments proved unacceptable – because here we have passed on from making Acts based on the existing consensus and they were seeking to establish minimum standards – and that meant that some of the amendments were unacceptable to some of the contracting states of the Berne Convention, because they were not in conformity with their domestic law. That meant that each Act of Berne was, as it were, a separate convention or treaty, and it was possible to adhere to each individual Act. The result of this was that countries were bound by different texts, and that is the rationale for why we sometimes talk about the Berne Convention and sometimes we talk about the Berne Union: the Berne Union includes all the countries belonging to one (or more) of the many Acts of the Berne Convention. You are still in the Berne Union even if you have only ratified – which was until recently the case with Belgium – the Rome Act 1928, for example.

Objectives of the Berne Convention acts

The objective of these successive Acts of the Berne Convention was to attain the adherence of as many countries as possible, and in particular to build a bridge between the civil law and common law countries. This led to compromises on a number of issues: for example, compromise was needed to embrace different approaches on the question of formalities, which was an issue until Berlin; on the question of the degree of originality required for protection; and on the question of moral rights. When such rights were introduced into the Berne Convention, it was made clear that you did not have to protect moral rights

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necessarily by copyright law, because it was recognised that in common law countries for example (as somebody mentioned this morning) moral rights were protected by other means. Then there were also issues of ownership of rights and, for example, it was left open as to who should be the author of a cinematographic work, because again there were differences of approach.

The second objective of these Acts was to keep up-to-date with developments in national laws, adding new subject-matter from time to time, and, of course, to promote uniformity of copyright law.

Principal features of the Berne Convention acts, pre-Universal Copyright Convention (UCC)

Let us look briefly at the principal features of the Berne Convention Acts before the UCC was adopted in 1952.

The Berlin Act, adopted in 1908, introduced the term of 50 years PMA, although it was still optional; it provided that no member of the Berne Convention could insist on formalities for the existence of copyright – and that meant that for example the UK, before it ratified Berlin, had to abolish formalities in its own Act. The formality requirements in its law was also one of the reasons why the United States could not join the Berne Convention for a very long time. The Berlin Act introduced full national treatment, and the principle was introduced that protection and enforcement was governed by the law of the country where protection was claimed.

Then the Rome Act, in 1928, introduced moral rights of paternity and integrity; and, responding to new technology, broadcasting rights.

Then we come to the Brussels Act of Berne, and here more rights began to be introduced in response to new technology – so photographic works and works of applied art were added; and the mechanical recording right – quite a long time after the invention of recorded sound – finally made its way into the Convention: this was a right for authors and composers to get a royalty for the use of their works in mechanical recordings. The option to derogate from the term of 50 years was removed. The simultaneous publication provision made it clear that works published in a non-Berne country, which were also published within 30 days in a Berne country, would also be protected under the Convention.

Universal Copyright Convention 1952

Then another minimum standard convention was adopted outside the Berne Convention family. It came to be necessary as after the Second World War it had become clear that the United States of America, which had been working for a long time on trying to bring its law into conformity with Berne, was not going to be able to do so; and also because there were many other countries which felt that the standard of protection in the Berne Convention was too

high. So this led to the United States (and of course other countries) promoting the Universal Copyright Convention 1952 under the auspices of UNESCO. The UCC had a shorter term of protection, 25 years PMA only. For a long time the UCC was an extremely important convention: the developing countries tended to join that rather than Berne; but in recent years, since the US joined the Berne Convention in 1989, its *raison d'être* slightly faded, and today it only has 100 member states whereas the Berne Convention by contrast now has 163 member states.

Rome Convention 1961

The next important convention setting minimum standards was the Rome Convention of 1961, and this at the time was a really pioneer convention to provide some protection for performers, producers of sound recordings and broadcasters. It was a pioneer convention in that at the time it was adopted, very few countries had legislation in conformity with it in respect of all the three beneficiaries. For many countries, these were entirely new rights; most civil law countries did not protect these categories of beneficiary. The Rome Convention does not lend itself to self-implementation, so countries needed to legislate before they were in a position to ratify it.

The Rome Convention took a very long time to build up membership, and there are still only 86 members as opposed to 163 for Berne. When I first got involved in copyright in 1970, there were only 12 member states in the Rome Convention.

The question arises 'Why do we need the Rome Convention at all?' It was required at the time to create a bridge between different approaches to the protection of these beneficiaries in the common law and civil law jurisdictions; the three beneficiaries were not, on the whole, protected in many civil law countries, and they were not all protected either in the common law countries. Why this was a problem was that the civil law countries on the whole take the view that an author cannot be a legal entity – it has to be a natural person; whereas producers of phonograms and broadcasting organisations are by definition legal entities. Under the UK law, and that of commonwealth countries based on UK legislation these right owners were protected by copyright (one has to remember that the UK 1911 Act was extended throughout the then British Empire, and the laws were maintained in the same style when countries became independent, so that British-style legislation was in force in many countries all over the world including important countries like Canada, Australia, New Zealand, India, Pakistan, many African and South-east Asian countries, and so on). All those countries protected producers and broadcasters by copyright, and their authors were the makers of these works; whereas in civil law countries either there was no protection at all or it was very limited. France, for example, did not protect these categories of right owners until 1985, except by unfair competition law. Moreover, performers were very

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badly protected in many countries, including in the UK, where they only enjoyed limited protection by means of the criminal law, certain acts in relation to performances being offences punishable by fine or imprisonment.

Although under Article 2 of the Berne Convention it is for national legislation to determine what may be considered a literary or artistic work under that Convention and Article 2(1) is non-limitative, saying that it protects works 'such as', giving a non-limitative list, the suggestion of the United Kingdom to include sound recordings (phonograms), for example, in the Berne Convention right from the beginning – from Berlin onwards – was always rejected, although the need for some form of protection was recognised. Thus, in order to obtain some international protection for these beneficiaries, the Rome Convention was adopted.

The Rome Convention requires reciprocity with regard to some of its provisions as it provides for countries to make reservations with regard to various rights. Nevertheless, in the long run, the Rome Convention has exercised a profound influence in the development of national legislation in the field of copyright and related rights, and in spite of all the differences in approach, nowadays the scope of protection of the three beneficiaries has become uniformly high. The main difference between 'copyright' works and related rights nowadays is the period of protection, because authors have seen their rights increased in term from 50 years PMA to, in many countries and throughout the EU, 70 years PMA, whereas the beneficiaries of the Rome Convention generally under TRIPS and so on, have 50 years from publication.

Impact of TRIPS 1994

TRIPS is another minimum standards convention – setting minimum standards for not just copyright and related rights, but also for patents and trade marks. It is extremely important because it applies to all countries within the World Trade Organization international trading system, which has a very large membership. Contrary to all the other IP conventions, it has a dispute settlement regime which carries with it sanctions. This is really the reason for TRIPS being adopted because the other IP conventions are completely voluntary, in that you could be a member of the Berne and Paris Conventions and totally in breach of your obligations under both conventions but nothing would happen. Under TRIPS, by contrast, action can be taken against a country in breach of its obligations under the TRIPS dispute settlement regime and it can be fined or have other sanctions taken against it.

Again, TRIPS was the result of compromise: moral rights had to be excluded – nobody could agree on that; and the work leading to the adoption of TRIPS drew attention to the continuing policy differences between the USA and Europe, and the civil law and common law approaches. In the 1980s everybody got very bogged down in their own national theories about authors' rights and copyright, and these difficulties also bedevilled the later negotiations

for the World Copyright Treaty (WCT) and the World Phonograms and Performers Treaty (WPPT), known as the WIPO Internet Treaties.

TRIPS is of major importance because all of the developing countries had to meet target dates to bring their legislation into line with the minimum standards that are in TRIPS.

WIPO internet treaties

Finally we have the WIPO internet treaties, which are the most recent treaties to set minimum standards. These entered into force as law in 2002 and deal with the application of rights in the digital environment, with a new right to control access to online works, and also protect technical protection measures and rights management systems.

The fact that it was necessary to have the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty was because of the different approaches to the protection of authors' rights and related rights, and so as a result this Berne Convention / Rome Convention divide in the international classification of rights has been set in stone. It had been hoped at one time that all these rights could be dealt with together in a protocol to the Berne Convention.

These norms established by the new treaties are having a major impact as countries update their laws to bring their legislation into line. The European Union is the prime example: the InfoSoc Directive aims to bring legislation throughout the EU countries into line with the Internet Treaties.

Stage 3: harmonisation

So then we come to the third stage – harmonisation based on treaty standards. As I have said, we have WIPO promoting national legislation based on its international classification of rights, and promoting standards of protection which reflect the present level of protection as reflected in the various treaties. The Directives which have been negotiated and adopted in the European Union have the same aim. So I would say that the normative effect of the international treaties is now reaching a very high level. We are seeing the international classification of rights taking hold everywhere. The minimum standards are gradually being embodied in national legislation throughout the world as a result of the influence of the WIPO, the WTO and the EU. And the EU has a very big influence throughout the world – quite beyond its own frontiers – because of the terms of the bilateral trade agreements that it adopts with third countries. If it adopts a bilateral trade agreement it also says, 'and you shall protect copyright and related rights in the following way...'

Part II – The relationship between international treaties and national laws

To come to the second aspect of my talk, I want to highlight the relationship between the treaties and the national laws from a historical perspective in England, the USA and France. As I said before, I am taking that order because of the seniority of the copyright laws.

England

In England, there was no international copyright protection for anybody before 1838 when piracy of books became a problem but that protection was very limited; the International Copyright Act 1844 was the first to pave the way for bilateral agreements with foreign governments. It was introduced because the House of Lords had said that without such agreements no foreigner could own a copyright in England. As I have said, before then piracy of books was becoming a big problem, and so the United Kingdom got very active in the preparations for the negotiations for the Berne Convention. As I have also said, the Berne Convention did accommodate the copyright approach.

The Berne Convention was approved by the UK in 1887, and at first the courts applied the Berne Convention directly and required domestic law to give effect to treaty obligations. But the basic rule ever since 1911 is that the courts do not interpret treaties except in one set of circumstances: where a UK Act is ambiguous and the parliamentary records show that the intention was to implement the convention. Such circumstances do not arise very often in copyright, but it happens all the time with the interpretation of the European Patent Convention – Lord Justice Jacob, as he now is, regularly interprets the EPC.

After the Berne Convention, in England there were two motors for copyright reform: the first was technical development and the second were the international norms which were being set. So we had a pattern of the UK catching up with the Berne Convention. Every new Act of the Berne Convention was followed by a UK government committee reporting into the state of copyright and into what should be done; and then subsequently, in due course, the Copyright Act was revised.

The UK ratified the Berlin Act in 1912, following the adoption of the 1911 Act, because from then on it could not adhere to any convention without getting its domestic legislation in line; and the same applied ever afterwards. In fact the UK took a long time to revise its laws: after 1911 the next Act was in 1956, following the report of a committee set up to consider what amendments to the law were needed by the Rome and Brussels Acts; and similarly the Whitford Committee was set up in the 1970s to consider what changes were necessary to update the law following the Stockholm and Paris Acts of 1967

and 1971. The process again took a long time, and a new Act was not adopted until 1988. The new Act is still in force, although of course it has been amended endlessly in the meantime to bring UK legislation up-to-date and to comply with TRIPS, WCT, WPPT and all the EC Directives. The EC Directives are never discussed in Parliament; they just go through as Statutory Instruments.

International protection in the USA

In the United States, in the days when the Berne Convention was adopted, there was no protection at all for international works, and in the 19th century the United States had in fact encouraged the pirate trade in books – especially trade in UK works. It was not until 1891 that they thought that there was any need to protect foreign works, and even then they protected them only if the books had been published or printed in the United States (the so-called manufacturing clause). Imported works were still not protected.

The development of copyright in the United States was going to be very problematic because it legislated in 1909, just after the Berlin Act of the Berne Convention of which it took no notice. That Act of 1909 remained in force until 1978, when the 1976 Act entered into force. That is an extremely long time, in the course of which all sorts of new technologies arose and all sorts of new uses of works developed. Up until the outbreak of the Second World War (1939) there were many legislative efforts to legislate to revise the 1909 Act and conform to the Berne Convention, but there were so many competing interests that no conclusions could be reached. The main stumbling blocks as far as the Berne Convention was concerned were formalities; the ‘manufacturing clause’ in United States legislation; and differences on authorship and originality. After the war, the United States, as I mentioned, decided to forget about the Berne Convention for the time being and go for a new convention – and as you have seen the UCC was adopted.

From that time, until the 1976 Act, there were a series of Revision Bills presented to Congress, but again, as before the War, vested interests made it very difficult to legislate. Finally, there was a very dynamic Register of Copyrights in the US – a lady called Barbara Ringer – and by some magic she brought off finally the 1976 Act, after a tremendous effort. That paved the way for the United States to take its full place in the international copyright world.

The US then joined the Berne Convention in 1989, and since then it has taken on a major role in international copyright. Together with the European Union it was behind the efforts to obtain the TRIPS Agreement; and now also the international treaties have had a major influence on the US copyright strategy. It was more or less the first country to implement the WCT and WPPT, with the adoption of the Digital Millennium Copyright Act, and so it has joined the other major countries as an important player in the Berne Convention.

6. The impact of international treaties on national interpretation of copyright

France the precursor

Finally, I want to talk about the situation in France, which is completely different. France had a very big influence on the adoption of the Berne Convention in 1886, and ever since it has continued to have a major influence – this despite of the fact that France had the same law from the time of the Revolutionary Decrees of 1792 until the adoption of the Copyright Law 1957. So copyright policy in France was based on the principles set out in the 1792 Laws, as developed by case law. For example, moral rights were developed in the French case law at the end of the 19th century and the beginning of the 20th century, although these were not protected by legislation until 1957.

France had the great merit of conferring protection on works published abroad; as early as 1852 it made it a misdemeanour to counterfeit foreign works in France, and protection was extended to foreign authors unconditionally. The importation of pirated copies of French works from abroad was also prohibited.

Having protected foreign works in 1852, Victor Hugo, ALAI and the French government were major promoters of the Berne Convention. The new features of the various Acts of the Berne Convention after that followed on from developments in French law or case law, as can be seen in the following table:

Table 1 – France the precursor

Date in French Law	Copyright Feature	Berne Act	Date
1866	Duration 50 years <i>pma</i>	Berlin	1908
1905	Film = artistic work	Berlin	1908
19 th century	Moral rights	Rome	1928
1920	Droit de suite	Brussels	1948

Achieving the ideal of international protection

So what can we deduce from all this: are we close to achieving the ideal of international protection of copyright? Zachariah Chafee, a great writer on the subject of copyright in the 1940s, at that time said that international protection had been realised only painfully and imperfectly. So what has happened since then? We have got the Berne Convention, which was a compromise but a beginning. From 1886 to 1989, when the United States joined the Berne

Convention, France as I have said was the motor for the revisions of the Berne Convention, in spite of having no major copyright reform itself; the UK deliberated and updated its laws; and the US struggled to adapt. Since then, as we have seen, everything has changed and the Berne Convention now has 163 members, and the WCT and the TRIPS Agreement has been given wide acceptance, and so the international situation for the protection of copyright and related rights has advanced very considerably.

What next?

I will leave you with a few questions on the future of copyright. Has the ideal of international protection been achieved? There are some outstanding issues – issues on which agreement could not be reached at the time of the adoption of the WCT and the WPPT – that is to say, the protection of databases, performers' rights in audiovisual works and broadcasters' rights. Only recently an effort to adopt a new treaty on broadcasters' rights failed. We could consider whether further revision of the Berne Convention is necessary or possible; the conclusion taken in the 1990s was that it was not possible to revise the Berne Convention – that the whole thing might fall apart if an effort to do so was made. But the latest text now dates from 1971, and one could envisage perhaps that the time has come – now a much greater consensus has emerged from all the discussions of the 1980s and 1990s – once again to contemplate a revision of the Berne Convention. Finally, there is the question of what the impact of further European harmonisation will have: I would predict, for example, that the 'copyright' system will disappear because European harmonisation is making the UK system conform ever more closely to the European continental civil law model.

7. International copyright and the TV format industry

Edward Humphreys

Introduction

This chapter examines the limited, but growing, body of case law in various jurisdictions which has examined the question of copyright protection for TV formats. Two broad approaches can be identified on the part of the courts involved: (1) to try to draw analogies or parallels between TV formats and plays or scripted dramas; or (2) to examine the nature of the TV format on its own merits, in terms of its original and identifiable structure and fixed elements. The first approach makes it very difficult to find copyright protection; the second has borne fruit in some of the cases. One possible reason for these divergent approaches may derive from the way in which the definition in the Berne Convention for the Protection of Literary and Artistic Works of 1886 of copyright 'works' has been implemented into national legislation. Where the national legislation defines a copyright work as one of a limited list of categories, the courts have been forced to take the 'dramatic work'-analogy approach: in other words, to try to shoe-horn TV formats into a particular pre-defined box. On the other hand, where national copyright acts have more faithfully followed the Berne Convention illustrative list, there seems to be less of an intellectual challenge in finding possible copyright protection. This chapter examines whether there are patterns that can be followed and, without moving into the subsequent issue of copyright infringement, the implications for TV format producers and distributors at the licensing stage.

Commercial context

The continuing rise in TV format production and distribution

The international trade in TV formats is undoubtedly one of the decade's success stories when we look at content development within the TV sector – indeed, it might be ventured, across the traditional media industries as a whole. The first comprehensive quantitative survey of the international television format industry, published in 2005 by media business analysts Screen Digest, valued the global market for television format production at €6.4bn for the three-year period from 2002 to 2004. During that time the number of different

types of formats, the number of individual episodes within formatted series, and the total number of format hours broadcast all increased significantly, at 35%, 18% and 22% respectively.⁵⁵ A report published in October 2007 by Oliver & Ohlbaum Associates identifies ongoing dramatic growth in the production value of the European formats market (20% since 2002), far outstripping other genres, and achieving a total of €2.8bn in 2006.⁵⁶ The same report estimates an ongoing growth rate of 15% per year for European producers of global formats, attributable to what it identifies as an ongoing trend for broadcasters to make use of cost-effective format programmes across genres (as well as in increased interest on the part of the US networks in non-US originating formats).⁵⁷

This observation that formatted programming offers a cost-effective solution is not simply a reference to the preponderance of reality-TV shows, which tend – at least in theory – to be better suited to a limited budget. Instead this is something that has to be seen in the modern media landscape, to which the (traditional) TV industry is having to adapt. In the current era of multi-channel, multi-platform digital television, where television services, technologies and providers have proliferated, ‘the most significant dynamic seems to be one of adaptation, transfer and recycling of narrative and other kinds of content’. This manifests itself in the development and international licensing of programme formats, where already-familiar material and programme frameworks can be adapted and re-used – and in this way can serve as at least some sort of insurance against economic and cultural uncertainties.⁵⁸

The leading market position of the UK and Scandinavian countries

Press reports from the autumn 2007 international audiovisual content market, MIPCOM in Cannes, suggest that the profile and market position of Scandinavian format producers and distributors are particularly in the ascendancy⁵⁹; an observation that is also borne out by the market research figures. Annual growth rates (when looking at total format hours broadcast) for Sweden and Norway are identified by Screen Digest at around 200%; similarly significant percentage increases can be observed by reference to format hours

⁵⁵ D Schmitt, G Bisson & C Fey, *The Global Trade in Television Formats* (Report) (Screen Digest, London 2005) (the Screen Digest Report) 16. The countries studied for the report were USA, Australia, UK, Germany, France, Italy, Spain, Netherlands, Belgium, Denmark, Sweden, Norway and Poland.

⁵⁶ Oliver & Ohlbaum Associates, *Prospects for the European TV Content Sector to 2012* (Report) (published 11 October 2007 – www.oando.co.uk, and see C21Media.net: ‘Report forecasts continued format boom’ 11 October 2007)

⁵⁷ OOA report referred to in note 2

⁵⁸ A Moran (with J Malbon), *Understanding the Global TV Format* (Intellect, Bristol 2006) (Understanding the Global TV Format) 10-12

⁵⁹ E Waller, ‘Format buyers look North’, C21Media.net, 16 October 2007

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exported (ranging from 30% in Denmark up to 1000% in Norway, with Sweden occupying a 'lagom' position somewhere in between).⁶⁰ Analysis of the combined production spend on formats of the three Scandinavian countries shows a value of €320m for the period 2002-2004⁶¹: making this a significant player in the international context, behind only the UK, USA and Netherlands – and roughly equivalent to Australia – in terms of money invested. The increased number of market players, and developed formats, since those figures were published suggests no less a lofty position in the international arena.

Figures published by FremantleMedia in August 2007 looking at entertainment formats adapted in at least two other territories in 2006 places Sweden and Denmark in joint fourth place, behind the same three main players. The UK's market leading position was confirmed by this same research: it continued to account for 40% of the world trade in formats.⁶² The 'Strictly Come Dancing' format (exported as 'Dancing with the Stars') continues to be a significant factor in this success: the Australian version was the highest rated show in that country in 2005, and the season one finale in the US attracted 22 million viewers.⁶³

What is a TV format?

Industry definitions

Without in this chapter getting into great detail about what is a far from certain concept, a TV format, the general TV and broadcasting use of the phrase has in Moran's words 'been closely linked to the principle of serial programme production. A format can be used as the basis of a new programme, the programme showing itself as a series of episodes, the episodes being sufficiently similar to seem like instalments of the same programme and sufficiently distinct to appear like different episodes.'⁶⁴ A couple of food-related analogies are creatively proposed by Moran: the TV format can therefore either be seen as a cooking recipe, a 'set of invariable elements in a programme out of which the variable elements of an individual episode are produced'; or as an 'outer shell or

⁶⁰ *Screen Digest Report*, 24, 26

⁶¹ *Screen Digest Report*, 30

⁶² (FremantleMedia research from August 2007 – see e.g. Swan Turton e-bulletin 10 August 2007, 'UK Continues to Enjoy Success in the Global TV Formats Market', and C21Media.net – Ed Waller, 'UK's got talent – but it's not the only one' 21 August 2007)

⁶³ See 'Trading TV Formats' by C Fey, published by Eurovision TV 2007 (figures mentioned on C21Media.net website where it can be bought)

⁶⁴ *Understanding the Global TV Format*, 20

organizing framework' where '[t]he "crust" [of the pie] is the same from week to week but the filling changes'.⁶⁵

Taking this abstract cookery definition a stage further, and applying it to the industry's actual way of working, Moran then quotes one of the key players in the international TV format market, Michel Rodrigue, CEO of Distraction Formats:

*[It] is a recipe which allows television concepts and ideas to travel without being stopped by either geographical or linguistic boundaries. To achieve this, the recipe comes with a whole range of ingredients making it possible for producers throughout the world to locally produce a television programme based on a foreign format, and to present it as a local television show perfectly adapted to their respective countries and cultures.*⁶⁶

(Whether or not this ideal is always obtained is perhaps another issue, the notable failure of *Big Brother* to attract audiences in the US and certain Middle East countries, being a case in point.)

Traditionally, discussion of TV formats has gone hand-in-hand with an increase in so-called 'reality TV' – from the old favourites such as *Big Brother* and *Survivor/Robinson*, to modern classics such as *Wife Swap*, *Paradise Hotel* and *The Farmer Wants a Wife*, not to mention the raft of innovative new factual entertainment and reality programming that many of today's audience are involved in. 'Format' has therefore been shorthand for reality, docu-soap, or quiz show. But the industry usage of the term and notion is wider than that. In addition to genres such as game shows, quiz shows, lifestyle makeovers, celebrity challenges and relationship programmes, the list also includes politics, business and a notable increase in what are being described as scripted formats. This last category includes situation comedies, dramas and telenovelas.⁶⁷

Legal attempts at a definition

As already indicated, 'format' or 'TV format' is not a legal term of art – and hence the uncertainty that surrounds its protection. It is not apparently defined in any country's legislation (copyright or otherwise), or in international intellectual property treaties; indeed the World Intellectual Property

⁶⁵ *ibid*

⁶⁶ *Understanding the Global TV Format 27* (taking the quote from MA Burneau, 'Up for the Prize' *Television Business International* January/February 2001, 25-28)

⁶⁷ V Mouseler, 'What's Hot? – Fresh TV Around the World' (presentation at The International Television Format Industry workshop, organised by the Erich Pommer Institut, Mallorca 8-11 June 2006). See also The Wit website at <<http://www.thewit.com>> accessed 16 November 2006.

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Organization says that '[t]elevision formats, however, have not been discussed at WIPO as subject of a separate international protection'.⁶⁸

That is not to say that there is a shortage of suggested definitions in various legal contexts. The phrase often trotted out from the *Opportunity Knocks* case (discussed in more detail below) as reflecting the Privy Council's view is 'those characteristic features of the show which were repeated in each performance'⁶⁹ The German Supreme Court in the *Kinderquatsch mit Michael* case (also discussed later) gave the following definition:

*The format of a TV show can be defined as the entirety of all its characteristic features which are capable of acting as a general mould shaping each single show this enabling the audience to easily identify each transmission, irrespective of its varying content, as part of a series of TV shows...As a rule the format of a TV show is...a plan, a bundle of stage directions or a general framework guiding the development of a bundle of similar transmissions.*⁷⁰

Karnell, in his English language article from 2000 'Copyright to Sequels – With Special Regard to Television Show Formats'⁷¹ chooses to adopt the UK Patent Office wording from its consultative document in 1996 – that the characteristics of a format are 'the common, unifying features appearing in each programme of a television or radio series.' He notes that 'the "format" character depends upon its repetition from one programme to another, all of which may be said to demonstrate a certain format'.⁷²

A still earlier definition, by another distinguished writer on the subject, refers to 'the fixed structure of a programme which is repeated week after week, giving the programme its character, dramatic movement, identity, and,

⁶⁸ World Intellectual Property Organisation website – copyright frequently asked questions <http://www.wipo.int/copyright/en/faq/faqs.htm#P49_7090> accessed 21 March 2008. It should be noted that an individual broadcast television programme may not be copied or intercepted without the consent of the broadcaster, and so the broadcast itself is protected (by what is sometimes categorised as a related right); but this does not have anything to do with protection for the *format* of the programme that is being broadcast.

⁶⁹ *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700 (PC) (the *Opportunity Knocks* case) 702

⁷⁰ *Sendeformat* BGH 26.06.2003 I ZR 176/01 [2003] ZUM 771, referred to and quoted (in English) by U Klement, 'Protecting Television Show Formats under Copyright Law – New Developments in Common Law and Civil Law Countries' (2007) 29 EIPR 52, 53

⁷¹ GWG Karnell, 'Copyright to Sequels – With Special Regard to Television Show Formats' (2000) 31 IIC 886, 888

⁷² *ibid*, 888

incidentally, its marketability'. While the content will change from week to week, the nature of the type of material will remain the same.⁷³

As mentioned, it is beyond the scope of this chapter to attempt a full definition of what is involved, but a synthesis of the above shows the focus on a structure or framework of repeated elements, defining and driving the show, but with the actual specific content (in the sense of the words spoken and the specific situations presented) varying between individual episodes.

The legal problem: what are the legal rights being bought and sold, and how can a TV format be legally protected?

The growth in this market, and the significance of Sweden's and the UK's leading positions in it, makes the vexed question of intellectual property right protection for TV formats all the more current. The trade that the figures quoted earlier in this chapter refer to is based on the licensing of legal 'rights' of some sort, yet there is no specific recognition in international or national copyright legislation of 'formats' as a protectable category of work. Despite, or perhaps because, of this the industry seems to have developed certain agreed 'rules of the game' of its own, in order to reduce the instances of copycat productions.⁷⁴ TV format licence agreements in any case encompass a wide variety of elements which clearly are protected by copyright and other intellectual property rights, notably trade marks; but there is at best a question-mark over the underlying core of what is being licensed as a format.

Of course, it can therefore be questioned as a result whether this is a suitable long-term basis on which to regulate the industry, both from the point of view of legal certainty and practical application. Or should TV formats qualify for specific legal protection? To answer these questions would demand a detailed, principled analysis of the wider issue of some sort of internationally agreed (or agreeable) definition or recognition of a TV format 'right': no small task given the variety of approaches and lack of international consensus mentioned above.

Instead, the purpose of the remainder of this chapter is to analyse some of the increasing body of inconsistent (and in many cases incomplete) copyright case law from various jurisdictions around the world, where certain specific TV formats have been the subject of judicial analysis. One thing that appears from these various cases is that – although there certainly is no consensus or clear guidance on whether TV formats are subject to copyright protection – a major

⁷³ S Lane, 'Format rights in television shows: law and the legislative process' (1992) 13 *Statute L Rev*, 24-29 (quote at 26)

⁷⁴ For an industry perspective on the format trade, see chapter 9 of this book: Martyn Freeman, 'The changing media landscape'

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factor in the prevailing uncertainty can be traced to varying national treatments of what, in the first place, can be treated as a copyright work. What, then, does the existing international copyright law tell TV format producers and developers about the nature of their creation? The discussion below is looking just at the initial issue of whether a format can be categorised as a copyright work at all, and therefore whether it is at least potentially capable of being licensed. The discussion here does not move on to the subsequent stage of analysis – i.e. how such a copyright work could be infringed or enforced.⁷⁵

What are the international copyright rules that apply?

Although there is no specific legislative treatment of TV format rights, there is a growing body of inconsistent (and in many cases incomplete) copyright case law from various jurisdictions around the world, where certain specific TV formats have been the subject of judicial analysis. One thing that appears from these various cases is that – although there certainly is no consensus or clear guidance on whether TV formats are subject to copyright protection – a major factor in the prevailing uncertainty can be traced to varying national treatments of what, in the first place, of being treated as a copyright work. What, then, does the existing international copyright law tell TV format producers and developers about the nature of their creation?

The Berne Convention provides (among other things) that the rights of authors in literary and artistic works are to be protected in the convention countries.⁷⁶ The expression ‘literary and artistic works’ is a very wide one, encompassing more than just written material and ‘art’; Article 2(1) defines these protected works as including ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’, before proceeding with a detailed list ranging from books and artistic works such as paintings, architecture and sculpture, to dramatic works, music, cinematographic works, photographs, and illustrations and plans relating to geography and science.

As to what ‘literary, scientific and artistic’ means, Ricketson and Ginsburg note firstly that ‘the adjective “scientific” in the context of “literary and artistic works” seems unnecessary as works concerned with scientific matters will invariably be either literary productions...or artistic productions.’ [S]econdly, it must be acknowledged that the expression “literary and artistic productions” is, on its face, a literally inaccurate description of many of the productions

⁷⁵ The author is in the process of producing a doctoral thesis, in which this further stage of analysis can be given detailed consideration.

⁷⁶ Arts 1, 2(6), 3 and 5(1) of the Berne Convention

which the Convention expressly contemplates as falling within its scope.’⁷⁷ In this second regard, they refer in particular to dramatic, musical and cinematographic works, all of which ‘are intended to be represented or performed, rather than read or viewed, as is the case with the usual kind of literary or artistic production’.

How are these international rules implemented nationally?

Does a TV format come within this apparently wide formulation? We will see that the answer may vary depending on exactly how the above words have been implemented into respective national legislations. Why this matters because Articles 5(1) and 5(2) of the Berne Convention provide for the principle of national treatment, i.e. that authors of one Convention country are entitled to protection in other Convention countries in the same way given to those other countries’ nationals. The extent of protection, as well as the means of redress (i.e. the sort of action that can be brought), are governed exclusively by the law of the country where protection is being claimed. So although TV format producers can start with the general position and principles under the Berne Convention, it is necessary to move into the respective national legal systems to see what they say.

From the relatively few court cases that have addressed the question of copyright in a TV format, we can see two main approaches.⁷⁸ The first sees the court try to draw an analogy between a TV format and a play or TV drama. This appears to be necessitated in countries where there is an exhaustive list of works in the country’s copyright legislation, and where the analysis of the TV format as a potential copyright work has to centre on one of the defined categories – e.g. dramatic work. The other approach is to take the TV format on its own merits, which seems to boil down to the following: is there evidence of ‘an original format with a discernibly distinct structure’, or in other words, ‘does the format show when taking the show as a whole and its particular way of combining tension points, the rules of the game and so on, develop a sufficiently coherent and recognizable structure?’⁷⁹ This latter approach would seem to be more open to countries with an open (or non-exhaustive) list of copyright works in its copyright legislation. These points will be developed below in the following national case law review.

⁷⁷ *ibid* 406 (8.06)

⁷⁸ Useful overview by Justin Malbon in *Understanding the Global TV Format*, 127-9

⁷⁹ *Understanding the Global TV Format*, 127

The first approach – common law, exhaustive treatment

We will start the review by looking at the UK since this jurisdiction (at least, together with its former territory of New Zealand), is home to what is often presented as the starting (and perhaps defining) point for case law on TV formats, that of *Green v Broadcasting Corporation of New Zealand* (the *Opportunity Knocks* case)⁸⁰.

By virtue of section 1(1) of the UK's Copyright, Designs and Patents Act 1988 (the CDPA), copyright subsists in eight types of work: original literary, dramatic, musical and artistic works; films, sound recordings, broadcasts and published editions (typographical works). (It will be noted that this list even includes many works generally categorised in civil law countries – and indeed international conventions – as the subject of related rights rather than copyright proper.) Nevertheless, the key point for our purposes is that in contrast to the position under Article 2 of the Berne Convention, this is an exhaustive list. Therefore if a creative work – no matter how original – does not come within one of those eight categories it cannot qualify as a copyright work under English law.⁸¹

In the case of a written format bible (or a written description of a television programme), there can be little doubt that this itself can come within the English category of literary work, defined by section 3(1) of the CDPA as meaning 'any work, other than a dramatic or musical work, which is written, spoken or sung...'.⁸¹

It is harder to categorise a TV format, however, in the sense we have been looking at: the realised concept and collection of elements in a produced programme which define how that programme can be repeated. Although any one transmission of an overall show will come within the statutory definition of 'broadcast', this offers copyright protection for the transmission itself, rather than the format of its contents. A more appropriate legal home for that format needs to be found, and this is the issue that the court addressed in the *Opportunity Knocks* case.

There, an action for copyright infringement was brought by the late TV presenter, Hughie Green, who was the creator and host of a talent competition shown on British TV from 1956 to 1978, called *Opportunity Knocks*. In 1975 and 1978, the Broadcasting Corporation of New Zealand had broadcast a

⁸⁰ *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700 (PC) (referred to in this chapter as the *Opportunity Knocks* case)

⁸¹ See for example *Creation Records v News Group* [1997] EMLR 444, where a collection of objects around a swimming pool which was assembled in order to be photographed for the cover of the pop group Oasis' new album was found not to come within the meaning of any of the categories of protected copyright works – in particular, it was neither an artistic nor a dramatic work.

television talent quest under the same title that was similar to Green's UK show. The case was ultimately decided by the Privy Council – something of a peculiarity of the common law, comprised of English law lords who usually sit in judgment in the House of Lords – the UK's Supreme Court. In this case they were constituted as the Privy Council since the case concerned an action on appeal from a commonwealth jurisdiction, New Zealand.

His claim relied on the 'dramatic format' of the show, which Lord Bridge understood to mean 'those characteristic features of the show which were repeated in each performance'. Lord Bridge identified those features as being the title, certain catchphrases ("for [name of competitor] opportunity knocks," "this is your show folks, and I do mean you," and "make up your mind time"), use of a 'clapometer' to measure audience reaction to competitors' performances, and sponsors to introduce competitors.⁸²

The Privy Council decision in *Opportunity Knocks* saw the case founder on the grounds of the work not coming within the appropriate category. Lord Bridge said (in the context of whether or not 'format' was an appropriate word to be using):

This difficulty in finding an appropriate term to describe the nature of the "work" in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a TV series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the questions and answers in the quiz show, etc) and identified as an "original dramatic work".⁸³

It is widely acknowledged that one of the difficulties suffered by Hughie Green in that case was a lack of evidence; the Privy Council never saw evidence of the scripts that were produced at the original New Zealand trial, and Lord Bridge of Harwich specifically noted that the subject matter of the 'dramatic' format was 'conspicuously lacking in certainty'.⁸⁴ The final nail in the coffin, however (presumably in no small part influenced by this lack of evidence) was the requirement expressed by that Lord Bridge 'that a dramatic work must have sufficient unity to be capable of performance'. He considered the features of the format claimed in this case lacked that essential characteristic.⁸⁵

MacQueen, Waelde and Laurie in their discussion of the *Opportunity Knocks* case, observe that the work under consideration (held by the Privy Council not to amount to a dramatic work) was excluded from copyright, 'not on the grounds of lack of merit, but on the grounds that [it] lacked the intellectual

⁸² *Opportunity Knocks*, 702

⁸³ *ibid*

⁸⁴ *ibid*

⁸⁵ *ibid*

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qualities of the categor[y] under which copyright was claimed'.⁸⁶ (They later observe too that, by effectively placing this restriction on producer interests, namely that 'works which do not fit into the expressed categories of the law do not receive copyright protection', copyright law is at least indirectly protecting user, or non-producer, interests.⁸⁷)

It may of course be entirely possible for a format to come within the category of dramatic work. The authors of *Copinger & Skone James on Copyright*, one of the leading textbook authorities on English copyright law, support this approach, writing that '[t]here is no reason in principle, however, why a format should not be protectable as a dramatic work if it contains a sufficient record of how the show is to be presented'.⁸⁸ If so, then the practical lesson for production companies is that detailed information and written directions concerning the production of the format would be key. Nevertheless, by having to begin the quest by searching for some degree of 'unity', and drawing analogies between TV formats and 'traditional' dramatic works, the prescriptive list approach of the UK system makes it a less attractive jurisdiction in which to begin.⁸⁹

⁸⁶ H MacQueen, C Waelde and G Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2007) 2.38 / 51

⁸⁷ *ibid* 7.12 / 229

⁸⁸ K Garnett, G Davies & G Harbottle, *Copinger and Skone James on Copyright* (15th ed.) (Sweet & Maxwell, London 2005) 3-42.

⁸⁹ It may be worth noting that the case was originally brought in New Zealand, and that its copyright law, in common with that of Australia, takes a slightly different approach to the categorisation and definition of copyright works to the UK. Section 32 of the Australian Copyright Act 1968 specifies protection as being available for four categories of original works: literary, dramatic, musical and artistic. (Sections 89-92 then also name copyright as subsisting in four categories of 'non-works': sound recordings, cinematographic films, broadcasts, and published editions.) Section 14 of the New Zealand Copyright Act 1994 also restricts copyright to a list of defined works, and reflects more closely the equivalent UK categorisation: literary, dramatic, musical or artistic works; sound recordings; films; broadcasts; cable programmes; and typographical arrangements of published editions. In both those Acts (section 2 of the New Zealand Act, and section 10 of the Australian one), a dramatic work is widened out to include 'a scenario or script for a film'. This may offer more hope when trying to draw analogies between TV formats and dramatic works.

The second approach – civil law, illustrative examples

Netherlands

Article 10 of the Netherlands Copyright Act of 1912 contains an illustrative list of ‘literary, scientific or artistic works’, following closely the Berne list of examples and concluding with what appears to be a fairly wide catch-all: ‘...and generally any creation in the literary, scientific or artistic areas, whatever the mode or form of its expression.’⁹⁰ This relatively wide formulation was interpreted by the Dutch courts as enabling (potential) copyright protection of the *Survivor* format, in the case of *Castaway Television Productions Ltd and Planet 24 Productions Ltd v Endemol*.⁹¹

In that case, the Dutch Supreme Court held that the format of *Survive* (the Dutch version of *Survivor*) was a copyright work under Netherlands law, but that the *Big Brother* format did not amount to an infringement of that copyright. In doing so the Supreme Court confirmed the 2003 decision of the Amsterdam Court of Appeal which had held that:

*In principle, formats qualify for protection by copyright if they satisfy the requirements laid down for a ‘work’. With regard to formats, this chiefly means that (1) the work must be sufficiently original and (2) the work must have been worked out into sufficient detail.*⁹²

In order to determine whether there was copyright in the *Survivor* format, the court examined the written programme proposals, a 40-odd page document which detailed the format outline, the rules of the game, and the production strategy. The claimants, Castaway, argued that there were twelve elements to the proposal, and that although each single element itself may not have been original, the way in which they were combined created an original work. These elements consisted of things like a group of people being selected by psychologists and the producer, the group being separated from the outside world, being filmed 24 hours a day, having to be self-supporting, having to fulfil tasks, having to nominate people for removal, the use of personal video diaries, and the all-or-nothing prize on offer.

⁹⁰ Translation published by the Institute for Information Law (IVIR), Faculty of Law, University of Amsterdam - <<http://www.ivir.nl/legislation/nl/copyrightact.html>> accessed 20 October 2007

⁹¹ Dutch Supreme Court, 16 April 2004 – summarised in the *Screen Digest Report* 70-72

⁹² *ibid*, 70

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In this case the court found that the combination of 12 elements within the *Survivor* format when taken together was sufficiently unique and specific to count as original. Furthermore, the format had been described in great – and therefore legally sufficient – detail in the format ‘document’ (bible).⁹³ So in other words, provided there is at least an original combination, and that there is enough detailed evidence of the work, the ‘open’ copyright work formulation can pave the way to recognition for protection. If the problem ultimately here for the producers was that this copyright was not in fact infringed by the *Big Brother* format, at least there is recognition of copyright to license in the first place.

Other ‘high-water mark’ format cases: Hungary and Brazil

Similar, ‘high-water mark’ examples of open (illustrative) list civil law countries finding copyright protection for a format have also been reported from Hungary and Brazil.

In a Hungarian case reported by one of the lawyers active in the International Format Lawyers Association⁹⁴, the Hungarian Supreme Court considered the possible copyright protection for a radio format. The show in question, *Cappuccino*, was a light entertainment programme containing various regular repeated features. The dispute involved use of the show’s name by another radio station, but consideration of the facts of the case included analysis of the underlying copyright protection of the radio programme’s format. The Hungarian Copyright Act⁹⁵ adopts a wide form of protection for copyright works: Article 1(2) says that ‘[a]ll creations of literature, science and art—whether or not specified by this Act—shall fall under the protection of this Act’, and then goes on to list particular examples. This formulation is apparently wide enough to encompass formats – the Hungarian Supreme Court reported to have said:

*The radio programme created through editing, if it is distinguishably individual and original as compared to other radio programmes, shall be considered as a work enjoying copyright protection, which protection shall extend to the unique title of the work.*⁹⁶

⁹³ *Understanding the Global TV Format* 136-137

⁹⁴ The International Format Lawyers Association website is at <<http://www.ifla.tv>> and details of this case were written about by one of its founding members, Jonathan Coad, a solicitor and partner at Swan Turton (see further footnote 96 below)

⁹⁵ Act No. LXXVI. of 1999, on Copyright – published in English on the WIPO Collection of Laws for Electronic Access website at <http://www.wipo.int/lea/docs_new/pdf/en/hu/hu035en.pdf> accessed 22 March 2008

⁹⁶ J Coad, ‘Hungarian Court Confirms Copyright Protection for Radio Programme Format’ (Swan Turton Solicitors e-bulletin 10 March 2006)

The Brazilian case, *TV Globo & Endemol Entertainment v TV SBT*⁹⁷ involved the *Big Brother* format – which had originally been the subject of licence discussions between the format’s owners, Endemol, and a local Brazilian TV station. The Brazilian station decided not to take the licence, but later began broadcasting a similar-looking programme, *Casa dos Artistas*. The Brazilian District Court decided that the *Big Brother* format was a copyright-protected work and that *Casa dos Artistas*, was an imitation which infringed that copyright.

The Brazilian Copyright Law⁹⁸ again has an open definition of protected works – in fact taking a far wider formulation than that in the Berne Convention, with Article 7 of that Law providing that ‘[t]he intellectual works that are protected are creations of the mind, whatever their mode of expression or the medium, tangible or intangible, known or susceptible of invention in the future, in which they are fixed, such as...’ before offering a list of some 13 illustrative categories.

In identifying the *Big Brother* format’s worthiness for copyright protection, the court said:

The format of the programme Big Brother is not limited to spying on people locked up in a house for a certain period of time; it goes far beyond that. The format contemplates a programme with a beginning, middle and end, with a meticulous description, not only of the atmosphere in which the people will live for a certain period of time but also of the places where the cameras are positioned. The format consists of details such as the use of microphones tied to the participants’ body, links for 24 hours a day, music styles, how the participants will have contact with the external world, their activities, etc. The images and sounds captured for hundreds of thousands of people through daily episodes on television and the Internet and their subsequent commercial exploitation are also a unique characteristic of the format...

...The format, though, doesn’t just regulate the way in which the actual programme proceeds; it also provides technical, financial, commercial and operational instructions. It is the combination of these characteristics of the

<<http://www.swanturton.co.uk/ebulletins/archive/JKCHungarianCourt.aspx>> accessed 21 March 2008

⁹⁷ Judgment of the Brazilian District Court Osasco São Paulo, 16 June 2003, reported in the *Screen Digest Report* 74-76; and on the International Format Lawyers Association website – Legal Information: ‘Endemol Wins Copyright Protection for Big Brother in Brazil’ <<http://www.ifla.tv/uk-endermol.html>> accessed 22 November 2006

⁹⁸ Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights – published in English on the WIPO Collection of Laws for Electronic Access website, at <http://www.wipo.int/clea/docs_new/pdf/en/br/br002en.pdf> accessed 22 March 2008

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*format of the programme Big Brother which shows that it possesses its own personality...*⁹⁹

Not only was the court in this case able to take advantage of the open and wide formulation of what could be a Brazilian copyright work, but it was able to go one step further than in the Netherlands *Survive* case, and found that the copyright-protected originality of the *Big Brother* format had been used by *Casa dos Artistas* to a substantial and therefore infringing degree. The key point for our discussion, however, is that – again – here we have a jurisdiction whose copyright legislation broadly and openly defines what is meant by a copyright work, and that it consequently appears to be easier for a court to interpret that legislation as encompassing a TV format.

Patterns for finding a copyright work?

Does this point to a pattern emerging, between common law, exhaustive list countries on the one hand, and civil law, illustrative list countries on the other? The answer does not appear to be that simple, as the following examples will show.

USA

Take the United States of America, for example, a common law country (of sorts) whose Copyright Act¹⁰⁰ provides that copyright subsists in original works of authorship fixed in any tangible medium of expression; it then goes on to list eight illustrative categories of such works.¹⁰¹ These categories are used essentially for administrative purposes for the process of registering copyright works in the US, and are not meant to be exclusive. In the words of Halpern, Nard and Port, '[t]he fundamental concept is that, except as specifically excluded, *all* original creative expression fixed in a tangible medium of expression is eligible for copyright protection.'¹⁰² This offers rather greater potential for finding at least copyright subsistence than in the other common law jurisdictions discussed above.

To illustrate this, we can look at the case of *CBS Broadcasting Inc v ABC Inc* from 2003¹⁰³: an interlocutory decision, delivered in open court, which appears to be the only source of detailed judicial comment regarding the US Copyright

⁹⁹ Quoted from the *Screen Digest Report* 74-76

¹⁰⁰ Copyright Act of 1976 – 17 USC §§ 101-810; 1001-1101

¹⁰¹ 17 USC § 102(a)

¹⁰² S W Halpern, C A Nard and K L Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent, Trade Mark* (2nd ed) (Kluwer Law International, Aalphen aan den Rijn, 2007) 5

¹⁰³ 2003 US Dist. LEXIS 20258 (US District Court S.D. N.Y., 14 January 2003)

Act's treatment of TV formats (at least in respect of reality TV). The case was an application for a preliminary injunction brought by CBS to stop ABC broadcasting the show *I'm a Celebrity, Get Me Out of Here* which they alleged breached copyright in the format *Survivor*. The court refused to grant the injunction, on the basis that there was no substantial similarity between the copyright-protected elements of the two formats. The judge assumed that the format of *Survivor* was only a compilation of non-protectable generic ideas (which as was seen in the Netherlands *Survival Big Brother* case, was accepted by the parties), but she accepted, however, that it may be possible to grant copyright protection to a format on the basis of 'originality by combination'. She quoted Judge Weinfeld from the case of *Barris/Fraser Enterprises v Goodson-Todman Enterprises* (Southern District Court New York, 1988):

*...even where a television game show is made up of entirely stock devices, an original selection, organization and presentation of such devices can nevertheless be protected, just as it is the original combination of words or notes that leads to a protectable book or song. Copying of a television producer's selection, organization and presentation of stock devices would therefore be misappropriation.*¹⁰⁴

However, since this effectively amounts to 'copyright protection in a compilation of ideas', the copyright protection will be 'thin' – and, as mentioned, ultimately the judge denied CBS's application for a preliminary injunction on the grounds that if there was a copyright work here, it was not being infringed.

This 'combination' approach also finds support in Nintendo video games case from the early 1980s, where the court was prepared to protect games such as *Donkey Kong*, emphasising that copyright applied to the combination of elements that comprise the video game, and not just its fixed sequences. The 'expression' of ideas which gained copyright protection included 'the characters, obstacles and background as well as the sequence of play of the game'.¹⁰⁵

In principle, therefore, it appears that the US copyright law is capable of treating the combination or compilation of otherwise unprotectable ideas as a protectable copyright work: by what could be classified as a sort of hybrid approach between language we might expect to see reserved more for restricted notions of a 'dramatic work' category (look and feel, tone, characters and plot), and a freer form of analysis derived from the openness of the US Copyright Act's classification system.

¹⁰⁴ *Screen Digest Report* 73

¹⁰⁵ *Nintendo of America Inc v Elcom Industries Inc* (1982) 564 F.Supp. 937

Germany

If the US system therefore seems to be more open than might at first blush have been expected, then this can be contrasted with the German civil law system. The German Copyright Law of 1965¹⁰⁶ provides for copyright for the creators of literary, scientific and artistic works, provided the work in question is a 'personal intellectual creation': an expression of the individuality of the creator. It is possible under German law to gain copyright even in an oral expression of a thought, providing it has a sufficient degree of personal intellectual creation¹⁰⁷; in other words, there is a less rigid requirement of fixation in material form, which underlies the common law approach.¹⁰⁸ In Article 2 we again see an illustrative list of 'protected literary, scientific and artistic works', broadly corresponding to the Berne categorisations, although focusing on certain 'themes' such as in Article 2(1)1: 'works of language, such as writings, speeches and computer programs'. However, maybe as a result of the nature of its categorisation, the lack of a general catch-all, and the requirement for 'personal intellectual creations', case law suggests that this may be a harder jurisdiction in which to shoe-horn the concept of a format into an obvious protectable work.

To illustrate this, we can see the case of *TV-Design v Südwestrundfunk* from 2003¹⁰⁹, the German Federal Supreme Court refused copyright protection for a French format, *L'école des fans* which it was alleged had been copied by the makers of a German programme, *Kinderquatsch mit Michael*. The court held that it was not a protected work under the German Copyright Act:

*The format of a television show series that elaborates the concept for an entertainment show with a studio audience (in this case singing performances by small children and invited guest stars) is in general not susceptible to copyright protection.*¹¹⁰

According to Dr Marc Heinkelein, author of a German doctoral thesis on format protection, this decision is 'self-contradictory to a high degree and

¹⁰⁶ Urheberrechtsgesetz (UrhG) – published in English on the WIPO Collection of Laws for Electronic Access website, at <<http://www.wipo.int/clea/en/fiche.jsp?uid=de078>> accessed 22 March 2008

¹⁰⁷ *Understanding the Global TV Format* 134

¹⁰⁸ See JAL Sterling, *World Copyright Law* (2nd ed) (London, Sweet & Maxwell 2003) 246, where the author notes that at least in common law countries, one of the difficulties faced when claiming format protection is that the format may not be fixed (although filming or recording could address this). His conclusion is that 'the line between the protected elaborated plot and the unprotected format remains indefinable, and will depend on the facts of each case.'

¹⁰⁹ Decision of the German Federal Supreme Court of 26 June 2003 (I ZR 176/01), (2003) GRUR 876 = 2003 ZUM 771 – summarised and discussed in English in the *Screen Digest Report* 67-70

¹¹⁰ *ibid*

untenable in its reasoning'.¹¹¹ The court went beyond the case in question, to look at the more principled question of formats in general, and took a hard line against the idea of bringing them within the meaning of 'work', saying that '[c]opyright law only protects works against their unlawful infringement...but not against their mere use as a model in order to create other subject matters'. The authors of the Screen Digest report question whether the Supreme Court did not end up confusing the question of the extent of the protection (how far a format should be protected against protection – which is what 'using as a model' appears to refer to) with that of the conditions for whether a format is protectable as a work at all.¹¹² Nevertheless, as the decision stands, it suggests that – in contrast to the USA, and to some of the other civil law jurisdictions mentioned earlier – the German Copyright Law cannot be broadly interpreted as far as formats are concerned.

The decision can also be contrasted with the earlier so-called '*Happening*' case¹¹³, which had suggested a rather more liberal approach to the requirements of the German Copyright Act. A choreographic and stage presentation based on the painting 'The Hay Wagon' including new symbols and other items, described as a 'happening' by the claimant who presented it at a High School media centre, was held by the German court to constitute a personal intellectual creation within the meaning of article 2(2) of the German 1965 Law. The categories of work in article 2(1) were 'merely illustrative', and so it did not matter whether it could be classified as choreographic or dramatic – it did not have to fit precisely into one of the categories. Whether such a line of reasoning would be successful again is unclear.

The approach in Scandinavia

Since the patterns for identifying national rules for the international TV format trade remain unclear, we should at least conclude our discussion by touching upon the way in which the question of copyright protection for TV formats has thus far been addressed in Scandinavia.¹¹⁴ Here, whilst in principle the wording of the copyright legislation might lead to door open to format protection every bit as much as in the Netherlands and other civil law jurisdictions mentioned

¹¹¹ International Format Lawyers Association website – Legal Information: Germany - <<http://www.ifla.tv/germany.html>> accessed 22 November 2006; an argument that is developed by Dr Heinkelein and Christoph Fey in a German article, 'Der Schutz von Fernsehformaten im deutschen Urheberrecht' (2004) (4) GRUR Int 378

¹¹² *Screen Digest Report* 68

¹¹³ BGH 6 February 1985; (1985) GRUR 529 – discussed in JAL Sterling, *World Copyright Law* (2nd ed) (London, Sweet & Maxwell 2003) 246-248

¹¹⁴ Of course this can only be a tentative suggestion in this limited context, since there have only been reports of two relevant cases relating to TV formats, one in Denmark and one in Sweden – as shall be discussed

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earlier, the courts appear nevertheless reluctant to help claimants through that door – at least not where more practical solutions otherwise exist.

To expand on this proposition: we find an illustrative (non-exhaustive) list of categories of copyright works in the Copyright Acts of Sweden, Denmark and Norway, in apparently wide terms. For example, Sweden's Copyright Act (URL)¹¹⁵ ch.1, s.1 provides as follows:

Anyone who has created a literary or artistic work shall have copyright in that work, regardless of whether it is

- 1. a fictional or descriptive representation in writing or speech,*
- 2. a computer program,*
- 3. a musical or dramatic work,*
- 4. a cinematographic work,*
- 5. a photographic work or another work of fine arts,*
- 6. a work of architecture or applied art,*
- 7. a work expressed in some other manner.*

A very similar formulation can be found in the Danish Copyright Act, and a fairly similar one in Norway. The 'catch-all' wording at the end would appear to support arguments that TV formats could or should also be included as a copyright work, much along the lines discussed earlier in relation to the Netherlands, and in contrast to Germany whose legislation does not have quite such an open formulation.

The open nature of the Swedish Act does not imply that the categories have no significance, and does not mean that so long as one comes within the general catch-all then this is going to be sufficient; rather, it should be remembered that the particular exclusive rights of the copyright owner are dependent upon the category into which the work in question fits.¹¹⁶ But for the purposes of this brief discussion, where we are looking at the potential for a TV format to come within national copyright legislation at all, the very existence of such open wording at least suggests a greater possibility of looking at protection for formats.

However, in the two cases thus far reported to have been heard before courts in Sweden and Denmark, those courts have not been very willing to acknowledge such a possibility. The Danish case, *Danmarks Radio v Celador Productions Ltd*¹¹⁷ was a decision of the Eastern Division of the Danish High Court in relation to a case brought by Celador, the English production

¹¹⁵ Lagen om upphovsrätt till litterära och konstnärliga verk (URL) (SFS 1960:729)

¹¹⁶ In fact similar comments could apply to other jurisdictions discussed in this paper.

¹¹⁷ (1999) UfR 1762, [2000] ECDR 158 – discussed in H Kirk Deichmann, *Programkoncepter: Ophavsret til tv-formater* (Thomson, Copenhagen 2002) [*in Danish with English summary*] and L Gough, 'The Drama over Format Rights' (2002) (May) *Managing Intellectual Property* 26

company behind *Who Wants to be a Millionaire*, the format of which had been licensed to a number of countries, including TV2 in Denmark. Danmarks Radio (DR) television produced a new quiz programme called *Kvit eller Dobbelt* ('Double or Quits'), the overall content and form of which bore a strong resemblance to Celador's show. Although the Danish High Court upheld the lower court's decision to grant an injunction against the broadcast of *Kvit eller Dobbelt*, on the basis that it infringed the Danish Marketing Practices Act (since the UK format was already known worldwide when the infringing Danish format was first developed), when it came to copyright the Danish High Court held that programme concepts are merely a collection of ideas and are therefore not copyright protected.

In the Swedish case, *Zandnia v MTV Mastiff*¹¹⁸ a contestant from a (another) Swedish reality programme brought action against the production company MTV Mastiff for what she claimed was breach of her copyright in a programme concept for a 'docu-soap' on dogs and their owners, *Top Dog*. The Swedish Court of Appeal denied her application for an injunction on the grounds that the programme ideas in dispute were insufficiently concrete/precise.

These two cases, it might be argued, have merely denied protection to *concepts* – not something likely to be controversial in any copyright system – but that this does not close the door to seeking protection for fuller-presented and argued 'formats'. In the Danish case, the potential problem could be side-stepped anyway by enlisting the help of national unfair competition (marketing practices) law. In the Swedish case, at least from piecing together the limited information available, it sounds as though clearer use of confidentiality agreements may have been the real commercial answer. So in neither case was it necessary for the respective courts to give full consideration to protection of formats as such. Perhaps this is a more practical approach, and should be noted by production companies considering their best strategies for licensing and protecting their formats.

Conclusions and commercial implications

The focus of this chapter has been the underlying (copyright) protection of what is being licensed in the course of the international TV format trade. Even where it can be shown that a TV format *can* qualify as a copyright work under one or more country's laws, the next stage in the copyright analysis would be to prove infringement in individual cases. This subsequent stage also poses challenges for media companies since it brings into play some of the possible weaknesses in the underlying protection – such as the thinness of copyright for

¹¹⁸ Svea HovR (Court of Appeal) 24 January 2006, Case (*mål*) Ö 660-06 (Dokusåpar med hundar) – referred to in M Levin, *Lärobok i Immaterialrätt* (9th ed) (Norstedts Juridik, Stockholm 2007)

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formats even where it exists (cf. the US case referred to above), and the question-marks over protection for ideas (meaning potentially that the part of the format the producer most wants to protect – the underlying concept, perhaps – is that which is free to be taken anyway).

The wider questions of specific format right protection, and effective enforcement against infringers are, as explained, beyond the scope of this discussion¹¹⁹, but the message of the analysis in this chapter is that an international approach to the question of current protection for TV formats – whilst showing inconsistencies – does also show possibilities. Some courts are able to be more creative than others, thanks to differences in national legislation, and this can therefore be taken into account in development and licensing strategies: the countries and territories to focus on, the choice of law for governing licence agreements, and the choice of jurisdiction in which to enforce the production company's 'rights' can and should all be considered. (On this last point, although this is not an issue that has been discussed in much detail here, it should be noted that the availability of remedies under national unfair competition law, used with some success in Denmark, Germany and France, for example, should also be added to the consideration of the best forum for litigation.)¹²⁰

And finally, although there is no agreed international position on TV formats, and that even in the application of the Berne Convention national approaches to copyright 'works' differ quite significantly, the national differences all still culminate in one key commercial point: the need for detail – as much detail as possible, in fact, on all aspects of the format being protected and licensed. Each of the court cases mentioned in this chapter, regardless of how the jurisdiction in question is categorised, ended up basing their analysis on the availability of detailed evidence (or not) of the copyright work that was put before them. Whether trying to show that a format is a dramatic work, or a copyright work in its own right, the court has to see as much detail as possible.

¹¹⁹ Something that this author intends to analyse in another forum. See also J Phillips, 'Of form and format (Editorial)' (2006) 1 *Journal of Intellectual Property Law and Practice* 625

¹²⁰ For further discussion on unfair competition law see chapter 1 of this book: Jeremy Phillips, 'Compliance with international treaties: does the UK have or need a law of unfair competition?'

8. The WIPO copyright framework: a basis for business and development

Dimiter Gantchev

This chapter is an edited transcript of the talk that Dimiter Gantchev delivered to the symposium on International Copyright Law on 26 October 2007

Introduction

I would like to present to you today a perspective from the World Intellectual Property Organization (WIPO). A number of issues have already been discussed by the presenters before me which makes my task in a way easier, but I will add a different angle from the point of view of the WIPO Secretariat. I would like to talk about the copyright framework as a basis for *business* and as a basis for *development* as well, and I more specifically touch upon three major sets of issues.

Firstly I will discuss the challenges to the copyright framework – the way we see them, the magnitude of the current problems, the avenues that we are exploring for the future of WIPO.

The second set of issues, which is linked to copyright for business, is copyright and economics – the possibility of using copyright as a tool for economic analysis. I am not going to discuss business models, but I think that when we discuss businesses we need to be clear about the extent to which copyright is relevant to the economic analysis that can be applied.

Finally, I would like to touch upon the issues of copyright and development: what does copyright mean for developing countries, and how can copyright regimes support development. I will then draw some conclusions.

Part I – Challenges to the copyright framework

WIPO's traditional role

WIPO is one of the UN agencies with 184 member states as of today. It is the 17th specialised agency of the United Nations system, with a specific mandate in the field of intellectual property. Traditionally WIPO has administered treaties in the field of copyright and related rights and further developed international copyright law and normative developments aimed to harmonise the international copyright system. WIPO has always had responsibilities in the fields of technical assistance and capacity building, helping developing countries to implement the provisions of the international treaties. More and more WIPO deals with the exploitation of copyright and related rights – which includes the collective management of rights – to the extent to which we must ensure that collective management is done in compliance with the international treaty obligations. Naturally in order to respond to changes which are happening in the world you have to monitor trends, and we have been doing this constantly.

The WIPO copyright framework

The milestone of international copyright protection today remains the Berne Convention: with its 163 member states it is the widest international treaty that we have in the field of copyright. What is the future of the Berne Convention – what are the chances of revising it or updating it? Under the current political circumstances our guess is that nothing major is going to happen and that things are going to stay as they are with regard to this treaty. It is not likely that the Berne Convention will be revised in the very near future because a revision may go both ways – upwards or downwards – and it seems that nobody is very interested in changing it right now. Therefore the chances are that it will remain unchanged for the time being, and will continue to be the milestone of international copyright protection.

WIPO also administers the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These two treaties are relatively recent – they are 11 years old, entered into force only five years ago (2002) and they have already respectively 64 and 62 member states that have ratified them. With the anticipated accession of the European Union as such we hope to bring up the number of members to these conventions to a figure which is comparable to the Rome Convention – which will render them treaties with serious membership. These two treaties form the basis of the international copyright protection in the digital age.

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As for the Rome Convention, which has 86 members, I have to underline that it is not administered only by WIPO. The International Labour Organization (ILO) had a great deal to do with the work on this convention – and the ILO together with UNESCO and WIPO are in charge of the administration of this convention in the field of neighbouring rights. No major revisions of the convention are envisaged for the time being. A number of its provisions have been taken up in other agreements such as the WPPT and partially TRIPS. The Rome Convention as such is quite difficult to change – the mechanism is much more complicated than the Berne Convention (which requires unanimity for a change). It is therefore not likely that the Rome Convention will be revised in the coming years unless other developments point in that direction.

What sort of developments do I mean? Here I turn to some of the outstanding issues which Gillian Davies mentioned¹²¹. In 1996, when the diplomatic conference adopted the WCT and WPPT, there were three sets of outstanding issues. The first was the protection of audiovisual performances, and that was the subject of a diplomatic conference which took place in Geneva in 2000. That diplomatic conference was ‘inconclusive’. It failed on one article related to the transfer of rights, and the division was so big and the damage so serious that for a number of years there were no further discussions on the issue. However in 2002-2003 a number of efforts were made to start talking again on the subject – with not much success. The issue is on the agenda of the General Assembly at WIPO, and right now it is the General Assembly which has to decide to take it up again, when it considers that the conditions are there for doing so. It concluded just three weeks ago that the interest is still there and the issue was maintained at the level of the General Assembly. If it goes to the level of the Standing Committee on Copyright and Related Rights a lot more time will be needed to bring it up again to the General Assembly.

The second issue is the protection of broadcasting organisations: a treaty that has been discussed over time did not seem to gain enough support earlier this year, so after more than eight years of work this important area unfortunately did not make it to a diplomatic conference at this stage. The protection of broadcasting organisations was on the agenda of the General Assembly: it discussed it, and the next Standing Committee on Copyright and Related Rights, which will take place in March 2008 will again discuss this issue and what has to be done next. It is clear that diverging opinions remain on more than one point – so apparently broadcasting organisations are not immediately going to see a breakthrough.

Finally, protection of non-original databases was the third issue which was left out in 1996. There was a desire to push this issue forward – although not by everyone. While the European Union member states enjoy protection of non-original databases the United States does not have this form of protection,

¹²¹ Editor’s note – see chapter 6 of this book: Gillian Davies, ‘The impact of international treaties on national interpretation of copyright’

and some developing countries don't understand it. The issue has formally been dropped from the agenda of the Standing Committee on Copyright and Related Rights. WIPO produced a number of studies on that issue, but they did not lead to a consensus on taking it up as a candidate for discussions on a treaty or any kind of regulations in that field.

Transformations affecting the IP system

The world of intellectual property is facing different kinds of transformations today. As usual, we start with the economic basis: what is happening on the economic front; what are some of these major economic transformations that we have to take into account? We live in the knowledge economy, and here we have a lot of proof of a much more important role that intellectual property plays. We have different indicators through which we can trace this increased importance. First of all we see a higher demand for protection. If you look at the WIPO treaties which I mentioned, the rate of accession to those treaties over recent years has been much higher than in all previous periods. Why is that so? People suddenly become aware that there is a high value in intellectual property and that they can benefit from that – they can benefit from intellectual property protection in a wider geographical area, they also realise that intangible assets make up 80% of the assets of companies today, intellectual property and copyright become the major subject of trade negotiations and so we do see higher demands for copyright protection in the field of patents and trade marks¹²².

On the other hand we see demand for new rights, expanding the scope of protection, which is driven by different factors. Some are technology-driven like the database protection mentioned earlier on; we have witnessed expansion of rental rights and communication right – in the WCT, WPPT and TRIPS. There is in parallel an interest to introduce rights in new areas which are not technology driven. In WIPO there is an intergovernmental conference which is looking into the issue of possible protection of traditional knowledge, genetic resources and expressions of folklore.

I would like to turn now to some of the political transformations in the world of intellectual property which we are witnessing. The major political transformation today is the empowerment of a broader range of participants in the network society. We usually talk about a new type of consumer or user and I think we should find perhaps a more dignified word for that, because we are all consumers and users. What is the new role of the consumer, what is so specific about the consumer today? What is specific is that he/she is not behaving in an economically rational manner. He is not only interested in more

¹²² In the field of patents we have a 7% annual increase of the registrations to our Patent Cooperation Treaty; for the last ten years a constant upward trend – 150,000 per year

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goods at a better price and higher quality – he is interested in access to information. He wants information now, he wants it everywhere, he wants it in the format that he prefers, and he is not prepared to pay any price for it. So we have a different type of consumer and he is participating very actively in shaping the international copyright framework today. At WIPO we have more than 200 observer organisations which are taking an extremely active part in our discussions.

On the other hand, we witness the emergence of new, horizontal alliances – which I call global, but they exist also on regional and national scale. We have very active states which are taking very resolute stances in the field of copyright protection. We have non-governmental organisation (NGO) alliances which are also taking very active positions. We see experimentation models, such as the Open Source model, Creative Commons, and we have recently seen that they cooperate with traditional models. All of this is happening against the background of a growing anti-intellectual property movement. So we can say that copyright has become a global issue – it is no longer a local or national issue. It is a global and a national policy issue. Parties make copyright an issue on their agendas: this has been the case in Sweden, Finland, France and Bulgaria. The fact that copyright has become an issue on everyone's agenda is not necessarily a bad thing – it is an opportunity. The interest in intellectual property is higher than it has ever been.

On the legal front, I will just mention two points. My first point is that copyright and intellectual property in general today are no longer the issue of just one organisation – it is not only WIPO who is dealing with this today. WIPO has a specific mandate in the UN system on IP matters. But there is a complex relationship and interaction between the various UN bodies. More than one of them has a stake in this: the WTO administers the TRIPS agreement, UNESCO is not concerned with the development of the legal framework but is contributing in many important ways to the international discussions on copyright. The International Labour Organisation (ILO), the International Telecommunications Union (ITU), the Convention on Biological Diversity (CBD) and others have demonstrated interest in the matter.

And the other point, which was mentioned by Professor Rosén¹²³ is that today intellectual property is considered also from the point of view of other public policies. Unfortunately sometimes we see attempts to use the IP system to achieve objectives which are in other public policy areas. That is the legal reality.

¹²³ Editor's note – see chapter 2 of this book: Jan Rosén, 'Copyright control in Sweden and Internet uses: file sharers' heaven or not?'

Technological transformations

I would like to mention here the four main areas which we have to take into account when we discuss transformations affecting the IP system.

In the field of **creation** of IP we have seen an incredible amount of collaborative creativity, which poses a challenge – to fair use dealings and to moral rights. We see an enormous encouragement of user-generated content and the amount of information available which is generated by users is striking; we witness a phenomenal growth of MySpace and YouTube.

In the field of **distribution** we see legal – and illegal – peer-to-peer services; online video streaming and download subscription services; online music distribution with or without DRMs; mobile content such as ringtones and online gaming. All of these are new challenges to the distribution, new things which are happening.

In the field of **protection**, we see more DRMs being employed in some countries, less in others, and we see a huge debate on that issue. Issues of access are being raised, issues of compatibility are being raised – these are all technological challenges posed in the digital environment.

In the field of copying, **piracy** is a phenomenon which is rendering some of these industries almost very difficult to sustain.

The impact of transformation

So what is the result of all these transformations?

The result is a system which, politically correctly is in evolution, but if we want to be more precise we can perhaps talk about a system which is in a situation of stress. This is a functional stress on the one side, because we have an explosion of demand – people want to use the system more and more; but on the other hand we have an explosion of counterfeiting and piracy. It is also political stress because the issues of copyright and intellectual property are being discussed today in so many different forums – everybody is an expert on copyright today. That renders the debate sometimes very complex. On the other hand we have diverging agendas on the political front. So are we interested in the functional efficiency of the system or in the achievement of political objectives? Where is the balance between them? Are we going to go for parallel systems or for a convergent system? And finally, we are talking about an evolution but where does this evolution bring us to? Perhaps closer to more and more balanced models in the field of copyright.

WIPO's current copyright priorities

So what are some of our priorities right now on which WIPO is working? The word 'balance' is a key word in my talk today. The way we see our priorities today is that in the first place we have to maintain the balance in the system, the

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balance between the private rights and the public interest, between the rights of the rights holders and users. Secondly, we have to ensure more equitable access to the system; access for creators in developing and developed countries. This is an issue that is politically loaded, and is very often raised in our discussions. And thirdly we have to make the system more relevant: to serve all member states on the one hand, but also to try to lower the costs of entry to the system both in acquiring and in exercising rights. We have seen in the past mostly legal solutions to the problems that have existed in the field of copyright, as in the 1970s and 1980s, and we have seen the resort to technological solutions in the 1990s. The time has come to look for more socially equitable solutions.

Possible new areas of work

What are some of the new areas of work which have been discussed by our member states?

One of the candidates for substantive discussions is the area of limitations and exceptions. There has always been interest in this field. WIPO has produced regular studies in this area and these studies could provide inputs for discussions in the Standing Committee.

A second issue is Digital Rights Management (DRM). Some people tend to see DRM in the context of the discussion on limitations and exceptions. WIPO's role in this field is not to proceed to any norm-setting or producing any standards regarding DRMs. For the time being we have tried to provide a place where different issues can be debated. We have produced three studies and very recently had a seminar on rights management information, where we had some incredible presentations – all of this is available on our website¹²⁴ – to see how creativity can be accessed in a network environment. If our member states wish to pursue discussions regarding DRMs then this is one of the candidates for more substantive discussions in the future.

Professor Rosén and some of the other speakers mentioned the issue of liability of the internet service providers.¹²⁵ In 2006 WIPO held a seminar on internet intermediaries, but it seems that there is as yet no consensus to put this issue onto WIPO's agenda. There are lots of industry interests at stake here, lots of lobbying, and it is not yet evident that our member states feel that we have the right environment to proceed with this issue.

New demand from the member states

Unfortunately we must state that in the last ten years we have seen a slowing down of the normative activities at WIPO and this tendency is likely to continue in the next few years. In the meantime we have to provide more

¹²⁴ WIPO's website is at <<http://www.wipo.int>>

¹²⁵ Editor's note: see chapters 2 and 5 of this book

flexible solutions, including soft law approaches: providing best practices, joint recommendations, and other things that can be of practical value to the rights holders and to the member states.

A very important issue is how to keep the balance, the equilibrium in the system – balancing access rights with ownership rights. WIPO has always been and will be a forum for discussions and policy debates, and I can tell you that the debate on copyright is extremely lively these days – it is one of the most-attended standing committees that we have. The policy debate has to be based on better information. We will try to encourage and spread better information which can facilitate this debate.

Currently we focus much more than in the past on the commercial exploitation of intellectual property, and the administration of intellectual property rights. Hence the title of my presentation – copyright for business and development: I think this characterises our immediate agenda, this is where we try to be more visible and more efficient.

This is an appropriate moment to mention enforcement issues. Up until several years ago, enforcement efforts at WIPO were not very active, but since the establishment of our advisory committee on enforcement we have been doing quite a lot of work in assisting developing countries to bring the provisions of their national laws into compliance with the treaties and also to endorse the building up of national capacity to deal with the issues of enforcement. In January 2007 WIPO hosted the Global Congress on the fight against counterfeiting and piracy. We are working together with the OECD on the issues of measurement of counterfeiting and piracy. Enforcement is becoming a very important issue and it will be on WIPO's agenda in the years to come.

Part II – Copyright and economics

Copyright and economic analysis

I would like to turn to some of the issues surrounding economic analysis. If we talk about copyright for business, we have to be aware that copyright is also an economic concept and it can be applied in economic analysis. Empirical research is crucial in this field and we must admit that often empirical research has been used to make the case for extended scope of protection. In order to extend the duration and the quality of the protection, you always bring in empirical results in that discussion. We have seen at WIPO growing interest in the issue of measurement – how can we measure intangibles, intellectual property, copyright? Why is this of interest? First of all, everybody says that creativity is a driver in the knowledge economy. That has to be proven – we need to verify this with facts and empirical research. What is the potential of these industries? What is their performance? What is their competitiveness – is

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this sector more competitive than others? We need to measure in order to be able to answer these questions. And finally if you wish to provide credible policy options, you need to monitor trends and that you can do through economic research on regular basis.

Depending on the policy objective, you can resort to different tools for measurement. You can go for social indexing, if you are not working with very precise figures; you can do cultural mapping if you are interested in linkages between various cultural sectors; you can do economic measuring if you are interested in macro-economic indicators. The problem is how to capture the non-economic returns on activity. There are quite a number of gains from creative activities which cannot be measured, which is a limitation in the approach.

What can be measured?

One has to be very transparent regarding what exactly can be measured and to introduce precision and clarity from the outset. People who work in business know that every asset has a value and that its value changes over time. In order to assess economic performance we need a set of indicators. We can survey the size of the industries which operate on the basis of intellectual property. We can also assess their economic contribution or we can try to assess their impact which is much more difficult. If we wish to evaluate their importance, again the issue is: what exactly does it involve and what is the purpose? WIPO is estimating the relative share of the industries that rely on copyright protection in terms of establishing their quantifiable characteristics. We do that because countries have asked us to do that – they would like to compare themselves and we needed to produce guidelines on cross-country comparability, to offer something simple and practical that can be used to produce policy research.

Copyright as an instrument to measure creativity

Let me turn to the relationship between copyright and creativity. Creativity is the subject matter of copyright protection. Copyright protects and promotes creativity. And copyright is a very well-defined concept, unlike creativity which is a concept which presents some difficulties in terms of delimitating the scope of creativity in various human activities. Copyright on the one hand is a set of economic and moral rights. On the other hand copyright can be seen as a legal framework for the operation of the market. A third possible way in which we can analyse copyright is to regard it as a financial mechanism to reward creators, a mechanism that is being more and more used by the creators. Finally, copyright is an economic category because it has very clear economic characteristics, economic functions and consequences of an economic nature. There are a number of conditions that have to be met for its economic efficiency.

Being a clear economic category copyright can be used as a benchmark for economic analysis. According to the working definition that we have adopted in the field of creative industries, those are the industries involved directly or indirectly in the creation, manufacture, production, broadcast and distribution of copyright works. We have heard a lot of examples today from the UK, but I have to underline that the UK is using a different definition¹²⁶.

Main features of the WIPO measurement model

What are some of the features of the model that we are using in WIPO? It is a model that has been developed by a group of experts, including Robert Picard, and we have produced some guidelines on how to measure the economic contribution of copyright. We have stressed four major features of the model.

- (1) It offers clear guidelines on how to relate copyright to business activities and statistical reporting. You may wish to measure everything under the sun, but if you cannot link it to statistical reporting that means that every time you will be conducting an extremely expensive survey. So you have to relate your subject matter to what is available in terms of statistical information.
- (2) The model contains clear and new definition on the copyright-based industries? As mentioned before, our definition is built around the criteria of level of dependency on copyright. So we have four groups of industries, distinguished on the basis of the different level of use of copyright material.
- (3) The model provides a step-by-step methodology and offers measurement techniques which could be used to implement the model.
- (4) The model is built around the measurement of three indicators: what is the contribution to value-added (in terms of share of GDP), what is the level of employment that has been generated by these industries and what is their contribution to foreign trade?

WIPO surveys – the empirical evidence

Let us now look at some of the evidence that WIPO has been able to produce in the last five years. These are studies that have been done according to the same methodology which means that you can compare the results – and this has not been the case in the past. We have assisted studies in developed and developing countries and countries in transition. One thing which is striking when you look at the results presented on chart 1 is that it is a quite significant contribution. We see the US topping this list with over 11% of contribution to

¹²⁶ Editor's note: see the website of the UK Government's Department for Culture, Media and Sport at <http://www.culture.gov.uk/what_we_do/Creative_industries/>

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GDP by the copyright-based industries, and contributing more than 8.4% of the employment in that country. This makes the sector which is more important than the entire healthcare and social assistance sector there, it also exports more products for a higher value than the whole of the aircraft industry in the US. In Singapore, a country which did the survey for the first time, the result was surprisingly high – 5.7%, which ranked it among the top-seven industries in that country. Latvia, which also did the survey for the first time, and did it only to see how it compares to the other EU member states, was happy to discover that it had a good average level within the European Union. Hungary was focusing on its traditional cultural excellence, and it indeed produced very impressive results – more than 7% of the employment in that country comes from that sector.

Table 1. Contribution of copyright-based industries to GDP and employment in various countries¹²⁷

Country	Contribution to GDP	Contribution to employment
USA	11,12	8,49
Singapore	5,70	5,80
Canada	4,50	5,55
Latvia	4,0	4,50
Hungary	6,67	7,10
Philippines	4,92	11,10
Bulgaria	3,42	4,31
Mexico	4,77	11,01
Russia	6,06	7,30
Lebanon	4,75	4,49
Croatia	4,42	4,80
Jamaica	5,10	3,03
Romania	5,54	4,17

But if you look at developing countries like the Philippines and Mexico you will discover that over 11% of the workforce is employed in those industries which makes them extremely important socially, and means that they are job-creators. In essence the result indicates that you can link the development of the creative sector to achieving most important development objectives of these nations.

We also have ongoing surveys in countries like Brazil, Columbia, Peru, Tanzania, Malaysia, Ukraine, China, Morocco, Pakistan, Sudan and Kenya.

From chart 1 you can see that the average contribution of creative industries to GDP reached 5.4% in the countries where surveys were carried out, and from chart 2 that the average contribution to employment was 6.2%.

¹²⁷ Based on WIPO data

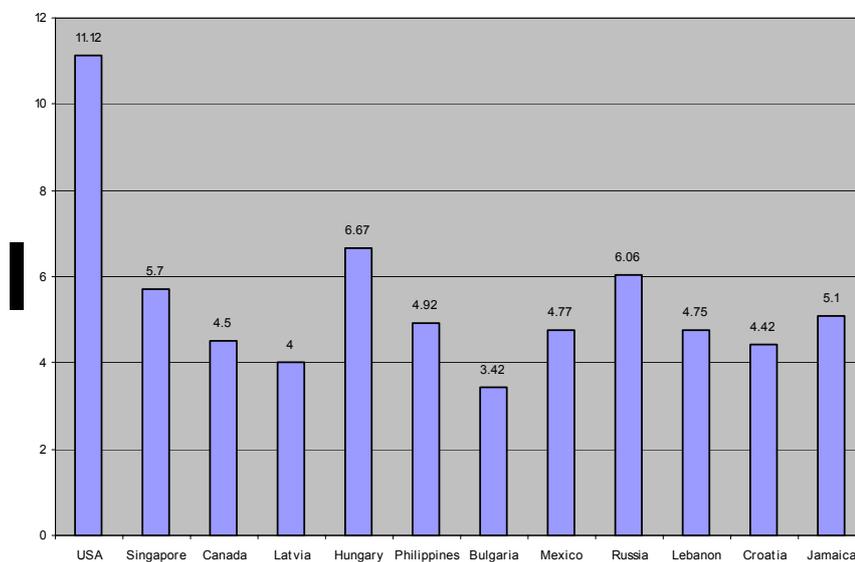


Chart 1. Contribution of Creative Industries to GDP

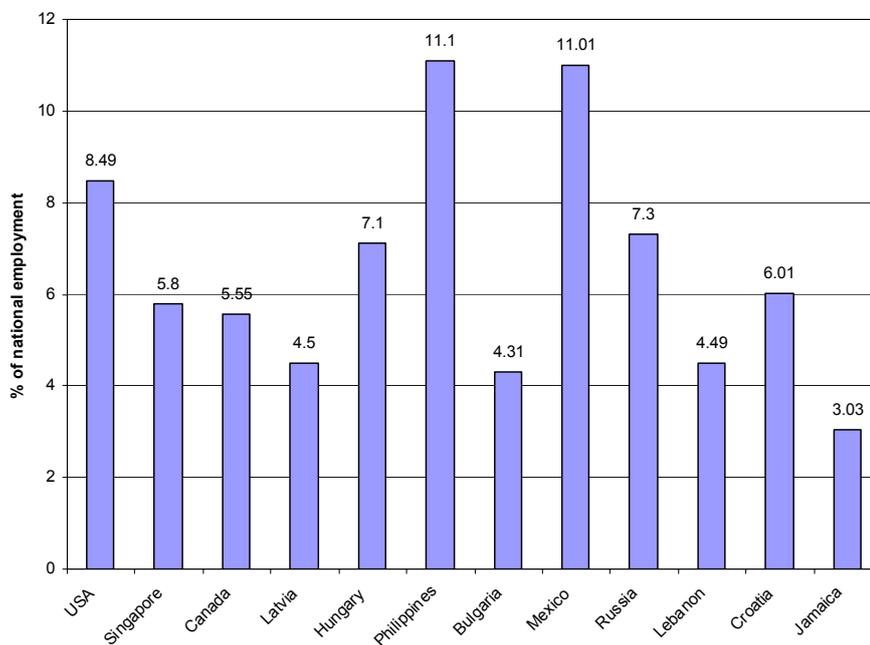


Chart 2. Contribution of Copyright-based industries to employment

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Let me spend a moment on what these results are telling us. The first conclusion that I would like to offer you is that the figures we have seen are not necessarily in line with figures for the overall economic development of these countries. Some of the countries are not doing that well on the whole, but in this sector they seem to be outperforming the rest of the economy. That of course creates a strong expectation among some developing countries that perhaps investing more into that sector – both in terms of political and financial commitment – can perhaps bring better results than if they invested in traditional sectors.

Secondly, we have seen very high multipliers in these industries. For example, if you invest one Singapore dollar in a copyright-based industry the employment multiplier would be seven, in other words you will create seven times more jobs than if you invested in a traditional sector.

Thirdly, there seems to be a strong influence of the economic cycles. If the survey is implemented in a difficult year in terms of the overall economic development, the result in the creative industries – in fact it is worse than the rest of the economy. If you perform the survey in an excellent year, then these industries are outperforming the rest of the economy. So they are very volatile, and in times of change they are the ones that are first affected.

The industries are also affected by administrative changes. If you change the classification system, the result on their contribution changes as well. It does not mean that something has happened, it just reflects a mechanical change on how statistics is reported so we have to be very careful when interpreting the results.

A most important finding is that the dynamics in these industries are impressive: it is two to three times higher in these sectors than is the average for the economy – that was the case in Canada, Bulgaria and many other countries. This comes to prove the case for these industries – they are a driver of the economy, pushing forward the development frontiers.

And finally what is happening in these industries is an indicator of some of the structural changes in the economy. In a recent study that we completed in Mexico we saw that the major copyright industry in that country was still the publishing industry. However, radio and television was picking up in the last two years at such a pace that it will soon outperform publishing. This was a surprise to our Mexican colleagues, which was not observed on the general level of statistical reporting.

In terms of perception of these WIPO surveys we must state that we are witnessing a growing interest in these products. We have had more requests than we can respond to. We have translated the guidelines into five languages, have done over 24 surveys, and are considering the preparation of a new edition. We see that countries are interested in having this type of evidence when they present their copyright profile. We publish these surveys in quite bulky books, five studies in each book, about 100 pages for each country. You always have differences because countries are different – you cannot apply

exactly the same model everywhere, because every country has a different objective. It is performed by a different unit which has different links to development policies, they have access to different levels of information. We try to make them as harmonised as possible, but inevitably there are some differences.

Limitations of applying the IP framework to economic analysis

At the beginning of this second part I said that copyright can be applied into economic analysis. However, there are quite a number of challenges when you apply the IP framework to economic analysis.

One of the challenges is the scope of these surveys. Copyright is limited to what is protectable. We do know that there are forms of creativity which are not copyright protected, so they are thus excluded from the scope of the surveys. We are using official data, and consequently the grey economy is not surveyed. In many countries we have substantial levels of employment which are created there, but we could not possibly report that because this is not official data and is not based on official sources. Finally, social and cultural aspects do not fall within the scope of this survey – these are economic surveys. We thought we should start with this, and then build up using different methodologies to capture cultural impacts and social consequences.

When it comes to statistical issues, we have been applying an industrial approach, and we have been dealing with individual creative activities. Unfortunately sometimes some of these individual creative activities cannot be captured in the existing statistical framework. We apply a production approach while traditionally in cultural studies you apply a consumption approach. We are focusing on production because we believe that the data on production is more robust and consistent, and it gives us a possibility to survey across several years with a higher level of certainty of the quality of the data.

The statistical framework for collecting and reporting data on creative industries is underdeveloped. This adds naturally to the complexity and the cost of the studies.

WIPO's creative industries agenda

I will now mention a few 'highlights' of what is on our creative industries agenda.

In terms of methodology we need to develop better methodologies. We try to improve the existing methodology on surveying the positive economic contribution of the copyright industries. An important new area is how to put a figure on copyright piracy – how to produce some guidelines on measuring piracy. As you know there are some statistics in different parts of the world, and these are basically industry statistics. What we would like to offer countries is

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some guidelines on how they could themselves do some surveying, and produce their own figures.

Secondly, we need to conceptualize the creative industries. They have been considered very often from their cultural perspective. What we would like to do is to strengthen the IP perspective because we believe that this is essential for them. This is the topic of a conference which we are holding on 29 October 2007.

The third area is of course to support more and more research in this field, providing expertise but also trying to look beyond that. The data does not mean anything by itself; the data makes sense if it helps you to shape policies. Let's look more broadly: what are the policies that can support the creative industries? One of them has been named this morning: competition¹²⁸. We have to look into competition issues – how can they impede on the creative industries, and how can they support them? What do you need to do in terms of education, infrastructure and others? The launching of appropriate strategy based on evidence is an issue which deserves more and more attention.

And finally we are looking into producing something that can be of use to the creator – the individual creator: some guidelines on using intellectual property for small and medium sized enterprises. These are some of the areas where we have publications: IP in the music, publishing, film, and design industries.

Part III – Copyright for development

I will now briefly turn to the third topic of my presentation, the policy issues relating to the use of copyright for development. Why do we talk about copyright for development in WIPO? The first reason is because as a UN agency we are implementing the UN Millennium Development Goals, and we try to sensitise countries on how to integrate intellectual property in their development policies, and how to meet these goals. Secondly, there is more demand coming from the member states in this field, especially developing countries which turn to us with more and more sophisticated requests regarding the use of copyright for supporting development objectives. They see copyright as a tool for development – social development, cultural development and economic growth – and they realise that copyright is becoming more important for the national economy but also for the individual firm. Intangible assets are becoming important for them.

¹²⁸ Editor's note – see chapter 1 of this book: Jeremy Phillips, 'Compliance with international treaties: does the UK have or need a law of unfair competition?'

A more structured approach to IP in development

During the last three years WIPO has taken a more structured approach to development. A special office has been developed within the organization entrusted with the implementation of this approach. Before that it was a horizontal activity; now it is focused within the Office for the Strategic Use of Intellectual Property for Development. It is focusing on how to facilitate some of the political processes, to produce some expert advice and economic analysis.

The WIPO development agenda

In September 2007 WIPO adopted at its Assemblies the so-called 'Development Agenda'. You will be hearing more about that in the future as it was one of the most important outcomes of the Assemblies. It was basically the result of almost three years of discussions where more than 111 proposals were considered, finally trimmed down to 45 proposals. These proposals relate to six areas:

- Technical Assistance and Capacity Building
- Norm-setting, Flexibilities, Public Policy and Public Knowledge
- Technology Transfer, Information and Communication Technology and Access to Knowledge
- Assessments, Evaluation and Impact Studies
- Institutional Matters including Mandate and Governance
- Other issues

and perhaps copyright can be applied to at least half of those.

The first session of the newly-established Committee on Intellectual Property and Development will take up in 2008 11 proposals which are for immediate action.

Conclusions

I would like to offer you four conclusions which reflect the essence of my talk today.

Point number one is that the international copyright system is living through a time of change and it is facing challenges which are affecting the pace of normative development. They require new impetus and focus in international discussions and we do not know yet where they will take us.

This brings me to my second point: that international consensus-building has become more difficult today, and our role is to facilitate this process. We will try to facilitate it with the objective of maintaining the balance in the

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copyright system, a balance which takes into account the interests of all stakeholders.

My third point is that economic research is important and can be an instrumental tool for building an intellectual property culture. Economic research is also important for showing the potential of the creative sector and opens the door for policy interventions, as the data which is provided is solid and comparable over time.

Finally, development strategies should try to take into account the copyright angle and make use of comprehensive and solid analysis of the economic performance of this sector and its relations with the other sectors of the economy.

9. The changing media landscape: an industry perspective

Martyn Freeman

This chapter is an edited transcript of the talk that Martyn Freeman delivered to the symposium on International Copyright Law on 26 October 2007

Introduction and background

I want to give you a bit of background about how the BBC and BBC Worldwide fit into the marketplace. We span both ‘analogue’ copyright issues and also increasingly digital marketplace copyright issues, so I want to pick up on a range of these – some of the problems that a content producer, distributor and broadcaster face when dealing on an increasingly global market. By analogue issues I mean things like copyright term and formats. Then as we move into the digital landscape we have new issues, such as the fact that, although the BBC was not initially a direct-to-consumer business, it will increasingly become so in the digital world; piracy; the relationship between traditional broadcasters and some of the new digital companies; and then a few issues around DRM (digital rights management) and domain names.

Public purposes and BBC services

Why do these issues affect the BBC? The White Paper in 2006 set out six clear public purposes for the BBC, namely:

1. Sustaining citizenship and civil society;
2. Promoting education and learning;
3. Stimulating creativity and cultural excellence;
4. Representing the UK, its nations, regions and communities;
5. Bringing the UK to the world and the world to the UK; and
6. Helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television – in other words bringing to the public the benefit of digital technology and digital convergence.

This is a fairly wide-ranging sweep of objectives, which are achieved via the following.

The BBC – licence fee funded services

This is essentially a line-up of the BBC’s public services: there are eight national television channels, with local opt-outs for the different regions of the UK; there are ten national radio networks, and 46 local and national radio stations on FM and digital; BBC online in the UK – bbc.co.uk – has about 3 million pages, and 1.5 billion page impressions per month; 24/7 interactive TV (BBCi, with enhanced television and radio services); and a public service seven-day catch-up service in the UK.

In addition, funded slightly differently (by FCO Grant-in-Aid), but also on the public service side, is the World Service radio which has about 140 million listeners in different countries of the world, broadcasting in English and 32 languages.

Licence fee spend on the BBC’s services

The BBC’s licence fee spend broadly works out as follows: BBC One, which is the main channel (the main BBC channels take a serendipitous view of broadcasting in the sense of being multi-genre rather than genre-specific) – accounts for about £1 billion of the licence fee; BBC Two about half that; the digital channels about half of that again; and the balance is then split over online and radio. So there is quite a substantial spend on new content every year.

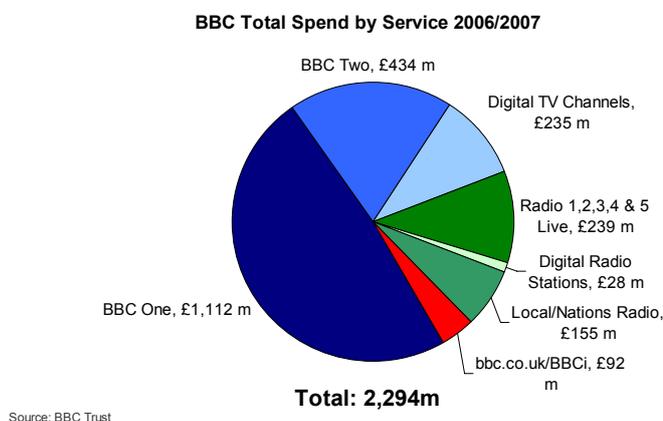


Figure 1 – BBC Total Spend by Service 2006/2007

What is BBC Worldwide?

BBC Worldwide is a wholly-owned commercial subsidiary of the BBC, essentially there to take BBC assets to the world: the BBC has an obligation to generate commercial revenue as well as to spend the licence fee. BBC Worldwide is a multi-media distribution company, which sells about 40,000 hours of programming per year, publishes about 40 magazine titles in the UK, has channels abroad – such as BBC Food, BBC Prime, and a suite of channels just being launched: BBC Knowledge, BBC Entertainment, BBC Lifestyle, and the children’s channel, CBeebies, together available in around 260m homes around the world. As well as the BBC, BBC Worldwide now makes programmes – which I will come onto in the context of formats – and has production offices in Los Angeles, Sydney and Mumbai, with more to follow in different territories in Europe and Latin America. It has a DVD business (2Entertain, the largest non-US UK DVD distributor); and various joint ventures around channels – Discovery (Animal Planet and People & Arts) and Virgin Media (UKTV), and publishing activities to do with books and learning businesses – Random House (BBC Books) and Pearson Education (Learning). Finally, it has an increasing portfolio of digital direct-to-consumer businesses, for example *bbc.com* which is launching as an international-facing version of the website, carrying advertising and other kinds of commercial sponsorship for non-UK users, and it has bought a 75% stake in Lonely Planet, which will be very much a digital venture going forward.

With a turnover of £850m in 2007, and profit of £111m, this results in around £170m being generated back into the BBC to make new content.

Copyright issues for traditional media

I will look first at the ‘traditional’ side of the copyright issues faced. The BBC is a complex organisation facing tensions between the public service aspirations – which are generally around reach, creating public value, sustaining audience, and more importantly making assets available to the public, often for free; and the commercial side of the organisation which is tasked with doing precisely the opposite, which is making those assets available for cost. So that leads to some interesting discussions internally, and adds spice to some of the debate that I will mention later.

But in particular for the BBC, because it is very old and because it spans a number of areas, issues such as copyright term become very interesting, as do formats. There is also the ‘Gowers Review’, which was a review of the UK copyright and IP framework, which I will not go into in detail – but there are various bits of the BBC’s response to that to which I will refer in different points of the talk.

Copyright Term

Why is the issue of copyright term interesting for us? We started broadcasting for radio in the early 1920s and TV in the late 1940s, and have accumulated a very big archive – most of which is unexploitable, usually because it is no longer of sufficient quality because the recordings have deteriorated, or possibly was never of sufficient quality because it wasn't very good, or because there is not enough of an audience to justify any kind of sensible commercial distribution. Increasingly with the BBC's archive, a lot of our material is now falling out of copyright, and so we have quite important radio recordings – sound recordings particularly from the 1950s, and some comedies such as the *Goon Show*, which are commercially still exploitable but are approaching the end of their copyright. Although some of the underlying rights, such as those of the contributors, are still in copyright, the sound recordings themselves are falling out of copyright. It is ironic that, just at the point where technology is enabling exploitation on a commercial basis of material in the 'long tail' – where you can afford in the digital world to make things available to a smaller audience – this material is falling out of copyright, which impacts on commercial distributors' opportunities.

Formats

Formats is an interesting area, and I am only really going to endorse what Edward Humphreys says¹²⁹ – I am not going to go into it in any detail. Our view, and the view we submitted in reply to the Gowers Review of intellectual property in the UK, is that we do not see any particular need to use copyright to enforce formats as a specific right, because the formats business works pretty well without it. The market was worth around •2.5 billion in 2005, the UK accounting for about 31% of that in terms of exports. It accounts for a lot of BBC Worldwide's business – it was around £35m of revenue in 2006; and *Dancing with the Stars* is broadcast in over 40 countries.

Commerce tolerates the level of legal uncertainty that exists in relation to formats –usually because the people in the business are buyers as well as sellers, and so there is a vested interest for companies involved in this to sustain a commercial model even if there is not any particular legal certainty around it. If you have got something to sell, and somebody else will buy it; and if you're buying it it keeps the model going, which tends to benefit everybody. It doesn't always work and we have had instances where we have tried to sell a format to somebody, who has decided they did not want it, and then mysteriously a few months later something pops up in their schedules which looks remarkably similar to the thing we offered them in the first place. But for the most part,

¹²⁹ Editor's note: see chapter 7 of this book – Edward Humphreys, 'International Copyright and the TV Format Industry'

9. The changing media landscape: an industry perspective

there is a pretty successful – and growing – formats business which people can dip into and take advantage of.

Practically, the points that Edward Humphreys makes around detail is exactly how you enforce this and make it work.¹³⁰ For all of the BBC's big formats we have bibles which are 30-40 pages long and which set out exactly how you would go about making that programme, how you would find your audience, how many people you need, what balance of celebrities and non-celebrities you should have, what the set design should look like, what the lighting is, how dramatic it should be, how much music you have: all the levels of detail to enable somebody to just re-stage that production. We are very clear with people when they take our shows, like *Dancing with the Stars* for instance, that there are certain elements that they have to maintain – they have to maintain that look and feel. Certain things can change to allow for cultural differences, but the whole point is that we are trying to enforce something, or make or repeat the same thing in a different marketplace. So producers have to create as much written evidence as they possibly can, and, more importantly, do it quickly: if you have a format, then you have to get out there, and sell it to as many places as you can before the copycat formats – which inevitably will crop up – get in the market and steal your thunder.

Formats and local productions

And this is something which is only going to grow, because an average of 84% of the top programmes in each territory are locally produced. This means that if you are a distributor, you are only competing for 16% of the total available television slots – so unless you can get into local productions, and can produce programmes in the local territory, that is where the commercial expansion is going to come. The market for simply selling English programmes abroad is pretty static – competition is all within that 16%. If we can get to a local market and we can make our own shows, then we can get into the 84% and can open a whole new market for ourselves – which is why over the last few years we have increasingly moved into opening production offices abroad. *Dancing with Stars*, which is a very big hit with ABC in the US – it is their biggest programme and has been for 4 seasons – is produced by us in Los Angeles, so that we are moving up the food-chain: rather than simply selling a format we are actually making the programme as well. Programme sales are really only expected to grow quite modestly, whereas the format business, is expected to grow quite significantly.¹³¹

Local copyright differences, then, will become rather interesting, as there will increasingly be multiple versions of the same format, possibly available in

¹³⁰ *ibid*

¹³¹ *ibid*

the same territory, where the underlying contributions to those programmes are subject to potentially entirely different copyright regimes.

The digital revolution – a revolution in viewing and listening choice

The digital world changes things by volume, and volume is something I will focus on in the next part. In the 1970s in the UK, for example, there were three channels, two of which were the BBC; now there are about 1000 channels, and eight of them are BBC. In radio there are 500 channels, ten of which are BBC. So the volume and the choice and the amount of copyright works out there has just grown exponentially.

A revolution in viewing and listening choice

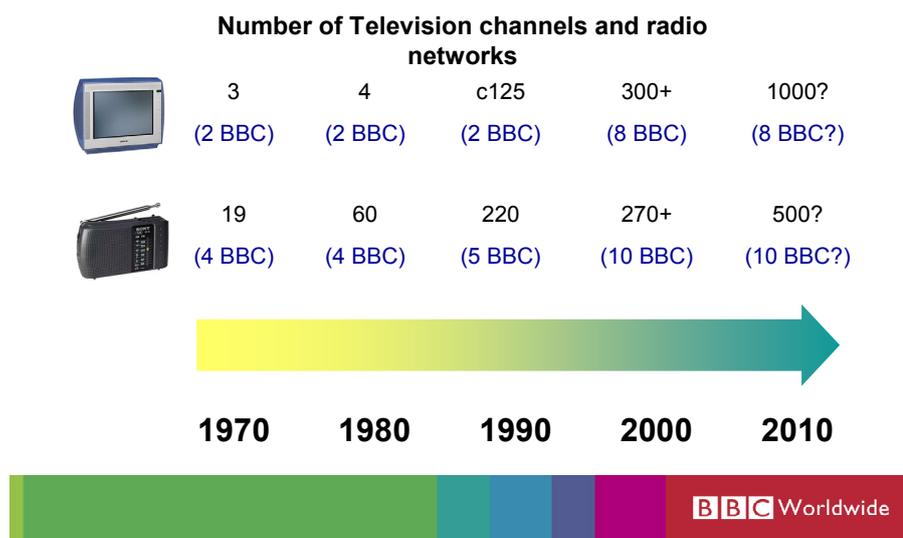


Figure 2 – A revolution in viewing and listening choice

Digital has changed UK media forever

And it's shifting, too. We go from a world which was largely based around linear channels to a world where, although there are still linear channels, in a digital space – just more of them, broadcasters and distributors are competing also in ways which were inconceivable 20 years ago. Channels are available

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online as well as in their original linear form. Distribution – rather than being handicapped by the economic requirements of physical media (the cost of creating prints or tapes) – has potentially unlimited shelf space in which to put digital assets. This means that the ability to exploit the long tail (to exploit those programmes where maybe only a handful of people will buy them) can be done on an economic basis because there are no real distribution costs. Amazon, for example, makes far more of its profits from the non-bestsellers which it sells at maximum price, even though to only a few people, because the margin on each number is that much greater.

There is a multitude of different devices on which to watch the same content, and audiences expect now not only for content to be portable, but also ‘anytime, anywhere’ content; they expect and want to be able to watch it on any device, in any place, at any time. Control is moving away from the broadcaster: the BBC’s ‘Reithian’ objectives of public service broadcasting, based on the concept of pumping something *out* to people, is all very well – but that’s increasingly not where the control is any more; people are deciding very much what they want to consume and how they want to consume it.

Digital has changed UK media forever



Figure 3 – Digital has changed UK media forever

The next phase of digital

So we are moving from an analogue world of what is essentially broadcasting, through a mixed world – which is where we have been, into a world where actually it is increasingly not about transmission on a one-to-many basis: it is something which is much more controllable and consumable by the consumer in the way that they want to have it and from where they want to get it.

The next phase of digital

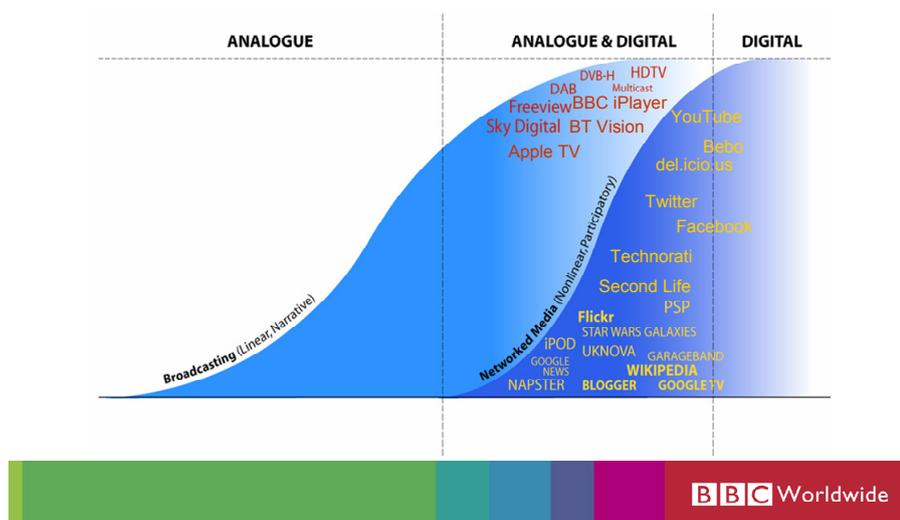


Figure 4 – The next phase of digital

New challenges

This raises its own new challenges for broadcasters and content producers. They need to produce rich AV content in multiple different forms for different platforms, and make that content mobile. Syndication is no longer just like cable syndication to a couple of other broadcasters on the same platform, but involves syndication between platforms and all the reformatting, re-versioning and re-creating of content that needs to happen in order to jump from one platform to another. There is the issue of personalisation and customisation – where people can go in and change the content for their own needs; and the development of digital social networks, which involves all of the above. All of this dictates what the user's attitude is, which is not just about receiving content

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any more – it is much more about a proactive attitude, wanting to get involved, wanting interaction, and wanting to be part of that creative process.

This leads to ‘360-degree content’ – something of an in-phrase, not only used by the BBC – where the idea is that you are not simply producing a programme for one use, for one purpose; it’s about 360-degree commissioning – you are producing something which is for television, online, mobile, and the web; is interactive as well as non-interactive.

Copyright issues for digital content

This leads us to some perhaps different issues – including for example competition issues, as well as the new copyright and related contractual issues for the new types of content and production and distribution arrangements. The changing face of media means that we are looking at new issues because things have gone from being one-way to being interactive, and gone from being something which was exclusive to being something which is increasingly shared. The traditional broadcast one-to-many relationship is now increasingly either a one-to-one relationship, or a many-to-many relationship – and involving a very different relationship with the content.

Some of the issues are precisely about that complexity through volume, an example of which I will come on to – the BBC’s Creative Archive; as well as issues around piracy, issues around the relationship between traditional broadcasters and their new counterparts, and other miscellaneous issues thrown up by all of these others.

The complexity of the digital world

When you are a volume user of third party intellectual property, as the BBC is, this becomes quite significant. The BBC itself spends about £230m per year on acquiring third party intellectual property rights; if you add BBC Worldwide’s acquisition of independent distribution rights, this increases by about another £30m to £40m overall. About £60m of this is spent on acquiring rights from individual contributors to programmes, which represents in total probably 4,000-5,000 contributors. About the same amount is also spent on a collective licensing basis to acquire rights to around 180,000 music items per week across the BBC’s different services. The significance and impact of collective licensing in a business of that size cannot be underestimated: the man-hours involved in spending the first £60m as opposed to the second £60m, and what it costs the organisation as these levels of usage start to rack up in a digital and multi-platform environment and become really quite significant. This means that effective collective licensing regimes become even more important in the digital sphere.

Legacy contracts make progress in the digital world potentially impossible, not least because there are new uses which were not envisaged at the time the contracts were entered into. Take, for example, an agreement in the 1950s with a contributor to the *Goon Show*: little did they expect it to be on web syndication and mobile phones in 2007. So we do not necessarily easily have the rights to be able to go back and clear that material and make it available. And sometimes – even now, but particularly in the days when television and radio were largely ‘watch and wipe’ media, in that you watched it and then erased it and re-used the tapes, which were more valuable than the content (as was thought at the time) – a lot of the BBC’s recordings were literally thrown away; this happened a lot in the 1970s. Finally, people had, and still have, the right to prevent programmes subsequently being exploited – so essentially one contributor can stop a whole series of programmes being exploited. Again, one of the arguments that the BBC has made is to question whether that is necessarily fair. It is great for the contributor that they have got that control, but is it fair on the licence-fee payer who has paid to have the programmes made in the first place, and is it fair in relation to all of the other contributors who contributed to that programme who perhaps want to continue to derive economic reward from those programmes? Should there be some form of compulsory collective licensing, at appropriate and reasonable rates, in order to ensure that material can continue to be exploited for the benefit of all of the people involved rather than a slightly anachronistic approval mechanism?

The Creative Archive Licence

A good example of this is the Creative Archive Licence. The Creative Archive is a BBC initiative with a number of other partners (the British Film Institute, Channel 4, Teachers TV and the Open University), and it adopts the principle of creative commons – the idea being to take a pool of legally cleared archive material, material which has largely outlived its commercial use, which – if it was made available – would stimulate media literacy, benefit education, and inspire creative contribution from the audience/user. People will be able to get a Creative Archive Licence which would allow them to download the material, to edit it or use it to create something new with it, for non-commercial purposes. In the trial, about half a million people downloaded excerpts from about 1,000 different programmes, but certain issues became clear, such as that even with a creative commons licence, sometimes the terms would not necessarily allow the user to do the activities that we intended. As a public service broadcaster trying to put something like this in place then perhaps we need to look at some kind of mandatory licensing – with appropriate equitable remuneration – to ensure that the material can be used in this way, and that it isn’t artificially stopped from being available.

Piracy

A recent Ipsos survey suggested that piracy cost the UK audiovisual film industry about £468m per year (made up of around £400m from film and £70m from television). Piracy, it must be said, is not a new, digital issue only – but that same survey said that 25% of people in the UK had viewed a pirate film or TV content in the preceding year; and that 60% of pirated copies result in somebody either not going to the cinema, or not buying a DVD – so piracy clearly has been having some economic impact on the industry. And that latter figure had itself increased by about 3% from the previous year, so it seems as though piracy is having more of an impact as time goes on.

Analogue piracy has been there for a while: the BBC, for example, has seized 1m counterfeit Teletubbies over the years from different factories across the world, trying to escape into the appropriate market. In 2006, one member of staff was tasked with looking at audiobooks appearing on eBay, where they took down 3,800 audiobooks and half a million DVDs from auctions that should not have been happening.

Digital piracy is now on a similarly massive scale – for example, 2,300 copies of *Top Gear* were illegally downloaded in one week in October 2006. It is the cumulative impact of this activity that is really quite significant. In September 2007 there was a project monitoring six internet sites – YouTube, DailyMotion, Guba, Stage6, Veoh, Tubearoo and Videogoogle – looking for 30 titles which are part of the video-on-demand deals that we have done, and in that month we took down 2,519 clips which had cumulatively been viewed 29m times on these different sites, an extraordinary volume of usage.

In 2006 we conducted a fact-finding trip to Korea, who are way ahead of the UK in the digital sphere – not least because their technological infrastructure is so much better than the UK and most of Europe. In the urban centres in Korea, particularly in Seoul, broadband speed is between 50 and 100 megabytes – which enables 10 high definition channels to be streamed via a broadband phone connection. The impact that has on the way in which video is consumed, and on piracy, is fascinating. In some of those markets, the nature of the technological revolution – where they haven't had to take old copper wires and convert them to fibre-optic, but instead have been able to start afresh – has meant that they have been able to get these incredibly high broadband speeds and a much better infrastructure for the digital world. That has had a massive impact on the way in which media is consumed.

What can be done against piracy and what are we doing about it? There is a group in the UK called Television Against Piracy, which consists of the major broadcasters plus PACT (the Producers Alliance for Cinema and Television – essentially the trade union for independent producers), and the aim is to focus attention around the issue of TV piracy. It is co-ordinated by Olswang, one of the leading media law firms, and there will be a big conference in 2008 to promote awareness around TV piracy issues – because although a lot of

attention has been given to film, not very much has been given historically to TV, and the aim is to try to change that.

The BBC has a take-down policy – as discussed earlier, we do try to deal with some of this activity – but it is interesting to note that these issues have to be addressed carefully, since it is amazing how many letters we get from outraged members of the public when we have taken down illegal content accessible on YouTube, for example. So the impact you can have on the audience by trying to enforce your rights is very different when they just expect to be able to do it and not to be told off for it; it is quite a difficult balance between protecting your rights and protecting your relationship with your consumer – the very relationship that the new BBC business is trying to develop. It is also difficult for any organisation, but particularly a public service organisation, to pursue individuals too vigorously. If you are pursuing pirate organisations, as in the case of tv-links.co.uk – a pirate TV company which was essentially set up to relay signals who were shut down by FACT (the Federation Against Copyright Theft, an enforcement organisation) – this is one thing; but, as the music industry is finding, enforcement against individuals is a whole different public relations issue. For public service – and even commercial – broadcasters, that is a difficult road to go down.

The idea, then, is to construct a legitimate business model – which would then have an impact on piracy. The BBC iPlayer is an attempt to do that: it is a catch-up service offered by the BBC in the UK, for the purpose of its public service brief, to enable the audience to catch up with anything that was on the BBC for the last week and watch it until next week for free. Our role at BBC Worldwide will be to make that into a commercial model both within and outside the UK, providing downloads for a reasonable price so as hopefully to encourage people not to use the pirate options.

There are also other issues remaining. One is that of proving ‘substantial copying’ when you have peer-to-peer relationships, because whether the individual computers are actually copying anything that is substantial is an unanswered question. Another is the issue of tracing and tracking down cybersquatters and infringers – which is quite difficult, largely because a lot of detailed information is needed in order to be able to find them, and this is not available from internet-service providers (ISPs) without court disclosure orders. And finally there are legislative differences between home and abroad: we have had various instances where customs, for example, will not give us information about seizures – so we are led to believe that they have just seized 100,000 Teletubbies, for example, and someone flies half way round the world to deal with it, only to find out that not only are they not Teletubbies at all, but that they are not even ours. This means a lot of time and cost is wasted around trying to enforce against physical product piracy.

UGC (user generated content), the broadcasters, and the digital media providers

There is an uneasy alliance between the old world and the new world, in that traditional media companies have got into a very established way of dealing; they use the territory-based licence, with quite clearly defined rights and quite clearly defined content; whereas a lot of the digital media companies – precisely because the digital media do not have the territorial boundaries – can structure their relationships very differently, and their contracts are on very different models. Many of the digital service providers grew out of the ‘less-official’ peer-to-peer culture, and have become more official as time has gone on. They want both user-generated content, to get that slightly anarchic counter-culture content coming up through the system, but at the same time they also want ‘official’ content – so they come to the BBC for example for content, because it legitimises their operation. In some ways they respect copyright, but equally they want to maintain their own ‘safe harbour’ positions in respect of that copyright (discussed more below), which creates a delicate tension between traditional broadcasters – who are very clear about what rights they are licensing, and some of the digital media businesses where it is a little bit ‘grey’ about who is responsible for what.

Traditional broadcasters need to realise that the digital world is a little bit more uncertain. We want to protect rights and our content, but equally we acknowledge that in the digital world, if you put your content on YouTube, for example, it is less protected – but there is a fantastic promotional value in having it collectively downloaded 2 million times. So again it is about the traditional world having to adapt to and accept the slightly more nebulous world that the digital landscape allows for.

As well as piracy, which was addressed earlier, user generated content creates a number of other issues – particularly for organisations like the BBC: all sorts of issues which are not particularly copyright-related around editorial control and moderation. What is the content? Does it meet with the appropriate editorial standards? How do you encourage users to interact and build a community whilst not losing the editorial control over the content that you have, or – more importantly – not allowing a brand you have to become tarnished in some way because of people posting inappropriate content. There is a very good illustration of this with an American car company who asked users to produce an iPod advertisement for their new 4-wheel-drive cars that they were launching. It is a great example of a traditional, old-world US car company meeting the new world, thinking they were being very cool – except that what happened was that the adverts that were produced completely slated the car, and so their whole campaign was dead in the water before it had even started. This indicates just how potentially dangerous the relationship is between the old world and new, and the need to approach it with caution.

An interesting issue for traditional broadcasters when dealing with ISPs is that of 'safe harbour' defences¹³². We are licensing them rights and material, giving the appropriate warranties and indemnities in relation to that intellectual property – which you would normally do if you were doing a traditional broadcast licence; but the ISPs, or other providers of internet-based services, not only want these warranties and indemnities but also want control of the proceedings, should any proceedings arise, and in particular they want approval over any settlement. The reason why they want approval over the settlement is largely because they want to protect their own safe harbour defences, such whether they have actually been responsible for publishing the material or not; whereas if you were licensing material to a broadcaster it is very obvious that it has been published. If you are licensing it to some of the internet or new digital services it might be very obvious that the material is defamatory in which case we, as the content supplier, would hold our hands up to that; but what we don't particularly want to find ourselves liable for it a test case where an ISP is trying to protect their safe harbour defences. That adds all sorts of complexities to the contracting process, and the warranties and indemnities relating to the intellectual property in the content.

Other issues – DRM and domain names

Finally, there are a couple of other issues around DRM (digital rights management) and domain names.

DRM is a really tricky issue: 'to DRM or not to DRM – that is the question'. Is it a good idea, do you want to include DRM, do you want to limit people's access to the material or not? For the public service iPlayer where there is material available only for 7 days, the idea is that after 7 days it ceases to be part of public service and ceases to be in the public domain – so if people want to gain access to it after then, the principle is that they have to pay for it. So some kind of DRM needs to be included, arguably, to ensure that those files and material are no longer available – otherwise you have essentially just released the material into the world, with no control over it. Certainly as a provider of commercial digital services we want to ensure that there is some dividing line between material available in the public arena or for a public window, and material which is then available for a commercial fee.

There are also a number of other issues relating to DRM that have not been talked about so much. One is that, as a news organisation, an increasing use of DRM material could impact on the ability to access and utilise material for fair trading. Fair dealing or fair use under UK and US law, where you can access material for the purposes of reporting on current events, could be adversely

¹³² Editor's note – see for example under the US Digital Millennium Copyright Act and similar provisions in the EU under Directive 2000/31/EC on Ecommerce

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affected by an increase in material being protected by DRM. Another is the PVR debate. We have heard a lot about what DRM should be applied to PCs, and what DRM should be applied to internet services producing download-to-rent or download-to-use services, but what has not been given as much thought is whether the DRM should be applied or not to PVRs (personal video recorders). At the moment we have personal video recorders whose hard-drive capacity is, on average, from 80 to 250 gigabytes. When you have a hard-drive capacity that is ten or twenty times that, which is quite conceivable in the next few years, there will be devices that can record and hold a month's worth of all of the BBC television and radio services. If a consumer puts one of those under his television, and records a month's worth of free-to-air television across 1000 channels, and then burns it to DVD, the question of whether we should add DRM to a 7-day catch-up service pales into insignificance by comparison to the impact that the large capacity PVR will have on the commercial infrastructure for broadcasters, distributors and various others in the industry. As storage capacity increases, that is going to become more and more of an issue, and the personal use exceptions which are more or less enshrined in different jurisdictions' Copyright Acts will have to be examined and debated.

The last issue is that of domain names. Our own experience of the introduction of the .eu domain was that of chaos: it was extremely complicated and hugely expensive. There were 3 stages of application, beginning with applying for domain names that you already had as .com, and ending up with a sort of 'land grab' when anyone could apply. There were also a great many different registrars, offering different approaches to the domain names, seemingly in conflict with one another. We were approached, for example, by various people offering us access to priority lists where we would have more chance of getting our own domain names back at a cost of £60,000 to £70,000. The process of the introduction of these new names, how it is managed, and how the registrars are appointed is chaotic – and something which should be considered for the future. When there are further domain names introduced down the line – such as .asia, for example, which is coming up – the process of whether or not you need them, how they are managed, and how it affects the potential cost and practical impact involved for the larger organisations which own a lot of domain names and a lot of registrations, is something which should be looked into.

Conclusions

It is a time of change and challenge for organisations like the BBC, which have been around for a long time and are largely analogue organisations becoming digital, where everyone is still walking around shaking their head. As an illustration, in the legal and business services part of the organisation we tried to set up a 'definitions group' to look into defining rights, and the rights we

needed to invest in, and we found that in the time it took to get the meetings into people's diaries within the organisation, the technology had moved on. This pace of change is a major issue for organisations trying to deal with the sheer volume of new developments. The only guarantee really is that it is going to get more complicated. Legacy rights and payment systems will have to change fundamentally in order to meet the challenges of the world as it approaches. And it is both a global world and a very local world, because there are increasingly things which are available on a global basis but where people individually want to be able to tailor that to their own usage. To put those together is an interesting, but certainly complicated, process.

Contributors

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