

THE FUTURE OF COPYRIGHT MANAGEMENT. EUROPEAN PERSPECTIVES

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First, a few words about the landscape of intellectual property rights in Europe. It is not monolithic and this point is significant.

Then, I will speak about the European Community legal policy that relate directly to our activity. With regard to it, I remind you that, when directives are adopted at the Community level, they must then be adapted within the national laws of the various Member States of the European Union.

Finally, after this long but essential introduction, I will cover, in the last part, the main evolutions one can expect in the area of copyright and "droit d'auteur" management.

IN EUROPE, DIFFERENT PRINCIPLES ARE EXISTING

I have just used the words "droit d'auteur" , which are words that cannot be translated by that of copyright.

As it happens, the field of intellectual property is interpreted in a different way in Europe. They are various historical reasons for this. For example :

- In the United Kingdom, it is the dissemination of knowledge that is invoked in the introduction to Queen Ann's Law which dates from the early 18th century. The priority is given to social worth, and the corporate and impersonal character of the scientific process is what justifies protecting the investment required for its dissemination ;
- In France, the land of "droit d'auteur", the starting point is creative writing, literature, which is no longer that of utilitarian designs. At the end of the 18th century, the idea that a work is the product of an individual personality will focus on the rights of the author-creator.

These differences have consequences and I will now sum them up in a very simplified way.

In copyright countries :

- The author releases quite all his rights to his work to the rightholder who is usually an investor, responsible for the distribution of the work, and often a corporate body ;
- The work is part of common law property. Therefore, touching the rights of the producer can be justified if it is for the common good. This is the theory of "fair dealing", presented very briefly, as it is regulated by very precise authorisations;

The theory of copyright rests on the idea of a contract between the author and society, on an economic logic based on the common usefulness of the work. The scope of creation is the profit to the author and the benefit experienced by the public but not the desire to express oneself. The work is an economic object responding to the logic of distribution.

In "droit d'auteur" countries

It's the author, a physical person, that retains the initial rights. He can never transfer the rights attached to the personality (moral rights) but he can transfer the economic rights.

The logic applied here is one where the person is protected above all. The work of the mind can no longer be placed at the free use of third parties. The driving spirit is no longer the necessity to support an economic activity but to support creativity.

Some exceptions to these exclusive rights of authors do exist nevertheless. Not as significant as those allowed by the "fair dealing", they respond mainly to private use and some secondary uses such as the right to citation, to realize a summary or a parody.

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This very schematic introduction on the legal systems seemed necessary since the European Union is trying to harmonize our legislation in an effort to de-fragment the European market and because this attempt raises some tricky issues.

On the other hand, if the prototype country for copyright is the United Kingdom, and France for "droit d'auteur", the landscape is not all that simple. Overall, Southern countries are mostly countries with "droit d'auteur" and the Northern ones copyright countries.

THE EUROPEAN UNION POLICY

A must in a European context, Community law plays an important role in our legislation and intellectual property cannot be an exception.

As a reminder, here are a few of directives that have been adopted recently and that can be consulted on the web site of the European Commission.

Directives adopted

- 1996 Databases
- 1993 Harmonisation of the term of copyright protection
- 1993 Satellite broadcasting and cable retransmission retransmission
- 1992 Rental and lending rights
- 1991 Computer programs

and some proposals

- Copyright and related rights in the Information society ("digital environment")
- Resale right for the benefit of the author of an original work of art

These texts might be prolific, circumstantial or sectorial, and because of that, disparate and poorly coordinate. They would also result in strange new legal figures as they would often be the result of compromise.

But they meet specific issues at stake :

- The free circulation of goods through the harmonisation of the intellectual property rules in Europe, including in the long term countries of Eastern and Central Europe. Anyway, let me remind you that these texts are issued by the "Internal Market" Direction of the European Commission.
- The safeguard of the authors and performers rights in a digital environment, in order to meet the requirements of international conventions and to be able to ratify the 1996 WIPO treaties.

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I will not make a detailed list of the contents of these directives, but instead will attempt to underline the thorniest points and the debates they have caused and still cause. Two examples:

1. The directives for software and databases

In France, in the name of protecting heavy investments, unfair competition could have been blamed. Instead, legislators have favoured the development of exclusive rights, similar to those of an economic monopoly, such as "neighbouring rights" and copyright.

For software, curiously enough, the choice was based on the work instead of the patent. "Droit d'auteur" countries, must therefore protect an investment in the same legal framework and with the same concepts as for personal creations. In the French law, there has thus appeared an "hybrid" item, because :

- The criteria for protection come from the “droit d’auteur” theory, the originality, that is the person's imprint but in the framework of a technical development ;
- The rules of ownership are borrowed from copyright since it is the employer that holds it ;
- The right of reproduction is “sui generis”, I mean new, to account for the utilitarian character of the tool and only one back up copy is allowed ;
- And only a small residual of an artificial moral right remains.

For databases, a new right was set up in order to protect the investments but there too is a reference to copyright in order to protect the selection and organisation of the database, which meet utilitarian criteria but don't express a personality. As to real works, they were already protected by the “droit d’auteur”. Finally, here too, a complex system of three levels had to be built.

2. The proposal of a directive on the harmonisation of copyright

This text is a good illustration of the views of copyright and droit d’auteur defenders. Thus, there is much discussions concerning the nature of fair compensation planned for some exceptions which, too burdensome, could harm the rights of users. On the other hand, one should also point that a special clause concerning the right to adapt would have minimised the possibility of damage to the integrity of the work, so easy in the digital environment. Of course, this is an issue of moral right.

In the end, the text, the final version of which is not yet known, is more of an adaptation of the law rather than a genuine harmonisation since the range of exceptions to monopoly is longer and longer to progressively include all traditional exceptions from all the Member States of the European Union. And Members States will be able to chose which exceptions suit them.

One can also add that the loose interpretation of definitions that can be made by the various courts in the Member States, definitions at times very vague, will possibly emphasise even more the differences. On the other hand, the European Court of Justice may contribute to unify, but in the very long term, European practice jurisprudence.

COPYRIGHT MANAGEMENT IN A DIGITAL ENVIRONMENT

Several modifications can be foreseen in the near future :

- The loss of the exception for a private copy ;
- A strict control over use ;
- The extension of pay-per-view systems ;
- The domination of contracts ;
- The circumvention of collective management societies
- The development of collective work and weakening of moral rights.

- **The loss of the exception for private copy**

In an analogue environment, copy of works for a strictly personal use is one of the main exception in French law. Digitisation that allows for the multiplication of exact copies has been interpreted as an exploitation of works. For this reason, the exception for private copy, already abolished for software and electronic databases may also end for all digital media.

Finally, in the latest known version of the copyright directive, they admit, in return for a fair compensation which takes account of the application of technological measures, an exception for private copy.

I put the stress on the private copy because the exception for teaching and research doesn't exist in France. Yet, and it is worth underlining, some actions are in progress now in my country, in the university circles, in order to obtain a recognition of this exception¹.

- **A strict control over use**

The distribution of works will be monitored by technical means that allow the identification of works through a system of digital tattoo and the control of their use.

¹ « Conférence des Présidents d'Université » and University of Aix-Marseille

But these systems could slow the access of information and increase the cost of distribution. Mainly, they substitute for legal protection. In fact, they lessen the margins for negotiation since there is no way to freely determine a fair use. In addition, they could raise questions to the respect for privacy.

- **The extension of pay-per-view systems**

The use of these techniques involve pay-per-view system, though all information and use are not of a commercial nature. Actually, even the mere bringing up on the screen, without downloading, can be subject to payment. This is an excessive protection as screening could be compared to leafing through a book or a journal and this has never be recognised during the negotiations related to the copyright directive. It has even been considered that technical copies be submitted to an authorisation request and the lack of economical value be proven. They usually are in fact and only those that are totally volatile are not included.

On the other hand, I repeat a point that is also one that France particularly supports, that privacy of citizens must be protected and these systems provide a monitoring of works that could threaten the anonymity of everyone, be it an individual or an organisation.

Besides, the system of paying by the unit downgrade the mission of libraries and constitute an obstacle for the availability of information to all publics, whatever may be their financial means.

- **The domination of contracts**

Whatever the final text of the copyright directive will be, contracts will be the rule tool in a digital environment.

If the principle of fair use or fair dealing is often mentioned in the world of libraries and institutions of learning, it is, on the one hand, a foreign concept to the French tradition, on the other hand, in the United States, one is seeing a progressive transformation of common law - copyright which incorporates the fair use - to a private right by the adding on of signed contracts with libraries.

We are therefore clearly moving towards contractual solutions. But the contract belongs to private law and leaves a great deal of liberty in the negotiation. The rightholder is left free to dictate a price and to define the conditions of use according to the market conditions. In this case, to carry adequate weight during the negotiations, it is important to form consortia, buyers' groups, which represent the model one is seeking.

Licence models can be used but they do not solve all the problems and usually require legal assistance. In addition, once the licence is established, one must be able to ensure its maintenance within one's institution.

I might add that there is no plan to mention in the copyright directive that contractual law does not override intellectual property law, something that would ensure that the legal exceptions would have be taken into consideration in contracts or licensing agreements.

In the case of contracts for electronic media, there are new precautions to be taken before signing, in addition to an examination of costs. Besides, the choices will be different depending upon the type of structure and the negotiations can be individual or within a group (consortium). One must not forget that digitised works are not sold and purchased, but that only their access and use are covered by a licence. The licence allows one to give right to use a work without giving the ownership.

Many pitfalls should be avoided during negotiations. Anyway it is the title of a brochure published by EBLIDA (European Bureau of Library, Information and Documentation Associations) that defines the latter. One might also perhaps add that teaching how to read contracts and the types of negotiations should be integrated in the basic and lifelong training of information professionals.

- **The circumvention of collective management societies**

These societies are in charge of collecting reproduction and communication rights. They are many since each category of work has its own and technological evolution leads to their increase.

But it is unlikely that these societies, anyway in their current form, can facilitate creativity the Internet, mainly because they don't always have the rights they pretend to manage and because it is

becoming a rough job to correctly define the type of agency that should be collecting the rights. The crumbling, indeed the conflicting rights makes any kind of management complex. In addition, economic barriers will possibly arise to add to legal barriers.

A recent study on the various ways the European collective management societies operate has just been issued by the European Commission and will no doubt lead to a stand on such issue.

- **The development of collective work and weakening of moral rights**

The French "droit d'auteur" makes difficult to acquire rights through the employer for the works of its employees as well as commissioned works. Only the category of collective work could authorise the fixed payment of authors and limit their moral rights, reduced to the recognition of the paternity.

But even if the collective work is recognised, such as with newspapers, there have been lawsuits filed by journalists to obtain new payment for all digital dissemination of works on paper, considering it a new commercialisation.

This is the origin of the attempt to consider multimedia works, whose legal status is not yet clearly defined, as collective works, so that they could be commercialised in a way similar to copyright. This would be easier for employers and commissioners to manage.

The numerous French collective management agencies have a lot at stake in this debate as they are the ones who must collect the royalties of authors and co-authors, physical entities. If multimedia works are considered a collective work, they risk losing huge amounts of money, if they don't change their status and the way they work.

CONCLUSION

- Regarding the major principles of the intellectual property management, the two systems - copyright and droit d'auteur - present some advantages. Copyright gives more weight to users, but the "droit d'auteur", thanks to a stronger moral right, allows the author to control the use made of his work, through the right of paternity and the right of the integrity of his work. This would allow him to prevent any re-use that he sees as going against his ideas or his interests.

In fact, all works should not be dealt in the same way. Some are closer to personal creation, others meet an industrial logic. Therefore, when the industrial stamp is stronger, French law draws on neighbouring rights and economic rights and it becomes more like a collective work. In copyright countries, some categories of works are accompanied by a moral right when they have a personal stamp.

- It seems difficult to-day to give a precise definition of the systems that will soon be offered to us to manage our documents in digital formats. Several systems could co-exist ; pay-per-view systems by the way of technical systems, the payment of rights to collective management societies, taxes on blank media, contracts, Besides, a balance must be obtained if the objectives of the information society are to be met, through the desire and need to disseminate for purposes of fame, training, public information and cultural dissemination.
- With regard to the proposed directive on some aspects of copyright, exceptions should be allowed in the public interest for copies made for educational reasons, training, research including personal research. Governments should allow these exceptions to balance the interest of rightholders. There is a real danger in allowing the users to negotiate exceptions with the rightholders who, obviously, want to have a complete control over the access to their works.
- We can see that The digital environment raises economic and ethical issues linked to the flow of information. There is a serious risk of decreasing the global access to information, to create a social divide, problems of privacy protection. Only a political will can promote appropriate solutions for equal access to culture while respecting legal principles.

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