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Electronic transmissions and copyright

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Doctrine

News and information

The new WIPO Treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

André Kéréver*

Background to the Diplomatic Conference of December 1996

Both these international instruments were adopted by the Diplomatic Conference held at Geneva from 2 to 20 December 1996. That Conference, which brought together representatives of 157 States, and observers from numerous non-governmental organizations (NGOs), was convened by the World Intellectual Property Organization (WIPO) to consider the fruit of several years' work by the Committees of Experts established for the purpose of updating the Berne Convention for the Protection of Literary and Artistic Works (copyright) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (neighbouring rights), known as the Rome Convention. The rapid development of communication technologies and the intensification of trade in cultural property have prompted awareness of certain obsolete aspects and shortcomings in both Conventions, particularly with regard to the implementation of the standards that they set.

With regard to copyright, the advent of digital technologies has raised certain problems of interpretation of the Berne Convention concerning the legal status of computer programs. While a consensus emerged during the 1980s that these should enjoy copyright protection, it remained an open question whether or not computer programs should be deemed to be 'literary works'. This is not merely a semantic debate: the States Parties to the Berne Convention have a legal obligation to grant protection in their national legislation to 'literary' works originating in other countries of the Union (Article 2, paragraphs 1 and 6).

Furthermore, Article 2(5) of the Berne Convention does not provide a clear answer to the question whether databases, in the sense of 'collections' of primary data, may receive protection in cases where the data are not themselves protected works. A restrictive interpretation would considerably reduce the level of protection

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of digital databases to the extent that they consist of factual data. A broad consensus was becoming apparent in favour of ruling out such a reductionist interpretation. However, that consensus needed to be given concrete legal form. In these two matters, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) annexed to the Marrakech Treaty of 16 May 1994 establishing the World Trade Organization (WTO) confirmed that computer programs should be protected as literary works (Article 10, paragraph 1) and that original databases, irrespective of whether the primary data were subject to copyright protection, should be protected (Article 10, paragraph 2). Clearly, the General Agreement on Tariffs and Trade (GATT) decided to examine those two matters because it was impatient with the slowness of the international copyright community in ruling on specific points of interpretation which had acquired considerable economic importance in the digital age. Following the TRIPS Agreement, it became urgent and indispensable to 'incorporate' into international copyright law the solutions officially sanctioned by GATT/WTO.

Public digital 'network' communications and the upsurge in Internet communications both required, at the very least, that legal definitions in respect of copyright should be found for the new types of use of protected works available through these new technologies. The Diplomatic Conference answered these questions in part. However, the transnational aspects of network communications have not been resolved in the two new instruments, and neither has the question of who shall be subject to copyright liability.

Independently of the questions raised by digital technologies, as early as 1980 the implementation of the Berne Convention gave rise to certain queries regarding analog transmissions such as cable and satellite broadcasting, private audio and audiovisual copying in respect of Article 9(2) of the Berne Convention, and the choice between international and national exhaustion of the right of reproduction.

However, important though they may be, these questions were only partially resolved by the Diplomatic Conference, owing to more acute difficulties raised by the low-key, but none the less real, confrontation between 'copyright' and 'authors' rights'. This confrontation has it roots in the efforts being exerted to secure recognition by the international community of phonograms as 'works' protected under copyright. These efforts were successful in the TRIPS Agreement, but on one point only: the right to authorize the rental of phonograms, since Article 14 of the TRIPS Agreement grants producers of phonograms the exclusive right to authorize rental of phonograms, given that authors are not mentioned as successors in title under the Convention. The efforts were continued in an attempt to eliminate the distinction between copyright and neighbouring rights, or at least to raise the level of the neighbouring rights of producers to that of copyright. This confrontation prompted a re-examination, in the two instruments resulting from the December 1996 Conference, of the question of the ownership of the right to authorize the rental of phonograms. The text adopted would appear to be more favourable to authors, but nevertheless retains a large measure of ambiguity.

This brief review conveys the general tenor of the contents of the two December 1996 instruments, one of whose chief aspects is the adaptation of copyright and neighbouring rights to digital technology, notably in three ways: first, by adopting the interpretations enshrined in the TRIPS Agreement; second, by instituting or elaborating on new rights relating to network communications; and, third, by granting protection to electronic systems of identification and control of the use of

works. Another strong point of both texts is the attempt to clarify the rights relating to the rental of phonograms. The other provisions form a fairly heterogeneous collection, prominent among which is the inclusion in these instruments on copyright/neighbouring rights of rules relating to the application of rights modelled on those of the TRIPS Agreement.

The WIPO Copyright Treaty

General remarks

This Treaty is, legally speaking, a 'special agreement' within the meaning of Article 20 of the Berne Convention (Article 1, Relation to the Berne Convention). According to Article 20, the States Members of the Berne Union may enter into 'special agreements' which grant authors more extensive rights than those granted by the Convention, or which contain other provisions not contrary to the Convention. However – and this is somewhat contradictory to the notion of a special agreement – any Member State of WIPO may become party to the Treaty, even though it is not party to the Berne Convention (Article 17). This extension explains Article 1(4), which provides that 'Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention'. Therefore, a State which is not a member of the Berne Union may accede to the Treaty, but only provided that it honours the substantive provisions of the Berne Convention. The decision to use the special-agreement arrangement is justified by the desire to avert the risk of paralysing any revision of the Berne Convention itself by failing to secure the requisite unanimity from all the members of the Berne Union.

The consensus needed to arrive at this special agreement was achieved only with difficulty. Mention has already been made of the controversial nature of ownership of the right to authorize rental of phonograms. The question of rights in respect of digital transmissions was the subject of discussions – through the intermediary of government delegations – between holders of rights and operators of digital networks. This confrontation is apparent in the Preamble: the paragraph recognizing the need to maintain a balance between the rights of authors and the larger public interest (particularly 'access to information') is offset by the preceding paragraph, which emphasizes the exceptional importance of copyright protection as an incentive for literary and artistic creation.

These difficulties in achieving a consensus prompted the diplomats to include a number of statements of interpretation in order to clarify certain provisions. The scope of these statements of interpretation, called 'Agreed Statements Concerning the WIPO Copyright Treaty', is specified to be found in Article 31 of the Vienna Convention on the Law of Treaties. In order to be deemed an integral part of the treaty under interpretation, and thus to be binding, the statement must be adopted unanimously and concern a provision of the Treaty which is unclear, either in itself or in relation to other provisions of the same text. In particular, each individual provision of the WIPO Treaty must be seen in relation to Article 1 thereof, which states that the Treaty is a special agreement within the meaning of Article 20 of the Berne Convention. Only if the connection with Article 1 is not sufficient to dispel any possible ambiguity of a given provision is it legitimate to have recourse to an 'agreed statement' of interpretation.

On the basis of the above considerations, the Treaty can be analysed in terms of four distinct groups of provisions:

1. Interpretation provisions of the Berne Convention.
2. Rights relating to digital communications (on-line transmissions).
3. Rights relating to rental.
4. Other provisions.

Interpretation clauses of the Berne Convention

Article 2 withholds copyright protection from 'ideas, procedures, methods . . . or . . . concepts as such'. Indeed, the generally accepted interpretation is that copyright protection extends to formal creations described in the Treaty as 'expressions'.

Article 10 stipulates that the Contracting Parties may, in their national legislation, provide for limitations of, or exceptions to, the rights granted to authors under the Treaty 'in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author'. The last part of this clause is based on the wording of Article 9(2) of the Berne Convention, which provides for exceptions solely with respect to the right of reproduction. While Article 10 concerns only exceptions to those rights mentioned in the Treaty, it is difficult not to read this clause as an interpretation of the Berne Convention, according to which the exceptions provided for in Article 9(2) constitute a general principle concerning possible exceptions to all the rights mentioned in the Convention, and not solely to the right of reproduction, as might be surmised from a formal reading of Article 9(2).

Articles 4 and 5 in fact resolve the two problems of interpretation of Article 2 of the Berne Convention noted in my introduction. Article 4 specifically states that computer programs are protected as 'literary works', thus entailing the application to such works of Article 2(6) of the Berne Convention (see above). Similarly, Article 5 interprets Article 2(5) of the Berne Convention in such a way that protection of a 'collection', taken as a structured whole, is independent of whether or not the individual components of the collection are themselves protected works. This interpretation is signalled by the use of the term 'compilations' in place of the term 'collection'. Articles 4 and 5 also draw on the provisions of Article 10, paragraphs 1 and 2, of the TRIPS Agreement. As already suggested, the negotiators of the TRIPS Agreement have in fact anticipated the solution of a problem of interpretation which ought to have been solved by the Berne Union itself. Naturally, the fact remains that the WIPO Treaty here under discussion, while closely linked to the Berne Convention as a 'special agreement' within the meaning of Article 20 thereof, is nevertheless legally distinct from that instrument. The interpretation arising from the special agreement does not therefore, legally speaking, govern the Berne Convention itself. In order to remedy that defect and to enhance the scope of Articles 4 and 5 of the Treaty, these articles are the subject of identically worded 'Agreed Statements' to the effect that the scope of protection (granted by the Treaty to computer programs and compilations of data), read together with Article 2, is 'consistent' with Article 2 of the Berne Convention and 'on a par' with the relevant provisions of the TRIPS Agreement. Through these Agreed Statements, the States Parties to the Treaty recognize that Articles 4 and 5 constitute an interpretation of paragraphs 1, 5 and 6 of Article 2 of the Berne Convention inasmuch as, by special arrangement,

they undertake to refrain from adopting 'provisions which are contrary' to the Convention.

Rights relating to digital communications

It was hoped that the Treaty would do much to clarify the question of copyright in on-line digital communications. The difficulty of nailing down such copyright was apparently sufficiently great to dissuade the Diplomatic Conference from addressing the problems arising from the transnational nature of such communications. This difficulty is rooted in the nature of long-distance digital transmissions, which blur the distinction between the right of reproduction/distribution, on the one hand, and the right of public communication/performance, on the other. More specifically, digital transmissions work through a series of ordered and interlocking technical phases: transmission begins with a digital upload and generally ends with an arrangement whereby the message is rendered perceptible to the interactive addressee by means of on-screen visualization, with a possibility of making hard copies. It therefore constitutes a complex operation combining permanent reproduction and temporary or transient hard-disk reproduction with communication to the public through on-screen visualization. Furthermore, the work of the Expert Committees convened by WIPO in the years preceding the Diplomatic Conference needed to take into account the constant advances being made in technical performance. For instance, in the early 1990s, digital transmission was possible only for messages consisting of text and still images. That stage of technical development explains why the experts wondered whether Article 11 of the Berne Convention applied to that mode of communication. Article 11 provides that: '(1) *Authors of dramatic, dramatico-musical and musical works* [author's italics] shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works.' Article 11 must be read in conjunction with Article 14, which grants such rights to cinematographic works. Many experts concluded from those provisions that Article 11 did not apply to the transmission of texts or still images, since such works were neither dramatic, dramatico-musical, musical, nor cinematographic. This apparent limitation of Article 11 accounts for the fact that some experts proposed that on-screen visualization – the end-product of a transmission – should be seen as both an electronic and a temporary 'reproduction' and, as such, subject to the right of reproduction. The European Commission has proposed that digital transmission of an audio, audiovisual or textual medium should be deemed to be an act of 'rental', given that making the transmitted work available on-screen can be deemed to be commercially analogous to rental of a medium. The United States Administration classifies such communications as acts of 'long-distance digital distribution'. At the same time, however, there is a school of thought that is in favour of making digital transmissions subject to the right of reproduction and the right of public communication within the meaning of Article 11 of the Berne Convention, whatever the nature of the work transmitted.

It was in this context that a document, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference*, was prepared by the Chairman of the Committees of Experts of WIPO (document CRNR/DC/4 of

30 August 1996) and submitted to the Diplomatic Conference. This Proposal contained two key articles, 7 and 10, the combined effect of which was to make digital transmissions subject to the aggregate rights of reproduction and public communication. Article 7 in fact stipulates that the right of reproduction as laid down in Article 9 of the Berne Convention applies to the digital environment, and concerns both temporary and permanent reproductions. Furthermore, in accordance with Article 10 of the proposal, entitled 'Right of Communication':

> Without prejudice to the rights provided for in Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis*(1) of the Berne Convention [right of public performance/broadcasting], authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, *in such a way that members of the public may access these works from a place and at a time individually chosen by them* [author's italics].

The phrase beginning with 'including . . .' clearly reflects the characteristics of interactive on-line on-request digital transmissions.

However, while the Diplomatic Conference adopted draft Article 10 unchanged, which then became an Article of the Treaty, it was unable to achieve the necessary consensus on draft Article 8, although it did secure a large majority. The compromise solution was to refrain from including in the Treaty any provision dealing specifically with the right of reproduction. Consequently, implementation of the right of reproduction in the digital environment rests exclusively on a direct interpretation of Articles 9(1) and 9(2) of the Berne Convention. In fact, the Treaty is not entirely silent on this question, for Article 1(4), which obliges the Contracting Parties to comply with the substantive articles of the Berne Convention, is the subject of an Agreed Statement of interpretation according to which 'the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment . . . It is understood that the storage of a protected work in digital form in an electronic medium consitutes a reproduction within the meaning of Article 9 of the Berne Convention'. It is legitimate to have recourse to a statement of interpretation within the meaning of Article 31 of the Vienna Convention because Article 9 of the Berne Convention, which the WIPO Treaty obliges States Parties to observe, is very general and does not stipulate how it should apply to the digital environment. The first sentence of the Agreed Statement was adopted unanimously, and can therefore be considered to be an integral part of the Treaty. Its scope is very broad, since it subjects all 'use' of a work in digital form to Article 9 of the Berne Convention (the principle of the right and exceptions to the right). The second sentence specifically concerning the storage of works in a computer memory received a broad majority of votes, but not the required unanimity. One may nevertheless ask whether the second sentence is not redundant with respect to the first. In contrast to the Treaty's silence on the right of reproduction, Article 8, which reproduces Article 10 of the Chairman's Proposal in full, more than anything else supports an interpretation to the effect that the Convention grants authors a right of performance for *all* categories of works, including multimedia works, of whatever nature, and that such a right applies to on-line transmissions inasmuch as they make works available to the public, including interactive on-request transmissions. Such an interpretation of the Berne Convention, while admissible, is nevertheless not obligatory. Whichever interpretation is chosen, however, the article requires the States Parties to grant authors an exclusive right of

'communication to the public' by means of on-line digital transmissions; the stipulation that members of the public may access such works from a place and at a time individually chosen by them is designed to pre-empt any claims that those characteristics in fact make the transmissions a series of individual, and hence non-public, communications.

While Article 8 of the Treaty clearly requires States Parties to make interactive on-line transmissions subject to an author's exclusive right, there is some uncertainty as to whether the Treaty binds States with respect to the name under which that exclusive right shall be known. It is common knowledge that the United States of America wishes it to be called a right of (long-distance) 'distribution'. Against such an interpretation, it might be claimed that the Treaty already provides for a 'right of distribution' in Article 6, and that it is difficult to see how that right could be extended to the types of use referred to in Article 8. However, this argument is undermined by the fact that the neighbouring right granted to producers of phonograms in the other WIPO Treaty, which corresponds to the right provided for in Article 8, is called the 'right of making available of phonograms' (Article 14 of the Performances and Phonograms Treaty).

The WIPO Copyright Treaty takes no position with regard to the applicability of national legislation to transnational on-line transmissions or to the question of determining who shall be responsible for obligations to authors. The transmission of messages through digital networks requires a number of services: provision of content, organization or hosting of sites, and provision of access. It is well known that the last two categories of service providers refuse to assume responsibility with regard to authors. These questions were debated at the Conference, and were reflected in the Agreed Statement concerning Article 8, according to which 'the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication', which is subject to an exclusive author's right. Such a Statement resolves practically nothing, because it concerns solely the providers of physical facilities, and says nothing about the possible obligations of service providers.

Any analysis of the right of digital transmission needs to be supplemented by a list of exceptions to authors' rights for which States may make provision in their national legislation. As we have seen, Article 10 both allows and limits such exceptions on the basis of a general principle that exceptions may be made only 'in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author' (close paraphrase of Article 9(2) of the Berne Convention). As we have seen, this principle is applicable both to the rights laid down in the Berne Convention and to the rights specifically instituted by the Treaty. The following Agreed Statement was made concerning Article 10: '. . . the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention'. Furthermore, the same Agreed Statement permits Contracting Parties to 'devise new exceptions and limitations that are appropriate in the digital network environment'. Now, a statement of interpretation is admissible only if it is aimed at clarifying a case of imprecision. Therefore, only such concepts as 'a normal exploitation of the work', 'unreasonably prejudice' and 'the legitimate interests of the author' can require interpretation. However, the Agreed Statement concerning Article 10 does not keep within these limits. In saying that all existing and legitimate

exceptions in respect of analog transmissions may be carried forward and extended into the digital environment, the Statement is not providing any kind of interpretation: either it is adding to the Treaty – which it cannot legally do – or it is indicating that it is legitimate to carry forward or extend into the digital environment the exceptions established for analog transmissions only, provided that the limits and conditions set by Article 10 itself are observed, in which case it is superfluous. It may be noted that in European law, exceptions to the right of reproduction for private use have not been extended to the right of reproduction for computer programs precisely because such an extension would prejudice normal exploitation of the work. Similarly, the fact that the Agreed Statement envisages the possibility of devising specific exceptions for digital transmissions does not mean that those exceptions should not be bound by the limits set by Article 10 itself. Thus, in European Union law, the exception allowed for computer programs (and hence for the digital environment), known as 'decompilation', is framed in such a way as to make it compatible with the limits set by Article 9(2) of the Berne Convention.

In the Chairman's Proposal, it was planned to eliminate the leeway granted to national legislation to limit exclusive rights by introducing compulsory licences in respect of broadcasting/distribution by cable (Article 11*bis*(2) of the Berne Convention) and sound recording (Article 13 of the Berne Convention). Only one vote was lacking in order to achieve unanimity on the proposed elimination. It is that missing vote which explains the fact that the Treaty is silent on the possibility of introducing such compulsory licences.

Finally, the international status of digital transmissions established by the WIPO Treaty includes two important provisions (Articles 11 and 12) concerning the exercise of authors' rights which impose obligations on States with respect to the digital identification and protection systems included in support media and digital transmissions. Article 11 obliges Contracting Parties to provide in their national legislation legal protection and remedies against 'the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors . . .'. Article 12 provides similar protection for technical measures which identify works or provide information on rights and owners of rights. Indeed, while it is true that the sudden advent of digital technologies has complicated the exercise of copyright, these same technologies may also, to a certain extent, help to address the difficulties thus created. Digital media or transmissions may be coupled with electronic devices which may restrict or impede the performance of illegal acts (electronic copyright management systems – ECMS), or which make it possible to identify the work and the author or copyright-owner. Member States must therefore take legal steps to prevent the circumvention of protective systems measures and the elimination or modification of copyright information included in the works or copies of the work. However, it should be noted that infringement of identification procedures is punishable only if the persons responsible know or have good reason to think that their actions may give rise to an infringement of copyright. It remains to be seen who will be held responsible by the courts for proving whether or not those persons were in possession of such knowledge. Article 12 is the subject of an Agreed Statement to the effect that Contracting Parties shall not invoke that article in order to subject the protection of works to the completion of certain formalities. It should be said, however, that any such interpretation of Article 12 would be disingenuous.

The right to authorize rental

Article 7 of the Treaty provides that authors of computer programs, cinematographic works and works embodied in phonograms 'as determined in the national law of Contracting Parties' shall have the right to authorize commercial rental to the public of the originals or copies of their works. The Berne Convention does not specifically provide for any right concerning rental. Naturally, it is possible to regard this right as part of the right of reproduction and, as such, as implicitly recognized by the Convention. However, such an interpretation cannot be imposed. In this sense, Article 7 of the Treaty thus constitutes an extension of the rights recognized by the Berne Convention.

The right to authorize rental of cinematographic works

In contrast to the general provisions of the Berne Convention, Article 14 thereof, by referring to the right of authorizing the 'distribution' of cinematographic works, allows the right of authorizing the rental of cinematographic works. Consequently, Article 7 of the Treaty does not actually strengthen the protection of cinematographic works. Rather, it limits the protection arising from the Berne Convention because, having established the principle of a right of rental, it then practically annuls it by a restriction in paragraph 2. Paragraph 2(ii), paraphrasing Article 11 of the TRIPS Agreement, upholds that right only in cases where commercial rental has led to widespread copying of such works, materially impairing the right of reproduction. This restriction in both the TRIPS Agreement and the Treaty means in concrete terms the denial of a right which has thus received only virtual recognition. It should be noted that there is an internal contradiction between Article 1(4), which obliges Contracting Parties to comply with Article 14 of the Berne Convention, and Article 7(2)(ii), which disregards the same Article 14 as far as rental of cinematographic works is concerned.

The right to authorize rental of phonograms containing protected works

We have already seen that Article 14 of the TRIPS Agreement grants to producers alone an internationally recognized right to authorize rental of their phonograms. The right of rental of authors of works fixed on rented phonograms is mentioned only among the rights of 'other right-holders' as determined by national legislation. On first reading, at least, the TRIPS Agreement does not oblige the Contracting Parties to grant authors any right in the rental of phonograms on which their works have been fixed. Authors might have hoped for a better deal under the WIPO Treaty, which is specifically concerned with their rights. While Article 7 does formally grant them a right to authorize rental, it limits such protection to authors of '*works* embodied in phonograms, *as determined in the national law of Contracting Parties*' [author's italics].

There is thus clear recognition of an internationally recognized right in respect of rental of phonograms on which authors' works have been fixed. However, it is true that the text of the Treaty leaves it to national legislation to specify the works for which embodiment in phonograms gives rise to the right of rental. What, then, are the categories of works which national legislation might exclude from the scope of this author's right to authorize rental? An answer may be found in the draft texts,

and more specifically in Article 9(2) of the Chairman's Proposal, to which we have already made reference. This paragraph allowed the waiver of the exclusive right for specific types of works. However, this exception excluded musical works, and could only be applied provided that it did not impair the right of reproduction. It is therefore extremely clear, and indeed so obvious that there can be no question of interpretation on this point, that the leeway granted to national legislation to 'specify' the works for which embodiment in phonograms gives rise to an author's right of rental of phonograms does not, however, make it possible to deny the actual principle of the exclusive right of authors. That being the case, a statement of interpretation on Article 7 concerning the right of rental of phonograms was conceivable only if it concerned the sole provision standing in need of interpretation, namely, the 'specification' of the works for which embodiment in phonograms gives rise to an author's right of rental. Furthermore, such an interpretation might have made good use of Article 9 of the Chairman's Proposal. Quite apart from any need for interpretation, it is also clear that the rights granted to authors in Article 7 of the Treaty are broader (in respect of rental of phonograms) than those allowed by Article 14 of the TRIPS Agreement. In these circumstances, there are sound arguments in favour of the view that the conditions laid down by Article 31 of the Vienna Convention in order for the Agreed Statement adopted by the Conference on Article 7 to be considered an integral part of the WIPO Treaty have not been met, from which it follows that the Contracting Parties are under no obligation to recognize an author's right of rental of phonograms, and that Article 7 must be deemed not to establish any obligations broader than those arising from Article 14 of the TRIPS Agreement. Indeed, this Statement has no interpretative function, and should be seen rather as a kind of rewording, with different scope, of Article 7 of the Treaty. On this hypothesis, it is clear that the text of the Treaty takes precedence over that of the Agreed Statement.

Other provisions of the Treaty

These articles draw their inspiration from a wide range of sources, and will be analysed in numerical order. Their heterogeneity should not mask the significance of some of them.

Article 3 applies to the Treaty, *mutatis mutandis*, Articles 2 to 6 of the Berne Convention (types of protected works; points of connection giving rise to protection by the Treaty; the criteria of nationality of the author, place of publication and location of the producer's headquarters; the granting of national treatment and protection under the Convention).

Article 6 contains two important provisions. It establishes an exclusive right of authorizing the making available of the original and copies of the works through sale or other transfer of ownership (hence excluding rental, which is covered by Article 7). This provision clarifies the structure of copyright by distinguishing between and dissociating the rights of reproduction and distribution, it being understood that these rights may apply simultaneously. The distinction between the right of reproduction and the right of distribution is desirable in that the question of the exhaustion of an author's right arises only with respect to the right of distribution, and not to the right of reproduction. Indeed, the Conference was unable to choose between the notion of international exhaustion after the first sale – which does not

allow authors to oppose the parallel import of copies of their work – and granting authors a right to authorize the import of copies, with the reservation that exchanges between States members of a regional union cannot be deemed to be imports. As a result, paragraph 2 stipulates that 'Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right [of distribution] applies after the first sale or transfer of ownership'.

Article 9 deals with the duration of the protection of photographic works. The States Parties to the Treaty undertake not to apply the provisions of Article 7(4) of the Berne Convention, which makes it possible to limit the term of protection of photographic works to twenty-five years after their making. The Treaty thus imposes the application to such works of the common law term of protection as laid down in Article 7 of the Berne Convention.

Article 13 concerns the application in time of the new Convention standards. It provides that, *mutatis mutandis*, Article 18 of the Berne Convention shall be applied.

Article 14 is entitled 'Provisions on Enforcement of Rights'. As stated at the beginning of this article, one of the reasons for convening the Conference was the desire to remedy the inadequacy of the Berne Convention with regard to sanctions in cases where States failed to observe its provisions. By way of contrast, with its twenty-one articles in Part III concerned with the obligations of States to ensure enforcement of intellectual property rights, the TRIPS Agreement would appear to be much more satisfactory. It is therefore hardly surprising that there was a proposal to include in the Treaty a number of provisions closely modelled on Part III of the TRIPS Agreement. In the end, however, another, less ambitious solution carried the day. Article 14(1) has its source in Article 36 of the Berne Convention, which obliges the Contracting Parties to apply the measures necessary to ensure the implementation of the Treaty. Paragraph (2) strengthens this vague, general obligation by compelling States to ensure that 'enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to futher infringements'.

Setting aside Article 18, which provides that each Contracting Party shall enjoy all of the rights and assume all of the obligations under the Treaty (which would seem self-evident), Articles 17, 19 and 20 to 25 are of an administrative nature. It is recalled that any Member State of WIPO may become party to the Treaty. The European Community as such may become party to it (Article 17). Reservations to the Treaty are not admitted (Article 22). The Treaty is to enter into force three months after thirty instruments of ratification or accession by States have been deposited. This is quite a large number, but it should be borne in mind that the Member States of the European Community can be expected to accede to it (Article 20).

WIPO Performances and Phonograms Treaty

Overview

Unlike the Copyright Treaty, the second instrument adopted by the Diplomatic Conference of December 1996 has no specific legal link with the Rome Convention governing neighbouring rights. The Rome Convention does not contain any

provisions similar to those of Article 20 of the Berne Convention concerning 'Special Agreements'. Therefore, this second Treaty merely recalls that nothing in it shall prejudice any rights or obligations under the Rome Convention.

The Performances and Phonograms Treaty does not cover all neighbouring rights. It deals only with the rights of producers of phonograms and the rights of performers in respect of their performances that have been fixed on phonograms. It is thus silent on the rights of broadcasting organizations, as it is on the rights arising from audiovisual uses of performers' work. The latter exclusion is all the more remarkable in that the Rome Convention is itself highly restrictive in this respect. The rights granted to performers by Article 7 of the Rome Convention have no further application once a performer has consented to the incorporation of his or her performance in an audiovisual fixation (Article 19). However, the increasing circulation of videograms and the rapid growth in digital audiovisual services are giving rise to new uses of performers' work which remain devoid of appropriate international protection. Being aware of this situation, the Diplomatic Conference unanimously adopted a resolution in favour of rapidly concluding a protocol to the WIPO Treaty on such audiovisual performances.

Very many of the provisions of the second Treaty reproduce clauses contained in the first Treaty (the right of distribution; the possibility for Member States to choose between exhaustion of the right of distribution at the international level and national or regional exhaustion; obligations in respect of technical means of identification and protection of rights; sanctions for infringements of rights; administrative provisions). The comments on the second Treaty will thus be confined to those provisions which are specific to it.

Definitions

In order to gain a clear idea of the scope of the new rights, it may be useful to refer to the 'definitions' laid down in Article 2.

- With regard to uses which give rise to rights of 'communication to the public' (in the broad sense) of phonograms and the performances embodied thereon, Article 2 defines two concepts: 'broadcasting' and 'communication to the public' in the full sense of the word. To these two concepts should be added a third: that of 'making available', which appears in Articles 10 (rights of performers) and 14 (rights of producers).
- The term 'broadcasting' is reserved for 'transmission by wireless means', including by satellite, and encompassing encrypted transmissions. Broadcasting presupposes the intervention of an operator who ensures the relaying of programmes on the airwaves. The definition of Article 2 does not permit the exclusion of digital broadcasts from this process.
- 'Communication to the public' designates all modes of transmission except broadcasting. Subparagraph (g) of Article 2 stipulates that the term 'communication to the public' also includes 'making the sounds or representations of sounds fixed in a phonogram available to the public'. However, according to the text, this provision applies only to the interpretation of Article 15 of the Treaty, which establishes (as does Article 12 of the Rome Convention) a right to equitable remuneration for the broadcasting or communication to the public of phonograms. Despite the restriction of subparagraph (g) of Article 15, it is legit-

imate to suppose that this definition (making the sounds fixed in a phonogram audible to the public) has general scope. As thus defined, 'communication to the public', which excludes broadcasting, refers in particular to cable or wire distribution.

- Articles 10 and 14 of the Treaty specifically mention 'making available to the public', by wire or wireless means, 'in such a way that members of the public may access them from a place and at a time chosen individually by them'. This recalls the wording used in Article 8 of the Copyright Treaty to refer to interactive on-line on-request digital transmissions. Given that the act so designated does not involve broadcasting (it may be performed by wire and does not involve the relaying of programmes), the 'making available to the public' therefore appears to be a subset of acts of communication to the public.

Rights

Moral rights of performers

Article 5 recognizes that performers are endowed with the two essential features of moral rights: the right to claim authorship (to be identified as the performers of their live aural performances and of those fixed on phonograms), and the right to ensure respect, which is defined as the right to object to any distortion, mutilation or other modification of the performance that would be prejudicial to their reputation. These rights are stated to be independent of economic rights. The States Parties are bound to maintain these rights at least until the expiry of the economic rights. Given that the performances of performers express their personality, the granting of moral rights is perfectly justified, and it is to be welcomed that this is enshrined in an international instrument.

Right of rental

Article 13 grants producers an exclusive right of authorizing the rental of phonograms. International recognition of this right is subject to no limitations apart from the common law exceptions in respect of neighbouring rights. On the other hand, as for authors, the right of rental established by Article 9 for performers for their performances fixed on phonograms receives international recognition only on condition that national laws remain free to 'determine' which types of performance are to be subject to the right of rental. This provision thus confirms the perceived imbalance with respect to the right of rental between, on the one hand, producers, who are in a favourable position, and on the other hand, authors and performers.

Right of making available of phonograms and of fixed performances

Like performers, producers (Articles 10 and 14) enjoy an exclusive right of authorizing the 'making available' of phonograms and fixed performances. As was noted when reviewing the definitions, this making available refers to interactive on-line on-request digital transmissions. The act engendering these rights is therefore identical to that which gives rise to the author's right, known as the 'right of

communication to the public' in Article 8 of the first Treaty. The origin of Articles 10 and 14 lies in the desire of producers of phonograms to secure, at the international level, an exclusive right of authorizing or of prohibiting the broadcasting or communication to the public of their phonograms. Had that demand been met, the right of producers of phonograms would have become a 'quasi-copyright', even though it would have remained formally distinct from copyright. The solution adopted by the second Treaty is justified and reasonable. The granting of an exclusive right is limited to acts of on-line on-request digital transmission of phonograms. This new type of use may eventually threaten the phonogram market, given that the 'requester' of a digital transmission obtains nearly the same satisfaction as that provided by the purchase of a phonogram. It was therefore fair to allow producers, and consequently performers, to control this category of digital transmissions through an exclusive right of authorizing or of prohibiting. On the other hand, communication to the public by means other than the digital transmissions referred to in Articles 10 and 14 or by the broadcasting of commercial phonograms are the subject of Article 15, which is simply based on Article 12 of the Rome Convention. The States Parties grant a right of equitable remuneration to producers and performers. As in the Rome Convention, the obligations of Article 15 may be subject to reservations by the Contracting Parties (Articles 15(3) and 21).

Other provisions

Articles 1(2) and 4 deserve particular attention.

Relations between the second Treaty and copyright

Article 1(2) reproduces Article 1 of the Rome Convention: 'Protection . . . shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.' The reproduction of Article 1 of the Rome Convention in a treaty which raises the level of neighbouring rights must not be seen as a mere stylistic provision. Rather, it reflects a concern not to upset the balance between copyright and neighbouring rights, which may apply simultaneously to a single act of use. The scope and significance of Article 1(2) of the Treaty are underscored in an Agreed Statement, which stipulates that where authorization is needed from both the author and a performer or a producer, such authorizations are independent of one another and are not affected by the fact that both are required.

National treatment

Article 4 provides that the nationals of other Contracting Parties shall enjoy the treatment accorded to the nationals of the Contracting Party in which protection is requested solely with regard to the exclusive rights granted in the Treaty (rights of reproduction, distribution, rental, making available to the public) and the right to equitable remuneration. It is thus clear that the enjoyment of 'national treatment' does not include the application of national law in its entirety, but only of those provisions of national law which concern the exclusive rights or the right to remuneration specifically mentioned in the Treaty.

Overall evaluation

All commentators are agreed on a generally favourable assessment of the two treaties. However, such favourable assessment can only be 'general', given that the treaties contain a number of loopholes and imperfections: the referral to another instrument of the question of the rights of performers in respect of their audiovisual performances; the maintenance of compulsory copyright licences with respect to broadcasting; an ambiguous referral to national legislation, which it might be possible to use, with some degree of disingenuousness, to contest recognition of an exclusive right of rental for authors; silence regarding the application of the right of reproduction to digital transmissions, except through Agreed Statements of interpretation; the failure to rule on the question of national or international exhaustion of the right of distribution.

However, these drawbacks should not mask the fact that the two treaties establish new rights which it had become a matter of urgency to recognize at the international level, in view of the new modes of use of works. It is also to be welcomed that the two instruments enshrine standards of positive law in respect of digital transmissions. That being said, it may well be that the most significant contribution of the two texts is quite simply their having come into being. The fact that the Diplomatic Conference managed to arrive at imperfect, but acceptable texts demonstrates the capacity of WIPO to continue to be the 'laboratory' in which copyright and neighbouring rights are worked out. Indeed, such rights are too specific for responsibility for changes in them to be entrusted exclusively, without risk of damage, to the world body that deals with international trade.

Cyberspace as an area of law

Mikhail Fedotov*

The advent of the information highways has revolutionized those natural processes of ageing and renewal that used to proceed at a leisurely pace in the realm of copyright. While not claiming to present a full periodization of the history of copyright, I venture to observe that it went through similar upheavals in its formative period during the eighteenth and nineteenth centuries and later, in the middle of the present century, with the coming of radio, cinema and television and the subsequent development of copying technology (reprography). And yet the main idea behind copyright, constituting its very essence, has remained practically unchanged to this day: namely, the idea of supervising the use made of works on the basis of the exclusive rights of the author, thus providing creators and their families with an income and so stimulating creation.

This is where the two aspects of creation most clearly meet: the ideal, spurred by inspiration and the desire for fame; and the material, driven by mercantile considerations. The former aspect is more consonant with the personal non-property rights of the author, and the latter with the property rights. In antiquity literary emoluments were already current, and honours were bestowed on great writers. For instance, the Greek poet Pindar (fifth century B.C.) was lavishly recompensed for a martial ode, while Horace (first century B.C.) did not disdain to receive property from Maecenas as a reward for his verses. These were more in the nature of prizes, however, than of royalties in the modern sense.

The social and economic justification for copyright lies in 'the need to provide for the material welfare of authors, to relieve them of the need to seek sources of subsistence, and to secure for them an independent position in society', which legitimizes one of 'the few socially unobjectionable monopolies in view of its indisputable necessity and justice'.[1] Over a century later those ideas are echoed in the wording of the WIPO Copyright Treaty adopted at the Diplomatic Conference on 20 December 1996. It reflects the desire of the Contracting Parties to develop and maintain the protection of the rights of authors in their works in a manner as effective and uniform as possible, but also emphasizes the outstanding significance of copyright protection as 'an incentive for literary and artistic creation' (Preamble). Furthermore, any limitations or exceptions in respect of the rights provided for in the Berne Convention or aforesaid Treaty are considered admissible in certain special cases alone, and only those 'that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author'.

In other words, authors and their interests, counterbalanced by the public interest, were kept at the heart of the entire copyright system. Will this last? Is there not

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a danger that the profound influence exerted by the new information and communication technologies on the creation and exploitation of literary and artistic works, and which did much to bring the WIPO Copyright Treaty into being, will fairly soon make that international legal instrument obsolete? In that event, as on the previous occasion, the same question will arise once again with force: should copyright be adapted to the latest technical innovations (although many of the most recent technologies are neutral in terms of copyright) or does copyright naturally adjust itself to the new realities through judicial practice, doctrinal interpretation, and so forth? The adaptive capacity of copyright is in fact very great, as borne out by the immutability of its basic principles over the centuries. Today, however, although it is fairly static by nature, evolving rather slowly and discontinuously, copyright is confronted with the headlong development of technologies operating in the virtual reality of cyberspace. The 'information society' essentially represents a new human dimension, firstly of the mind and, ideally, of creative activity. In the vast expanses of cyberspace we are witnessing the birth of a radically new subject of history – the planetary intellect. But in this totally unknowable environment will copyright be able to retain its identity or will it have to give way to a fundamentally new system of legal regulation that is perhaps already taking shape in the depth of what is now referred to as computer law?[2] It is hard to imagine that a legal system providing an incentive for creative work will disappear without trace, for that would have dire effects on the intellectual potential of present and future generations.

Cyberspace is not just the sphere of operation of the Internet and other similar local, regional and global networks. Though as yet lacking a generally accepted legal definition, it is already swamped with legal relations from practically all the traditional branches of law, not to mention the most recent, such as information law, environmental law, and so on. In the WIPO Copyright Treaty, cyberspace is implicitly included in the notion of communicating works to the public, by wire or wireless means, 'in such a way that members of the public may access these works from a place and at a time individually chosen by them' (Article 8).

It all amounts to a legal headache since we are here at the epicentre of a communication revolution, leading as it inevitably does to radical shifts in mindset and to a transformation of organizational structures and the nature of people's activities and ways of life, including relations within the state and civil society. But neither the general public nor social institutions, nor much of the business world, are really ready for the new technologies. Above all, the legal instruments for regulating relations in cyberspace are either out of phase or non-existent.

We now have sufficient experience of network use to be able to set official legal standards in keeping with present-day ideas of democracy: election monitoring, information about the workings of public-sector institutions, public opinion polls, and the exercise of freedom of information and freedom of expression. The first steps are being taken towards a paperless society and government. In the United States of America, for instance, the Florida interactive system manages child-safety problems. It will not be long before people everywhere can use the Internet or local networks to register their car, change their address on their driving licence, study the real-estate market in their city or district, and so on.

As software improves, answers can be found via the networks to an ever wider range of questions, from local regulations governing the use of wood-burning fireplaces to the location of shops found to be infringing quality standards. In addition, members of the public will be able to contact the authorities through public

information systems to lodge a complaint, make an inquiry or file a job application form. The interaction between the taxpayer and the government or parliament may thereby become more regular, systematic and effective. Why not? Ultimately, the benefits will include stronger social institutions and democratic values; more information channels available to the citizen and hence greater pluralism and transparency; and more jobs for people working at home, resulting in increased economic activity and general well-being.

Civil law and its associated branches have the widest coverage in cyberspace. A great many civil law transactions are now concluded by means of network communication, particularly buying and selling, delivery, transport and contracting. For instance, Vendornet in Wisconsin, United States, contains sufficiently detailed information on government contracts and tenders to enable businessmen to strike deals in real time. Proper use of networks can avoid long queuing in offices or endless waiting for answers to telephone inquiries.

Furthermore, according to forecasts by the specialists, the development of global networks will gather speed in the near future. Objective economic factors are working in this direction. For instance, 10 per cent of GNP in the United States is produced by telecommunications systems. The spreading use of information technologies within society makes living standards ever more directly dependent on the state and quality of telecommunications, whose users are not just government institutions, industry and the service sector, but ordinary taxpayers as well.

A good example of the globalization of information is the Internet, the worldwide computer network based on telecommunications standards originally developed by the Pentagon for military purposes. Like cyberspace as a whole, it rests on three main pillars: digital technology enabling any information to be translated into binary code language, thus placing on the same footing phonogram and television transmission, film and photograph, graphics and text; high-speed links enabling millions of communications to be transmitted simultaneously down a single fibre of a cable; and computer technology, the steadily decreasing cost of which has encouraged its widespread use. The new generation of network computers with no hard disk,[3] no complex programs and no technical devices for access to the network, such as terminals and modems, are relatively user-friendly and, above all, cheap. They seem set to complete the process of making the computer just another household article.

But then there is the cost of telecommunications services and the matter of payment for the use of information sources, the distribution, hire and communication to the public of works protected by copyright, and so on. In other words, what really pays in cyberspace is not the building of the ships that ply the information ocean but the sale of tickets for cruises and charters, the fees for negotiating straits, the harbour dues, and other payments. The pumping of resources towards countries exporting intellectual property is thus going full steam ahead, for not only is every access to the information highways to be paid for, but so too is a fleeting glance at a work to see whether or not you actually want it. This is rather like making somebody leafing through a book in a shop pay for it. The only way of avoiding an economic stranglehold arising out of copyright protection is to make active use in national legislation of a system of limitation of copyright in the interests of science and education, which is permitted under the Berne Convention and the Universal Copyright Convention and, implicitly, in Article 10 of the WIPO Copyright Treaty.

Cyberspace has a great future in store. While 99 per cent of present-day telephone traffic consists of oral communications and only 1 per cent of data, by the

early years of the third millennium data will have overtaken the human voice. Some forecasts have it that the number of Internet users worldwide will rise from 30 million in 1997 to 300 million in 2006. Furthermore, user demand for high-speed data transmission will increase several times over, since program applications requiring a large volume of information, including music and moving colour images, are already in use.

The bright prospects for cyberspace have brought about a new surge of capital concentration in the information sector. Massive mergers are leading to the formation of transnational corporations, and what we are now witnessing on the information highways is the emergence of service providers acting as a kind of 'door-keeper/bouncer', opening up or shutting off access to information networks. All this holds out the real prospect of a situation in which the control of telecommunications within a country is effected outside the national territory, which might complicate the preservation of a particular nation's cultural and social identity and accentuate the processes of linguistic and cultural uniformity. Hence the importance of efforts to defend informational, linguistic and cultural pluralism and to promote anti-trust measures limiting the concentration of information and communication resources in the same hands.

But a powerful telecommunications network can in a trice be turned into a disparate array of unserviceable peripherals as a result of a terrorist act or the doings of a computer criminal. In 1996 alone, United States telecommunications companies suffered losses of hundreds of millions of dollars because of hackers gaining entry to virtual shops and kiosks through the Internet and using phoney credit cards. Consequently, many companies now place warnings on their Internet hypertext pages of a ban on connections from Russia or other CIS countries.

Many millions of dollars are misappropriated on the networks by people breaking the computer codes of banks; the information systems of ministries and government departments are disrupted, and terrorists are recruited and trained (what other explanation can there be for the proliferation of do-it-yourself directions for making explosives?). These are some of the various elements that constitute computer crime. An indication of the seriousness of the situation is provided by the fact that the new Russian Criminal Code of 1996 includes a special chapter (Chapter 28) on 'Crimes in the Field of Computer Information'. The law-makers thereby clearly indicate that the number of acts constituting an offence in this area may well increase in the future. Infringements of copyright and neighbouring rights, on the other hand, get only one article (Article 146).

The looting of information from data banks and telecommunications systems causes huge economic losses and, what is no less dangerous, moral prejudice. The vandalism of hackers is particularly dangerous, for the misplaced efforts of programmers to assert themselves can lead to the use of computer networks for purposes of international terrorism and organized crime. In turn, the poor protection from criminal interference of people taking part in computerized interaction creates a negative attitude to virtual reality that may be projected on the 'real' reality.

Material is also found in cyberspace that offends human dignity, stirs up national dissension and intolerance, and is detrimental to public morals and health. In some countries, efforts are being made to combat this by disconnecting specific services. For instance, a French Jewish students' organization attempted to sue the French Internet operators for affording general access to propaganda material denying the Holocaust. To take another example, the American University in Paris was

prosecuted for infringing national legislation regarding the use of foreign languages since it had put a page on the Internet in English only, without a summary in French.

However, seeing that any limitation on the flow of information affects one of the fundamental human rights, law-makers and law practitioners face no simple task. One of the things that complicates international regulation of these matters is the fact that the notion of public morals differs from one national and cultural community to another.

Of course, only the 'Möbius strip'[4] has a single side; in cyberspace, there is both good and bad, and this gives rise to new challenges and ways of responding to them. Hence the Internet can quite justifiably be called both an information treasure-house and an information dump. The Club of Rome, meeting in October 1997 to discuss the role of the new information and communication technologies, described them as a catalyst of social restructuring, requiring humanity to adapt to new relations in time and space. Such radical changes call for intelligent use of the new information media and instruments. In the next few years universal access to information and transparency must become the basic conditions for joint creative activities and solidarity. The humanistic and scientific dimensions of such a prospect will have to be reduced to a common denominator if these conditions are to be met. The positive effect of the new information technologies and information media can be enhanced and their adverse consequences alleviated through democratic participation, an intelligent approach to the responsibilities, rights and obligations they entail, and development of the creative potential of all.

The greatest danger is that the new information and communication technologies may further widen the gap between rich and poor. The poor countries run the risk of becoming still poorer; debarred from the world communication networks, they may be left out of the global process of the development of civilization. There is a danger of their becoming even more *misérables* than the heroes of Victor Hugo's famous novel.

The information highways are indeed like high-speed motorways intersecting countries and continents. But there are still people who live in small towns and villages past which fancy limousines sweep day and night, but who are denied the opportunity to sally forth on these superhighways. What conveyance would they use anyway? A cart? Hence the importance of the principle, upheld at the twenty-ninth session of the UNESCO General Conference (October–November 1997), of 'information for all'. It attests to the readiness of the world's intellectual community to engage in combined efforts to avert the danger of communication marginalization in the hope that computer technologies may usher in a new renaissance for the whole of humanity.

The features of the emerging information society are, admittedly, painted in contrasting tones, and the ethical and legal component of computerization occupies a central place in the picture. But the world community must not allow cyberspace to lie outside the realm of good and evil. And the main requirement here is to pool our efforts in order to reach an effective solution to the ethical problems of self-regulation (INFOETHICS) and to establish a new international and national legal system (INFORIGHTS). The first steps in this direction were taken in Russia over thirty years ago when, on 27 May 1966, a national code was adopted in the field of informatics and telecommunications. The Russian organizations and firms that signed the code undertook not to infringe protected intellectual property and the

confidentiality of communications, not to violate information systems, not to seek profit from the use of another's trademark, and so forth.

If we compare the legal relations prevailing in everyday life and constituting 'living law' with those taking shape in cyberspace, we will find both similarities and differences. On the one hand, the problems raised by the new information and communication technologies are simply an updated version of the hardy perennials of theft, vandalism, plagiarism or 'piracy' in regard to intellectual property, non-payment of royalties, and the like. On the other hand, the cosy 'domestic' nature of an offence perpetrated in carpet slippers before the screen of a personal computer produces the deceptive impression of a harmless prank well beyond the reach of the law.

Furthermore, offences in cyberspace may be due to the inexperience and functional unpreparedness of the surfer. Journalists have now been joined by thousands of other communicators, many of whom have no notion whatsoever of the traditions and standards of journalistic ethics which are built upon the ideas of service to the community, professional duty and social responsibility. Such people may, for instance, put on the Internet a photograph surreptitiously taken of some celebrity they came across on the beach, without it even entering their heads that they might be intruding on somebody's private life. Quite oblivious of the consequences, they produce a photomontage on their computer. Some journalists' organizations are already calling for a special tag to be placed on distributed photographs when they have been digitally processed.

Incidentally, the increasing vulnerability of privacy to the threat of media intrusion as we turn into an information society has drawn extremely radical proposals from a number of European jurists. In particular, the noted French lawyer Georges Kiejman, speaking at a Council of Europe seminar in December 1997, proposed the enactment of a statutory 'period of decency' during which the heirs could call for a ban on the dissemination of works touching on the private life of a deceased person. The analogy with copyright, which continues to apply after the author's death, seems quite plain to me. Developing his colleague's parallel between the right to privacy and copyright, François Stefanaggi has put forward the idea of establishing criminal responsibility for invasion of privacy.

Offences in the area of copyright are much more blurred in cyberspace. First, it is hard to identify the culprits, especially if they operate from some Internet café or other public place.

Secondly, lawbreaking in the virtual world may go unnoticed for a long time in so far as it is done 'on-line' and legally is not as yet monitored in cyberspace. Indeed, there are grounds for wondering whether it can be monitored, given the scale of the networks and the rate at which they are developing.

Thirdly, once a work with no special protection is launched into cyberspace it becomes an easy prey for anyone wanting to reproduce it, copy it, use it in a compilation or even alter it for the purpose of damaging the author's reputation. And what redress can there be if the counterfeit version has been propagated far and wide on the network?

Fourthly, copyright is done a bad turn by this much-vaunted 'interactivity' which results from the qualitatively higher degree of interaction between the consumer/user and the work. By encouraging surfers to make individual use of the contents of a multimedia work, it objectively creates the impression that there is nothing unlawful about interfering with an author's work.

For instance, the computer game 'Mon théâtre magique' invites users to make their own animated film from moving images – complete with soundtrack – of persons, animals, plants, and so on. If this multimedia game is itself a copy of a work, the quasi-films made from it also possess all the features of works. Furthermore, while they may be regarded as derivatives, by being kept in the game file, they become part of the copy of the initial work, which ceases to be identical with the original and is thus no longer a copy. Children do something of the sort with their colouring books when they paint in the shapes. But the basic difference is that these children's pictures are rarely to be found anywhere else than in the papers of their doting parents, and not in cyberspace as works to which copyright may automatically apply.

So the borders between creation and the interpretation of pre-stored data are becoming increasingly blurred. Clearly, to speak of the production of an object of copyright as a result of interaction between a person and a computer is justified only when the activity of the surfer was creative and deliberately directed towards creating a work. But in the virtual world, particularly where collective interaction is involved, creation may be spontaneous. In this event, so-called chance productions quite often come about as a result of a mistake by the user or in the operation of some item of peripheral equipment or software. Can the programmer justifiably claim co-authorship of such a work, or should the rights be granted to the user only? At the same time, can the user who has merely set the computer the task of creating the work in question be regarded as its author?

If we are to answer this question in the affirmative, there must logically be some creative elements in the setting of the task by the user. For example, when formulating the task, the surfer may provide the algorithm for its fulfilment or spell out the key idea of the future work. The creative character of such acts is beyond doubt, as is the fact that all conventions in force exclude from copyright protection ideas, processes, algorithms, and the like. Consequently, the nature of creation in cyberspace takes us back to the far from new question – a sort of 'squaring of the circle' of intellectual property – of the legal protection of ideas.

By revolutionizing the modes of creating, propagating and utilizing works, the new information and communication technologies are objectively nudging the world community towards an ever more searching review of the foundations of the generally accepted copyright doctrine. It is highly significant that the 1996 WIPO Copyright Treaty contains norms regarding the technological measures used by authors (Article 11) and the obligations of Contracting Parties concerning rights management information (Article 12). Of crucial importance is the interpretation of electronic rights management information as information which identifies the work, the author of the work or the owner of any right in the work, or information about the terms and conditions of use of the work.

This brings us very close to the idea of registering works, something deeply alien to the spirit and letter of the Berne doctrine. In this case, however, responsibility for registration does not lie with the State but with associations of authors, which will naturally decide for themselves what deserves to be recognized as a work and what does not. So the emergence of a new variety of censorship cannot be ruled out. Furthermore, legalizing the procedure whereby electronic rights management information has to appear on the computer screen when a work is communicated to the public means in practice that any work not accompanied by such information falls *de facto* into the public domain.

But the stakes in this game are already too high to pay attention to such 'trifles'. The International Confederation of Societies of Authors and Composers (CISAC) recently reported that its member societies annually collect and pay out to authors approximately $25 billion. And these are only amounts not covered by bilateral agreements between authors and users.

So on the one hand we have the objective difficulty of taking due account of the distinctive features of the new information and communication technologies in international and domestic law, while on the other, there is the complication of monitoring cyberspace in view of its transboundary nature and the immediacy of communication, especially in the on-line mode. It does not follow, however, that there is no room for law or State regulation in cyberspace. On the contrary, the growing seriousness of the challenges necessitates a more active role of the State.

The State must be ready to wield the 'big stick' in defence of the public interest and human rights, including on the Internet. I venture to predict that we shall soon be seeing State (or inter-State) bodies operating directly in cyberspace. This may take the form of specialized sites monitoring law and order in the communication environment and keeping information pollution-free, or courts – primarily arbitration tribunals — taking on cases on the network, hearing the parties and handing down judgements. Arrangements can be made to apply court decisions in cyberspace, in any case those that involve freezing a bank account, imposing a fine, awarding damages, and so on. Care should be taken, however, to ensure that actions to uphold law and order are not used to justify censorship.

Societies of authors must also move into cyberspace and learn how to work there. Indeed, it already provides the main source of royalties for creators of multimedia works. Modestly known as 'compilations of data', these works, combining as they do many types and genres of art, now represent an important component of world culture. In his report *The Legal Status of Multimedia Works*, prepared at UNESCO's request for the Eleventh Session of the Intergovernmental Copyright Committee (June 1997), the Argentine lawyer and professor Antonio Millé observes: 'The great changes needed urgently if copyright is to function equitably and efficiently in the information society should affect all works, not only those produced using the "new technologies"'.[5]

If we really want to safeguard the legitimate interests – just compensation and the protection of moral rights – of those working in the world of intellectual creation, and whose works are used on local and global networks, we must develop international and national copyright not in isolation but in the general context of establishing a legal framework for cyberspace. Only through the mutual integration of the various branches of law can information law ultimately take shape.

Notes

1. G. F. Shershenevitch, *Avtorskoie pravo na literatournye proizvedenia*. [Copyright in Literary Works] pp. 8, 14, Kazan, 1891.
2. See, for example: Yu. M. Baturin, *Problemy kompiuternogo prava* [Problems of Computer Law], Moscow, Yuriditcheskaya Literatura, 1991.
3. Building the personal computer without a hard disk is a shrewd way of preventing surfers from copying any works they fancy and using them for as long as they like. With a network computer, users will have to pay considerably more for their access time,

which is hardly likely to foster the spread of knowledge and general intellectual advancement.

4. August Ferdinand Möbius (1790–1868), the German mathematician and astronomer who discovered that when one end of a rectangular strip is twisted and stuck to the other end, the resultant figure has only one side.
5. Antonio Millé, 'The Legal Status of Multimedia Works', *Copyright Bulletin*, Vol. 31, No. 2, April–June 1997, p. 38.

The need for shared liability on the Internet

Ralph Oman*

'We must all hang together, or assuredly we shall all hang separately.'
(Benjamin Franklin, at the signing of the Declaration of Independence, 4 July 1776)

Introduction

In the 1960s film, *The Graduate*, a drunk businessman gave Dustin Hoffman a shrewd word of career advice: 'Plastics'. In an eerie reply of that scene, a certified Hollywood mogul gave me another one-word bit of career advice. He leaned forward conspiratorially and whispered: 'Digital'.

The furore over digital technology and its impact on copyright will hold us in thrall for years to come. This technology has already had a great impact on education, libraries, archives and the business of scholarly publishing. It has not yet turned the great entertainment industries upside down, but it is about to do so. And in anticipation of that upheaval, we have to sort out the complex problems raised by digital technology: how to market, licence and enforce rights on the Internet, on CD-ROMs and on machines not yet built.

The technology of reproduction and distribution has evolved rapidly in the past twenty years, but the often apocalyptic rhetoric about copyright remains weirdly the same. We have heard and will hear again of the growing irrelevance of traditional copyright law. We have heard and will hear again that copyright will become a system of compulsory licences. We have heard and will hear again that copyright will degenerate into a right of 'equitable remuneration'.

Some pundits say there are too many works, too many uses and too many users to sustain a legal tradition based on contract. They say there is too much decentralization of copyright transactions since personal computing merged with digital media and today's copyright law cannot cope with this chaos in a balanced and effective way.

These pundits say that we have reached the end of the copyright road. They would rather develop new producer/publisher/disseminator 'neighbouring rights' for the digital environment instead of sharpening the traditional tools that protect authors' rights.

Some of these predictions overstate the threat, and thus cause us to take it less seriously. Too often we hear that the sky is falling, or that civilization, as we know it, will end. Still, the Cassandras, even if not believed, at least get our attention.

As a digital information network, the Internet is spreading rapidly. It is not the

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product of a single federal programme or plan. It is an organic phenomenon; a steady, slightly chaotic, information quilting bee – a piecing together of large and small users, of networks and information resources, into a publicly accessible whole. While the cutting edge of this phenomenon remains scientific, technical and medical publishing, the powerful logic of digitalization sees the TV and stereo collapsing into the personal computer.

In this new environment, every plugged-in consumer is a potential author, a potential publisher and a potential infringer – all at once or at different times. Everyone will have the capacity to manufacture copies of works of perfect quality. For reference books, magazines, newspapers, sound recordings, computer programs, films, television programming, photographs and graphic works, this means demand distribution. Back in 1976, the drafters of the new United States Copyright Act were smart beyond measure when they noted that information and communications technologies were diminishing the centrality of the right of reproduction and distribution of physical copies in the copyright hierarchy. The exclusive right of public display and a much strengthened right of public performance were essential, they said, to future copyright protection. What they may not have anticipated or fully appreciated was how fast that change would come.

The public performance right now looms as a key to realizing the so-called 'celestial jukebox' – a vast electronic database of digitally stored recordings distributed via satellite to home subscribers. The question of public performance rights in digital sound recordings is not a matter of creating a new revenue stream to enrich the record industry. The United States Congress recently created this new right in the context of digital broadcasting and digital cable services as a logical replacement for the traditional manufacture and distribution of CDs and tapes for public sale in stores or by mail. Record companies, composers and performers will become more completely engaged in creating and storing performances for others to 'manufacture' or compile at their own expense. And consumers may choose to buy an hour of music without making a copy, or they may choose to create their own albums on their own digital equipment. The emerging digital delivery services now being built could make the traditional record store and jukebox obsolete.

To print publishers, the celestial jukebox translates into what electronic publishing specialist Tony Feldman calls 'customer controlled publishing of the twenty-first century'. On-line primary publishing, unbundled text, and interactive instructional publications – digital innovation in the staid world of publishing – are close kin to the flashier celestial jukebox.

Although further off, the same technologies and marketing structures fit audiovisual works. After all, radio and television stations, movie theatres and video rental stores are all in the same business: they juggle physical copies to get copyrighted works to viewers and listeners. Call it the 'celestial box office' or 'viewer controlled television in the twenty-first century'. Whatever you call it, it is an exhilarating prospect.

Moreover, unlike other recent technological challenges to effective copyright exploitation (read 'opportunities for piracy'), digital technology has important positive applications to the orderly licensing of copyrighted works and to the detection, monitoring and prohibition of unauthorized uses of these works. Certainly, we use anti-copying technologies in analog media, but this is very primitive stuff compared to the copyright management and enforcement possibilities available with digital technology and on-line delivery.

With that as a background, I will now mention some problems we face just down the road – all of them directly related to the Internet and digital technology.

Building a secure system

With all of these new marketing opportunities on the Internet, we must recognize that very few really valuable works will be sold or licensed in the netherworld of cyberspace unless the copyright-owners have confidence in the security of their works. The ultimate issue of liability of the various parties – the content providers, the on-line service providers (OSPs), the Internet access providers (IAPs), the telecommunications carriers that function as 'mere conduits', the equipment manufacturers and the end users – must be addressed at the front end. The engineers and visionaries have developed razzle-dazzle anti-copying technology, but none of the systems will work unless all parties in the chain of distribution actively co-operate and share liability.

The United States Congress will soon enact two measures to implement the country's obligations under two new treaties – one on copyright and the other on performances and phonograms – negotiated in Geneva at the World Intellectual Property Organization (WIPO) in December 1996, one measure that prohibits the alteration of copyright management information embedded in copyrighted works, and another that restricts the manufacture or importation of little black boxes that allow people to defeat anti-copying circuitry. These measures will help control the threat of copyright piracy and unauthorized use, and encourage the development of the Net to its full potential.

Even though these legislative proposals will help resolve the question of security, they have encountered strong opposition in the United States. The risk is great that powerful special interests, including universities and libraries, in their eagerness to get convenient access to materials on the Internet without seeking the author's permission, will force Congress to mandate a porous system that will accommodate their parochial desires, rather than a secure system that will shut down the pirates and give a big boost to American creativity worldwide.

Educators and librarians speak with great moral authority, and they argue now for unfettered scholarly use and uninhibited browsing on the Internet. Many valuable copyrighted works are intended only to be 'browsed' – newspapers, for example, generally merit no more than a cursory scan. Francis Bacon reminded us that 'Some books are to be tasted, others to be swallowed, and some few to be chewed and digested'.[1] It would be wrong to exempt from copyright protection that large class of works that are meant only for browsing, sniffing or tasting.

The librarians also contend that fail-safe security will hamstring traditional library uses and thereby run counter to the United States Constitution's Article 1, Section 8, Clause 8 mandate 'to promote the Progress of Science'. This reading of the Constitution is one-dimensional. A more careful analysis of the copyright clause leads to a different conclusion. The drafters wanted to stimulate the public dissemination of knowledge and literature. They concluded that by providing sufficiently strong copyright protection, they would encourage authors to take their works out of their locked desk drawers and publish them for all to read, to learn from, and to build upon. A distribution system that is vulnerable to piracy chills that kind of public distribution and frustrates the 'Progress of Science'.

Educators also want a broad application of the United States notion of 'fair use', as well as generous on-line photocopying exemptions, and unrestricted classroom use. While their positions are sincerely held and not without some merit, they seem careless of the fact that their desire for easy access to copyrighted works will open such gaping holes in the security of the Net that pirates and irresponsible hackers will rush through those holes to fleece the creators. This prospect becomes especially worrisome when we note the borderless nature of the medium and the existence of pirate havens in countries with access to the Net. Unless the creators can control the system with foolproof encryption and electronic monitors, they will remain extremely cautious in using the Net. Ultimately, they must convince Congress that they will negotiate appropriate low-cost tariffs for scholarly and classroom uses as long as the educators and librarians agree to support the concept of full liability and agree to support the implementation of technology that ensures a secure and fully accountable system of control.

If we had had this digital technology twenty years ago, we could have solved many difficult copyright issues. For example, library photocopying appeared to be an insoluble problem in the 1970s. Librarians are by nature respectful of authors and creativity, but they also fight hard for library patrons. If the copyright laws had allowed copyright-owners to pull the plug on library photocopying machines twenty years ago because no effective monitoring or enforcement system existed, we would have lost a valuable new tool for scholarly research. So librarians in many countries fought for and won very generous provisions for library photocopying. In some countries, the government encouraged the establishment of collective rights societies to administer library uses. In other countries, like the United States, librarians do little more than post signs over the copying machines reminding patrons to respect copyright. If the world had then had a digital encoding system that would have wired each machine to a central clearing house, monitored use, and, if appropriate, assessed a minuscule but fair charge for each reproduction of a copyrighted page, the authors and publishers would have rushed to enhance the system and worked hard to make it cheap and convenient for scholarly users. They may even have tried to make it more convenient for commercial users, who would have leapt at the chance to regularize their photocopying activities in a painless way. Unfortunately, that technology was not then available, and many countries still wrestle with the rampant infringements, litigation and bad blood brought on by the primitive enforcement systems now in use. With creators and hardware companies working closely with educators and other users, we will resolve these difficulties by application of these new digital technologies that will make copying on the Internet fast, cheap and easy for all users, and flexible enough to accommodate academic needs.

The United States concept of fair use can prosper in this type of controlled environment. We should start our analysis by remembering that the courts created the fair-use doctrine to introduce a degree of common sense and flexibility into an otherwise rigid system bound by absolute notions of copying. With the new digital technology, we can build great flexibility into the system itself. We can programme the machines to make special allowances for the uses contemplated by courts when they fashioned the fair-use doctrine back in the era of hard copies. The digital copyright management technology has the capacity to accommodate the concerns of professors and librarians without destroying copyright in the process. The new system will offer a rich menu of site-specific licensing options. It will be flexible in its application, subtle in its ability to distinguish between different uses and reliable in

its implementation. These automated site-specific services will use a debit card or will automatically charge an individual's personal bank account, or an institutional account, for each use as appropriate, and then divvy up the royalty pool among the various copyright claimants with great precision. It is an exhilarating prospect, but it requires a co-ordinated effort by all parties.

In the final analysis, the creators may find solace and succour in the Berne Convention. A Berne Union country that implements a copyright management system with huge loopholes that seriously erode the rights of the Berne Union authors – including the reproduction right, the public performance right, the distribution right and the right to make a derivative work – would breach its Berne Convention obligations. If that country implemented such a loose and unenforceable system, another country could challenge it in the World Trade Organization and, if successful, retaliate against the offending country.

Copyright liability on the Net

To make this new management system work, Congress must confirm the legal liability for copyright infringement of all parties in the chain of distribution. The Commissioner of Patents and Trademarks, Bruce A. Lehman, says that he will not make the IAPs, including America On-Line and NetCom, the deep-pocket guarantors of copyright, but the Commissioner does not suggest that Congress exempt them from liability.

The telephone companies, the IAPs and United States and foreign hardware manufacturers, in a bold marriage of convenience with educators and librarians, are fighting hard for just such an exemption from copyright liability. They should all soon realize that their defensive posture is ultimately a dead-end street, because it will stunt the vigorous growth of the technology. Only if these key players take an active role in the enforcement of copyright will the creators play an active role in ensuring the success of the Internet, to the benefit of all, especially the public. The creators are already implementing their part of this comprehensive copyright management system. For example, the International Confederation of Societies of Authors and Composers (CISAC) and the United States performing rights societies have developed a global digital identification system. Known as the WorksNet Project, it will allow composers and publishers to encode each musical work with a unique digital identifier, the International Standard Works Code (ISWC). It is intended to exploit the revolutionary new accounting capabilities and the limitless information storage capacities of the digital technologies. In that way, in the words of Frances W. Preston, the President and Chief Executive Officer of Broadcast Music, Inc., the creators will bridge 'boundaries of language, culture and geographical location. When implemented, WorksNet will improve the accuracy, speed, and scope of reporting and payment . . . around the world'.[2]

The deployment of the copyright management information is an important first step, but it will require the active co-operation of the IAPs to succeed. Let me offer a simple hypothesis.

A major record company, working closely with composers and performers, encodes all recordings with copyright management information that prohibits copying without authorization. That company has also perfected a cheap but foolproof monitoring device that will prevent unauthorized transmission of the encoded

recordings on the Internet, as long as that device is installed by the IAPs. But one IAP refuses to install it, and a computer hacker, playing Robin Hood, uses that IAP to upload all of the record company's new digital recording onto the Internet for the world to listen to and copy.

Under well-established copyright principles, that IAP should be contributorily or vicariously liable for copyright infringement. It has the ability to control the copying, it makes the infringement possible by its inaction, and it profits directly or indirectly from the activity. We have not yet officially reached this legal dénouement, but we are heading in that direction. The copyright law makes clear that actual knowledge of the infringing act is not a precondition for the strict liability that attaches under the 1976 United States Copyright Act. Its only relevance goes to the determination of whether the infringement is wilful or not. If an IAP operates a naked wire and allows pirates of malcontents to send encoded material over that wire without authorization – popular songs, computer programs, motion pictures, video games, you name it – the IAP must be implicated in the infringing activity. The old paradigm of physical copies moving in commerce breaks down in cyberspace. 'Take-down after notice' is not enough, because the damage is done so quickly. Unauthorized worldwide distributions can take place instantaneously and often anonymously. A reliable system must be able to intercept an unauthorized transmission as it is being made, or before it is completed, and stop it. Under these circumstances, a congressional grant of immunity from liability for one or more of the key links in the chain would render the management system unworkable.

All transmissions, both foreign and domestic, including those that are digitally encoded by the copyright-holder, will transit through the IAPs' electronic filters. This copyright management information (now protected by the WIPO treaties) will regulate the use of the material – it could be free, it could be browsed, it could be read or listened to for a small payment, it could be limited to a single use without reproduction, or, for a higher fee, it could be printed or taped by the home user. But for this system to function, we need a leakproof technology. In the case of recorded music, we need the composers, the performers, the music publishers, the record companies, the telephone and cable companies, the performing rights societies, the IAPs and the consumer electronics industry all working together to design and implement a system that allows the creators to control the use of their songs and CDs throughout the extended chain of distribution. In the case of computer software, databases and textual materials, we need the authors, the publishers, the collective management organizations, the telephone and cable companies, the hardware manufacturers, the IAPs and the academics and librarians all working together to create a system that allows for fair but nuanced application.

This black-box technology is closer at hand than most people think. It will provide the filter through which all messages or fragments of messages will pass. As a digital monitor, it will screen each transmission automatically without human intervention, and it will work at the speed of light. No bottleneck need ever develop. For uncoded public domain material, the digital monitor will whisk the message out over the Net to its destination. For a message that contains encoded proprietary material, the monitor will process the transaction instantaneously, and, if it satisfies the terms and conditions established by the copyright-owner, it will speed the message to its addressee. For those messages or fragments of messages that contain encoded copyrighted materials that are intended for an unauthorized addressee, or that originate from an unauthorized site, the filter will simply not permit them to go through. The

system could be so refined that it could permit limited scholarly use by students in university libraries for a nominal charge, or even without charge, while charging full freight to commercial users at a per page, per minute, per word, or per work rate. Or it will note the existence of a blanket licence or a paid subscription. The new system will also end, once and for all, the destructive anonymity of the web. If someone wants to transmit copyrighted works, he or she must agree to positive identification, be it a coded digital signature or an electronic watermark. Otherwise, the black-box monitor will disable the transmission. Encrypted signals present a special challenge, but not one that is beyond the reach of technology.

With the IAPs monitoring the Net, the enforcement problems become manageable. Grizzly bears feast on salmon swimming upstream to spawn. The bears can't catch salmon either in the broad stretches of the river or once the fish get to the lake, so they position themselves at the narrow point of a stream. Like the grizzlies, the IAPs are at the narrow point of the stream, and they are in the best position to detect infringements. Unless they share in the enforcement responsibility, detection of infringing transmissions becomes extraordinarily difficult. And unless the IAPs share a degree of liability, they will simply sit back, fold their arms, and tell the copyright-owners that enforcement is their problem, not an IAP problem. With confirmation of their liability, they will participate actively in the co-ordinated technological effort we need to beard the dragon of piracy. With the IAPs standing astride the choke point, their black box guarding the flow of copyrighted material, this exciting new distribution system will flourish. Recognizing their own self-interest, the IAPs will help engineer the technical solution needed for secure copyright management.

If Congress were to immunize the IAPs from copyright liability, they would have no reason to install the monitoring devices. In fact, such immunity would give them a positive incentive *not* to install them. An unethical company could make a business judgement that potential customers may find more attractive the services of an IAP that is less vigilant on copyright enforcement than one that is more vigilant, and refuse to install the monitor on competitive grounds as well. Even if Congress were to immunize only 'mere conduits' from liability, it is a certainty that every IAP in the country will change its business practices and strive to do everything possible to become entirely passive to qualify for the exemption. Most assuredly, they will refuse to install monitoring devices, on the theory that to qualify for the passive carrier exemption they must close their eyes, plug their ears, and hold their nose, the author be damned. Such crass business decisions are possible only if Congress shields them from liability.

Indeed, the business world is already moving in the opposite direction. Two years ago, CompuServe negotiated its first licence with a content provider. The agreement settles an action brought by the National Music Publishers Association (NMPA) for copyright infringement.[3] The NMPA claimed that CompuServe was a direct, contributory and vicarious copyright infringer because, without authority, it:

(a) permitted paying subscribers to upload copyrighted sound recordings of musical work into its computer database – in violation of the mechanical reproduction right;
(b) stored the music in its database; and
(c) allowed its subscribers to download the songs and play them back.

This act not only implicated the reproduction right, but the right of public performance as well.

CompuServe denied the allegations, saying it had no responsibility for the infringing acts of its subscribers. Even so, it agreed to pay the music publishers $500,000 up front, with a continuing royalty based on the statutory rate for each mechanical reproduction. This is the first such agreement, and it could serve as a model for the future. CompuServe has assumed the obligation to pay the royalties for its subscribers, and that is a tremendous breakthrough. Shared responsibility for security will transform the Net from a glorified chatboard for nerds to a broad avenue for scholarly discourse and mass entertainment.

Conclusions

At the end of this article, I would like to press upon you one last thought with the greatest urgency but with the greatest respect. Digital technology poses several options for copyright policy-makers, and those options in turn pose some real dangers to authors' rights. Not only from pirates and 'scofflaw' hackers but also from the growing sentiment that the classic laws of authors' rights show signs of age. In our drive to protect a host of players with parochial interests – service providers, dealers in copyrighted materials, librarians, satellite resale common carriers, telephone companies, educators, cable companies (it's a long list) – we run the risk of thinking that we have naturally protected authors and copyright-owners. Not so. Obviously, these interests deserve protection against abuse. But their rights should never be confused with authors' rights.

The very best copyright laws everywhere have always protected the power of the creator against the power of owners of technologies that earn money exploiting the creations of authors. This has been so whether the technology is the printing press, broadcasting, laser printers, photocopying machines, digital tape recorders, mainframe computers or personal computers with vast electronic storage and retrieval capabilities. The debate over technology and the interests of authors is the very essence of copyright thinking – the core that makes copyright law historically unique, socially revolutionary, and worth fighting for.

Congress, the courts, and international organizations such as WIPO and UNESCO must reaffirm the fundamental purposes of copyright. The author, a human being, stands at the centre of our copyright universe, and we must preserve that vital core as one age slips into another, as one technology fades and gives way to another. The author must enjoy the power to authorize, or prohibit, uses of his or her creative expression on the Internet. Those of us who believe in intellectual property and champion the goals of the Berne Convention should not see our job as planning a new regulatory future for our digital market place. Instead, let us find ways to bring the digital environment under the control of the author. Let us make digital technology not just a blessing for all citizens, but a trusted servant of authors' rights as well.

Notes

1. F. Bacon, 'Of Studies', *Essays* (1625).
2. Frances W. Preston, *Music World*, Autumn 1996.
3. *Frank Music* v. *CompuServe*, No. 93 iv. 8153 (JFK) (S.D.N.Y.).

Librarians: a special case for treatment

Sandy Norman*

Introduction

The digital revolution has made a great impact on libraries. This has created expectations that the advances in optical storage and data compression, greatly increasing the capacity for storage and information retrieval, and the ability to transmit and receive information using enhanced bandwidths will be available to be used to improve services to patrons and so, potentially, be of benefit to all members of society regardless of frontiers. Although efforts are being made, this has not yet been resolved to the satisfaction of all parties in the information chain – authors, producers, publishers, broadcasters, service providers, library and information providers, etc. The promise of the Information Society will not be fulfilled until and unless a careful balance is maintained between both economic and public interests. It will not be achieved if the rights to packaged information are tightly controlled by those with only an economic incentive to make as much money as possible out of these new opportunities, regardless of society's interests. Without the appropriate safeguards to society such as exceptions, this will create a greater divide between the information rich and the information poor at a time when the opportunity exists to narrow or even close this gap.

Librarians fear that with more and more rights given to copyright-owners access to all packaged information will be confined to those who can pay for it. Those who cannot afford to pay will be effectively disenfranchised and it would be impossible for librarians to provide equitable access to resources needed for education, creativity and the advancement of knowledge. Librarians advocate international harmonization of the laws but maintain that exceptions should remain to ensure, at least, that permitted uses apply equally to information in electronic form as they do to information in print.

Librarians – responsible professionals

Judging by the copyright laws they adopt, there are very few law-makers who really appreciate exactly what librarians do, so this article will be an opportunity to explain. The practical day-to-day reality of abiding by copyright laws is rarely appreciated. Librarians are responsible members of society. They are not pirates. They respect copyright and take it seriously. They have to, as a great deal of the

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material handled in libraries is protected by copyright. They have to familiarize themselves with copyright laws and take reasonable precautions against any inadvertent infringement which may take place in libraries. They alert their patrons to the law as well as give guidance on how to remain inside it. This is not an easy role to sustain as they are frequently accused by their patrons of being obstructive in preventing copyright abuse or misuse, while at the same time they are often accused by right-holder representatives of encouraging copyright infringement. It is quite often stated, especially by publishers, that librarians are always trying to obtain something for nothing: to avoid having to pay for information. Librarians are publishers' customers and therefore require value for money just like any other set of customers. When librarians talk about free access to information, this is literally taken to mean information for free, whereas what is meant is that they want access to information which is flowing freely, i.e. unrestricted, packaged information which is purchased by libraries and made available by the quickest possible methods to patrons.

Librarians have idealistic aims but then so do most professions. Their aim is to facilitate access to education and knowledge by collecting and making these collections available to those who need them, whoever and wherever they may be. They preserve collections as part of a nation's heritage. They spread the knowledge of their collections and share their resources both nationally and internationally. They have learned skills in searching and retrieving information from external sources and can assist in the learning process. Their role is, therefore, to help their patrons to identify, obtain and use the information they need. However, if this vital role is not recognized by governments in the form of legal support, this system will break down, with the resulting loss to society.

The digital revolution

Technology is available to improve library services, but more often than not, depending on a nation's laws, full advantage cannot be taken of it because of copyright considerations. Library and information professionals are committed to make works available for all to access. The Fourth Law of Library Science is: *Save the time of the reader*.[1] Librarians and their patrons become frustrated, therefore, if access is hampered. For example, many would like to digitize and network parts of their printed collections in order to offer as wide an access as possible to readers. There are other obvious advantages to this as well: the information can be safely preserved, and is free from the dangers that exist in its printed form – pages ripped out, books defaced or stolen, etc. This is not material which is already in digital form so it can be argued that it is not competing with the normal exploitation of the work. Access and use could be restricted to registered patrons of the library so an element of security is offered. However, obtaining authorization, if no statutory right exists, is time-consuming and may even be impossible: many publishers do not respond promptly to permission requests, if at all; some are difficult to trace; some demand prohibitive fees and/or tight licensing conditions; and some refuse. Added to this is the question of whether the publisher holds the rights or whether it should be the author one has to approach. Multiply all of these requests by the number of authors and publishers and the scale of the problem can be appreciated.

The hopes and expectations of librarians in being able to use the new technologies to enhance their services have clashed with the fears of rights-owners about use

of copyright-protected material. Rights-owners fear that, once their intellectual property is in digital form, it will be appropriated by the less than scrupulous users in certain States, particularly in those with inadequate statutory protection, causing widespread piracy. This is a valid fear, although not yet proven. Some publishers (such as the Stationery Office in the United Kingdom) have reported that putting the full text of their works on the Web actually increases sales. The library profession maintains that given certain rights and safeguards, piracy will not happen to materials in their care, although they cannot be held liable for all acts of infringement on the library premises. They are not, and should not be expected to be, copyright police.

Right-holders believe that 'digital is different' as uses of their works can be monitored using digital solutions. It is true that digital technology has the potential to enable rights-holders to track and charge for every instance of electronic access. In the view of many right-holders *all* access and use of works whether in printed, analog or digital form should be licensed and paid for. This is a dangerous argument as having such market power gives them the green light to impose monopoly prices and potentially oppressive terms on users, including libraries and academic and research organizations, and to ignore the social consequences that follow from the inability of such organizations to make payment for every access. Where is it written that right-holders should be entitled to a *maximum* return on investment? An *equitable* return to encourage the creation of new works is all that should be expected. Statements which assert that because all digital copying has the potential to be tracked and controlled there is now no need to apply any exceptions for uncontrolled copying and use, demonstrate the one-sidedness of their argument. What right-holders appear to have forgotten is the other side to copyright: the needs of society. This cause has to be taken up by the library profession as there is no other profession which is upholding the consumer interest on copyright.

The World Intellectual Property Organization (WIPO)

The original proposals put forward by WIPO in their draft copyright treaties had a very short consultation period, giving the impression that WIPO wished to rush through these important digital changes. This unseemly haste appeared to be dictated by the entertainment and leisure industries and did not inspire confidence that sufficient thought had been given to balancing the needs of society with the economic interests of those who hold and control the rights. Fortunately, because of successful lobbying by library and telecommunications organizations, a compromise was reached and the more controversial proposals were not adopted or amended.

However, the new right of communication to the public poses a threat to library services. Of special concern are activities such as browsing and viewing from a computer screen, which are likely to fall under this right. Librarians do not believe that they should have to be authorized to browse or view. The definition of browsing and viewing in this sense is akin to looking among the bookshelves for something which catches the eye and examining it to see whether it is appropriate for a purpose. It is accepted that patrons can browse and 'view' works in printed form so there should be no difference in looking at an electronic version. If browsing and viewing has to be authorized, the public is at the mercy of right-holders who could charge what they like. This would mean, in effect, that patrons will be paying for

reading. This is totally unacceptable. It was never intended that copyright protection should extend to reading. It is essential, therefore, that there is a statutory exception to this right. Rights-holders should not be given the opportunity to control the right to read, view, listen or receive or inappropriately monitor the use of information.

European Union

The precedents being set by the European Union are a worrying factor for libraries. The European Union is tipping the balance more and more in favour of owner interests:

- the term of protection for copyright works has been extended from fifty to seventy years *post mortem auctoris*, thus extending exploitation potential and delaying works falling into the public domain;[2]
- public lending – one of the prime functions of a library service – has been brought under copyright law;[3]
- a new form of protection has been given to databases as well as the potential for perpetual protection for such works;[4]
- the latest threat is a draft directive from the European Commission which proposes to increase copyright protection in line with the WIPO Treaties, while at the same time ignoring WIPO by severely narrowing the scope for Member States to provide exceptions.[5]

It is clear from the European Commission Follow-up Green Paper[6] and the response of the subsequent consultation that the views of the commercial sector, ostensibly the leisure and entertainment industry, prevail in this new Directive. However, although plugging the gaps to preserve exploitation potential of entertainment and leisure works is important, it is unfortunate that education and research uses are caught up in this rigid protection. The green light given by Article 10 of the WIPO Copyright Treaty for Contracting Parties to apply appropriate exceptions should not be undermined or reinterpreted by the European Union. The European Commission's commitment to society's needs appears to be very lukewarm. In a recent resolution from the Commission, the statement in the preamble to the WIPO Treaties: 'recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information' is welcomed but in the same statement it is diluted by stressing the overriding need for protection.[7]

The case for exceptions for fair practice

One of the fundamental purposes of copyright is that it should foster creativity and the development of knowledge which in turn benefits society. It is in the public's interest to have access to information, in all its formats, which is widely accessible and which may be freely communicated. This leads to a better informed and educated society which, in turn, leads to the creation of more intellectual works.

An exception which allows copying for research actually supports the economic argument that copyright provides incentives to potential creators to create new works, it does not negate it. Although *existing* authors need protection to stimulate the digitization and dissemination of their works, *potential* creators also need

encouragement to carry out research for a work. If there are barriers to access (being refused, or having to pay a high price to access and clear rights to copy), the costs of producing a new work will be higher and this could be a disincentive to create. Scientists and academic researchers especially need easy access to data at prices they can afford. If data become too expensive scientific research suffers irremediable harm.[8] Much of the information generated which is likely to be copied and used comes from the academic and scientific communities and is paid for out of public funds. The public should therefore benefit from their output.

It is our belief also, that some members of society – students, researchers and those carrying out activities which benefit society – should not have to pay for copying and using information, whether they can afford to pay or not. Provision should be made in all national laws allowing the free copying and use for private, educational or research purposes.

Many governments are already drafting legislation to cover digital technology so it is important that the point of view of the library/user community is heard. In many countries, groups have been campaigning to obtain rights of digital access. In 1996, the International Federation of Library Associations (IFLA) produced a position document on the exceptions from copyright needed by librarians to continue to fulfil their role.[9] In Europe, IFLA has also been working closely with the European Copyright User Platform (ECUP). ECUP is a concerted action supported by the European Bureau of Library, Information and Documentation Associations (EBLIDA) and funded by the European Commission (DGXIII).[10] ECUP aims to raise awareness and stimulate discussions on copyright issues, and is devising model licensing clauses for the use of electronic information. An active lobbying group in the United States of America is the Digital Futures Coalition[11] which is campaigning to highlight digital copyright issues from the position of the user and lobbying for the most effective legislation.

Librarians speaking for the good of society at large need to make a strong case for greater flexibility if the ideals of the information society, being promoted by many governments, are to be achieved. Maybe traditional exceptions from protection do not translate from some laws into the digital environment but this does not mean that they should be abandoned altogether. To maintain a balance between the private interests of copyright-owners and society at large – the concept behind fair dealing/fair use – copying by librarians and for education and research must be preserved. It should be rethought and adapted to meet society's needs. Perhaps the less emotive term 'fair practice' should be considered. This term is already used, for example, in Article 10 of the Berne Convention for the Protection of Literary and Artistic Works. What was 'fair' could then be judged by a court of law, case by case. It should be fair practice to copy reasonable amounts from certain materials by individuals for their own private study. Similarly, copying for research and educational purposes should be allowed under fair practice.

Conclusions

Before we can make full use of the advantages of new telecommunications and information technology in our libraries and information departments, governments worldwide need to be persuaded: (a) that the library and information profession is responsible and takes copyright seriously; (b) that they are aware of all the rules and

regulations affecting different copyright-protected library materials; and (c) that they are in a prime position to facilitate the flow of information within and between all sectors of the community by educating patrons and by providing a gateway to the material. Library and information professionals are the key intermediaries between rights-owners and end users. The protection of copyright materials will only be successful when actively assisted by the full co-operation of librarians.

With the arrival of the digital revolution, the world's collection of knowledge is potentially available for all to access. To be able to share this vast collection with all nations, not just for the developed world, would be the realization of the library ideal. We want governments to give us special treatment to be able to use the new technology lawfully to continue our services and achieve this aim. Most of what librarians do is in the public interest. Despite some who forecast that there will be no need for libraries in the future, librarians will nevertheless endure and will play an important role in ensuring that there is no stratification in society between those who have the means to obtain access to knowledge and those who have not.

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The Qatari Law concerning the Protection of Works of the Intellect and Authors' Rights

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The Qatari Law No. 25 concerning the Protection of Works of the Intellect and Authors' Rights was issued on 22 July 1995 and came into force six months thereafter. However, due to requests from the circles concerned, an additional period of grace of almost two years was granted by the Ministry of Information and Culture. Therefore, this Law became fully effective on 1 May 1997.

A member of the World Intellectual Property Organization (WIPO), the State of Qatar has not yet adhered to the various WIPO treaties, such as the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), although adherence to the first two conventions is at present under consideration. Qatar is already a party to the Arab Copyright Convention (since 1986) and is planning to adhere to the Universal Copyright Convention. Having joined the World Trade Organization (WTO), Qatar will be bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as of 1 January 2000, after a four-year period of grace granted to make the necessary amendments to the above-mentioned Law which, for example, does not provide for the protection of neighbouring rights.

Scope and field of applications of the Law

The protection provided by this Law of 22 July 1995 (hereinafter referred to as 'the Law') shall be enjoyed by authors of original works of literature, art and science, whatever their value or nature, the purpose for which they were made or the manner of their expression (Article 2).

This concerns the works of Qatari authors published inside or outside the country, works of foreign authors published for the first time on the Qatar territory and

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works of authors from other States which grant similar treatment to Qatari authors (Articles 2 and 6). The protection generally applies to original works that are expressed in writing, by sound, by drawing, by painting or by movement. The Law (Article 3) provides for particular usual examples of protected works, including different writings; works communicated orally (e.g. lectures, addresses, poems and hymns); choreographic works and pantomimes; photographic works; cinematographic, television and radio works and creative audiovisual works; works of fine and applied art, whether handicraft or industrial; computer programs and applications and imported and locally developed operating systems. It also applies to encyclopaedias, anthologies and selections that involve creative intellectual work in the selection, arrangement and writing of their subject matter; works relating to the collection and classification of folklore material; and the title of the work if it is distinguished by its creativeness and is not merely an ordinary word describing the subject of the work.

The protection provided by the Law is extended also to the person who, with the consent of the original author, translates the work into another language, and likewise to any person who summarizes, adapts, explains or comments a work in such a way that it appears in a new form. Such acts must be made without prejudice to the protection afforded to the author(s) of the original works. The protection of the author's right, and the right of the person who has translated his (or her) work into another foreign language, to translate it into Arabic shall cease if the author or the translator has not, either personally or through another person, exercised that right within three years from the date of the first publication of the original work or of the translation thereof (Article 4).

Protected persons

Persons protected by the Law include the author who is defined as the person in whose name the work has been published, whether by attaching his name to the work or by any other methods of referring works to their authors, in the absence of proof to the contrary (Article 1). This also applies to co-authors, where two or more persons participate in the creation of a work. This concerns cases where both it is or it is not possible to distinguish each author's contribution. The former particularly relates to co-authors of the cinema, dramatic works and works made for radio or television broadcasting (Articles 28–34).

Where the contribution of each co-author cannot be distinguished, the rights in such a work are exercised jointly by all the co-authors, unless they mutually agree otherwise. If the contributions may be distinguished, each co-author may exploit his contribution separately, provided that this does not prejudice the exploitation of the entire work, unless agreed otherwise (Article 28).

Where due to 'acceptable' reasons one of the contributors to the creation of a cinematographic or dramatic work or a work being made for radio or television fails to complete his part of the work, other contributors cannot be prevented from using his contribution which will be in his name. However, if the reason for not completing the work was unacceptable and it transpires that the co-author acted willingly, then he will be deprived of any rights in his contribution.

The person who organizes the creation of a dramatic, cinematographic, radio or television work, bears the responsibility for its creation and places at the disposal

of the authors of the work the material and financial resources needed for its production and direction, is considered to be the producer of such work. The producer of a work is also considered to be its publisher and has the right of its publication and reproduction during the period of exploitation of the work, and acts as the authors' and their successors' agent in title with respect to the licensing of the display and exploitation of the work, without prejudice to the rights of the authors of the literary and musical works to publish their works by other means, unless otherwise agreed.

Authors' rights

Similar to the laws on copyright of other countries, this Law provides for the protection of both the moral and economic rights of the authors.

Moral rights

Provisions relating to moral rights may be found in various articles. According to Article 9 the author shall have:

- the right to have his work ascribed to him and to have his name mentioned on all reproduced copies thereof whenever the work is communicated to the public, except where the work is incidentally mentioned in the reporting of current events by means of broadcasting; this right is inalienable and imprescriptible;
- the right to decide whether his work is to be published, recorded or exhibited, and to specify the conditions and restrictions relating thereto;
- the right to exploit his work, on condition that he has not already relinquished it to another person.

Article 11 provides that 'the author alone shall have the right to modify or alter his works'. This provision is supplemented by Article 13 according to which the author is entitled

to prevent any deletion from or change to his work or distortion thereof. However, if the deletion, addition or change were made in the translation of the work, the author shall not have the right to prevent it unless the translator has failed to refer to the spots where the deletion, addition or change have been made or his intervention has caused the author's reputation or artistic standing to be impaired.

With the agreement of the person to whom the right has been transferred, the author may withdraw his work from circulation or make any alteration through deletion therefrom or addition thereto; in the event of disagreement the author shall be obliged to pay the said person such fair compensation as the court may decide (Article 16).

Rights of exploitation

Exploitation of any work is not permitted unless a written authorization has been given by the author or his representative or heir. This concerns:

- communication of the work by any means and in particular by publication,

public recitation, musical distribution, stage acting, public performance, broadcasting, sound or picture;
- communication of the work to the public in an indirect way, in particular by printing, drawing, engraving, photography, lithography or any one of the methods of planning arts or three-dimensional work or through photographic or cinematographic publication (Article 10);
- translation of the work into another language (Article 11).

By virtue of Article 15, the author has also the exclusive right to publish his letters, but that right may not be exercised without the permission of the recipient of the letters if publication is liable to be prejudicial to him.

The Law expressly stipulates that the author has the right to defend the rights granted to him against any infringement (Article 13).

Transfer of economic rights

The author may transfer any of his economic rights to any person, provided that the transfer is recorded in writing and expressly mentions each right to be exploited, together with all the details relating to the period, manner, quantity, purpose and place of exploitation (Article 14). After the transfer the author has to refrain from committing any act that is likely to hinder the use of the right transferred (Article 16).

Limitations of economic rights

The Law specifies the cases of free use of protected works. This concerns various ways of use of works for different purposes (Articles 17–22) such as: reproduction, translation, adaptation, etc., for the user's own personal purposes; for educational, cultural or religious purposes or for vocational training, by way of illustration to the extent required by the purpose and provided that the utilization does not serve any profit-making purpose; quotations from the work in another work by way of illustration, explanation or criticism, provided that the quotations are compatible with fair practice and their extent does not exceed that justified by the purpose; the reproduction of any work that can be seen or heard in the reporting to the public of current events by means of photography, television or other method of public reporting shall be permitted, provided that it is justified by the informatory purpose; public libraries, non-commercial documentation centres, educational institutes and scientific and cultural institutions may reproduce protected works by photographic or similar processes, provided that such reproduction and the number of copies made is limited to the needs of their activities, does not conflict with the normal exploitation of the work and does not prejudice the legitimate interests of the author; the Departments of Radio and Television may make ephemeral recordings of any work that they are authorized to broadcast for the purpose of their own programmes and using their own facilities; the reproduction of political, economic, social, cultural or religious articles published in newspapers or periodicals, as well as broadcasts of the same nature is allowed subject to the express mention of the source and the name of the author, if any; the press and other information media may publish addresses, lectures, speeches delivered during legal proceedings and any other similar works

communicated to the public – however, the author alone has the right to publish such works in a collection or in such other manner as he may decide.

After publication of a work, the author may not prevent it from being displayed, performed, acted or recited in a family gathering, society, club or school as long as the display, performance, acting or recitation does not serve any direct or indirect profit-making purpose. Musical bands belonging to the armed forces and others that belong to the State or other public entities may play or perform a published work without authorization of the author as long as the play or performance does not serve any direct or indirect profit-making purpose.

A person who takes photographs or paints any person is prohibited from publishing, exhibiting or distributing the original picture or copies thereof without the permission of the said person; this provision shall not apply if the publication of the photograph or the painting takes place in connection with events that take place openly or concerns officials or famous persons, or if, in the public interest, the public authorities have permitted its publication. The person of whom the picture was taken may authorize its publication in newspapers, magazines and similar periodicals even if the photographer has not given his consent, unless otherwise agreed. These provisions shall apply to the picture whatever method is used for making it (Article 40).

Duration of the protection

The general terms of protection of the author's rights is his lifetime plus fifty calendar years after his death. The term of protection of the author's rights in case of works of joint ownership will run from the date of the death of the last surviving co-author (Article 25).

The term of protection is fifty calendar years from the date of publication for the following works: cinema films and works of applied art; works made by corporate bodies; published pseudonymous or anonymous works, unless the identity of the author is revealed; works published for the first time after the author's death (Article 25). Photographic works are protected for twenty-five calendar years from the date of their making. Where the term of protection is computed from the date of the first publication, the latter is considered the starting date for the expiration of the protection term, unless its author has altered it to such an extent that it could be considered a new work (Article 26).

When a work consists of several parts or volumes published separately and on different dates, each such part or volume is considered an independent work for the purpose of calculating the term of protection.

If a work is published for the first time by the heirs after the death of the author, the heirs shall enjoy protection and have the right to exploit it commercially. If in his will the deceased author prohibited the publication of his work or fixed a date for its publication, the heirs and other persons must act accordingly. Where the author or a co-author dies without leaving a will (intestate) his copyright will be enjoyed by those who are entitled to it according to sharia law (Article 23).

If the heirs of the author or the persons to whom his rights have been transmitted fail to exercise the rights vested in them and the Minister of Information and Culture is of the opinion that the public interest requires that the work should be published, he may request the heirs, by registered letter, to publish the work and, if

they fail to do so within one year from the date the request was made, he may order that the work be published, subject to payment of fair compensation to the heirs (Article 24).

Sanctions for infringements of authors' rights

The author is the person who may authorize the publication of his work. If another person published it without obtaining his written authenticated authorization, or of his heirs or his agent, as the case may be, that person shall be punished with imprisonment for a period of not less than six months and not more than one year and with a fine of not less than 30,000 riyals and not more than 100,000 riyals, or with either one of those punishments, without prejudice to any more severe punishment prescribed by another law. If somebody claims ownership of a work that was created by another person, that person shall be liable to the same punishment (Article 42).

Without prejudice to any more severe punishment prescribed by another law, any publisher shall be punished with imprisonment for a period not exceeding one year and a fine of not less than 30,000 riyals and not more than 50,000 riyals, or by one of the two punishments, who, when publishing a work, has altered its real meaning, nature, subject or title in contradiction with the instructions or wish of the author of the work. The same punishment is applied to a publisher who republishes the work without the author's written permission or contrary to his instructions (Article 43).

Any work may be published or printed in Qatar only by authorized persons or entities. Any one who contravenes this provision may be punished with imprisonment for a period not exceeding six months and a fine not exceeding 10,000 riyals, or with either of these two punishments (Article 44).

Establishments engaged in distributing, selling or reproducing copies of works may do so in respect of a given work only with the written consent of the author, owner of the work or his representative. The owner of the establishment who contravenes this condition may be punished with imprisonment for a period not exceeding one year and with a fine of not less than 30,000 riyals and not exceeding 50,000 riyals or with either one of these two punishments (Article 45).

In all cases of infringement of the author's rights it is imperative to order the confiscation of the infringing copies and an order of closure of the establishment involved may be made. In case of recidivism the said punishments are doubled, and the court may order the publication of the judgement in one or more newspapers at the expense of the condemned person (Article 45).

Office for the Protection of Intellectual Works and Authors' Rights

This Office was created in virtue of Chapter VII of the Law. In general, its responsibility is to see to the implementation of the Law (Article 49). In particular, it may:

- draw the attention of authors to the most appropriate means of exercising their moral and economic rights, and assist them in doing so;
- establish the necessary basis for determining the value of the author's economic rights, with due regard to the importance of the fields in which his works are used;

- rule on any disputes that may arise between authors and others in accordance with the provisions of the Law, if the parties so agree;
- study and follow up matters relating to authors' rights that arise at the local Arab and international levels, and submit suggestions or recommendations in connection therewith;
- study applications for the deposit of artistic works and proceed with the deposit of such works according to the provisions of the Law;
- suggest the necessary decisions for the implementation of the provisions of the Law, and in particular the appropriate systems for the deposit of works with the Office, the publication of reference thereto and the deposit forms and registers.

The personnel of the Office for the Protection of Intellectual Works and Authors' Rights appointed by the Minister of Information and Culture has also the capacity of law officers for the detection and proving of offences committed in violation of the provisions of the Law. For that purpose, they have the right to enter and search premises where the works are published, distributed, reproduced and produced, and to inspect documents and lists and seize the materials, copies and equipment used in committing the acts contrary to the Law.

Retroactive effect of the Law

The legislator decided to give the Law retroactive effect by providing that it applies to 'all works in existence at the time of its entry into force'. For the purpose of calculation of the term of protection of these works, that term includes the period elapsed between the date of the event designated as the starting date of the term and the date on which the Law came into force (Article 48).

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