IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Who Owns Electronic Rights?

A round table conference was held on 27 May 2000 at the Institute for Information Law of the University of Amsterdam (IViR) to discuss the issue of the ownership of copyrights, with special focus on the new electronic media. The conference was organised by the Institute for Information Law in co-operation with the European Audiovisual Observatory (EAO).

A. Opening and Introduction

Professor Bernt Hugenholtz (IViR)

The problems concerning the allocation of copyrights are as old as the history of copyright itself. The contractual struggle over the ownership of those rights was essentially a simple one in the sense that both authors and "exploiters" (broadcasters/publishers/producers) wanted all rights in copyright works. The arguments put forward by the authors quite simply is that they are the authors, and that this justifies the allocation of the authors' rights to the authors themselves. The exploiters argue that they need protection from third parties – a protection they would have if they had separate publishers' rights or exploiters' rights or broadcasters' rights. Secondly, the exploiters argue that they need the rights so that they can freely further exploit the works that they have commissioned. Finally, it could be said that the exploiters should have the rights because they have paid for the works and that this justifies the allocation to the exploiters themselves.

The digital environment has fuelled the discussion over the allocation of rights and raised it to a spectacular level that has been highlighted in the flurry of case law in Europe and the United States. Journalists, largely, initiated these cases, and they have won practically all those cases brought. The Courts called upon to address the cases have considered that any rights in pre-existing works belong to the authors unless specifically licensed or transferred. This case law has led, in turn, to the redrafting of the contractual language between authors and exploiters, and has even led to some preliminary legislative initiative.

The aim of the workshop was to take stock of what the current position is regarding the allocation of rights and to exchange knowledge and information about the issue. Finally it was hoped that some practical solutions could be found.

B. The Existing Statutory Framework

Jean-Paul Triaille
(*Centre de Recherches Informatiques et Droit* - Namur)

Jean-Paul Triaille discussed the various types of rules on the allocation of rights. The first type of statutory rule is concerned with who is the actual owner of the rights. It will not always be the original creator, for example, in cases of employment agreements, "work for hire" situations, audiovisual productions, and "collective works". Generally these ownership rules are default rules - they will only apply unless otherwise agreed. In the field of software development and employment agreements there probably has not been any employment agreement that deviate from the general principle that the employer is the owner of all intellectual property rights.

The second type of rule governs copyright transfers or licenses. In some countries there are no copyright specific rules, only general principles of contract law. In the countries where there are copyright specific provisions there are, in general, three types of rules. Firstly, rules regarding formalities, for example, the agreement must be in writing or there must be written documents to evidence the transfer. Secondly, rules regarding the content of the contract often include the obligation to be detailed or explicit on the type of right being transferred or the type of media concerned. Some laws provide for a mandatory right to proportional or adequate remuneration. Alternatively, there may be provisions requiring that the author must have a share of the benefits. Other provisions concern the prohibition on transferring rights in respect of "unknown uses" of the work, restrictions on assigning rights in future works, or rules that enable termination of a copyright contract if rights transferred or licensed are not used. Finally, rules of interpretation of copyright contracts will generally favour the authors. An example is the "purpose of grant rule", which implies that the grant only comprises those rights that are necessary for the purpose of the agreement itself. Besides these general rules there are particular rules for particular agreements and these can be specifically regulated.

The unsatisfactory answer as to whether these rules are default or mandatory is that it depends. The rules allocating rights to non-creators are generally default rules. Others imposing formalities, or the obligation to be precise, or to provide for proportionate remuneration, or to exclude unknown uses, will generally be mandatory. Rules of interpretation will generally be mandatory as well. What is not clear, however, is when these rules are mandatory, how mandatory will they be? In addition, it may be possible to avoid these rules by applying foreign law to the agreement.

When the rules are default rules, or where there are no author-protective rules in place, then general principles will apply. For example, competition law can be invoked in favour of the author or producer, or unfair terms legislation, undue influence provisions or general principles of good faith. If more protection is needed for the authors, the solution is to gather more bargaining power and to go for collective solutions.

Author-friendly rules exist because they protect the weaker party. Producer-friendly rules are justified for economic reasons as producers provide the finance and take the risk. It is argued that for the sake of efficiency it is too difficult and too time-consuming to go back to the author every time a new work is produced, or every time a new form of exploitation is discovered. There is also the continuity argument that says that exploitation in digital form is a normal consequence of analogue exploitation, and the convergence of technology should imply the convergence of rights in the hands of the same parties.

At present the case law has interpreted old (or pre-digital) agreements and decided in favour of the author. The response of the producers has been to re-draft (standard-form) agreements in order to acquire all rights for all possible uses in all territories.

Discussion

From the journalists' point of view the experience is that the rules work and they don't work. They work in the sense that they defend against "robbery" by publishing houses or employers. They do not work, however, in a situation where there is a concentration of media (printed or electronic) in one international company. It was felt that this would become more common in the future. Copyright is an instrument for the integrity of the media, and that integrity is important, not only for the interests of journalists, but also for the protection of society. In the Netherlands, for example there is very little copyright contract law written into statutes, and the collective agreements are used to "mend the holes" in the Dutch law. It was feared that with the development of more international owners, the owners would simply say that the Dutch collective agreements do not interest them. Journalists, certainly in the Netherlands, are vulnerable from attack from international media concentration and the lack of protection from Dutch law. This would certainly seem to confirm the view that internationalisation of the industry might make national solutions redundant, especially if private international law allows circumvention of national systems.

With regard to the mandatory nature of copyright contract law, it was noted, in the Netherlands there are specific rules on audio-visual works. Under a provision that was introduced into the law in 1985 producers are presumed to have been assigned certain exploitation rights and, in return, the authors are entitled to "equitable remuneration" for each mode of exploitation of the work. However, it is still unclear whether or not payment of a lump-sum qualifies as "equitable remuneration", or whether additional remuneration can always be claimed for modes of exploitation not specifically mentioned in the agreement. The conclusion, certainly in the Netherlands, is that the rules do not work in practice, and do not help the creators in obtaining fair compensation. The situation remains as it always was – rights are assigned and money (a lump-sum) is paid.

In respect of actors, the situation is largely the same in the Netherlands. In practice what happens is that the payment is split up and dedicated to different modes of exploitation, and therefore in the long run the actor will not benefit at all. In practice an actor in many cases will receive one single payment for all modes.

Some insight was given regarding the situation in France, where rules differ according to whether the case concerns an actor or an author. In contracts concerning authors everything needs to be mentioned in the contract, and normally there has to be proportional remuneration. In practice, there are no problems for film producers as there is a long tradition of transfer clauses. Therefore it was felt that the problem of exploitation of film on the Internet would not occur, as the producers will already have the rights. In other media, apart from audio-visual, there is no tradition of transfer clauses. What does exist is a right to receive a separate payment for each new mode of exploitation, and the author will be paid for each use on a separate basis. There is a possibility that lump-sum payments will be made, but certainly for the moment, there are no contracts that contain separate exploitation clauses for the Internet, so it would seem that authorisation by the author is necessary. In the audio-visual context, film producers need to acquire all the rights to exploit the film. In fact, there is a public register in Paris that provides information on questions of film ownership and contractual clauses.

The view was expressed that strong laws were actually a sign of weakness, and what should happen is that authors should create their own power. It was felt that protective laws were in fact just "crutches for the lame", and in the end the mightier would always prevail in any event. Strong unions winning collective contracts would mean that speculative legal niceties would become superfluous. There was some agreement with this view – it was felt that laws that were too protective did not benefit authors, but on the other hand, in the Netherlands, for example, journalists felt that their hands were tied as the law favoured the owners.

In Belgium, the law provides for rather detailed author-protective rules. If such a rule, however, becomes too difficult or provides too much uncertainty, then it will not work. For example, in an employment agreement, the employee can transfer all rights in respect of unknown uses of a work; however, the contract must guarantee the author a proportional share of the profits. However, often this is so vague and brings about so much uncertainty that the parties will not accept it. Parties will therefore rather not agree and leave some matters to chance, rather than put specific clauses in the contract.

Within this context a short overview was given of the German draft bill amending the Copyright Law, which was published on 22 May 2000. An expert group, initiated by the Ministry of Justice, has drafted it; the drafters are generally seen as "author-friendly". The starting point for the draft bill was to strengthen creators' rights that were protected by German constitutional law. Germany has had cases where the Constitutional Court said that where there is a structural imbalance, and where there is an unequal bargaining position and private autonomy is not safeguarded, the legislature has a duty to intervene to restore the balance between the parties. The rationale therefore behind the draft bill can be equated to consumer protection and labour law or other laws protecting the weaker party.

The draft bill only concerns the initial phase between creators and producers, and does not affect contracts further down the line between producers. The two main features of the draft bill are, firstly, to create a mandatory claim for adequate remuneration for each use and, secondly, to create the possibility for all authors to negotiate collective agreements. The latter will particularly affect freelance authors who at present are hindered by competition law restrictions. Other relevant features of the draft bill are that all claims for remuneration are non-transferable (except for transfers to a collecting society). There is a possibility of revocation after thirty years; a license can be revoked after thirty years if the initial work is to be re-marketed. There is also a limited possibility of revocation in the case of the sale of a producer's business.

Article 31(4) of the existing German Copyright Act states that any transfer in respect of future unknown uses is null and void. The courts are very reluctant to apply this, but have done so in relation to musical rights in respect of CD uses and rights in printed matter. According to the draft bill, article 31(4) will not apply in two situations. Firstly, it will not apply to contracts between collection societies and authors. This will therefore enable collection societies to represent these authors. German collection societies in the literary fields have recently tried to sell rights in local area networks, but their claims were rejected because they could not prove their rights. With the new draft this situation will be rectified. Secondly, in the past, future uses had to be actually "unknown". However, deals could still be valid if parties took or envisaged the risk of future technological developments. Under the proposed regime, risk transactions will essentially be barred.

The draft bill has been received favourably, although it was felt that the thirty-year revocation provision was too long. Granted, it was "crutches for the lame", but it provided the opportunity for authors to organise themselves and to flex their muscles. However, it was noted that it was only a national approach and it was doubtful that it would help in an international context.

Regarding harmonisation, it was noted that the issue of electronic rights was already on the agenda for the International Conference on Management and legitimate use of intellectual property, which was organised by the European Commission in Strasbourg (10 July 2000), but it would take some time for anything concrete to emerge from the Brussels legislature. For some Member States harmonisation might eventually imply a lower level of author protection; other Member States might have to introduce or strengthen author-protective rules. It was felt that the burden on the EC could be alleviated if some Member states took the initiative in this matter.

Generally, it was felt that author-protective measures by statute would only work in practice if they were supported by collective bargaining agreements. It was important that authors organise themselves to negotiate agreements as protective measures had to be supported by power.

C. The Existing Contractual Framework

Jonathan Tasini (National Writers Union - USA) and Heijo Ruijsenaars (European Broadcasting Union)

Traditionally in the United States authors are (from an organisational point of view) not very well organised. This was relevant to the question of contract and power, as in the United States there are hundreds of authors' organisations. The National Writers Union, for example, represents only about 5% of freelance authors. In the United States there is a very bad environment for freelance authors to the point where it undermines the law of copyright from a public policy point of view. Contracts have become very broad "all rights contracts", and most magazines/newspapers are issuing rights contracts on a "take it or leave it" basis. Trying to find enough authors willing to challenge the newspapers in the courts on the basis of unfair trade practices is difficult. Book publishing is a little different, but there is a worsening situation that has to do with the scope of primary rights. In the United States there are very few standard negotiated terms of agreement, and collective bargaining agreements that are union-negotiated only account for a very small percentage. This has to do with the issue of competition and freelance authors not having collective bargaining rights. Traditionally, the environment in the United States is very anti-unionist, and the trend is not to have collective bargaining agreements or collective action. Electronic rights are rarely administered collectively. The Copyright Clearance Centre is relatively weak in that it administers a very small part of the market, mostly photocopying, although it is trying to move into electronic rights, and has just signed a deal with a major newspaper.

On the other hand, the situation in the film industry is much better; this is because of the traditionally strong union position, not because of anything in the law. However, internationalisation of companies is certainly weakening the strength of the unions. The Screen Actors Guild is on strike over commercials. It is a very difficult strike for them, as their traditionally strong position has been weakened. Freelance authors in the United States tend to be a sort of "hybrid" because authors give up their copyright to become employees of a film company in order to receive decent remuneration and health care benefits. In the eyes of the law they are employees. Still, they are essentially a hybrid because they are not traditional employees, but freelance authors who do not own their copyrights. Essentially they create "works for hire".

Members of the European Broadcasting Union were questioned in 1998 regarding their collective bargaining practices. The results were that there were already a number of collective agreements in place with certain categories of freelancers that include rights for exploitation. Yet not all rights were covered. The answers further suggest that the existing differences between writers/musicians/ journalists/photographers would remain the same in the context of the "new" media, especially in relation to payments "Generally, contracts would be flexible as regards payments, and might possibly include a flat-rate fee per contribution based on quantity, royalties based on income received by third parties, or royalties based on renewal payment".

In Europe, different countries have different ways of negotiating – the BBC for example negotiates differently from an equivalent Portuguese company. The UK, Germany and the Nordic countries use collective agreements, and find that electronic rights are part of those agreements. Broadcasters see a flexible system as being the most important. One member of the EBU has an internal agreement with a union where the relevant parties have acquired rights by contract. However, in accordance with the agreement the level of payment depends on a separate agreement to be negotiated with the union at a later stage. One might say that the European broadcasters are essentially in the same boat as the authors, in the sense that large media conglomerates (such as AOL/Time Warner) pose a serious threat to public broadcasters. Public broadcasters are also under pressure to acquire rights to broadcast productions on the Internet. Broadcasters are obliged to serve the public in a neutral way, and therefore they cannot exclude the Internet from their activities. Payment is a difficult issue. It is hard to predict how the Internet will develop, and there-

fore the question really is: what use is commercially efficient and what is the consumer willing to pay for?

Discussion

The question was raised as to why in the digital age equitable remuneration of the authors has become such a difficult issue. Part of the answer may be the changing structure of the market. Previously, public service broadcasters had 100% of the market, but now if they had 30% that was considered to be good. The service has become very fragmented, and therefore the calculation of figures has become much more difficult.

According to the law in Finland, copyright can be transferred entirely or in part. Moral rights can only be partially waived. The Labour Unions are very strong and there is a long history of collective bargaining. Publishers and journalists see that they cannot rely on the law, and therefore all transfers are contained in collective bargaining agreements. Articles 15 and 16 of the Collective Bargaining Agreement concerning copyright, which is an agreement in Finland between the Federation of the Printing Industry and the Union of Journalists, concerns only employed journalists. From 1996 publishers have enjoyed all the rights without providing any additional remuneration. The same applies to electronic distribution channels, like the Internet and CD-ROMs as well as any other electronic media. As an archive service, traditional or electronic, publishers may provide articles to customers for private use. If it is for something else, then there has to be separate agreement and separate payment. There is no recall right for electronic rights, and without a separate agreement copyright cannot be transferred to third parties. Under the collective bargaining agreements electronic rights are transferred. Salaries for employed journalists were increased in 1996, and traditionally journalists will sell all rights to magazines (even "unknown rights"). The collective bargaining agreement comes up for renewal every two years. With regard to freelancers, most publishers have made agreements with freelance journalists regarding Internet use. Publishers will usually have electronic rights, but not exclusive rights. Freelance journalists will be paid by way of compensation that will include electronic rights. Generally, new audio-visual companies will only commission works on the basis of "all rights" contracts and will use freelance works only once they have negotiated the rights.

In the US the Screen Actors Guild (SAG) applies a system of "residuals". The actor enters into an agreement with his/her producer, which stipulates that the latter will pay a certain percentage for additional uses in case a film is sold for distribution on video. The SAG acts as a union and collection society in that it distributes residuals. In 1985 an agreement with the Motion Picture Association of America was executed, whereby a screenwriter would receive a percentage from income derived from home copying levies. This is seen by most screenwriters as an advantage, as usually they will only be taken on in a work for hire situation and usually they will have no rights at all. It is in fact the paradox of the situation that writers have to give up rights to be organised in a union. On the other hand, through collective bargaining they get rights they would otherwise not have had.

The view was expressed, however, that in the future segmentation of the work force and the involvement of a few global companies would turn collective agreements into weak instruments for the protection of authors, and that collective agreements would disappear in the European media industry. Alternatively, it was felt that it would only take a very small percentage of workers to re-negotiate their rights particularly in the context of the strong Nordic labour union model. It was clear that there was interplay between the various power positions and that this in itself was a good thing.

D. The Role of Authors and Media in a Multimedia Environment

Professor Bernt Hugenholtz (IViR)

Why do producers need "all rights"? The classical argument is the risk argument, i.e. the producer bears the entire economic risk for the media production, and therefore "deserves" all rights. Another argument might be that media productions, particularly in the audiovisual field, are typically created by multiple authors. Concentration of rights in the producers obviously facilitates rights management. Another argument might be that producers have become multimedia publishers. Media companies have become large concentrated conglomerates that are active in a variety of media (e.g. AOL/Time Warner). The counter-argument is that the conglomerate, in reality, consists of an array of different companies competing with each other; "synergy", in practice, rarely happens. An argument increasingly encountered is that producers want all rights simply because licensing has become their primary source of income. Producers no longer produce, but trade intellectual property rights. "We're in the rights business, now". This has already been happening for a long time in the area of music publishing.

From the author's point of view the world looks a very different place. Copyright ownership is the independent author's primary source of income, and enables authors to live a life independent from media companies or state control. Moreover, why should an author give up any rights that the publisher does not truly require? In practice, hardly any media company actually publishes in all media; the multimedia publisher is more myth than reality. From a practical perspective, the pivotal question is whether authors are truly capable of exploiting electronic rights individually, or perhaps collectively.

Discussion

It was observed that the allocation of rights has an immediate effect on the market structure. If the first exploiter gets all the rights this then cuts out the possibility of other companies putting those rights to secondary uses, thus preventing others from coming into the market to exploit them. If a large company has these rights they can be used as a defensive measure.

The question of multiple authorship is an important issue in respect of archive material. The public service broadcasters need the rights, but it takes enormous administrative effort to get clearance. Authors need to be identified, then traced;

then rights have to be negotiated. For an average television programme this can cost up to Euro 650,000 just for the process, and can take between four months to two years. For older productions clearing rights may be simply impossible.

There was some debate as to whether the problem of clearing rights was something for the legislature or not, and it was suggested that a solution might be along the lines of a requirement of "reasonable efforts" to trace the author. Alternatively, a system of compulsory collective administration of rights might be helpful in solving the problem of trying to trace authors, and would lead to some remuneration. However, under such a system, electronic rights would stay secondary forever; this would imply that the authors could never sell those rights exclusively, and that this in turn would take away much of the value of those electronic rights. The view was also expressed that archive issues were essentially past history. All material is now digital, electronic rights have become primary rights almost by definition.

An example was cited from Canada where potential users of copyright material had to do two things; firstly, to make serious efforts to find the authors, and secondly, to deposit money into a fund. If this had been done, then the users were allowed, without risk, to use the work. For archived work this seems a very equitable solution. Looking to the future it was felt that information would be included in all copyright material pinpointing contact details as to where the rights owner/author/agent/collective society could be found.

Finally, the view was again expressed that the concentration of power in worldwide companies was a dangerous development, and that allocating copyrights to these companies might make matters worse. It was felt that the independence of authors is under threat from the concentration of rights and power in large media companies. This development, in turn, might pose a threat to freedom of expression and diminish the plurality of voices necessary in a democratic society.

E. Solutions

Professor Thomas Dreier (University of Karlsruhe)

Professor Dreier presented a summary of the questions discussed during the workshop, and offered a few tentative solutions.

He recalled the suggestion that a solution to the question of an equitable allocation of rights between authors/publishers/producers could be achieved in the future if the perspective of the argument was changed. The argument involved the fight for control over exploitation, and the solution could be to transform the right from an exclusive right into a mandatory claim for remuneration. Thus, the bottom line would be that every author, at least, receive fair compensation. Consequently, the question of who is in the driver's seat becomes more of a technical problem than a question of power.

As to model contracts, Professor Dreier suggested that a competition law exception was probably required, and that there should be a duty to negotiate and to conclude binding collective agreements. He felt that there was a role for collecting societies, but that the need for collective administration might decline due to increased electronic control possibilities. Collecting societies represent authors, but the problem was if certain major authors opted out, then the position of smaller authors would become more tenuous. Even with the possibility of on-line tracing there was certainly a need for collective administration in the interim transition period. However, questions remained as to who would maintain the database – would it be a trusted third party? To strengthen the role of collecting societies, there might be a need for the legislator to become involved.

Finally, it was established that there was a definite need for harmonisation of statutory law governing copyright contracts, be it on a European or an international level (even if it was just to provide crutches for the lame). It was acknowledged that huge organisational and political differences need to be overcome. The solution could be to produce a self-regulatory body of like-minded players, who would bind themselves to what they will and will not promise to do, and to act by certain guidelines. Law does not define these guidelines, but national/European "hard" law and international "soft" law will encourage the players to comply. The more international a law becomes, the more general the principles become (hence "soft law"). It is incredibly difficult to come up with precise harmonised rules, and therefore self-regulation might be a solution.

Discussion

It was observed that journalists need exclusive rights to negotiate equitable remuneration. Self-regulation was strongly supported by the journalists, nevertheless the problem of exclusive rights needed to be tackled first (in terms of remuneration).

It was also felt that the model of mandatory remuneration was difficult to implement in a situation where electronic uses have become not secondary, but primary uses; exclusivity is needed if only to negotiate a fair price. Another problem might be that in a model of mandatory remuneration, the producer has less incentive to exploit the rights. It was suggested that this problem could be solved by rules stating that the grant could be revoked if exploitation did not take place within a certain time.

With regard to the problem of globalisation and the possibility of using the law of conflicts to circumvent protective regimes, the courts in Germany have said that the applicable law is the law where the protection is being sought.

There was also some sympathy expressed with the soft law approach. It was much easier to achieve a result if people "sought it out amongst themselves" rather than getting the lawmaker to do it.

Finally the forthcoming WIPO Treaty on the protection of performers in audiovisual productions was discussed. It was observed that the transfer of rights was an important issue in this context, with the European Union and the United States taking different positions. ■

Reporter: Christina Lampe