

COPYRIGHT LAW REFORM: SOME ACHIEVABLE GOALS?

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A. INTRODUCTION: THE NEED FOR REFORM

Copyright law reform is in the air. A European Commission Consultation on the review of EU legislation on Copyright and Related Rights, issued in July 2004,¹ assesses, in particular, whether any inconsistencies between the different Directives hamper the operation of EU copyright law or damage the balance between rights holders' interests, those of users and consumers and those of the European economy as a whole. The working paper concludes that there is *no need for root and branch revision* of the existing Directives but that *fine-tuning is necessary* to ensure that definitions – for example of reproduction right - are consistent. Similar updating is thought necessary with respect to the exceptions and limitations set out in the different Directives. The working paper also assesses whether further legislative or other action is needed to ensure the Internal Market functions properly, and concludes that the immediate need for action may be limited to achieving a level playing field on the criteria used to determine the beneficiaries of protection in the field of related rights. It may be significant, however, that the Consultation Paper appears at various points to envisage a 'Copyright Code' for Europe.

The Labour Party's manifesto for the 2005 general election included the following commitment:

“Copyright in a digital age: We will modernise copyright and other forms of protection of intellectual property rights so that they are appropriate for the digital age. We will use our Presidency of the EU to look at how to ensure content creators can protect their innovations in a digital age. Piracy is a growing threat and we will work with industry to protect against it.”²

On 16 June 2005 James Purnell, the new Minister of Creative Industries and Tourism at DCMS, said in a speech:

I can announce today that DTI and DCMS will set up a joint project to implement our manifesto commitment chaired by Lord Sainsbury and myself. We will examine in the first place what issues need to be addressed, including the key issue of Digital Rights Management and the interoperability of new technologies.

* Director, AHRC Research Centre for studies in Intellectual Property and Technology Law, and professor of Private Law, University of Edinburgh. This is the draft to which the author spoke at the AHRC Copyright Research Network Conference at Birkbeck College, London, on 28 June 2005. Not to be quoted without prior reference to the author (hector.macqueen@ed.ac.uk).

¹ See http://europa.eu.int/comm/internal_market/copyright/review/consultation_en.htm.

² http://www.labour.org.uk/fileadmin/manifesto_13042005_a3/flash/manifesto_2005.swf (p. 95).

Obviously the primary role is for industry, which is why we have asked the Creative Industries IP Forum to advise us on this.³

The Creative Industries Forum on Intellectual Property, a cross-Government body (including the devolved administrations and also industry representatives), considering how best to meet the “opportunities and threats that rapid technological developments are generating for the UK's Creative Industries sector”, was set up by DCMS in July 2004.

Purnell's speech was non-committal on the shape reform might take, but he did add this:

To attract creative companies, they need to know that we have an IP regime that will allow them to make returns on their creativity and to invest in innovation. Bands like Coldplay will make enough money for their company to help them discover around 50 to 100 bands. At the same time, an information rich society needs an easy exchange of ideas – after all, creativity often comes from collaboration, from putting existing ideas together in new ways. So, we need an IP framework that balances the needs of consumers, creators and businesses.

While then the speech does refer at the end of the quoted passage to the need for balance, it emphasises more the needs of industry, particularly the creative industries – “obviously the primary role is for industry”. Further, the Creative Industries Forum is a body which, so far as I know, has membership only from representatives of industry. The concerns of consumers, or users of intellectual property, appear as little more than an afterthought in Purnell's speech, and only as being potential creators themselves.

Amongst the many developments which have thus brought copyright reform to the fore in the UK and Europe may be included:

- File-sharing through peer-to-peer networks, especially with regard to sound recordings, but also in relation to computer software and games, and increasingly in relation to films as well.⁴
- current pressure from the sound recording industry to replace the term for the protection of sound recordings (currently 50 years from release for media-works) with a term said to be the same as that in the USA (i.e. 95 years from the year of first publication)
- Open access publishing of scholarly and scientific journals as first recommended by the Wellcome Trust in 2003 and supported in a Report of the House of Commons Science and Technology Select Committee published in July 2004.⁵

³ Accessible on the DCMS website at

http://www.culture.gov.uk/global/press_notices/archive_2005/purnell_creative_inds_speech.htm.

⁴ See C Waelde and H MacQueen, “From entertainment to education: the scope of copyright”, *Intellectual Property Quarterly* (Issue 3, August 2004), reviewing the current debate down to April 2004.

⁵ See <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39902.htm>.

- The establishment of Creative Commons UK (building on a US model), website <http://creativecommons.org/projects/international/uk/>; in the words of the website, this project aims to develop forms of licence “that help people dedicate their creative works to the public domain — or retain their copyright while licensing them as free for certain uses, on certain conditions.”

There are, however, also widespread perceptions in many sectors, ranging from disaffected teenagers to elderly professors and judges, of copyright as

- complex,
- inaccessible,
- productive of difficulty and uncertainty in relation to otherwise lawful activities,
- and sometimes absurd.

The position is not helped by the further perception that copyright is widely flaunted, whether deliberately, through ignorance, or through inability to answer such questions as whether copyright exists in a given piece of work and, if so, who its owner is.

A huge range of areas of activity is affected by copyright – government, entertainment, education, creativity, technology and international development, to name but a few. Much of the debate has arisen in the context of the ever-expanding scope and possibilities of digital technology for the creation, dissemination and reproduction of ideas, information and entertainment. The ability to publish material so that it is potentially always available to users at times and places chosen by them has transformed the context for policy thinking in the areas traditionally covered by copyright.

So the need for reform is apparent – but it is not necessarily the case that the “primary role” in developing this reform should be for industry. Indeed, as Jessica Litman has pointed out from the US experience of copyright law-making, there are real problems inherent in an approach to reform taking the self-perceived needs of industry as paramount. I will simply quote *in extensor* the key relevant passages from her book *Digital Copyright* (2001):

About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation. By the 1920s, the process was sufficiently entrenched that whenever a member of Congress came up with a legislative proposal without going through the cumbersome prelegislative process of multiparty negotiation, the affected industries united to block the bill. Copyright bills passed only after private stakeholders agreed with one another on their substantive provisions. The pattern has continued to this day.

A process like this generates legislation with some predictable features. First of all, no affected party is going to agree to support a bill that leaves it worse off than it is under current law. ... Second, there's a premium on characterizing the state of current law to favour one's own position, since current law is the baseline against which proposals are negotiated. ... Third, the way these things tend to get settled in the real world is by specifying. ... As the entertainment and information markets have gotten more complicated, the copyright law has gotten longer, more specific, and harder to understand.

Anyone who has grappled with the US Copyright Act will appreciate what Litman means. Later on, she elaborates her final point:

A process that relies upon negotiated bargains among industry representatives, however, is ill-suited to arrive at general flexible limitations. The dynamics of interindustry negotiations tend to encourage fact-specific solutions to interindustry disputes. The participants' frustration with the rapid aging of narrowly defined rights inspired them to collaborate in drafting rights more broadly but no comparable tendency emerged to inject breadth or flexibility into the provisions limiting those rights. ... If negotiated copyright statutes turn out to be so unworkable, why is it that Congress continues to rely on private interests to work out the text of bills? One reason may be ... [that] the participants are the people who will have to order their day-to-day business relations with one another around the provisions of the legislation. ... The process permits a give-and-take among a wide field of players whose competing interests are exceedingly complex. ... Putting all of them into a room and asking them not to come out until they have agreed to be bound by the same rules may be the most efficient approach to formulating law that will work well enough for each of them, although not necessarily for the rest of us.

This last phrase leads Litman to her most potent objection to the reform process she is describing:

The need to balance concessions in order to achieve .. agreement, of course, imposes constraints on the sort of legislation that is likely to emerge from the process. Unless the participants become convinced that the new legislation gives them no fewer benefits than they currently enjoy, they are likely to press for additional concessions. It must therefore be expected that any successful copyright legislation will confer advantages on many of the interests involved in hammering it out, and that these advantages will probably come at some absent party's expense. ... It is the seeming inevitability of bias against absent interests, and of narrow compromises with no durability, that makes such a process so costly. Each time we rely on current stakeholders to agree on a statutory scheme they produce a scheme designed to protect themselves against the rest of us. Its

rigidity leads to its breakdown: the statute's drafters have incorporated too few general principles to guide courts in effecting repairs. ...

Litman concludes:

Negotiations among current stakeholders tend to produce laws that resolve existing interindustry disputes with detailed and specific statutory language, which rapidly grows obsolete. Such laws consign the disputes of the future to resolution under models biased in favour of the status quo. A copyright law cannot make sensible provision for the growth of technology unless it incorporates both the flexibility to make adjustments and the general principles to guide courts in the directions those adjustments should take. The negotiation process that has dominated copyright revision throughout this century, however, is ill adapted to generate that flexibility. It cannot therefore be expected to produce statutes that improve with age.

When I first read these words of Litman, my initial reaction was that the history of copyright revision in the UK had been different. Each of the 1911, 1956 and 1988 Acts was preceded, not by a process of inter-industry bargaining, but by a committee or commission chaired by a neutral figure such as an eminent judge, which heard and weighed evidence, and made what appeared at least to be neutral and balanced assessments and recommendations, leading to wide-ranging overall legislation which tended to stand unaltered (but adaptably so) for periods of thirty to forty years. However, it seemed to me that in the last decade of the twentieth century that process had been displaced by the piecemeal, issue-driven approach of the European Union, which certainly to my eyes at least came much closer to the US experience analysed by Litman.

The copyright section of the Copyright, Designs and Patents Act 1988 now stretches to about 200 sections, to say nothing of various Regulations containing substantive provisions but not incorporated into the main Act. It is worth remembering that as originally presented the 1988 Act got through most of the basic principles of copyright in about 30 sections, with the bulk of the remainder being very fact- or sector-specific exceptions, Copyright Tribunal rules, and criminal law and qualification provisions. The presentation of even the first 30 sections of the Act has, however, now become exceptionally messy thanks to the frequent amendments made necessary by Directives and other legislation since 1988. **There is a powerful argument in the interest of letting people know what the law is, for producing a short Copyright Act stating the basic principles of the law in an orderly, principled and accessible manner, leaving detailed regulation, where necessary, (e.g. specific exceptions for libraries, archives, the disabled, and public administration; or of Copyright Tribunal jurisdiction; or of qualification for protection), to statutory instrument** (which should themselves nevertheless also be orderly, principled and accessible to those whom they affect).

In all probability such a short Copyright Act ought to be produced for the European union, and not just for the United Kingdom. But there is no reason why the United Kingdom should not take the initiative in this area. While any approach to copyright

reform has to take into account the limits imposed by the UK's international obligations regarding copyright, such as the Berne and Rome Conventions, the WCT 1996, TRIPS, and the EU's copyright Directives, the future of these is at least to some extent negotiable, and thinking might extend to consider what the aims of the UK in such negotiations might or should be. Further, at least some of the EU Directives are due for review in the not too distant future (e.g. InfoSoc Directive 2005, Database Directive 2006), thus providing a mechanism for reconsideration of their content in the light of experience to date. In any event, the UK is not wholly hamstrung by its international obligations, and there should also be consideration of issues where there is clearly room for manoeuvre.

The remainder of this paper therefore seeks to identify, it is hoped from a neutral and balanced standpoint, some of the issues which a comprehensive approach to copyright law might address. It is based upon a working paper prepared for the use of the Intellectual Property Advisory Committee of the UK Government's Department of Trade and Industry. The paper's working assumption is that copyright law will continue to exist for some time to come, although it does look at the possibility of contract playing a greater role in the digital environment. As it stands, the paper is incomplete, and the arguments by no means fully worked out; but it tries above all to show what might be achievable, or the directions in which academic research might go if it really wishes to have influence on policy and law-making with regard to copyright.

{COMMENTS WILL BE ADDED HERE OR HERABOUTS ABOUT THE REALITIES OF THE LAW-MAKING PROCESS INSIDE GOVERNMENT. HLM}

B. THE PURPOSE(S) OF COPYRIGHT

A fundamental question in thinking through systematic reform is the purpose – or purposes - of copyright.

(1) Economic interests

It is traditional in the UK to emphasise copyright's *economic* purpose, the incentivisation and rewarding, in accordance with market demand, of those involved in the creation and publication of certain kinds of work.⁶ These persons include, not only the creator, but also the entrepreneur who converts what is created into a product for the marketplace.

However, the digital environment also raises the question whether the economic interests of the creator and entrepreneur, or of society, actually require copyright. The technology allows the building into products – and also now into the hardware needed to play the products - of devices that protect against unauthorised access and use until such contractual conditions as the producer imposes (typically payment by way of credit card or fund transfer systems such as Paypal), are met by the would-be user. Equally through

⁶ There is a large number of economic studies of copyright, reaching a wide range of conclusions. A useful general survey is Cornish and Llewelyn, *Intellectual Property* (5th edn, 2003), pp. 35-41, 373-380. Recent detailed works include Towse (ed), *Copyright and the Creative Industries* (2002); Landes and Posner, *The Economics of Intellectual Property Rights* (2003); Einhorn, *Media, Technology and Copyright* (2004).

contracts such as the forms provided by Creative Commons, an author can indicate in advance, as it were, those uses of the work by others which are permitted, and require those using this method to apply those terms and conditions to further downstream sub-users. **Can contract (often automated in this context) replace copyright?**⁷

An obvious tricky point is that it is copyright, for the most part, which creates the subject-matter around which contracting parties can bargain – that in the absence of copyright there may be no bargaining. Further, the economic interests protected by copyright are not limited to those of the author/creator of the work and the entrepreneur who first takes it to market. Since the economic rights protected by copyright are freely transferable to third parties, the person who at any given moment owns the copyright and reaps the economic returns it gives, may well be someone who had no hand in the original production of the work or the product flowing from it. How far such investors may deserve the same level of protection as the originators of the work is a nice question: after all, they are risk-takers to a greater extent than those from whom they bought the rights, and they have helped to ensure that the author/creator/first producer does indeed earn reward from their work.

Another interest is that of the employer whose employees create copyright works in the course of their employment, and who under UK (but not other Continental laws) gets first ownership of the resulting copyright. Given that the employer is an investor who is backing the production of copyright works, his gaining the copyright (at least in its economic aspects) and the return therefrom does not seem so dreadful as is sometimes suggested by those from systems more focused on copyright as reflecting more of personality rights than economic interests.

It seems clear, however, that these non-author economic interests are as capable of protection through contractual mechanisms as through copyright ones.

(2) Moral and cultural interests

Even in the UK, however, copyright's purposes are not limited to the protection and advancement of economic interests. The *cultural* dimension to copyright is apparent in the nature of what it protects – literary, dramatic, musical and artistic works, films, sound recordings and broadcasts – and in the length of time for which it gives that protection, which is not necessarily (or at all) driven by economic analysis (see below, p. ??). More subtly, the variable term as between author and media works also reflects cultural judgments, giving a higher value to 'pure' authorship than to exploitation of technology. In any event, it is clear that the length of protection considerably exceeds what is needed to incentivise authors and producers, and that most works will have an economic life considerably shorter than the copyright terms.

But copyright's cultural purpose is most evident in what UK law, following the Berne Convention, calls the *moral rights*. These recognise inalienable, non-economic

⁷ There are of course issues about such matters as the equivalents to copyright term and exceptions in this model: these are dealt with below.

interests that an *author* (but no-one else) may continue to exercise in respect of a work even though no longer owner of the copyright or of the physical form in which the work was first created and recorded. There are two major rights at present,⁸ as follows:

- **Paternity**⁹: *the right to be identified as author of a literary, dramatic, musical or artistic work, or as director of a copyright film;*
- **Integrity**: *the right of such authors and directors to prevent derogatory treatment of their work;*

These rights are inalienable and so cannot be the subject of commerce in themselves; but under UK law, they may be waived, albeit this requires writing; while the paternity right must be “asserted” and does not generally apply to works created in the course of employment. In these ways, UK moral rights are weaker than the systems found, for example, in some other EU member states. The EU Consultation Paper, however, sees “no apparent need to harmonise moral rights protection at this stage” (para 3.5).

Even if economic interests in the digital environment can be as effectively defended by way of contract as by copyright, it is much less clear that this is so with the moral rights, since it will not necessarily be the author who is making the product available to the public (contractually or otherwise). The rights may be considered significant in a world where works can be speedily and endlessly transmitted and retransmitted, readily modified and re-shaped, and integrated, in whole or in part, in other works.

The issue here is, then, **whether moral rights should be given increased recognition as of especial significance in the digital environment**. The question is more ‘live’ than may at first appear, in as much as TRIPS and the WCT, the most recent harmonising instruments at a global level, make no mention of moral rights, and the subject is in general underplayed in international negotiations despite its potential cultural significance. The EU Consultation Paper also says that “no evidence exists in the digital environment either that the current state of affairs does affect the good functioning of the Internal Market” (para 3.5). But the good functioning of the Internal Market may not be the only relevant consideration. David Vaver has argued that there is a clear public interest in a strong moral rights regime on the following grounds:

- A trade mark-like function of assuring the public as to the origin and quality of the work
- Social reward going to where it belongs
- Cultural preservation, helping maintain the record of the country’s culture
- Author empowerment in connection with the exploitation of their work.¹⁰

⁸ Artists’ resale rights will be introduced in the UK from 1 January 2006 on, following an EU Directive of 2001.

⁹ In a world of gender neutrality this right might be better re-named the *attribution right*.

¹⁰ “Moral rights yesterday, today and tomorrow”, *International Journal of Law and Information Technology* vii(3) (1999).

Many of these functions could be of great importance in a world of open access journal publishing.

If this argument is accepted, then there may be **questions also about the present UK regime, in particular the position with regard to**

- **employment under the paternity right**
- **need to assert paternity right**
- **regulation of waivers for unconscionability**
- **duration** – it is not clear, especially in the light of some of the underlying policies referred to above, why there should be a time limitation on any of the moral rights

The UK will introduce artists' resale rights in 2006, following a harmonising EU Directive. This will guarantee the original artist a share of the returns being earned from sales of the original art work, regardless of whether the artist still owns the copyright in the work in question. It may be for consideration whether the principle underlying this right is capable of extension to other areas. For example, if the employer is the first owner of the economic rights of copyright in works produced by employees in the course of their employment (above, pp. 8-9), **is there a case for guaranteeing to the employee a right to participate in the economic benefit which the work brings to the employer?** An analogy can also be drawn with employee rights in patent law, although that scheme does not appear to have been regularly used and is not easy to apply. However, this may also be because well-advised employers put in place suitable or satisfactory schemes of their own devising as part of the contract of employment. **Were an employee reward scheme to be introduced into copyright, the question of whether it should be a default scheme subject to contract would have to be addressed.**

(3) Non-producer interests

Our focus to date has been on the producer side of the copyright equation, or in the consideration the present law seeks to protect. But by placing various limitations upon what it protects on the producer side, copyright also protects, directly or indirectly, other interests which here we may most simply describe as 'non-producer' in nature. Thus -

- Freedom of expression and information are protected by the limitation of copyright to forms of expression, as distinct from the ideas and information which are expressed
- Copyright is not unlimited in duration, and works which fall out of copyright at the end of their term are available to all for any purpose
- Works which fall below the threshold requirement of "originality" do not have copyright, even if in other respects they come within one of the categories of protected work (e.g. being written, they are literary).

- Works which do not fit into the expressed categories of the law do not receive copyright protection (e.g. the format and catchphrases of the TV show “Opportunity Knocks” did not amount to a dramatic work and so did not receive copyright protection¹¹)
- The copyright exceptions, whether general – e.g. fair dealing for private study, non-commercial research, or news reporting – or for specific types of work – e.g. decompilation of computer programs, ‘time-shifting’ of TV broadcasts – reflect a recognition that certain non-producer interests outweigh producer ones in at least some circumstances; or at any rate the impracticability of certain kinds of copyright enforcement.
- The *product* embodying the protected work can generally be dealt with freely by the first and subsequent purchasers apart from integrity / commercial rental / lending rights

C. CUMULATION ISSUES

(1) Copyright and other rights

The facts that copyright comes into existence with the relevant work (including possibly when the work is still in process of completion), and that as a result of the Berne Convention it takes a potentially world-wide effect for 50 years or more, but without any immediately necessary extra costs, makes it an enormously attractive right for investors of all kinds in new works. Thus at points where copyright may overlap with other forms of intellectual property, particularly where the other form requires registration, the would-be right-owner may well be tempted to prefer copyright; and where a court sees a deserving producer being ‘ripped off’ by a copyist, copyright may be the readiest tool at hand with which to tackle the problem. “What is worth copying is worth protecting.”¹²

But there can be difficulties resulting from this willingness to turn to copyright and consequent potential overlaps of protection. The best-known example is the development of copyright in the field of industrial design between 1965 and 1985, as a result of which the policy of design law became badly distorted. This was put right (more or less) by the Copyright Designs and Patents Act 1988, which sought, largely successfully, to expel copyright from the domain of product design. Again, protection for single words, titles, catchphrases, computer menu commands and the like might have caused the courts less unease with a firm approach that these were protectable, if at all, only as trade marks, or by the law of passing off.

¹¹ *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056 (PC). This case led to attempts to procure legislative provision protecting such ‘formats’ (so far unsuccessful).

¹² *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 610. Cf *Hodgkinson & Corby v Wards Mobility Services Ltd* [1995] FSR 169 per Jacob J at 173-5; Laddie J, ‘Copyright: over-strength, over-regulated, over-rated?’, [1996] 17 *EIPR* at 260 (speaking of ‘the pernicious refrain’ that what is worth copying is worth protecting, and adding, ‘we should not be handing out monopolies like confetti while muttering “this won’t hurt”’).

Cornish has remarked “a fundamental difference of attitude” towards the cumulation problem:

Whether from a root sense of equity or from a calculation of economic efficiency, individual IPRs mark off situations where particular factors should be wrapped in exclusive protection: ... To those who see considerable public benefit in leaving the remaining seas free for competitive navigation, IPRs should always be treated as exceptions confined to the objective which suffices for their creation. Each should be created only by legislation which has considered that justification and has shaped the right in detail to cover it but to go no further. ... The contrary attitude manifests far greater sympathy for those who, having initiated some development for goods or services, are then subject to free riding. People most readily convinced of a property rights approach to capitalist investment because of its unique ability to realise economic potential are much readier to provide legal redress that will stop others gaining something for nothing. For them, cumulation and convergence give rise to nothing like the same suspicion.¹³

Current issues in this area involve computer programs and databases. With *computer programs*, copyright is the principal form of intellectual property protection; but patents, having been excluded from computer programs ‘as such’, have been granted for computer programs if they have technical effects (whatever that may be decided to mean), and a draft EU Directive on the patentability of computer-implemented inventions, intended to ‘clarify’ the law, is now in existence. Recital 23 says:

The rights conferred by patents granted for inventions within the scope of this Directive should not affect acts permitted under Articles 5 and 6 of [*the Software Copyright*] Directive 91/250/EEC, in particular under the provisions thereof in respect of decompilation and interoperability. In particular, acts which, under Articles 5 and 6 of that Directive, do not require authorisation of the rightholder with respect to the rightholder's copyrights in or pertaining to a computer program, and which, but for those Articles, would require such authorisation, should not require authorisation of the rightholder with respect to the rightholder's patent rights in or pertaining to the computer program.

This is then given effect in draft Article 8. While the Directive thus uncomfortably provides for a form of cohabitation between patent and copyright protection, it does not address the much more fundamental question of whether such dual protection should be allowed at all.

Recital 18 now says:

Acts permitted under Directive 91/250/EEC on the legal protection of computer programs by copyright, in particular provisions thereof relating to decompilation

¹³ ‘Cumulation and convergence of intellectual property rights’, in Mirfield and Smith (eds), *Essays for Colin Tapper* (2003), at 204.

and interoperability, or the provisions concerning semiconductor topographies or trade marks, shall not be affected through the protection granted by patents for inventions within the scope of this Directive.

This is then given effect in draft Article 6:

Acts permitted under Directive 91/250/EEC on the legal protection of computer programs by copyright, in particular provisions thereof relating to decompilation and interoperability, or the provisions concerning semiconductor topographies or trade marks, shall not be affected through the protection granted by patents for inventions within the scope of this Directive.

With *databases* the issue is one created by the Database Directive 1996. Under it, a database may be protected by copyright if its selection and arrangement constitute an intellectual creation (a super-originality test). The Database Directive also introduced an additional, *sui generis* database right to protect those commercially valuable and expensively created databases henceforth to be excluded from copyright by the higher originality requirement. The principal substantive ground for database right protection is the creator's *substantial investment* in obtaining, verifying or preserving the contents of the database, and it is immaterial whether or not the database is also a copyright work, i.e. is an intellectual creation of the compiler in its selection or arrangement.¹⁴ *But* a copyright database is not precluded from also enjoying database right, the relevance of this being that database right confers protection against *extraction and reutilisation* of the contents of the database (i.e. the *information* in it), rather than the copyright protection for the *structure* of the contents. Further, as the European Commission's July 2004 Consultation working paper acknowledges (para 2.1.3.2), the differences between the copyright and the *sui generis* exceptions may mean that the former can be undermined by the rights existing under the latter. At the least there appears to be a recipe for confusion in the present law. Once again, the question of the desirability of dual protection arises.

The general issue here appears to be one of basic policy with regard to cumulation: **are overlapping rights to be avoided or not? Should there be a general provision in intellectual property law that a claim to one form of protection (whether at registration stage or in infringement proceedings in court) precludes any other form of protection for the work in question, at least if the claim is successful?** The immediate impact of this would be with regard to the development of the draft Software Patent Directive, and the 2006 review of the Database Directive. With regard to the latter, it would also raise the question of **whether databases should be protected by copyright OR by a *sui generis* right, and if the latter, how, if at all, that should be reformulated.**

(2) Cumulation within copyright

There are also issues of cumulation within copyright itself. Many products in the copyright domain are likely to enjoy more than one copyright. Thus a book will have

¹⁴ Copyright and Rights in Databases Regulations 1997, reg 13.

copyright as a literary work, but there will also be a copyright in its typographical arrangement, as would also be the case with printed dramatic scripts and musical scores. A database has copyright in the selection and arrangement of its contents, but this does not affect any copyright that items of content may have in their own right. A sound recording of a piece of music will involve copyrights, not only in the sound recording as such, but also, separately, one in the music. And if the work recorded is a song, there will be a further copyright in the song lyrics.¹⁵ A broadcast of a film or sound recording will have copyright as a broadcast, but this will leave unaffected the copyrights in the film or sound recording. While the sound track accompanying a film is treated as part of the film for copyright purposes, a copyright may also subsist in the sound track as a sound recording.

The difficulty which arises from this is the variability of the copyrights which may exist in a product, meaning that while one element is in the public domain, another is not. This could have the undesirable effects of damaging the remaining copyright interest in the work in question, or inhibiting its appropriate free use, or simply confusing people. The issue was focused in the summer of 2004 by the debate about the copyright term in sound recordings. While the right in recordings made in, say, 1955 would expire from 1 January 2005, the rights in the recorded music and song lyrics would continue until seventy years after the deaths of the respective authors. There was thus no danger at all of a rash of unauthorised issues of copies of old recordings, since that would also involve copying and issuing to the public works that were still in copyright (further, copyrights that presumably would often be held by the recording companies rather than the original authors). **A question of policy may therefore be whether, when a product enjoys multiple copyrights, these ought to stand and fall together, at least in relation to products of the kind in question; and this, whatever the duration of the rights may finally be.**¹⁶

In a number of recent cases the English courts have held that a work may belong to more than one of the categories into which works are divided in the copyright legislation. So, for example, circuit diagrams have been held to be both literary and artistic works,¹⁷ while a film has been held to be also a dramatic work.¹⁸ As Laddie J has observed, this is a different point from the one that a single product may embody several copyrights:

[A]lthough different copyrights can protect simultaneously a particular product and an author can produce more than one copyright work during the course of a single episode of creative effort, for example a competent musician may write the words and the music for a song at the same time, it is quite another thing to say that a *single* piece of work by an author gives rise to two or more copyrights in

¹⁵ There are also performers' rights to be considered, increasingly similar to copyright in content.

¹⁶ Note also the EU Consultation Paper, para 2.2.3.2, on "Criteria for calculating the term of protection in the musical sector", observing that some member states treat songs as works of joint authorship between lyricist and composer, others (including the UK) as two distinct works with different authors; meaning that the copyright term is very variable in the EU. The Paper raises the possibility that the term for such works as a whole should always be calculated in relation to the last-surviving author.

¹⁷ *Anacon Corp Ltd v Environmental Research Technology Ltd* [1994] FSR 659; *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401; *Sandman v Panasonic UK Ltd* [1998] FSR 651.

¹⁸ *Norowzian v Arks Ltd (No 2)* [2000] FSR 363.

respect of the *same* creative effort. In some cases the borderline between one category of copyright work and another may be difficult to define, but that does not justify giving to the author protection in *both* categories. The categories of copyright work are, to some extent, arbitrarily defined. In the case of a borderline work, I think there are compelling arguments that the author must be confined to one or other of the possible categories. The proper category is that which most nearly suits the characteristics of the work in issue.¹⁹

From a taxonomic point of view there must be much to be said for this approach; what after all is the point of having categories in law if they are not mutually exclusive? And if they are not mutually exclusive, or fail to capture particular types of work adequately, **should the categorisation not be abandoned or re-thought?** Thus, for example, the Berne Convention requires protection of “literary and artistic work” (Art 1), which includes “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” (Art 2.1); this is followed by an illustrative list, while elsewhere, and only so to speak incidentally the Convention refers to dramatic, musical and cinematographic works (Arts 4, 11, 13 and 14bis). French law speaks of “works of the mind whatever their kind, form of expression, merit or purpose” and gives thereafter an illustrative list (Intellectual Property Code Art L 112-1, 2).²⁰

D. ORIGINALITY

One of the major issues in harmonising copyright in Europe has been the different traditions of the UK and the Continent with regard to originality. Speaking very generally, Continental systems require works to manifest “*intellectual creation*”, and this is the standard which has so far been applied in those EU Directives referring to the matter (the Software and Database Directives – see further below, this page). The UK’s Copyright Designs and Patents Act 1988 still says, however, that to have copyright, literary, dramatic, musical and artistic works must all be original (s. 1(1)(a)), a threshold generally taken to be less demanding than that of intellectual creation although it is left undefined by the statute. There is no express requirement of originality as such in relation to films, sound recordings, broadcasts, and typographical arrangements of published editions (CDPA s. 1(1)(b)), but copyright does not subsist in any such work which is, or to the extent that it is, respectively, a copy taken from a previous film or sound recording, or reproduces the typographical arrangement of a previous edition, as the case may be.²¹ The basic idea apparent here certainly also captures at least one aspect

¹⁹ *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401 at 413.

²⁰ More specific provision has to be made for the neighbouring rights of performers, and producers of phonograms, videograms and audiovisual communications (see Book II).

²¹ CDPA 1988 ss 5A(2), 5B(5), 8(2). The 1988 Act provides that copyright does not subsist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast. The background to this is that merely broadcasting a programme which has already been put out has the effect of creating a new copyright. This is clear from the provisions of what is now section 14(5) of the 1988 Act, which state that “copyright in a repeat broadcast expires at the same time as the copyright in the original broadcast”. As the sub-section goes on to say, however, “accordingly no copyright arises in respect of a repeat broadcast which is broadcast after the expiry of the copyright in the original broadcast”. It is also clear from this that

of ‘originality’ in the context of literary, dramatic, musical and artistic works, namely, that to have copyright they must *not be copies of preceding works*. Another theme found in discussions of originality is the test of the *effort, skill and labour* which the author has invested in the work. Where this test is satisfied, there is likely to be a copyright in the result. But the production of a copy of a work may involve considerable labour and no little skill; in that case there will be no originality and no copyright.²²

In 1991 the Software Directive declared that “a computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation” (Art 1(3)), seeming to suggest that the higher Continental standard was being adopted. However the UK took no action to implement the Directive’s formula. There was a different result, however, in the implementation of the Database Directive, which again used the phrase “the author’s own intellectual creation” in defining the object of protection (Art 3(1)). The phrase now appears in section 3A of the Copyright, Designs and Patents Act 1988:

A literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.

Thus the test of originality for databases is not the same as for other literary works. As a result, many databases which would have been protected by copyright before section 3A was introduced no longer do so. This is why the *sui generis* right was created, establishing a special new and additional form of protection for databases even if they did not attract copyright under the more rigorous originality test. The aim was clearly to provide an alternative for those who would have had copyright in places such as the UK before the Directive. **But this development raises questions at least about the lack of express implementation of the higher standard of originality with regard to computer programs; and more widely with regard to what a genuinely Europe-wide and comprehensive test of originality should be for all copyright purposes (assuming that there should be such a test, which may also be a question suitable for investigation).** The EU Consultation Paper believes that, in the absence of contrary evidence, the difference between UK and Continental standards is not creating a problem for the functioning of the Internal Market and therefore there is no need for legislative action “at this stage” (para 3.1)

There have, however, been relevant developments elsewhere in the common law world, seeming to elevate ‘skill’ over ‘labour’ in the traditional test of originality. Adoption of a higher threshold criterion of originality (or equivalent) might remove from the ambit of copyright the relatively trivial and ephemeral material currently within its scope. The disadvantage would be that someone (ultimately the courts) would have to take the decision as to which side of the line any given work fell on. The possibility of seeming absurdity would be replaced by perhaps dangerous uncertainty. It should be noted, moreover, that

only unauthorised repeats infringe the original copyright and are therefore unable to claim copyright themselves.

²² *Interlego AG v Tyco Industries Inc* [1989] AC 217.

nearly all of the discussion of a higher standard in the common law world has been in the probably special context of databases where already the UK is applying a higher standard for copyright purposes (but not for the *sui generis* right).

An alternative approach would be to drop any threshold test whatsoever. Possibly this might sit best in a world where copyright had been displaced by contract, with the material which its producer did not want disseminated to a wider world being protected by laws of confidentiality and privacy. The protection afforded by contract would be relevant for any item for which a buyer was prepared to pay; that of confidentiality and privacy for material which was indeed confidential or private and which the producer was not prepared to sell or give away.

The policy issue here is the desirability of threshold tests such as ‘originality’ or ‘intellectual creation’, and what the consequences would be if (1) a higher threshold was adopted generally, beyond the subject matter of databases? Or (2) there was no threshold test at all?

E. FIXATION

The Berne Convention allows national law “to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form” (Art 2(2)). In the UK, the 1988 Act provides that copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded in writing or otherwise. The requirement of fixation therefore means that there is no copyright in the unrecorded spoken word, ad lib stage performance, or aleatory musical composition. Since the copyright does not come into existence unless and until the recording is made, copyright confers no right on a speaker to stop people making recordings of what is said. If there is any right at all to prevent recording of one’s words, it must be sought in other branches of the law.²³

However, the 1988 Act expressly provides that, for the purposes of conferring copyright on a work by recording it, it is immaterial whether the work is recorded by or with the permission of the author, i.e. the speaker.²⁴ Thus, while I may eavesdrop on and record other people’s telephone conversations without infringing copyright in what they say, as soon as the recording is made, the words have copyright and the subsequent reproduction and publication of these words elsewhere may be controlled by the speaker. This is an absurd position.

There is no explicit requirement of fixation in the 1988 Act with regard to artistic works, but it seems clear from the definitions within the category that copyright will not exist until the work is recorded in either tangible or visible form. Similarly films and sound recordings must both be “recordings” on some medium from which sounds or moving images, as the case may be, can be reproduced.²⁵ Broadcasts, however, are electronic

²³ For example, the Regulation of Investigatory Powers Act 2000 or breach of confidence.

²⁴ CDPA 1988 s 3(3).

²⁵ CDPA ss 5A and 5B.

transmissions of visual images, sounds or other information which need only be visible and/or audible to their intended audience.

Other legal systems within the Berne Union exercise their discretion to avoid the imposition of any requirement of fixation. In the UK the requirement in relation to literary, dramatic and musical works appears intended to serve a mainly evidential purpose, but to be cast in a right-constituting form. **It is suggested that consideration be given to dropping the requirement of fixation and leaving the question of the existence of a literary, dramatic or musical work as a matter of evidence (in which the existence of a recorded form is always likely to be the best kind of evidence).**

F. DURATION OF RIGHTS

A number of issues relating to the term of copyright have already been identified:

- Whether sound recording term should be extended to match that of the USA (note the conclusion of the European Commission Consultation on this issue: “time does not appear to be ripe for a change, and developments in the market should be further monitored and studied” [para 2.2.3.1])
- Whether when a multiplicity of copyrights exists in one product (e.g. a sound recording) they should all expire together, at least so far as regards reproduction of similar products
- Whether there should be any term at all for moral rights.

It is clear from economic studies that the duration of copyright is not governed by the need to incentivise production with the promise of a long-lasting reward should the product be successful. Production is generally governed by other incentives from the point of view of creative authors, and by much shorter-term calculations of likely return by copyright entrepreneurs. On the other hand, the length of copyright enables the author and the entrepreneur to take benefit from the development of new markets through changing technology (e.g. the emergence of the home video and DVD markets for films) and so encourages (and enables) them to take greater investment risks with new works only a very few of which will become such long-term winners. This is also true of the income generated by successful products over the lifetime of a successful product whether or not there is relevant technological change. **Empirical and economic analysis of the effects of the copyright term on entrepreneurial behaviour over time could be helpful in the formation of policy in this area.**

On the basis of the economic literature to date, however, it seems quite likely that such a study would show the impact of the copyright term on economic behaviour and initial decision-making about creation and publication to be negligible, whatever the length of time involved, so long as it extends beyond the period needed to ensure ‘lead time’ and opportunity to profit on investment. Much more difficult would be the question of **how to measure and assess the effects of works falling out of copyright at the expiry of term.**

This question would be raised in particular if it was decided, for example, to create a perpetual copyright to support a world in which copyright owners contracted directly and online with would-be users for access to and use of works. What is the value, economically, socially and intellectually, of works entering the public domain because they no longer enjoy copyright? One imagines that for the great majority of works it is nil or negligible; **is there a point at which the enduring value of a relatively small number of works should be taken out of the ordinary interplay of market and social conditions which produces a price for them as between supplier and customer? How far can copyright be analogised with, say, the antiques, paintings or books markets?**

One further issue related to the copyright is of considerable practical significance. Since copyright in author works extends well after the death of the author (and the date of that event may be difficult to ascertain), would-be users and republishers of works who wish to comply with the law frequently find it impracticable or impossible to take the necessary steps to do what they want to do lawfully, i.e. find out whether a work is still in copyright and, if so, who is now the owner. At present the law offers certain protections to such persons where authors have made it very difficult to identify themselves, by means of anonymity or pseudonymity. These protections themselves cause certain difficulties in many cases. One solution would be a copyright registration system, but that would presumably be a radical step too far. **Ought the law to provide that where it is impossible to identify whether a work is still in copyright or who the owner of any copyright is, the performance of the restricted acts will not be infringement of copyright provided that the original work receives due acknowledgement, attribution, and respect for its integrity in the new one?**