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Copyrights in an era of evolution

Christodoulos G. Vassiliades and Ourania Vrondou, Christodoulos G. Vassiliades & Co. LLC, review the legal framework for copyrights in Europe and the development of innovation encouraging Creative Commons licensing.

Heraclitus (the Greek philosopher) once said: *"Τα πάντα ρει, μηδέποτε κατά τ' αυτό μένειν",* which stands for "everything changes, nothing ever stays the same".

Evolution, as Heraclitus described it, is in human nature. One can either embrace it and move forward; or fight it and be left behind. Intellectual Property Rights, copyrights in particular, are an excellent illustration.

This article aims to compare the legal framework of copyright protection with the current social trend of fostering innovation; and how the latter is developing in Europe.

Protection of copyrights

The law on copyrights is well harmonized around the world, mainly due to the attestation to the Berne Convention of 1886. This Convention was the founding stone for the protection of copyrights in 'authorial' and 'entrepreneurial' works.

For example, the legislation of the Republic of Cyprus (the same being almost identical to the law pertaining to copyrights in the rest of Europe and especially in the UK), provides that the owners of authorial and entrepreneurial works enjoy exclusive rights to copying, issuing copies to the public, renting or lending their work, adapting and communicating the work to the public. Anyone purporting to exercise any of these rights without the consent of the owner will be infringing the copyright of such owner.

Infringement of copyright can be the basis for both criminal as well as civil proceedings against not only the person who infringes the exclusive rights of the owner, but also against secondary infringement.

Secondary infringement arises in cases of, *inter alia,* possessing or dealing with an infringing copy; importing infringing copies of the work; providing the means for making an infringing copy; and permitting use of premises for an infringing performance. Secondary infringement will only arise in cases where the infringer knows or has reasonable grounds to believe that any of the above acts was likely to cause or be involved in copyright infringement.

Nonetheless, the law recognizes the exception of certain domestic or non-commercial uses, in an effort not to open the floodgates of litigation proceedings against consumers.

The protection of copyrights, as a result of the person creating or owning such copyrights, are undeniably of great importance. Although case law suggests that establishing both primary as well as secondary infringement is difficult.

Courts try to strike a fair balance between the concept of 'substantial copying' of the author's work and cases

Résumés

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where the infringer has indeed manipulated the initial work to such extent that the end result is entirely original. The same are also called upon to establish whether the apparatus or other provided means are supplied with knowledge or strong belief that such means were likely to infringe someone's copyright. Whilst such means also have a legitimate, non-infringing use, the determination of infringement becomes harder to establish and therefore, the courts seem unwilling to establish infringement.

In view of the above and in addition to the time and effort spent in litigation (Cyprus does not have specialized Intellectual Property courts), litigating for copyright infringement is a time-consuming and expensive procedure. That being said, any owner who is eager to protect their copyright and eradicate any unauthorized use of the same could be involved in a full-time and draining witch-hunt which does not always pay off.

A pyric victory?

Collecting societies were presented as the solution to the grey area of copyright protection. The same were initially established by the owners themselves and were therefore considered as non-for-profit organizations. The owner of the work assigned their rights to the collecting society. Thereon, the collecting society undertook the demanding task of safeguarding the work against unauthorized use whilst making sure that the infringers were either provided with such authorization (entry into a license agreement) or pursued in court.

Dealing with such matters on an individual basis proved very cumbersome and time-consuming. Therefore, the market itself pressed towards the adoption of blanket licensing. Collecting societies, recognizing the aggregate value of their repertoire, provided for such licenses. This meant that the holder of a blanket license could lawfully make use of any copyrighted work in the repertoire of a collecting society.

The end result was that the collecting societies collected royalties and, after deducting the administrative cost, distributed such amounts to the authors as per the terms of their agreement.

The importance attributed to copyrighted work magnified the need to protect it. Therefore, "non-for-profit" collecting societies were soon joined by for-profit collecting societies (independent management entities), which in addition to the thriving evolution of the internet and its modern uses, streaming for example, triggered the need for transparency and better governance. The recent directive on *Collective Management of Copyright* (2014/16/EU) tries to bring collecting societies to terms with the abolition of national boundaries effected by the internet, while providing for a flexible way of achieving better governance, transparency and flexibility.

The pursuit of flexibility has become of extreme importance since copyright owners are no longer confined to their national collecting society. Further, the directive provides for the right of the owner to use their copyright for non-commercial purposes in certain circumstances. This right of the owner to make use of their copyright outside the strict norms of their agreement with the collecting society – albeit realistically restricted – is an evolution that confirms the need to shift focus towards supporting knowledge and creativity. It could also be argued that this does not constitute a shift of focus but a reminder of why copyrights were protected: in other words, as a celebration of knowledge and creativity; and the contribution to evolution.

Do copyrights prevent innovation?

Copyrights are intangible rights and therefore are recognized by and exist by the operation of the law. The proposition that copyrights prevent creativity conflicts with the reason for the recognition and enforcement of such intangible rights. To this end, copyrights do not inhibit creativity, quite the opposite.

It can be argued that it is the strict application of the rights conferred by copyrights that give rise to such misrepresentation; the same being to a certain extent justifiable. Collecting societies on the one part and record labels on the other (at least the ones that are large enough to accommodate the supervision of their intellectual property portfolios) aim to achieve the best possible, mainly financial, result for themselves (since their administration costs are paid) and consequently the authors/creators/performers they represent.

Consequently, exploiting the strict letter of the law, which was initially designed for *bona fide* protection of the work *per se,* has been provided with a commercialized purpose. This is what the market demanded at the time and to a great extent still demands due to the certainty collective societies offer.

However, trends are currently changing, although it is not suggested that such trends will achieve a shift in current commercial practices in the near future, at least as far as Europe is concerned. This is because the increasing use of the internet has made people more prone to trying new things as well as entertaining their curiosity.

Sharing is creating

Confucius said that: "Originality is nothing but judicious imitation. The most original writers borrowed one from another". This provides for a good description of the essence of Creative Commons licensing.

Creative Commons licensing provides a structured way for works of all kinds to evolve, be reproduced and adapted into something entirely new, without undermining the existence of copyrights but on the contrary by confirming the same (since they are conditional on the existence of copyrights).

Creative Commons Licenses (CCLs) were established in 2001. They make the work available to the public in respect of certain uses: e.g. reproduction, distribution, adaptation – that lie with the exclusive rights of the copyright holder.

The copyright holder may choose from a variety of licenses, currently six in number. These types of licenses provide the conditions pursuant to which a copyright holder makes their work available to the public (including without limitation attribution and the right to use the work for commercial purposes).

A CCL does not restrict the right of the copyright holder to commercialize their own work if they so wish, rather CCLs provide for the non-commercial) option. Alternatively, the internet provides for mechanisms that contribute towards such commercialization, for example, the provision of higher quality work to paying customers or to access-only customers.

Further, the latest version CCL 4.0 purports to be unported, in other words incorporates provisions that are common in most jurisdictions, although older ported versions for certain jurisdictions remain available.

Is there a catch?

CCLs are a very well launched initiative in all aspects. However, as with every venture of universal character, there are certain weaknesses.

They depend on the honesty and goodwill of all parties involved. So far, the indications provided are *prima facie* positive. However, it is unknown whether judicial intervention has been limited due to the economic position of copyrights holders or because CCLs indeed serve their purpose.

Further, there is the problem of privity of contract. The agreement is only binding on the initial copyright holder and direct recipient of the work. The later recipients down the line do not enjoy privity of contract, as CCLs specifically restricts sublicensing. Such prohibition seems to imperil, *inter alia,* the condition on Share-Alike (whereby the direct recipient is obliged to license any of their adaptations under the same terms as the initial copyright holder).

In addition, there are no warranties and exclusion of liability clauses. Therefore, when the CCL is triggered, the recipient has no protection against the possibility of the work not being the work of the person licensing the same or, even if it is, that such work has legitimately included the work of another.

It is worth mentioning that CCLs are only concerned with copyrights. Therefore, privacy, publication, moral and image rights are outside their scope.

Last but not least, a basic problem deriving out of its universal character (at least as far as version 4.0 is concerned) is the fact that the same lacks governing law and jurisdiction clauses. Therefore in cases of dispute, the applicable jurisdiction will need to be determined.

Do they really work?

As already mentioned, case-law is limited, nonetheless insightful. *Curry v Audax* (Case No. 334492/ KG 06-176 SR) clarified that it is obligatory that a copy of the CCL be made available to its recipients.

Despite the aforementioned, the District Court of Amsterdam was unwilling to satisfy the monetary claim of the claimant, since the initial copyright holder had not incurred any real damage.

Similarly, in *L'ASBL FESTIVAL DE THEATRE DE SPA* (T.N. 10/7597), the First Instance Court of Nivelles in Belgium found that CCLs may be used to authorize the use of music provided that attribution, non-commercial use and no derivation were complied with. In this case, the breach of these conditions gave rise to nominal and equitable damages. However, the Court refused to award damages based on commercial tariffs.

Importantly, both cases confirm the validity of CCLs in Europe. However, the same clarify that the courts will be unwilling to award damages (other than nominal and equitable ones), where the work was never intended to be commercialized.

What's next?

Copyright protection will always form the basis of any evolution in copyright law. Nonetheless, it is evident that such protection begins to give way to the sharing of knowledge and creativity.

Therefore, trends like the rise of the need to foster knowledge and creativity within artistic and scientific circles, market forces and societal changes create the ground work for evolution. This is not confined to the strict boundaries of CCLs but also towards the need to liberalize the law on orphan works, library archiving etc.

Indisputably, the internet has introduced a new way in which we perceive copyrights. It has also created a new perception of what constitutes infringement, thereby ascribing more flexibility to the wording of the law.

No matter the similarities of national legislations, social and scientific trends contribute towards a more universal understanding of what constitutes copyright protection. Consequently, although copyright law has always been perceived as 'well established'; in an era of evolution, it is almost impossible to remain unaffected.