F. COPYRIGHT

COPYRIGHT AND USE OF COMPUTERS FOR ACCESS TO PROTECTED WORKS

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Copyright

It is considered that the term "copyright" originated in Anglo-Saxon law at the beginning of the eighteenth century. Originally, it meant a "right to make a copy" of a work. This was because at that time copying (mainly by printing presses) was almost the only mode of reproduction.

Despite the evolution of technological means of use of works, this term remained the same though actually it has a dual meaning: the term "copyright" may be interpreted as an institution of law and as rights vested in the creator of a work (author) or other successor-in-title. Compared with analogous terms in other languages, the term "copyright" means, for example, "droit d'auteur" in French, "il diritto di autore" in Italian, "avtorskoe pravo" in Russian, "urheberrecht" in German. These terms seem to be more adequate nowadays as they may cover different means of use of works.

Unlike inventions, where the right is granted upon its recognition by the State as certified by an instrument of protection (patent, etc.), copyright - as a general rule - arises from the very fact of creating a work if it fulfils the requirements of the copyright law. (Only in a small number of States recognition of copyright is subjected to compliance with some formalities such as registration and deposit of the work.)

Copyright law generally covers all kinds of works of literary, scientific and artistic nature, whatever the mode or form of their expression. These may include books and other writings, lectures and works of the same nature, dramatic, dramatico-musical, musical, choreographic, cinematographic, photographic works, works of fine and applied arts, illustrations, maps, sketches and three-dimensional works relative to geography, topography, architecture or science. Derivative works such as translations, adaptations, arrangements of music and other modifications of literary, scientific or artistic works are

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usually protected as original works without prejudice to the copyright in the original work. Collections of various works, such as encyclopedias and anthologies which, by reason of the selection or arrangement of their content constitute intellectual works, also enjoy protection. Copyright law as a rule, excludes from its scope official texts of a legislative, administrative or judicial nature, such as laws, decrees, administrative orders, public documents, court decisions, etc. (The reason for this is evident - the content of such texts should reach the general public as rapidly as possible.)

It should be noted that the copyright law does not protect the ideas contained in a work but the form in which they are expressed. This may be illustrated by the following example. A scientist may make a discovery and the same discovery be made by another scientist because both of them are investigating the laws of the objective world. The scientist who manages to patent the discovery first will enjoy the right in it under the law on patents. However, nothing prevents other scientists from writing books dedicated to the discovery in question. Each of these books may enjoy protection under the copyright law because it is excluded that the same subject be described by different authors in exactly the same form (arrangement of the content, the order of words, etc.) unless, of course, it is simply a matter of copying. This applies also to painting, photographing or making a cinematographic work on the same subject. In short, each literary, scientific or artistic work expressed in original form falls within the scope of the copyright law in spite of the fact that it is based on the same idea, subject, historical event, etc.

The law initially vests the copyright in a work in its creator, i.e. the author, because the work represents the fruit of his intellectual labour. There may be cases, however, where the original copyright belongs to third parties. This depends on legal traditions of a country. For example, in the countries with Anglo-Saxon legal approach, copyright in commissioned works or works created under contract of employment belongs to the commissioner or employer unless the contrary is established by the contract of commission or employment. However, in the countries following Roman legal traditions copyright in such cases vests originally in the author except where it was agreed in writing to the contrary. The same relates to copyright ownership in cinematographic works, periodicals, reviews and newspapers.

Copyright comprises two kinds of rights : moral (or non-pecuniary) rights and economic (pecuniary or exploitation) rights.

Moral rights are mainly the right to the authorship in the work, in other words, the author's right to claim recognition of his quality as author of his work, and the right to the integrity of the work, which may be described as the author's prerogative to oppose any distortion, mutilation of, or other derogatory action in relation to his work. Some national laws on copyright also expressly mention the author's right to make corrections in his work before its publication

or when a new edition is prepared and the right to withdraw the work from sale or use (upon identifying any interested parties) where it no longer reflects his points of view, convictions etc.

Moral rights are attached to the persona of the author and may not be transferred to third parties. After the author's death they may be exercised by his heirs or other persons designated in his will or by a competent authority designated for this purpose in virtue of law, irrespective of ownership of the economic rights.

The author's economic rights are connected with various means of using a work. Some national laws provide for these rights in a very general form by stating that the author will have the right to control the exploitation of his work. But usually the copyright laws state either the economic rights or the forms of use for which the author's authorization is required. This relates to reproduction of the work by various means; public performance, broadcasting, making of translations, adaptations etc. and other acts by which the work may be communicated to the general public.

Economic rights may be licensed, transferred or assigned by the author inter vivos to third parties against payment or gratuitously, and transmitted mortis causa to his heirs or other persons in accordance with the author's will or in virtue of law. The author may also entrust administration of these rights to his professional organization which will be empowered to act as agent for the issue of authorization and for collection of royalties deriving therefrom.

It should be mentioned that the author's economic rights in respect of his work are not absolute either in their extent or in duration.

The copyright law usually provides for certain limited cases of free use of published works in the interests of society as a whole

For example, any person may make a reproduction or translation of a work for his private use. To some extent, an author may make quotations from works of others to illustrate the content of his own work, criticize others, enter into polemics etc. To the extent justified by the purpose, a work may be used by way of illustration in publications, etc. intended for teaching. Under certain conditions a work may be included in reports on current events by means of photography, cinematography, broadcasting, etc.; periodicals and broadcasting organizations may reproduce or broadcast articles on current, economic, political or religious topics, etc.

There may also be cases where a given work may be used without the copyright owner's consent but subject to remuneration for such use (the cases of compulsory or legal licences). This quite often relates to mechanical reproduction or works (discs, tapes) once the copyright owner has authorized this act for commercial purposes.

Under the national laws of many countries the moral rights are protected perpetually. This, in our view, is aimed at avoiding the danger of distortion and misrepresentation to which works of the mind are exposed. Certain national laws provide for the same duration of protection of moral rights as for economic ones. Economic rights are generally protected from 25 to 50 years after the author's death, (or after the date of publication in case of anonymous and pseudonymous works) depending on national legislation. After expiration of the term of protection, the work falls into the public domain and may be freely used, though some laws require that a small fee be payed.

Development of technological means by which protected works may be used has greatly influenced the evolution of national legislation on copyright. Elementary printing presses were perfected and followed by rotaprint, photomechanical reproduction and microfilming. Photography was followed by the invention of cinematography; radio broadcasting was followed by television. All these inventions enabled wide use and dissemination of protected works both nationally and internationally and required changes in the copyright law in order to maintain the author's control over the use of his work. However, this prerogative of the author is further complicated by the rapid scientific and technological progress witnessed throughout the 1970s. The use of satellites for broadcasting relay, the making of audiovisual recordings, distribution of broadcasts by cable television systems, use of computers for access to protected works, may have the effect of removing the copyright from the author. This is the problem raised by modern technological development for national legislatures and such intergovernmental bodies as Unesco which is administering the Universal Copyright Convention. In this respect it should be underlined that copyright law not only establishes social justice regarding authors but also stimulates creative activity by allowing intellectual persons to live on the income from the use of their works, favouring creation of a class of professional authors. Thus, the copyright law, in the long run, contributes to development of culture in general.

Copyright problems arising from the use of computers for access to protected works (1)

Referring to the latest developments in the field of computers in general, an extract from an article by Brigitte d'Aranda, freelance journalist from Strasbourg may be cited:

"The era of the new technological revolution, a greater revolution than that which replaced human physical effort by the steam engine, is upon us. It is overturning the world economy. Today, a microprocessor a few millimeters thick contains the same processing power as a computer that filled an entire room ten years ago. In five years, its price has shrunk twenty times. Everywhere and in the most disparate fields, from telephone network to factory and including games and teaching machines, micro-electronics have entered the scene and are dominating it." (2)

Computers are increasingly dominating the information scene. Creation of carefully directed information and documentation systems has

become necessary for the performance of the various functions of society. Rapid development of computer technology has led to the creation of computerized information systems, networks and data bases both on national and international levels. This enables information-seeking users to have direct access to the information and documentation stored in such systems.

Copyright was not involved at the time when the materials which were stored in and retrieved from the computers represented unprotected matters, such as mere bibliographic data (stored for the purpose of cataloguing) or the texts of laws, court decisions and other materials of the same nature retained in the memory of the computer. But the scene changed when abstracts were included in the bibliographical data and the legal texts were accompanied by commentaries taken from literature, in other words, when copyrighted materials were fed into computers. Nowadays, the information and documentation activities include collection, storage and making available different kinds of literature on a full-text basis. Modern information technology (electronic data processing, microfilm storage, etc.) makes full texts of protected works even more accessible, not only to industrial enterprises, research establishments, public authorities etc., but also to the general public through the libraries. It will not be long before any information-seeking user or person, eg. in France, will have access to the works published and located in the United States by simple manipulation of the computer buttons. Nevertheless, the author or other copyright owner cannot remain indifferent to such unrestricted use of his work. Consequently, the question arises as to whether copyright should come into play.

This question remained in the agenda of the Intergovernmental Copyright Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union for more than ten years. First of all, it was carefully studied (3) and the results of these studies were examined by the Committees. In 1979, a Working Group of Experts from various countries, convened jointly by Unesco and WIPO, drew up important conclusions on the matter. In 1980 the copyright problems posed by computers and the conclusions of the Working Group were discussed by a Committee of Governmental Experts. The Committee generally approved the conclusions reached by the Working Group and further developed and specified them.

The substance of the conclusions reached by the above Working Group and Committee may be summarized as follows:

1. In general, the use of computers for storage and retrieval of protected works does not create a new situation with regard to copyright protection. The existing principles in international conventions and domestic laws on copyright may be applied to the problems raised by this new technique. The question is how to apply these existing principles in order to cover adequately all situations arising from the use of protected works by computer technology.
2. As far as subject matter of storage and retrieval is concerned, three main categories and legal situations should be clearly distinguished:

a) The usual particulars of protected works (name of author, title, publisher, year of publication etc. - so-called 'index method'). Their use as such, for the purpose in question, does not give rise to copyright.

b) Full text of protected works (such as articles, journals and magazines, newspapers, works published in book form, including protected compilations). It is evident that, in so far as a given work is protected under national legislation on copyright, its use by computerized systems should require prior authorization of the author or other copyright owner.

c) Abstracts. As the case may be, an abstract of a work may or may not enjoy copyright protection. Originality and creativity constituting the basic elements justifying copyright protection of any work should also apply to abstracts. The Committee distinguished three main categories of abstracts:

(i) an abstract which is an adaptation of the original work which should be protected;

(ii) an abstract of a pre-existing work (not constituting adaptation) which is original in character and results from the creative efforts of its author, should also be protected;

(iii) an abstract which is limited to a mere enumeration of ideas and facts expressed in the original work does not seem to form a proper subject matter for protection.

Consequently, the use of the first two categories of abstracts should require prior authorization of the author or other copyright owner.

The Committee also recalled the case where abstracts are written by third persons. If an abstract constitutes adaptation or other derivation of a pre-existing work, its writing requires authorization of the author of the full text.

As far as compilation of information stored in an automated data base was concerned, the Committee's opinion was that such compilation should be considered as protected if it is original and results from creative efforts (collection and structuring of the data) and subject to the general rules governing the protection of the relevant category of works provided for in domestic laws. In other words, a compilation resulting from computerization of information may not enjoy copyright protection if it consists of nothing more than added data and no specific criteria or classification method was used for arrangement of its content. To enjoy protection a compilation must reflect the intellectual efforts of its maker. It may be illustrated by the following example. Supposing somebody is preparing a compilation of bibliographical data on publications in the field of medicine. The chosen subject is 'treatment of disease X'. All publications on this subject are collected and classified depending on the methods of treatment proposed or described by different authors. Furthermore, the data is arranged in such a manner as to show the evolution of the various methods and the country of publication. Thus, making of the compilation requires professional knowledge in order to choose the subject, collect and classify the data and arrange its content. The intellectual efforts and personal contribution of the maker seem to be evident, the compilation

should be considered as an original one and enjoy protection under copyright legislation. The author of the compilation should be the person who established it before it was fed into the computer. This is because the person who actually introduces the data into the memory of the computer did not participate in the creation of the compilation as such. Admittedly, the questions of granting protection, determination of authorship (initial author or employer, physical person or legal entity, joint or independent authorship, etc.) and the term of protection of this category of works are governed by national laws on copyright.

3. With regard to acts involved in storage and retrieval of protected works, the consensus of the Committee was that input of protected materials constitutes reproduction within the meaning given to that term by international conventions and national legislation on copyright (Article 9(1) of the Berne Convention and Article IV bis of the Universal Copyright Convention). At this stage the act of reproduction takes place when protected materials are encoded on such media as punched or magnetic cards and tapes and fixed in the internal memory of the computer. Consequently, the copyright owner's consent should be required for this act, otherwise his right would be infringed. Another argument in favour of authorization at the input stage is the moral right of the author since there is a danger of such infringements as omission of his name, distortion or mutilation of words due to technical faults, etc. Moreover, a contract concluded at the stage of input would solve many problems connected with different forms of the output or retrieval of protected materials.

The Committee generally agreed that when the output takes place in the form of hard copy print-out, it should be considered as reproduction (of course, both at the stage of input and output, this does not concern the works exempted from copyright protection under national legislation). More complicated is the situation where the output is affected by projection of stored material in the form of visual images on a screen or cathod ray tube or similar process. May this act be considered as public presentation, performance, communication of works by wire, etc. or would it be covered by the right of reproduction? Can this display be compared to mere reading in the library? The international conventions on copyright do not seem to give a clear answer to this question. In view of divergent opinions expressed by the experts, the Committee stated that there was a need for further in-depth study of the questions surrounding output, with particular emphasis on generally recognized exceptions from copyright. It seems that it is mainly in this respect that the Committee recalled the fundamental concept of copyright - control of utilization of works - and that the right of reproduction and the right to put into circulation usually implies the right to control the destination of reproductions.

4. The right of the authors to control the use of their works was also of great concern to the Committee while discussing the question of administration of rights. A large majority of experts were of the opinion that authorization to use protected works for storage in and retrieval from computers should be based upon contractual agreements or other negotiated licences. It was pointed out that granting of such freely negotiated licences may be arranged either on an individual

basis or through such mechanisms as collective administration of rights and clearing houses. On the one hand, it would be premature to introduce compulsory or legal licences in that field at this stage, on the other hand, international conventions envisage such licences for particular categories of works and in special circumstances only but not in general.

However, some experts were strongly in favour of a system of compulsory or legal licences in this field. Otherwise, in their opinion the easy dissemination of works by computer systems, specially by minicomputers, cannot be achieved because of the difficulty for users of computers to obtain negotiated licences either on an individual or collective basis.

5. Finally, the Committee stated that within the context of a rapidly developing technology and increasing worldwide use of computers, it was highly desirable that recommendations for solution of copyright problems be made as soon as possible to provide some guidelines for national legislatures. In the meantime the Committee suggested that the international non-governmental organizations concerned take the matter of the use of computers for access to protected works under consideration and strengthen their efforts to safeguard authors' rights.

As asked by the Committee, the Secretariats of Unesco and WIPO are preparing, in consultation with the officers of the Committee, a draft Recommendation on the subject. The draft will be sent to all Member States for comments and later redrafted in the light of the observations received. The resulting draft will be submitted for discussion (and possible adoption) to the Second Committee of Governmental Experts to be held in 1982.

Notes

(1) Problems arising from the use of computers for creation of works which may enjoy protection under the copyright law and protection of computer software are not dealt with in this paper.

(2) See: "Forum", Council of Europe Quarterly, No. 1/81, p. XII

(3) It should be mentioned that, at the request of Unesco and WIPO (World Intellectual Property Organization) a number of extensive studies on the subject were carried out by Professor Eugen Ulmer of the Max Planck Institute in Munich.

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