

AIPPI UK meeting report

Professor Lionel Bently

The Future of Copyright Law

7 April 2010, Hogan Lovells, London

Lionel Bently addressed AIPPI UK on *The Future of Copyright Law*, kindly hosted by Hogan Lovells on 7 April 2010. He started with the controversial proposition that the title assumed copyright had a future. Technology posed a growing challenge to the copyright framework and had prompted academic criticism of copyright's economic justification, notably from Lawrence Lessig and Boldrin & Levine. While not endorsing their views, Professor Bently regarded the legitimacy of copyright as proper territory for academic study.

Reviewing the current state of copyright in Europe, he noted that there has been partial harmonisation, through individual directives, but no European title comparable to the community trade mark or community design. The EC had started in the area with piecemeal “vertical” interventions, with the information society directive marking the first “horizontal” intervention. The piecemeal approach was mandated by the fact that – on its surface – EC copyright legislation found its basis in removing impediments to the internal market. Professor Bently questioned whether that reflected the full reality of the harmonisation realised under an internal market basis, which had run beyond what might commercially (rather than politically) be viewed as necessary to an internal market (see for instance *C-53/05 Commission v Portugal* on harmonisation of rental rights). In reality, harmonisation had been restrained only by political and cultural interests of individual countries. Copyright directives have been variously codified, but significant differences remain in implementation, and in the national laws of member states. Few if any member states have undergone a fundamental rethink about the form of their copyright law – the chaotic state of British copyright legislation illustrates the point.

Looking to the future, Professor Bently posed three visions to consider: (i) judicial deepening of harmonisation in the ECJ; (ii) further piecemeal legislation from the EU; and (iii) a European copyright code and unitary European copyright.

Referring to *SGAE v Rafael Hotels* and *Infopaq*, he noted that the ECJ has proven remarkably willing to deepen harmonisation beyond what might be considered justifiable. *SGAE* concerned communication to the public. In SEC(2004)995,15 the Commission recognised that the definition of “communication to the public” was to be left to member states. However, in *SGAE* the ECJ held that “public” has a community meaning. Similar harmonisation contrary to legislative intent can be seen in the treatment of “originality” and “substantial part” in article 2 of the information society directive. That article does not on its face provide for harmonisation of these concepts. The defendants in *Infopaq* operated a news clippings service, providing 11 words on each side of a key word. The question of whether that is “reproduction in part” was referred to the ECJ, which held that the question also required an examination of the concept of originality. The ECJ noted that originality was a harmonised concept in the database directive, the computer directive and the term directive, meaning the “author's own intellectual creation”. The ECJ held that all works are subject to this standard and that a “substantial part” is taken if by itself it would be “original”. While accepting that the decision as to originality on that test is a matter for the national court, the ECJ also added further guidance as to how the test should be applied, by looking at the choice, sequence and combination of words and whether thereby the author is expressing his creativity.

Professor Bently added that *Infopaq* is a decision of a chamber with limited input from Member States, and there are differences between the judgment and the opinion of the Advocate-General. It may therefore not be a strong decision. It is also worth noting that there is a consistent logic in

saying that if a part can be protected in itself, then its taking should be prohibited. It is a proposition supported by the speech of Lord Hoffmann in *NLA v Marks & Spencer*.

However, *Infopaq* can be criticised on numerous grounds. It threatens to lower the threshold for infringement without careful consideration of the effect of so doing. Uses such as parody and referencing could become infringements without the flexibility of suitable exceptions; and had the legislature known that the legislation would have that effect then it is likely that pressure would have been applied to review the exceptions regime. On the flip side, there may be some things that should be protected that will fall outside the “own intellectual creation” test and it should be for the legislature, not the judiciary, to make the decision on exclusion from protection.

In the 2004 staff paper, the Commission that notions of originality has not been addressed in community legislation in a systematic manner. It added that “special cases aside, member states remain free to determine what level of originality a work must possess”. Professor Bently noted that this was a question which the legislature had clearly reserved but which judicial deepening has removed.

There are a significant number of pending references that may further judicial deepening: see for instance C136, 168, 387, and 393/09, C421,432,462/09, C70, 135,145,162/10. Professor Bently noted that the process of judicial deepening could even provide a back-door into the introduction of a harmonised private copying levy.

Moving on from judicial deepening to legislative initiatives, the professor noted that there are signs of piecemeal legislative extension re-starting. Communication 2009(532) *Copyright in the Knowledge Economy* demonstrates a willingness to turn to legislation if collective licensing and consensual regimes prove ineffective. Other areas for possible legislation include collective management (seeking greater transparency in collecting societies), and harmonising exceptions, definitions of works and originality, contributory infringement, moral rights and ownership.

The third track covered by Professor Bently was codification. The IViR 2006 report *Recasting Copyright for the Knowledge Economy* marked the start of the process, and the Reding-McCreedy Joint Statement on 7 September 2009 demonstrated continuing Commission interest. The Commission's latest statement makes the vision clear: “A community copyright title would have instant community-wide effect thereby creating a single market for copyright and related rights.” Impediments in terms of competence have disappeared by virtue of art 188 of the Lisbon Treaty which allows the creation of unified IPR in the EU.

Professor Bently asked: what form might codification take? Academic proposals for the future European copyright code are set out in the Wittem Group report (www.copyrightcode.eu). The Commission moots a softer approach, of full codification accompanied by harmonisation, so that national rights would exist in parallel with community copyright. Critics say that this is incoherent: in that a regime of national rights cannot sensibly coexist with harmonised copyright. The third vision is IViR's proposal, but adding that subsidiarity and proportionality require culture-oriented aspects to remain a matter for member states and thus certain areas should be omitted (moral rights, copyright contract law, and the governance of collecting societies).

So what would the costs and benefits of European copyright? Uniformity would have the obvious benefits of enhancing free movement of goods, simplification, reduced transaction costs, reduced barriers to entry, and increased competition. However, there are also costs inherent in uniformity. Gerhard Wagner in “*The Virtues of Diversity in European Private law*” (a chapter in *The need for a European Contract Law*, Jan Smith, ed. (2005)) notes that the crucial question is not whether there are benefits, but whether the benefits outweigh the costs. Transposing directives into national law

involves substantial costs in itself; and the effects have local results that may introduce uncertainty until clarified in the ECJ (and that may take a succession of references to bring the law to a settled and comprehensible state). The professor added that removing diversity and preventing experimentation in itself may be disadvantageous. Wagner says that “*it is the competition for the best answer to new challenges that harmonisation would destroy*”.

The operation of diversity is illustrated in the reactions in member states to peer-to-peer copying. Some courts have applied tort law, some principles of contributory criminal copyright infringement, some secondary civil copyright infringement, and some legislative initiatives (e.g. 3 strikes laws). These attempts illustrate diverse responses to reconciling the protection of cultural industries, the encouragement of new technology, and the protection of privacy.

In concluding his talk, Professor Bently set out his vision for the future. He noted that codification would not be politically easy. The currently differentiated national copyright titles have created significant private interests that will be resistive to a single copyright law. Practical problems will need to be solved on how to transition from national laws to a community title. This is particularly complex given the different national laws on ownership. Experience from e.g. the reunification of Germany may inform the process, but the torrid history of the community patent illustrates the delay and difficulty that could arise. If a middle ground – like the EPC in relation to patents – can provide a workable solution, the question becomes how long one might be willing to live with the interim solution.

Questions afterwards were put by Jonathan DC Turner, Nicholas Macfarlane, Sir Richard Arnold and Robin Whaite.

The first question noted that we have community and national unregistered design rights coexisting. Similarly we have coexisting and very similar community and national competition law. Why then is there any real problem in coexistence of national and community copyright? On a second question, he noted that *Designers Guild* had held that the test for infringement could not exceed the amount needed to justify subsistence of copyright.

Professor Bently commented that the coexistence of rights with different criteria is something that can make sense but it is hard to see what effect arises where the rights are exactly coextensive. *Designers Guild* provided a systemic view of copyright. However, he noted that this conflicts with the historical development of copyright. The historical approach was to start with the artefactual status of the work, e.g. as a book, and look for colourable copying of that work as the test for infringement. The test in the UK always required more than just a small amount of taking but if one combines the UK concept of originality with the test for the threshold of infringement, the result may become ridiculous.

The second question asked who is clamouring for the change. Professor Bently said that the arguments in favour are coming from academics, who perceive that the European project is failing because licensing is still running on national lines.

The third questioner noted that some in the Commission may be perceived as favouring a European copyright title without necessarily addressing the difficulties that it might create. He asked in particular to what extent Professor Bently thought it possible to consider the future of European copyright free of the international dimension. In *SGAE* it is notable that the ECJ placed emphasis on interpreting the copyright directive in the light of international treaties. European law does not exist in isolation but rather in a framework of international treaties. How can it be considered separately?

Professor Bently responded by examining whether the ECJ felt itself bound or simply informed by treaty obligations. In the case of TRIPS, of course, the EC is a party (and thus bound), whereas with Berne the Treaty the EC is not a party and the Treaty should be regarded as an interpretative lead and not more. However, Professor Bently said that his concern with the ECJ's approach in *SGAE* and *Infopaq* was that it imagined that it could find answers in the Berne convention. The Berne standards were developed to allow differences at national level, and many of these international standards have been regarded as compatible with significant variations in national law for a century or more. So it is surprising that the ECJ finds that Berne incorporates an originality standard, when the existence and nature of such a standard is disputed by jurists. One reason to exercise caution about the ECJ's approach is that the treaty provisions on which they rely are not the subject of any authoritative ruling or international norms on their meaning. Of course, there may be provisions of international law where the meaning was clear, in which case it would be less problematic to interpret EC law in the light of those international norms.

The next question asked about the rules on protecting works. The rules on protecting and assignments under national law can be extremely costly where works interact and derive from multiple sources.

Trevor Cook, the President of AIPPI UK, offered a vote of thanks and the meeting moved on to lively further informal conversation over drinks, generously provided by Hogan Lovells.

Justin Watts, Secretary, AIPPI UK