Kluwer Copyright Blog

Publication: The variable scope of the exclusive economic rights in copyright

Sari Depreeuw (Crowell & Moring LLP and UCLouvain – Saint Louis Bruxelles) · Thursday, January 22nd, 2015

The book "The Variable Scope of the Exclusive Economic Rights in Copyright" recently published in Kluwer's Information Law Series is the result of my doctoral research (which led to a doctoral dissertation defended at Vrije Universiteit Brussel in 2011). This article provides an overview of the research described in the book, followed by a more detailed description of some of the key subjects covered.

Overview of the Book

Originally, the starting point of the research was the observation that in a digital always "ON" world some acts are protected under copyright, while the same acts are not in the analogue world. Take searching for information as an example: in the analogue world we have specific channels to find relevant information, depending on what we are looking for (we would consult the "golden pages" to find a plumber and the newspaper to find local cinema listings). Providing or retrieving such information would generally not entail any acts protected under copyright (except perhaps for copying protected film titles in a cinema listing).

We do not make this distinction online: we google everything. Behind a simple interface, a terribly complicated "engine" is hidden: in order to serve us relevant results that lead to the information we are looking for, online search engines go through an extensive process of preparing the search. This process involves copying every word, image and even video accessible on the Web. Moreover, these copied bits of information are ready to be sent to us, the users, as parts of a "snippet" or as a "thumbnail" image. Authors of all kinds have accused search engine operators of copyright infringements for these reasons and, indeed, several courts in European countries have confirmed that the functioning of search engines does involve copyright relevant acts (see for example here or here).

So, two "functionally similar acts" of "searching" for information have a different copyright status, depending on the technological environment in which they take place. This suggests that technical functioning of any online search engine determines that the act of searching requires the authors' prior consent and that their purpose of finding information does not suffice to create a "freedom of expression and information" shelter.

This reasoning called for further examination. The research was focused on the two main exclusive economic rights under copyright: the reproduction right and the right of communication to the public. The purpose was to verify whether the scope of protection offered to the author had changed (increased, decreased) or had stayed constant under the impulse of technological innovation. A historical approach was adopted, starting from the Berne Convention up to the Information Society Directive.

The Reproduction Right

As far as the reproduction right is concerned, exactly what value this right was meant to protect was examined, first for the specific instances of the reproduction right (mechanical, cinematographic reproductions and reproductions for broadcasts and their specific exceptions) and then for the general reproduction right (and its three-step test) in the Berne Convention. It was concluded that, under the Berne Convention, the reproduction right protected the material act of making a copy of the work on a tangible support – but at the same time, given the technical context in which the reproduction right was adopted, it was fairly straightforward that this "reproduction" was rather a proxy for the exploitation of the work on the basis of reproductions. In other words, the reproduction right offered protection for the author's ability to make money from their works (e.g. by selling copies) and, in the then existing technical framework, this objective was adequately expressed by the protection of the making of tangible copies of the work. Other uses that did not amount to an exploitation were not protected under copyright, such as "reading", "listening" or giving a copy of a reproduction to another person. Similarly, reproductions that did not actually harm the exploitation of the work could be exempted, e.g. private copies.

Then came the **digital world**: starting from the 1960s and 1970s the international copyright community were wondering how to treat use of protected works by means of the emerging computer technologies. Despite several reports (such as the interesting Ulmer reports in Le Droit d'Auteur on "copyright issues resulting from computer storage and retrieval of protected works"), no unambiguous qualification could be agreed upon.

At the same time, it was asked how computer programs should be protected, which led the European legislature to choose copyright as a suitable protection system in the Computer Programs Directive. For the first time appeared the reproduction right that we find in the Information Society Directive today: a wide reproduction right covering both temporary and permanent reproductions, by any means and in any form, in part or in whole. This reproduction right was sufficiently large to extend to the loading, displaying, running, transmission or storage of the computer program. This meant that the 'normal' use of software required the author's prior consent (whereas traditionally non-exploitation use of a work did not come under the author's control). By no means was this an accident: the legislature wanted the law to offer a copyright basis for certain exploitation models of software, more specifically licence contracts for tailor-made software that were commonly expressed in terms of "use" (e.g. a licence and corresponding licence fee for the use on a number of computers, the use by a maximum number of users or use on defined premises). If the software was used in any other way, not only would there be a breach of contract but also a copyright infringement. The exploitation model for standard software, in contrast, was different: such packages were sold to the general public so the later "use" of the software had little economic importance for the developer. The legislature consequently conceived the "reproduction right" as a notion that covered the "use" of software (in the sense of the "use licences" for tailor-made software) and provided an exception for the "use" of software (for the sake of users of standard software packages). This reasoning explains why the exception for the use of software in

Article 5(1) CPD begins with the reservation “in the absence of specific contractual provision”, referring to negotiated licence contracts for tailor-made software. The scope of protection of computer programs was thus determined by the exclusive right of reproduction and the “normal use” exception, a combination that was meant to reflect the main forms of (pre-Internet) exploitation.

While a clear connection could be found between the legal notion of “reproduction”, the technical (digital) context and the then-existing forms of exploitation of computer programs, this relationship was no longer found in the Database Directive. Not only was the subject matter different, but databases were commercialised according to different models from computer programs (i.e. mainly based on access to a distant database). Yet the same legal construction of a wide reproduction right and a narrow exception for access to and use of databases was copied from the Computer Program Directive. In addition, the Directive provided a right of distribution and communication, display or performance to the public – which was arguably in itself sufficient to protect the existing and expected exploitation models. The result is that a wide reproduction right was granted that covers all technical copies but no longer corresponds to an actual (or potential) exploitation mode.

A similarly large reproduction right was finally adopted under the Information Society Directive. Following the Computer Program Directive and the Database Directive, this reproduction right covering ephemeral copies on all types of digital devices had become the *acquis communautaire*. So the Information Society Directive followed suit, with its own exception for temporary acts of reproduction in Article 5(1). Remarkably, the development to a reproduction right that is a purely technical notion was confirmed: the actual exploitation of the work is not relevant to find a reproduction and to delineate this concept. The exploitation does play a role, however, for the exception for temporary acts of exploitation, which can only apply if the (exempted) reproduction has no independent economic significance. In other words, the “reproduction” has become a simpler notion, which coincides with any material copy of a work. The exception for temporary copies, in contrast, is a notoriously complicated provision, which is apparent from the number of preliminary questions brought before the Court of Justice of the EU on this point: Infopaq I, Infopaq II, Premier League and Meltwater. This also means that the legal uncertainty has shifted from the notion of “reproduction” (which – in analogue times – was questioned every time a new recording or copying technique appeared and enabled a new form of use) to the application of the exception for temporary acts of reproduction, and that risk of this legal uncertainty (i.e. the burden of proof) is shifted from the author (who had to demonstrate the existence of a “reproduction”) to the user who wants to rely on the exception (who now has to demonstrate that all conditions of the exception are met).

In a nutshell (and somewhat bluntly): the reproduction right has evolved from a protection of the exploitation of the work based on copies (in the Berne Convention) to a protection of technical copies without direct relation to the exploitation of the work (for the existence and delineation of the reproduction right). The reproduction right in the Berne Convention offered protection for material, tangible copies, which in the then technological context was adequate to protect the exploitation of the work based on material copies. Now the technical context has evolved to a digital networked environment, other business models and forms of exploitation exist – often intertwined with communications of some sort – and a “copy” in the material sense has a different meaning. Yet the protection of the reproduction right is still focused on the “copy” of the work to outline its protection.

The Right of Communication to the Public

The second category of exclusive economic rights discussed in the book is the right of communication to the public. Both at the international level and the European level, the authors enjoyed first a bundle of specific rights relating to the immaterial representation of their works (public performance, broadcasting, transmission by wire to the public, satellite broadcasting, retransmission by cable etc.) before being granted a "general" right of communication to the public, covering all sorts of technical transmissions (in the WIPO Copyright Treaty and in the Information Society Directive).

From the start it can be observed that there is no one-on-one relationship between the legal notion of "communication to the public" and the material act of transmission. The requirement of a "public" has forced courts to examine the underlying value that this economic right was meant to protect. Under the public performance right, for example, it had to be determined at which point such performance required prior consent. This was a matter of importance for 19th century cultural associations of amateur actors or musicians, who gathered to rehearse and perform dramatic or musical works at a non-professional level. Mostly these associations consisted of a limited number of friends and acquaintances with a shared cultural interest, but some associations grew to have hundreds of members – not exactly an intimate circle of friends… Several criteria were put forward to distinguish the "public" from the "non-public": the ties between the performers and the audience or among the members of the audience, the "commercial" nature of the performance, the public accessibility of the venue where the performance took place etc. This suggests that the "public" requirement served to catch all forms of exploitation (in an immaterial form), while the renditions that did not affect the work's exploitation could not be prohibited based on copyright.

New technologies made it possible to transmit radio and television programmes to vast audiences. Protected works were broadcast via Hertzian waves within vast (national) territories where everyone in possession of a receiver could see or hear the broadcast works (on territoriality of protected acts, see a study for the European Commission at p. 45 et s). Whether the works were transmitted to a "public" was not an issue: a radio broadcast reached a "public" by definition, due to its technical specifications it was not possible to send the programmes to a targeted audience of a few individuals (Article 11bis(1)(i) BC).

Later, transmissions by cable raised a new issue: where a radio or television programme is retransmitted via a cable network in a territory where the broadcast programme is freely accessible, is such retransmission then subject to the author's prior consent? The question was answered in the positive (as is clear from Article 11bis(1)(ii) BC). When cable networks were installed on a smaller scale, e.g. covering an apartment building or a few houses in the same street, the old question whether such retransmission reached a "public" was relevant again in the light of several factors (arguments were developed in the sense that an antenna on the rooftop of a building serving the inhabitants – each in their own right entitled to receive the programmes – was no more than a "collective reception device"; the urbanism policy of the cities prohibited that several antennas be placed; in other cases the owner had a commercial objective, where she let her property to a tenant at a higher price due to the better reception etc.). Questions that sound familiar to copyright enthusiasts who follow abundant copyright rulings of the Court of Justice on this issue (e.g. in Rafael Hoteles, Organismos Sillogikis, PPL and OSA).

The possibility of combining several transmission technologies to bring (protected) programmes to the public gave rise to several uncertainties. Television programmes were commonly broadcast (by radio waves) and retransmitted by cable to the cable subscribers, which gave rise to two separate acts of communication to the public (the broadcast and the retransmission by cable). Other

combinations were possible, such as the transmission by satellite and the subsequent radio broadcasting (as in Lagardère) or the "direct injection" of a television programme in the cable network (as in the case SBS recently lodged before the CJEU).

The Internet led to an overhaul of the models of "content" transmission, at the technical, the commercial and the cultural level. Copyright lawyers are getting headaches over the same questions as before: when does an architecture consisting of several technical transmissions qualify as a "communication to the public" (as in ITV)? How to distinguish primary, secondary and several independent communications to the public; or transmissions that are not communications to the public (as in Svensson, BestWater)? How is the "public" constituted online? These are difficult questions, especially when the legal issues must be decided on the basis of a general right of communication to the public (including the making available right) that gives little guidance as to what is protected. In contrast, the Berne Convention recognises specific rights of communication to the public and offers more guidance to the copyright lawyer – then again the Berne Convention took several decades to develop and to adapt to new forms of exploitation. Finally, the coexistence of the rights of communication to the public and reproduction leaves many unanswered questions, which are sure to cause more copyright concerns for the CJEU (some aspects have been examined in a recently published study for the European Commission).

Conclusion

The book concludes with a suggestion for a more consistent approach to the exclusive economic rights, the rights of reproduction and communication to the public. Unsurprisingly, it suggests aligning both rights to the exploitation of the work, both for the delineation of the rights (existence of a protected act) and for the qualification of the protected acts. Such an economic approach has historically driven the application of the "exploitation rights" and the exceptions to the rights. Although a technical approach seems to have been acquired in the existing copyright framework, it has been demonstrated that this methodology is unnecessarily complicated and sometimes even inadequate to articulate appropriate protection (thus avoiding excessive protection). The exploitation of the work is also central in the methodology that is proposed to apply the reproduction right and the right of communication to the public (and to distinguish both).

As far as online search engines are concerned, it is shown that national courts have judged the matter differently – which shows that the harmonisation of the rights of reproduction and communication to the public (and their accumulation) is incomplete and that guidance for the application of these rights is lacking. Search engines – however helpful in our quest for relevant information – do not escape copyright under the proposed approach solely because "searching" in an offline environment does not entail a copyright protected act. It is however suggested that the technical process is considered as a whole and that copyright law should treat as protected acts only those material copies and transmissions that amount to an actual exploitation (rather than considering each and every one separately).

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