International agreements, national fair use legislation and copyright royalty collection agents

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Abstract
Article 10 of the WIPO Copyright Treat allows for national legislation to limit the rights of copyright holders 'in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author'. This gives the impression that countries are free to take account of their own circumstances and needs in how they allow such exceptions.

TRIPS and the national copyright royalty collection agents have changed this position. The agents appear to be setting their own uniform standard as to what is fair use and TRIPS has put in place international enforcement measures that can be invoked against countries that take a more generous view of the limits of fair use.

It seems inappropriate that private organisations should take over such an important function, one that the WIPO Copyright Treaty gives to national governments. This, however, seems unavoidable under the present legal arrangement. The paper will look at alternatives to this situation. In particular it will suggest an international agreement to lay down in detail what is legitimate fair use. Such terms could be required in the licences under which copyright information is provided in digital form.

COPYRIGHT - A BENIGN MONOPOLY?

The modern law of copyright in a written text with its provision for international protection of the interests of the copyright holder began to take shape in the mid-19th century. This was a time when the laissez-faire economic theory proposed in Adam Smith's *Wealth of Nations* and its legal equivalent, freedom of contract, were at their most influential (Atiyah 112-38). According to these theories, if a market is left undisturbed supply and demand and the freedom of individuals to bargain for what they want will best promote the interests of society.

The law of copyright, of course, goes against laissez-faire economic theory in that it creates a form of monopoly in a written text. The Constitution of the United States (article 1, section 8.8) allows Congress to legislate for such a monopoly but only for a limited time. Those demanding international copyright protection, however, took a different view. They saw a written text as a new thing that belonged to an author in by virtue of the effort the author had expended in creating it. This view of ownership is present in the common law (Blackstone 1765-70, book 2, chapter 22) and also, but not with reference to copyright, in the Roman law (Institutes 2.1.1-5) that continental legal systems followed.

Successful authors might have been in a position to keep hold of the copyright in what they wrote. But the financial capital needed to print, promote and distribute a book and the risk that a book might not sell meant that most authors who wanted to see their writings in print were obliged to transfer copyright to their publishers. Publishers justified this by arguing that while they reaped the lion's share of the rewards of a successful publication they also carried the risk of a failure. There is judicial authority (Harms JA in *Biotech Laboratories (Pty) Ltd v Beecham Group plc and Another* 2002) for Alexander Pope's understanding of copyright:

`What Authors lose, their Booksellers have won,
So Pimps grow rich, while Gallants are undone.'

Whatever the injustices done to authors, these legal arrangements did involve competition between publishing houses. Writers kept writing and there was enormous growth in the number, quality and affordability of books and other publications. These publications educated informed and entertained people and made possible, among other things, the kind of informed democracy that the 21st century regards as the ideal. They also brought prosperity to many publishing houses.

EDUCATIONAL PUBLISHING, NEW TECHNOLOGY AND ROYALTY COLLECTION AGENTS

The last decades of the 20th century saw significant growth in educational and research publishing. This growth made it difficult for any but the wealthiest individuals, institutions and libraries to buy all the relevant published material. There was little incentive to contain the costs of these publications because there no competition. Educators and researchers cannot afford to ignore important published work simply because of its cost.

At about the same time, however, new technology began to offer cheaper ways to copy and distribute material. First came photocopy machines in libraries for the use of staff and students, then course packs of copied material and, more recently, material posted in electronic form on educational intranets.

Publishers feared that these practices would reduce the sales of books. This, they claimed, would increase the risk that went with publishing a book, leading to fewer books being published, so forcing publishers to charge more for the books they did publish, thus further reducing sales. To compensate for this loss of income and to allow them to continue to serve the community in the way, they claimed, they had traditionally done, publishers began to assert the right of the copyright holder either to prohibit any copying or only to allow it subject to the payment of royalties.

Collecting royalties is a tedious business that involves negotiation, administration and many relatively small payments. This provided a business opportunity for collecting societies. Collecting societies represented copyright holders, typically the publishing houses, they negotiated royalties with copyright users and collected and distributed the royalties.

It may seem that the law of supply and demand would operate between copyright users and collecting societies and that if a collecting society insists on unreasonable royalties the users would be able to find a more affordable alternative. Usually, however, a few collecting societies represent the majority of copyright holders and negotiate collectively on behalf of the copyright holders. Thus a big collecting society has an effective monopoly in a product (information) that is essential for certain important activities (education and research) It can dictate what institutions must pay to copy.

It is not that that those running collecting societies are rapacious or unaware of the social importance of education. They also accept that educated people who have learnt to use and appreciate books are more likely to buy books. But the collecting societies have to answer to their clients and their clients, may not see why they should subsidise education at the expense of their profits by waiving their royalties.

When collecting societies first began to collect royalties for copying, copyright holders were pleased to receive anything by way of royalty payment. But, while there may be no competition about royalty rates between the publishers who use the same collecting society, there is no bar to collecting societies competing for customers among copyright holders. A collecting society that offers copyright holders better royalties will probably displace a competitor that treats copyright users more generously.

It is also likely that once a collecting society has developed efficient ways, such as institutional licences, to collect royalties from large institutions it will use those

techniques to collect royalties from smaller institutions. In South Africa at the moment it is, for the most part, the tertiary education institutions that pay royalties for copying. There is no reason why this should not be extended to secondary and primary schools and any other form of institution that uses copies of copyright material.

RESTRICTIONS ON THE COPYRIGHT MONOPOLY

International agreements on copyright recognise that there may be situations in which countries need limit the monopoly enjoyed copyright holders. This resulted in the "3-step test' which allows countries to limit the rights of copyright holders `in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author' (Article 9(2) of the Berne Convention, article 10 of the WIPO Copyright Treaty and article of 13 of TRIPS). There are different ways to take advantage of these provisions.

National fair use legislation

Chapter 1 of the South African Copyright Act makes provision for royalty free copying or the purposes of education as envisaged by the 3-step test. The meaning of these provisions, however, is not entirely clear. Educational institutions are reluctant to test these provisions in court and there is no agreement about how the legislation should be amended.

Compulsory licences

In the United Kingdom, a compulsory licence is an exception to the general copyright law provided for by legislation. (Coppinger & Scone James 2005 p1589-1629) There are no compulsory licences of this sort in South Africa. It could be argued, however, that a discreet piece of legislation that created in clear terms a compulsory licence for educational copying would be a more practical alternative than trying to amend the Copyright Act. There is an example of a provision of this sort in section 73 of the Electronic Communications Act of 2005. This requires internet service providers to allow public schools a 50% discount on all internet services.

Legislation regulating collecting societies

Some countries have legislation regulating collecting societies that operate in certain areas of copyright. The Australian Copyright Act, for example, deals with societies that collect royalties for broadcasting (sections 135P-135S). Such legislation, however, is usually aimed at ensuring that a collecting society is accountable to its members.

Competition law

In the absence of special legislation, collecting societies will fall under legislation that limits anti-competitive practices. In South Africa the Competition Act of 1989 recognises two kinds of anti-competitive practices: restrictive practices (sections 4 and 5) and abuse of dominant position (sections 6-9). Only if a collecting society's approach to collecting royalties appears to fall under one of these headings will the Commissioner be likely to start an investigation in terms of the Competition Act.

Copyright tribunals

Another mechanism that can be used to limit the power of a copyright holder to set the royalties for copying or prohibit copying is a special tribunal with the power to compel licences and set limits to the payment of royalties. The first such tribunal was introduced in the United Kingdom in 1958 to deal with performing and broadcasting rights. It resulted from a finding by the Copyright Committee of 1952 that the collecting societies working in these areas were abusing their powers to grant licences (Copeling 1969, p222). The United Kingdom Copyright Act of 1988 renamed this tribunal the Copyright Tribunal and extended its powers and jurisdiction. There is also an Australian Copyright Tribunal established by section 138 of the Copyright Act of 1968.

The South African copyright tribunal was established by the Copyright Act of 1965. The copyright tribunal now falls under Chapter 3 of the Copyright Act of 1978. Although the copyright tribunal has been in existence for half a century it appears that it has only ever decided one matter. This was a case where a South African dramatic society wanted licenses to perform three plays in Johannesburg against the wishes of the authors who did not want their works to be performed in segregated theatres (Steyn 1969).

Despite concern about the amount they are paying in royalties for copying South African educational Institutions have never approached the Copyright Tribunal. There are three possible reasons for this. One may be concern about the legal costs of such an approach. Another may be uncertainty about what principles the tribunal will apply when fixing a reasonable royalty for educational copying. A third may be that approaching the tribunal to determine a royalty could be taken as accepting, what some currently dispute, that any copying of copyright material by an educational institution attracts royalty payment and that the exceptions in Chapter 1 of the Copyright Act apply only to individuals and not to institutions.

DATABASES LICENCES

A form of information that does not fall under the copyright royalty regime, is information contained in electronic databases. While much of the information in these databases is covered by copyright, how much is charged and how the information may be used is governed by contract. It seems unlikely that these contracts fall under the copyright tribunal. It is also not clear that the fair use provisions in domestic legislation apply to them. These are issues that will need to addressed in legislation.

INTERNATIONAL PRESSURES

It appears that in South Africa the collecting agencies have the upper hand when it comes to charging royalties for educational copying of material. It is possible, of course, that increasing royalty payments will eventually result in educational institutions getting together to campaign relief. They could do this by asking the copyright tribunal to reduce the royalties, by asking the courts to clarify the meaning of the exceptions and limitations in the Copyright Act or by asking Parliament to amend the legislation. Given the country's need for education and the publishing houses' need for income, it is unlikely that a confrontation between copyright holders and copyright users can be completely avoided.

Countries such as South Africa, however, are not free to treat its educational institutions too generously when it comes to copyright royalties. Much of the copyright in educational material is owned by foreign individuals and publishing houses. These can, through their governments, argue that provisions for reduced-royalty or royalty-free copying are a contravention of a country's international obligations.

The United States, through the Office of the Trade Representative. has been particularly active in protecting their citizens' intellectual property interests. Informal approaches to the government of a country that is seen to be offending may be followed by a country being placed on the Special 301 list of countries that, in the opinion of the Trade Representative, do not have effective protection for intellectual property rights. Appearing on the list can result in Congress withholding trade benefits and even, in serious cases, in the matter being taken to international dispute settlement.

CONCLUSION

It seems inappropriate that business interests should be able to play such an important part in how countries regulate special cases of intellectual property law. .This seems, however, unavoidable while there is no clarity about the meaning of the 3-step test in international law.

Vigorous academic discussion about the meaning of the test could result in some sort of international consensus. Alternatively, there could be some of form of more detailed

international agreement as to what the test means in particular situations.

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Section 2 of the South African Copyright Act of 1978 recognises eight different categories of material in which it is possible to hold copyright. This paper deals mainly with copyright in published material with the emphasis on its use for education in South Africa.

Institutions often encouraged this process by rating academics on the basis of articles in the more prestigious journals and books published by the more prestigious publishing houses.

This is not the place to ask whether publishers can justify this claim. It is possible, however, that any decrease in the sale of books is because potential buyers prefer to spend their money on other information and entertainment media such as magazines, cinema and material delivered electronically,

Sections 55 and 56 the Patents Act 57 of 1978 do allow for a compulsory licence of a patent but these are granted by a commissioner of patents in particular cases, not by legislation.

In 2002 *Sunday Times Business* reported that a dispute over the royalty asked for downloading a ringtone was going to the Copyright Tribunal. There were no further reports, presumably the dispute was settled.
http://www.suntimes.co.za/2002/06/09/business/technology/tech01.asp

In 2001 the Universities of the United Kingdom challenged the Copyright Licensing Agency over the royalties the Agency was charging. The cost of the proceedings was something the Chairman of the Tribunal mentioned as concern.

http://www.patent.gov.uk/copy/tribunal/tribnews4.htm
Arbitration of a dispute by agreement between the parties is always a possibility and is expressly allowed for disputes over broadcasting royalties by Section 9A of the South African Copyright Act. But arbitration is not necessarily less expensive than as shown by a recent South African arbitration which ran up more than R44 million in costs.
http://www.persfin.co.za/index.php?fSectionId=707&fArticleId=3318364

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