CLA Evening Meeting

Title: **Harmonisation By Stealth – Copyright and the ECJ**

Speaker: **Lionel Bently**

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The following is a summary of the presentation given by Lionel Bently.

The Limits of Harmonisation

- In contrast to trade mark law, it was not thought possible or necessary to have full harmonisation of copyright law within the EU.

- Subsequently, several EU directives have dealt with aspects of copyright law that are important for the internal market, providing partial harmonisation (but falling short of a full code).

The ECJ's Case-Law Extending Copyright

- Through its judgments, the ECJ has expanded the harmonisation of copyright law in four areas:

1. *Originality*

   The Commission Staff Working Paper on the Review of the EC Legal Framework (SEC(2004)995) considered questions on harmonisation of EC law, and included a clear statement that the concept of originality was not harmonised (save for the need to take account of the special features or technical nature of the category of work in question).

   Case C-5/08 Infopaq Int v Danske Dagbaldes Forening (2009). The ECJ considered which aspects of a newspaper article (from which 11 words had been reproduced) were original, and defined originality as "the author's own intellectual creation". Although this was a dramatic move on the part of the ECJ, the judgment might only have been applied in an infringement context.

   Case 393/09 Bezpečnostní softwarová asociace (2010). In this case, the ECJ appeared to harmonise originality for subsistence of copyright.

   Case C-604/10 Football Dataco Ltd and Others v Yahoo! UK Ltd and Others (2012). The judgment affirmed that there had been harmonisation of copyright originality, and the judgments in *Infopaq* and *Bezpečnostní softwarová* were cited with approval.

2. *"The Work"*

   There has been some explicit harmonisation of this concept in "vertical directives", including the Computer Programs Directive, the Database Directive and the Rental and Lending Rights Directive, but still no complete harmonisation by legislation.

   Case C-393/09 Bezpečnostní softwarová asociace (2010). The ECJ provided guidance for the identification of a "work" within the Information Society Directive, and simultaneously collapsed the concept of a "work" into its originality concept of

intellectual creation: the graphic user interface in question could be protected as a "work" if it was the author's own intellectual creation. The suggestion that this is an attempt to harmonise the concept of a "work" might be an over-reading of this case, but subsequent case law confirms otherwise.

Case C-403/08 FAPL (2011). The ECJ found that Premier League matches were not "works" in which copyright could be claimed, because they are rule governed and not an author's "intellectual creation". This decision confirms that the ECJ is defining the concept of a "work" at EU level.

3. *Designs*

The Designs Directive leaves member states with the discretion to decide the extent of protection conferred on a copyright owner, including the level of originality required for protection.

Case C-168/09 Flos SpA v Semeraro. The ECJ found that although the Designs Directive left member states some discretion, it did not extend to the term of protection, which was fully harmonised by the Term Directive. The ECJ judgment also suggested that any design that could be classed as an "intellectual creation" would have copyright protection under the Information Society Directive (even though the Information Society Directive is expressed to have no effect on design rights).

4. *Ownership*

Case C-277/10 Martin Luksan v Petrus van der Let (2012). The ECJ considered the question of initial ownership of a cinematographic work. Austrian legislation gave exploitation rights to the owner of a film, and defined the owner as the producer. The ECJ found the Austrian provisions to be incompatible with EU law, relying on the Rental Right and Lending Directive and the Copyright Term Directive to define the initial owner as the author, and the author as the principal director of the film. The ECJ referred to Article 17 of the Charter of Fundamental Rights to bolster its decision, "national legislation denying the principal director his rights would be tantamount to depriving him of lawfully acquired IPR". The ECJ added that had the Austrian provision taken the form of a rebuttable presumption of transfer to the producer, it would have been compatible with the directives.

- There are also examples of the ECJ being presented with the opportunity for further harmonisation, but declining to take it:

Case C-283/10 Circul Globus Bucuresti (2011). Unusually, the ECJ found that the definition of a "public performance" had **not** been harmonised, and declined the opportunity to further harmonise copyright law within the EU.

Harmonisation by "stealth"

- It has been suggested that the ECJ is harmonising "by stealth". However:

The ECJ is responding to national references. The ECJ does not set its own agenda, and requires national litigation followed by a national court reference for opportunities to opine on copyright law. Although the national courts have a degree of freedom in their responses, they may be influenced by national observations within references.

Varying judges and courts hearing cases in which harmonisation has deepened. A number of cases in which harmonisation of copyright law has been deepened came from the 3rd Chamber of the ECJ with Malenovský as rapporteur judge. However, the cases that deepened harmonisation the most were heard in other courts with different judges.

Harmonisation Techniques

- The ECJ has used several harmonisation techniques

  Autonomous meaning. If a references asks the meaning of something, a European meaning is required unless there is express reference to national law in the reference. This is not specific to copyright law, and means every concept in a directive has the potential to be harmonised.

  Dismissing other sources. References to the Commission Staff Working Paper were dismissed by the Advocate General because it was not a legal authority (and perhaps, because it did not suit the agenda of the ECJ).

  International law. The Berne Convention was referred to by the ECJ in *Infopaq*. The logic of the court seemed to be that because originality had been harmonised in international law, it was harmonised in Europe. This may be misguided because the Berne Convention still tolerates different concepts of originality.

  Systematic interpretation. The ECJ has been prepared to read across directives and generalise, a good example being the use of the "intellectual creation" concept for different directives.

  Rewriting the question. This is the most stealthy of the techniques, and is exemplified in the *Bezpečnostní softwarová asociace* case. The ECJ stated that even if a national reference was a limited question, it would "not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may enable it to rule on the case before it…".

  The Charter. References to the Charter of Fundamental Rights are made by the ECJ, in situations when it is not necessary to the decision to do so, for example in the *Martin Luksan* case.

Other explanations for the ECJ approach

- There is no specific ECJ copyright agenda, rather a general tendency of the ECJ to expand its own role and deepen harmonisation. This is consistent with the suggestion that the fundamental principles of EU law were developed by the ECJ.

- The ECJ is just fulfilling its role as a court and seeking to give the best answer it can. That answer is the one that fits best with clearly-stated norms.

Implications of the ECJ approach

- *Implications of the 'autonomous meaning doctrine*.' Numerous pieces of European legislation refer to 'authorship', so the ECJ will need to define authorship (and in turn co-authorship).

- *Moral Rights*. Moral rights are currently not harmonised and member states have the discretion to confer moral rights on authors. Following the *Luksan* case the argument could be made that the exceptions and exclusions for moral rights fall to be determined by EU law, and as such authors denied moral rights contrary to EU law could claim expropriation of their property under Article 17 of the Charter on Fundamental Rights. The ECJ chose not to protect moral rights absolutely in *Case C-70/10 Scarlet Extended v SABAM* (2011), but left the question of which rights are protected under Article 17 open.

Advantages and Disadvantages of the ECJ approach

- *Advantages*

  Harmonisation of copyright would be difficult for the European legislature to achieve, because of the political sensitivities between common law and civil law systems. The Commission acknowledged these difficulties in its Staff Working Paper. The ECJ is prepared to grapple with these sensitivities, and is arguably achieving legitimate outcomes in a way that the legislature would find very difficult.

- *Disadvantages*

  The ECJ is side stepping the European legislative process. National rules legitimately created by the legislature are being undermined by the ECJ. Whether it is appropriate for the ECJ to expropriate a role left to member states by the legislature and to redefine legislation, after its limits have been defined, is questionable.

  The transitional period during ECJ harmonisation causes uncertainty. The status of national court decisions becomes unclear, and national legislation potentially becomes inconsistent with EU law. An example of this uncertainty is the previously clear distinction between copyright and design rights, which recent ECJ decisions have blurred.