THE MAIN FEATURES OF COPYRIGHT PROTECTION IN THE VARIOUS LEGAL SYSTEMS

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I Introduction

IN THE field of copyright the two legal systems which are traditionally contrasted with each other are the common law system, exemplified by the laws of the United Kingdom and the United States of America, on the one hand, and the continental or civil law (sometimes called the Roman) system, on the other hand, of which the French law is, perhaps, the best example.

II Historical retrospect

It will be helpful to start with a brief historical survey. The idea of copyright protection only began to emerge with the invention of printing, which made it possible for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the appearance of a new trade—that of printers and booksellers, in the United Kingdom called "stationers". These entrepreneurs invested considerable sums in the purchase of paper, in buying or building printing presses, and in the employment of labour, involving an outlay which could only be recouped with a reasonable return over a period of time. In this situation, without any form of protection against competition from the sales of unauthorised copies, the investment in the printing and selling of books was a precarious

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and speculative venture, and many were ruined. The pressures grew for some form of protection; and this came in the shape of privileges granted by the various authorities; in the United Kingdom and in France by the Kings; and in Germany by the Princes of the various states. These privileges gave the beneficiaries exclusive rights of reproduction and distribution, for limited terms, with remedies available for enforcement by means of fines, seizure, confiscation of infringing copies, and possibly damages. The resulting situation exhibited many of the basic features of the copyright system as we know it today.

By the end of the 17th century the system of privileges—*i.e.*, the grant of monopoly rights by the Crown—was being more and more criticised and the voices of authors asserting their rights began increasingly to be heard; and this led in England in 1709 to what is acknowledged to be the first copyright statute—the Statute of Anne. The object of this law was expressed in the long title of the Bill as being for the encouragement of learning and for securing the property of copies of books to the rightful owners thereof. Its principal effect was to provide that the author of a book enjoyed the sole right to print and publish it for 14 years from the date of its first publication; he could, of course, sell that right; and usually did, to a bookseller. The Act also provided that at the end of that first period of 14 years a second protection period commenced which again belonged initially to the author, if living; so that the overall effect was to create a period of copyright protection running for 28 years from the date of first publication. In the case of books already printed when the Act was passed, there was a single period of 21 years protection. The emphasis of the Act was therefore on the protection against unauthorised copying of published works, and in practice the principal beneficiaries were the publisher/booksellers. It should also be noted that the Act imposed both a registration and a deposit condition; published books had to be registered at Stationers Hall, and copies had to be deposited for the use of universities and libraries (rising ultimately to a total of nine).

In the 18th century there was continuous dispute and litigation over the relationship between copyright subsisting at common law and copyright under the Statute of Anne. This was finally settled by the House of Lords in the case of *Donaldson* v. *Beckett* in 1774 which ruled that at common law the author had the sole right of printing and publishing his books, but that once a book was published the rights in it were exclusively regulated by the statute. This common law right in unpublished works lasted until the Copyright Act 1911, which abolished it; and today in England copyright subsists solely by statute.

In France the evolution from the system of privileges to a system of copyright was part of the general changes in French life brought about by the revolution, which abolished privileges of all kinds including the privileges of publishers; and in 1791 and 1793 the Constituent Assembly passed two decrees which laid the foundations for the French copyright system. The decree of 1791 secured for the author a right of public per-

formance throughout his lifetime, and for 5 years after his death for the benefit of his heirs or assignees; and the decree of 1793 gave the author an exclusive right to reproduce his works throughout his lifetime and for 10 years after his death for the benefit of his heirs and assignees. We can see immediately a difference in approach from that of the Statute of Anne. In France these rights are described as "authors' rights" and are enjoyed throughout the author's lifetime and do not depend upon either publication or compliance with formalities such as registration.

However, both in England and in France, the rights were seen essentially as property rights, simply securing for the author or his heir or assignee the economic value of the work protected.

The next development to note was the appearance in Germany of philosophic concepts by philosophers such as Kant, who saw in copyright or authors' rights not merely a form of property securing an economic benefit for the author or right owner, but they regarded an author's literary and other creative work as an extension of, or reflection of, the author's personality, in respect of which he was entitled by natural justice to be protected as a part of his personality; and this concept greatly influenced the development of copyright in continental Europe and in particular led to the development of the *droit moral* (the non-economic rights of authors).

To complete this brief historial survey one should turn to the United States of America and observe that until 1976 when the current United States Copyright Act was enacted, the law of copyright in that country was closely based upon the original provisions in the (UK) Statute of Anne. Thus, the first federal American law, enacted in 1790, provided for the protection of books, maps and charts for a period of 14 years from the first publication, which could be renewed for a further term if the author was still alive on the expiry of the first term, and subject to strict requirements of registration and deposit. Those features remained in the United States law until 1976 when the present law was enacted which changed the duration of protection to the life of the author plus 50 years, thus bringing it into line with virtually all other countries with copyright laws; however, the 1976 Act still retains the requirements of registration and deposit which have their origins in the Statute of Anne of 1709.

III Conceptual difference in two systems

Before we turn to an examination of the present copyright laws in the Anglo-United States systems on the one hand and the civil law systems on the other, let us attempt to summarise the essence of the conceptual differences between them. The common law countries treat copyright, in effect, as a form of property, capable of being created by an individual or a corporate author, and once created, susceptible to commercial exploitation in the same way as any other form of property, the component rights being exclusively directed to securing enjoyment of the economic potential of the property. In civil law countries the author's right is also regarded as having

"property" characteristics, and the copyright law seeks to protect the economic content of that property to the same extent as does the common law system; but, and herein lies the difference, there is an added dimension to authors' rights, *i.e.* the intellectual or philosophical concept that the work of an author is an expression of his personality which by natural justice requires protection just as much as the economic potential of the work. Let us now look at how these different approaches show themselves in the two systems in practice.

The first difference is one of terminology. In common law systems the protection is described as "copyright", whereas in civil law systems the expression is "author's right". Thus, in common law systems the right is related to the work or the property, whereas in civil law systems it is related to the individual creator of the work or property.

The next distinction flows, in a sense, from the first. Under the philosophy of civil law countries, notably France, only an individual can be the author of a work protected by copyright; and in the legislation of such countries, although it is recognised that works brought into existence otherwise than by individual authors—for example, films created by a film company or a sound recording created by a record producer—are entitled to protection, that protection is never described—indeed, cannot be described—as an author's right. The term used is "neighbouring right", *i.e.* a right analogous to an author's right. In common law legislation on the other hand, the protection which is given to broadcasts, audio-visual works, sound recordings, is described as copyright; and the "author" of such works may be—indeed, usually is—not an individual but a corporate body.

Another marked difference is the treatment given by the two systems to the ownership of copyright. Consistent with the concept that copyright is an author's right, the laws of civil law countries always vest the copyright in the author and there are no exceptions, we think, to this general principle. But in common law countries, while it is normal practice to declare as a general rule that copyright vests initially in the author, it is also usual to qualify that by enumerating a number of special cases where the copyright vests in some person other than the author, unless he has secured by an express contractual term that it should vest in him. Thus, both in the United States and in the United Kingdom copyright laws, there are provisions which stipulate that where an author is employed under a contract of service and produces a work in the course of his employment, the copyright in that work will initially belong to the employer and not to the author unless the latter is able to reserve by contract the copyright to himself.

One of the most frequently cited examples of the difference between the two systems is the treatment of the rights in films. In the Copyright Act 1957 of France, article 14 provides that "authorship of a cinematographic work shall be deemed to belong to the physical person or persons who brought about the intellectual creation thereof". It goes on to pro-

vide that in the absence of any other evidence, the co-authors of a film are deemed to be, (*i*) the author of the script; (*ii*) the author of the adaptation; (*iii*) the author of the dialogue; and (*iv*) the author of the music. If the film has been adapted from a pre-existing work, then the authors of that original work are also treated as co-authors of the film. In other words, under the civil law concept, every individual whose protected contribution is incorporated in the film is a co-author, and thus the conceptual philosophy of French *droit d'auteur* is respected. But the French are practicable people as well as being philosophic, and article 17 of the Copyright Act provides that the authors of a film are bound to the producer by a contract which, in the absence of a clause to the contrary, shall constitute the transfer to his benefit of the exclusive right of cinematographic exploitation. By this provision the French recognise that, in practice, it is essential for the rights of exploitation to be vested in one person or entity if they are to be exploited commercially with success. In the United Kingdom the treatment is conceptually different but almost identical in result. The Copyright Act 1956 provides in section 13 that copyright subsists in a film quite separate and distinct from the copyright which may subsist in the various constituents that have been incorporated in the film—the script, the music, and so on; and that the copyright which subsists in the film belongs initially to the maker of it, who is defined as the person by whom the arrangements necessary for the making of the film are undertaken. But there is another important provision in the United Kingdom law, in section 16(6), which expressly provides that where copyright subsists, *inter alia*, in a film, that copyright does not affect the copyright in any literary, dramatic, musical or artistic work from which the film is derived, and that in effect the two copyrights are additional to, and independent of, each other. The effect of these provisions is that a film producer must acquire by contract from all the contributors to the film all the rights he needs for the ultimate commercial exploitation of the film as a whole; and we think that it can be claimed with some justification that in this particular case the common law treatment is more protective of the author's rights than the civil law treatment, because in the latter there is a statutory presumption that the individual authors transferred certain rights to the film producers, and if they do not expressly reserve those rights or expressly attach conditions to such transfers, then their rights are lost by default; whereas in the United Kingdom (*i.e.* the common law treatment) there is no such presumption against the author; the producer must take the initiative and aquire the rights by express contractual arrangements.

Another distinction sometimes mentioned between the two systems is that in civil law countries authors' rights come into existence automatically immediately the work has been created, and this is not conditional in any way upon compliance with any formality requirement. It is true that in the past, as has been explained above, in common law countries copyright did depend upon compliance with registration, deposit and other requirements. Today, however, this distinction has largely

disappeared. In the United Kingdom there are no formality requirements; copyright arises automatically when an original work has come into existence; there is only a requirement that it shall have been reduced to writing or some other material form. This requirement does not reflect any conceptual difference, but simply recognises the practical consideration that if a work, claiming copyright protection, has not been fixed in some form by which it can be identified, then there are obvious practical difficulties in knowing exactly what is protected. So, certainly in the United Kingdom, we do not think that there is any conceptual difference so far as this particular feature of copyright is concerned. In the United States the Copyright Act 1976 still requires registration and deposit, so that there is certainly a difference, but in this instance it is now virtually alone and does not represent the approach of common law countries generally.

Perhaps the most significant difference between the two systems lies in the respective approaches to moral rights. In the [French] Copyright Act article 6 declares:

> The author shall enjoy the right to respect for his name, his authorship and his work. This right shall be attached to his person. It shall be perpetual, inalienable and inprescriptable. It may be transmitted mortis causa to the heirs of the authors. The exercise of this right may be conferred upon a third person by testamentary provisions.

In the Berne Convention the author's moral rights are described in article 6 ***bis*** in the following terms:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

It is true that in the copyright laws of the United Kingdom, the United States and other common law countries, there are no provisions which expressly correspond to either the Berne provision or article 6 of the French law. Nevertheless, in common law countries, much of the protection intended by these *droit moral* provisions is given by other legislation or general jurisprudence, and in particular, by the laws relating to defamation, unfair competition and passing off; so that the United Kingdom has always contended that although its copyright law itself deals with these matters, nevertheless they are very largely covered by the general law and jurisprudence of the country. However, it has been recognised in the United

Kingdom and in other common law countries that express provisions should be included in the copyright law and it is expected that when new legislation is enacted there will be clear provisions corresponding to those in the convention and the French law.

Two other examples of the differences between the two copyright systems should, perhaps, be mentioned. First, the use of what is known as compulsory or statutory licences. These are cases where the author's exclusive and unfettered right to decide whether or not his work should be used in a particular way, is modified by law, and his right to withhold his permission is taken away from him and he is left simply with a right to remuneration. There are cases of compulsory or statutory licences in both systems, but it is true that common law systems make greater use of them than do the civil law ones. For example, under the copyright law of the United States there are four cases of such compulsory licences:

(*i*) for the recording of musical works;

(*ii*) for the public performance of music by means of juke boxes;

(*iii*) for the cable distribution of copyright works contained in broadcast programmes; and

(*iv*) for the broadcasting of copyright works by public broadcasting entities, principally those providing educational broadcast services.

In all these cases not only is the author's right of control taken away from him, but although he remains entitled to remuneration, his right to fix that remuneration is also removed from his power and vested in a statutory arbitration tribunal. By contrast, the imposition of compulsory licences of this kind is much more limited in France. There is no instance of such a licence in the original text of the (French) Copyright Act but in a recent amending Act of 1985 a compulsory licence has been established in respect of the private audio and video reproduction of protected works.

The final example of the difference between the two systems which deserves mention is the recent tendency in common law countries to establish a statutory arbitration tribunal to determine disputes between authors and copyright owners on the one hand, and users on the other, over the terms and conditions on which users may obtain licences. Such a tribunal was established in the United Kingdom by the Copyright Act 1956; its jurisdiction is limited in several ways, *viz.*, *first*, the tribunal's jurisdiction may only be invoked when the rights in question are administered collectively—in effect, by a monopolistic body; *second*, the jurisdiction is limited to cases involving the public performance, broadcasting and cable distribution rights. In France there is no such special tribunal to which users have a statutory right to apply. However, we understand that, in the last resort, the ordinary courts would have power to review the terms and conditions which a monopolistic body collectively administering a particular category of rights decided to attach to the grant of its licence.

The foregoing summary shows that there is a very real difference

of intellectual approach to copyright as between the two systems. In practice, however, we believe that these conceptual differences seldom have much significance. Moreover, within both systems, there are quite marked differences between one country and another. In the civil law countries, for example, there is a significant difference between the French and the German law.

In Germany there are two laws dealing with copyright, *viz.*, (*i*) the copyright statute itself which is a comprehensive code of the rights which subsist under German law; and (*ii*) a separate statute dealing with the administration of copyright. Both laws were enacted on the same date (9 September 1965), the latter supplementing the former. The administration statute agencies which administer authors' rights on a collective basis, require official authorisation and are required under article 11 to grant licences to anyone requesting a licence in respect of the category of rights administered by the particular agency provided the applicant is prepared to pay the remuneration demanded by the agency; and if there is a dispute regarding the terms of the licence offered by the agency, article 14 of the administrative statute makes provision for statutory arbitration. These provisions are not limited to certain classes of rights, as are those in the United Kingdom which have just been described, relating to the Performing Right Tribunal; so that, in effect, in Germany where authors' rights are collectively administered, there is a much wider (virtually unlimited) use made of compulsory licensing and statutory arbitration procedure.

In the common law countries, there is also by no means common practice; in the United States, for example, the Copyright Act does not contain provisions corresponding to those in the United Kingdom Act which establish the Performing Right Tribunal and collective administration agencies are not by the Copyright Act of the United States subjected to the same kind of control as they are in the United Kingdom and, as just mentioned, in West Germany. It may be added however, that under the anti-trust laws of the United States, the operations of the American composers' societies, ASCAP and BMI, are subject to quite rigiorous regulation and supervision.

It must also be remembered that both common law and civil law countries belong to the Berne Union. Indeed, the archetypal examples of the two systems, the United Kingdom and France, were among the founding members of the Union, and their respective copyright statutes, in the various texts which have been in force throughout the hundred years life of the Union, have been regarded as each providing protection for authors' works in conformity with the common standards prescribed by the Union.

Another reflection is that today when the commercial exploitation of rights of copyright and neighbouring rights takes place not within a single country or group of countries but on a worldwide basis, the contracts regulating this vast international business which are drawn up in different countries by lawyers primarily familiar with the national law,

are in practice satisfactorily effective throughout most countries of the world irrespective of whether they originated in a common law or civil law country.

Finally, it may be commented that for a country contemplating new copyright legislation, it is more important to ensure that the legislation harmonises with the general jurisprudence and the main body of statute law within the country with which the judiciary, the legal profession, and the businessmen, will be familiar, than it is to draft a law on the basis of copyright intellectual concepts which are alien to the legal philosophy and practice of the country. In short, in countries like Malaysia or Singapore, which have inherited common law jurisprudence, it would be sensible to enact copyright legislation which harmonised with that background; whereas, in a country, for example, Vietnam, with a civil law background, it would be more appropriate to model copyright legislation on statutes from countries within the civil law system.