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Scientific publishing and copyright

by Willi Egloff

I have been asked to give an overview on European copyright as far as scholarly publishing is concerned. "European copyright" means several international copyright treaties as the Berne Convention, the Rome Convention, different WIPO-Treaties, several EU-directives and 27 different copyright laws in the 27 European member states. Such an overview could therefore be rather long. However, there is a common base and there are common rules. My presentation concentrates on these common aspects.

1. The notion of "artistic and literary work"

I shall start with the most important notion in copyright: the artistic and literary work. Copyright protects works of arts and literature. These works can be fixed in any medium of expression, in any form, in writings, books, film, video, musical compositions, lyrics, computer programs and so on. Artistic and literary works does not only mean fine art and belles-lettres. It also means plans, sketches, commercial, technical and scientific writings and applied art. It does not depend of quality or value: It means masterpieces as well as products of bad taste.

However, "work" does not mean "text", does not mean "illustration", does not mean "data", does not mean "information". "Work" is something more. The definition varies in the different copyright legislations; it may be described as originality, novelty, individuality, singularity or by other cognate terms. It does not refer to the content, but to the form of presentation. "Work" in the sense of copyright legislation is an intellectual product whose form of representation is particular, individual, original, new.

Copyright protects the form of presentation, not the content. It protects a novel, but not the storyline. It protects a painting, but not the painted item. It protects a

photograph, but it does not prevent anybody else from taking another picture of the very same object. It does not protect taxonomic information, but articles and books, as far as they are original. You can find that, for example, expressed in the Slovak Copyright act, where section 7 paragraph 3 reads as follows: “No protection under this Act shall extend to any idea, procedure, system, method, concept, principle, discovery or mere information that has been expressed, described, explained, illustrated or embodied in a work”.

This is not absolutely correct as far as the UK Copyright is concerned: In British law, copyright is not only guaranteed for works but also for “typographical arrangement of published editions”. Such a typographical arrangement may be protected, even if there is no individuality in this arrangement. This may result in the fact, that a pdf-file can be protected by copyright in Great Britain, whilst it is not in the rest of Europe. But keep in mind that this is the exception and not the rule. The rule is that copyright does not protect content and it does not protect standardized print forms; it protects works because of their individual form.

Every text, every plan, every photograph that is not a work is, from the copyright point of view, in the public domain. It can be used by anyone without any restriction. The same applies to works whose protection has expired, i.e. in most European countries 70 years after the author’s death. It does not matter if there is a copyright sign on the text or not: A text or an illustration that does not qualify for a work is not protected by copyright, even if there is a huge copyright sign on the publication.

2. Making use of protected works needs an authorisation

For every publication that does qualify as a work and whose protection has not expired, there is a copyright protection. This means: you need an authorisation if you want to make use of it. You can get this authorisation by two means: by an individual permission or by a legal licence.

But: You need an authorization if you want to make use of it. “Make use of a work” means to copy it, to distribute it, to communicate it to the public, to make it available on the internet and so on. But it does not mean to consume it. You may read a book, you may see a film, you may listen to music. You may consume works without any

authorisation of the rightholder. Consumption of works is not part of the copyright. Nobody can prevent you from consuming a work on the basis of copyright law. They only can prevent you from copying it, from distributing it, from making it available to the public. That is what you need an authorization for, an individual permission or a legal license.

Individual permission means that the rightholder gives you the authorisation of what you may do with his work and by what conditions. The rightholder decides on how many copies you may make, to whom you may sell or show the work, for how long you may make use of it, how much you have to pay and so on.

The rightholder can also decide to give a general permission for the use of his work. This is the way that is practiced in the environment of commons. The authors or the rightholders declare that their work is open for certain uses or even for every use. But these open access declarations are still individual permissions given by an author or a rightholder.

Legal licence means that the authorisation is given by law. The law allows certain kinds of utilisations and prevents the rightholders from authorising or prohibiting these utilisations. The EU-directive on the harmonization of copyright in the information society contains a list of such “exceptions and limitations” to the copyright, which member states are allowed to introduce in their national legislation. These legal licences are often linked to remuneration. The fee is not paid to the rightholder directly but collected by so called collecting societies. The amount of the fee is usually subject to control by a public institution.

The fair-use-clause that you find in US-Copyright law is also a kind of legal licence. It says that the use of a work is allowed without the rightholders authorization if certain criteria are fulfilled. The difference to European legal licences lies in the fact that this exception clause is based on a case-to-case-examination. It is not necessarily linked to a predefined objective of the use of a work and it is never linked to remuneration. The result of this case-to-case-examination is much less predictable than it is the case with respect to legal licences in European law.

3. Scholarly publication in the Gutenberg area

Let us think for a moment on the good old times when scholarly publishing meant the publication of texts and pictures in printed form. Most of the published texts and pictures were individual and thus protected by copyright. They were sent as books and journals to libraries, to individual scientists and to other interested persons around the world. Everyone who had a physical access to a copy of these publications could read them and make use of the content for his own scientific work. Nobody had to ask for an authorization in order to do this scientific work. Reading of books and journals, gathering information, borrowing documents in a library or in a documentation centre does not mean to make use of that work in the concept of copyright. It is consumption of works, not use. So you do not need any kind of authorization.

Of course, you need a permission, if you want to copy a printed work. But the restricted form of use that is practiced in this world of printed matter - copying excerpts of books or journals and so on - is covered by legal licences in all European countries. Art. 5, par. 2, lit. a of the above mentioned EU-directive reads as follows: „Member States may provide for an exception to the reproduction right in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects”. You will find this copyright exception in the national copyright legislation of every single European country. On the basis of these and some further exceptions, there was little impact of copyright restrictions on traditional scientific work.

4. Scholarly publishing in the digital area

Things have changed in the digital world. When you read an electronic book or an electronic journal on a screen, you copy it. If the information is presented in form of an audiovisual work, you have to screen it in order to make available this information. If a library does not borrow you a book, but sends you a file, it copies the work. And when you download that file from the net, you copy it once again. So, what was consumption of works in the traditional scientific world becomes use of works in digital and audiovisual procedures. And for this use, you always need an authorization, either an individual permission or a legal licence.

You need a double permission if you work in the UK as there is not only the protection of the work, but also the protection of the typographical arrangement. This is the legal basis for several standard licence agreements between editors of scientific journals on the one hand and authors or users on the other: They often say that the author may re-use the article but not in the published pdf-form. This may seem a quite normal agreement under UK-copyright, but it is a very strange practice in the eyes of continental author's right, as there is no protection at all of such standardized print formate in most national legislations on the continent.

But there is another important point: Not only the form of publishing has changed but also the form of scientific work. You often work in groups, you are connected to other researchers in other countries who work on the same items, you spend a lot of time on meetings and congresses all over the world. You do full text research and data mining in virtual libraries in order to find the information you need. This means: You must have access to a maximum of scientific information wherever you are. It means that works will be copied and copied again and made available for different persons all over the world. This evolution is quite obvious. But the problem is: You can only do it, if you get an authorization.

Of course, you can try to get an authorization for the use of any single journal, book, picture, film or other type of work you need. But then you will never do any more scientific work. You will spend your lifetime by looking for the rightholders that you have to get your permission from and by requiring permissions. Fulltext research, automatic text analysis and so on are not possible on the basis of individual permissions. The only realistic way to make these modern forms of research possible is the introduction of legal licences for research purposes.

5. Existing legal licences

The EU-Directive on the harmonization of copyright in the information society contains two or three of such legal licences for research purposes. Section 5, par. 3 allows the member states expressly to introduce an exception for the use of works for research purposes, as long as this research activity has a non-commercial character. Unfortunately, this possibility is not always transferred into national law. You can find a general exception in the copyright laws of France, Malta and the Nordic countries.

In some country, as in Greece or Slovenia, the exception is restricted to the right of reproduction. That means that you can reproduce the work for yourself but not distribute the copy to your colleague in another university and you may not make it available by internet. In some countries there are exceptions for teaching purposes, but not for scientific research. In the UK and in Slovakia, the use of the copy for research purposes is restricted to the premises of the library or archive where you have found the original. In Hungary, the exception is restricted to analogue reproduction.

The EU-Commission, in its Green Paper “Copyright in the Knowledge Economy”, published in August 2008, expresses its concerns that such differences can constitute a problem “when teachers and researchers carry out their activities in several institutions located in different countries. Depending on the country, identical acts could be legal or illegal.” So the Commission suggest mandatory minimum rules for the research exception.

There is another exception rule in the EU-Directive which allows archives and libraries that are publicly accessible to make such copies. But in this case, the exception must be restricted to the use of such copies and to the making available of works within the premises of the archive or library. You’ll find transformations of these clauses in nearly all national copyright laws in Europe. There are often particularities, special conditions for the application of the clause, restrictions on the extension of the exception with regard to the number of copies, to the persons aimed at by the exception, to the use you may make with these copies. But as the exception is so restricted already on the European level, you will always have the same problem: the electronic way of research, collaboration between different research groups, information exchange and so on is eliminated from the beginning.

6. Maintain the goal of scientific publishing

Let us once again go back to traditional scholarly publishing. With the act of publishing, the article, the plan, the illustration could be used immediately by anyone else for his own research purpose. He or she had only to have access to a copy of the publication. It did not matter, if he or she had bought a copy, had gone to a library where there was a copy, had asked a copy through the library exchange system or

had got it from a colleague. So, the principal goal of scientific publishing was to give access to the largest possible audience by distributing the largest possible number of copies.

From my point of view as a simple researcher, the goal of scientific publishing should still be the same: To make available the results of scientific research to the largest possible audience. To give access to scientific publications to everybody who is interested in these results. And this means, transferred to copyright, to allow everybody to make use of the published works for research purposes. You can contribute to that goal in different ways:

- You can exercise political pressure in your country in order to have your national copyright act completed by a general exception for any use of works for research purposes. That exception should not depend of any qualification of the single work nor of the person who does the research work nor of the institutional organisation of the research nor of the place where the computer is located and so on. It should not be restricted to excerpts or abstracts or other parts of works, it should be applicable for both the analogue and the digital world. It should be just general, in order to allow the researchers themselves to decide on the organisation of their research activities.
- As most legal licences are not applicable to commercial activities, you should refrain from linking your public interest activity to business activities. May be you could earn some money by selling some of your publications, but it will not be a good affair in the long run. This commercial activity will create copyright problems to your core activities because you leave the area of non-commercial research and thereby exclude the applicability of various legal licences.
- As these legal licences probably will not be introduced in very short laps of time, you should declare all your publications as open access publications. Make sure that every publication of your institution is accessible for anyone who is interested in it. Do not restrict the re-use of these publications – except for others' commercial use.

And finally: Take into consideration that copyright is internationally harmonized but that there are still important differences between the copyright legislations of different countries. Make use of this situation by organising your international research work, your publications and the information exchange in order to avoid as many copyright problems as possible. For example: Make sure that you launch your common taxonomic journal in a country that has a far reaching legal licence for scientific publishing, such as France, Malta or the Scandinavian countries.