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BOOK REVIEW

COPYRIGHT AND COMMUNICATION TO THE PUBLIC: A GLOBAL STUDY

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Makeen Fouad Makeen

Copyright in a Global Information Society: The Scope of Copyright Protection Under International, US, UK and French Law

Kluwer Law International 2000, 363 pages

Introduction

[161] The focus of Makeen's monograph is, notwithstanding its more expansive title, squarely upon the development of the exclusive right in copyright of communication to the public. Beginning at the point immediately prior to the codification of copyright in the UK and France in the 18th century, and ending with developments subsequent to the *WIPO Copyright Treaty* of 1996, the monograph details the evolution of the communication *to the public* right from the performance *in public* right. Makeen's central thesis is that, in response to new technologies, the communication to the public right has evolved to entail three aspects. The first is the 'geographic aspect', by which recipients of a copyright work may be dispersed geographically. The second is the 'single rendition/multiple prohibited acts' aspect, by which one performance of a copyright work may give rise to multiple separate communications of that work to the public. And the third is the 'chronological aspect', by which recipients of a copyright work may be communicated the work at a time of their own choosing. The author demonstrates the evolution of these aspects of the communication right in each of the three national jurisdictions chosen, and as a matter of international law under the *Berne Convention* and the *WIPO Copyright Treaty*.

The monograph's organisation is difficult to fault. Divided into seven chapters, each flows logically from one to the next. The first chapter has two parts, and covers the origins of copyright in the UK, France and the USA, and the development of the performance in public right. The second chapter details the expansion of the performance in public right to include communications to the public. Chapters three,

four and five consider (respectively) the application of [162] the communication right to terrestrial wireless broadcasting, satellite broadcasting and diffusion by cable. Chapter six considers the application of the communication right in the context of networked computing, and chapter seven contains some final comments and recommendations.

In substance, too, the monograph is impressive. It is a work of serious scholarship, reflecting its origins as a doctoral thesis, and represents an important contribution to the research and analysis of the communication to the public right. Extensively researched, meticulously structured and clearly written, it will serve as a valuable resource for anyone seeking to understand how copyright law has responded to the challenges of new technologies, and provides insight into how copyright law might develop in the digital era.

Some of the issues addressed by Makeen were of particular interest to me, and it is in respect of those issues that I confine my more specific comments.

The origin of copyright: pragmatism or justice?

Makeen’s exposition of the origin of copyright in the UK focuses on the move away from the regulation of printing *per se* to the recognition of authors’ rights in their works. Hence his description of the *Statute of Anne* as having been enacted following the discontinuation of printing press licences for the main purpose of ensuring ongoing trade regulation, albeit in a different guise (6). This understanding of copyright law as having originated as a pragmatic response to the demands of trade is, however, questionable. Specifically, it ignores the fact that common law copyright existed in the UK prior to the *Statute of Anne*,[2] and that such copyright was based not on pragmatics but on the natural law principle that authors ‘should reap the pecuniary profits from [their] own ingenuity and labour.’[3] The effect of the *Statute of Anne* was merely to codify this copyright in respect of published works to a term limited to 14

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[2] See generally, David J Brennan and Andrew F Christie, ‘Spoken Words and Copyright Subsistence in Anglo-American Law’ [2000] *Intellectual Property Quarterly* 309, 313–316.

[3] (1769) 4 Burr 2302, 2398; 98 ER 201, 252 (Lord Mansfield).

years. In respect of unpublished works, common law copyright continued in the UK until its abolition in 1911[4] and continues to date in the US as a matter of State law.[5]

Makeen also cites pragmatism as the basis of two other developments within Anglo-American copyright jurisprudence. The first of those developments is the extension of the performance in public right to include terrestrial broadcasting, and the second is its extension to include the making available of works through video-on-demand or computer networks. However, the view of copyright as a property right with a natural law basis supports an alternative understanding of these developments. Technology alters the value that copyright adds. Printing, broadcasting and computer networking all require content. New technologies traditionally make possible new transactions between disseminator and recipients for which copyright content is required. For each new use it is arguably a matter of underlying justice that copyright owners and creators should be given some share of the value copyright adds to the transaction.[6]

The communication right, the reproduction right and the right of access

Another issue that Makeen identifies is the move away from the reproduction right as the central right in copyright to the communication right which, he claims, should become the guiding concept for copyright in the new century.[7] That Makeen makes this claim is not surprising given his extensive and persuasive exposition of the communication right — he may well be vindicated if the elevation of the right in the *WIPO Copyright Treaty* 1996 is any indication.

[163] There is, however, a crucial limitation to the communication right which Makeen also identifies: the territorial nature of copyright. In dealing with this limitation, Makeen describes three main approaches for overcoming the private international law consequences of transnational exercises of the communication right. Those approaches involve (respectively) the treatment, as the governing law for any communication, the law of the recipient or 'footprint' country (the Bogsch Theory), the law of the emitting country (the Emission Theory), and a hybrid of the two (the

[4] *Copyright Act 1911* (UK) s 31.
[5] *Goldstein v California* 412 US 546 (1973).
[6] On how much of that value may be appropriated, see Carl Shapiro and Hal R Varian, *Information Rules* (1999) 196–203.

Communication Theory). Makeen is critical of WIPO's ducking of this private international law issue in the lead-up to the *WIPO Copyright Treaty* of 1996 (207) and observes that whilst the EU has adopted the Emission Theory for satellite transmissions,[8] it appears likely to adopt the Bogsch Theory for communications to the public generally.[9] Ultimately, however, Makeen's awareness of the extent of this limitation to the communication right does not affect his view of that right as the guiding copyright concept of the next century.

In addition, Makeen's thesis in this regard pays little attention to the development in copyright law of rights to prevent the circumvention of technical measures.[10] Thus, there has been said to be emergence of an access right through these anti-circumvention provisions.[11] At one point he forcefully dismisses the suggestion that an 'access right' might offer a way forward.[12] Here, in my view, Makeen's conclusion is somewhat premature. An access right places the relevant activity squarely within the territory of one particular jurisdiction and, on its face, overcomes many of the conflict of law problems inherent in the transnational exercise of the communication to the public right. It may well also be that an access right lends itself more flexibly than the communication to the public right to a variety of different business models. Furthermore, and as has been elsewhere observed, there is something inherently consistent in the application of an access right to copyright in the digital age.[13] When the only medium of distribution for works was the printed page, access to works was only viable by being able to access those pages. Thus, in its original context, copyright law operated by giving authors the right to control the number of printed copies available to be accessed and read. The point is that copyright law has always

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[7] Makeen states: 'the future of copyright should be based upon the communication to the public right, and the importance of the reproduction right could fade away': 314.

[8] Council Directive 93/83/EEC on the Co-ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 27 September 1993, OJ l248/15.

[9] Proposed Directive on the harmonisation of certain aspects of copyright and related rights in the information society, OJ C 180, 25.6.1999, 6.

[10] Kenneth W Dam, 'Self-Help in the Digital Jungle' (1999) 28 *Journal of Legal Studies* 393, David J Brennan, 'Locksmiths and Safecrackers in Cyberspace' (2000) 2(1) *Digital Technology Law Journal*: <http://wwwlaw.murdoch.edu.au/dtlj/articles/vol2_1/brennanDTLJ2_1.htm>.

[11] Jane C Ginsburg, 'From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law', *Social Science Research Network Paper Collection*: <http//papers.ssrn.com/paper.taf?abstract_id=222493>.

[12] Page 312: 'the so-called access right adds little or nothing to the communication to the public right'.

[13] See Ginsburg, above n 11.

granted to authors a right to control access. It is my view that Makeen dismisses the emergence of and potential for an access right too abruptly.

[164] **'New public'**

Another issue of interest is Makeen's characterization of the second of the three 'aspects' of the communication to the public right: the 'single rendition/multiple prohibited acts' aspect. This is said by Makeen to require the author's consent for every communication of his work to a 'new public not intended by the original rendition' (315) — a point he illustrates with the following extract from the House Report to the Bill which became the US *Copyright Act 1976*:

> a singer is performing when he sings a song; a broadcasting network is performing when it transmits his performance …; a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcasts to its subscribers; and any individual is performing whenever he … communicates the performance by turning on a receiving set (90).[14]

It must be doubted, however, whether the concept of an 'unintended new public' is really to the point. The concept of a person being in the 'new public' merely because she listens to a song from a radio in a sandwich bar rather than in her car seems to me a strained and imprecise use of language. As Makeen acknowledges, Art 11*bis*(1)(ii) of the Berne Convention[15] reveals that a theory of liability based on the 'new public' concept was rejected in the context of retransmission (242). In my view it should be rejected generally. This is not to say that the second aspect of the communication to the public right identified by Makeen does not exist. Rather, it is to say that 'one rendition' will only give rise to the exercise of the communication right by third parties when those parties intervene to communicate the copyright content to the public for some commercial reason.[16]

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[14] The excerpt is taken from the US House Report on the Bill which became the US *Copyright Act 1976*: H R Rep 94-1476, 62–63.

[15] Article 11*bis*(1)(ii) provides: 'Authors of literary and artistic works shall enjoy the exclusive right of authorizing … any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one'.

[16] See W Cornish, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights* (3rd ed, 1996) 376 and Gummow J's analysis in *APRA v Commonwealth Bank* (1992) 40 FCR 59.

Section 110(5) of the US *Copyright Act 1976*

Makeen devotes some considerable time attacking the US ‘home style’ exception to public performance right, which comprises s 110(5) of the US *Copyright Act* 1976. Makeen undertakes an extensive discussion and analysis of s 110(5), much of which argues that the exception offends the *Berne Convention* (94–110). The exception provided that the right is not infringed if the performance occurs without a ‘direct charge’ by means of the reception of a ‘transmission on a single receiving apparatus of a kind commonly used in private homes’. The exception was intended to permit small business to freely perform broadcast content for the incidental entertainment of their customers, and to codify an earlier holding of the US Supreme Court.[17] Makeen explains that since 1976 the provision has been the subject of various, contradictory lower court decisions. The muddled outcomes from those court decisions (and perhaps the desire to avoid TRIPs violation) motivated the enactment by the US Congress of the *Fairness in Musical Licensing Act* 1998. This provided in new s 110(5)(B) detailed and technology specific exceptions from performance right for the broadcast reception of ‘non-dramatic musical works’ and ‘audio-visual transmissions’. These new provisions provide criteria such as the area of the premises, the number of loudspeakers and the ‘diagonal screen size’ of audio-visual devices. The original provision relating to the use of ‘apparatus of a kind commonly used in private homes’ was also amended to become s 110(5)(A) and has operation only in respect of dramatic musical works, such as dramatic renditions of operas, [165] operettas and musicals.[18]

Makeen notes, under the heading ‘Section 110(5) and the Berne Convention’:

> It is understood that the Irish music industry through the Irish Music Right Association are in the process of filing a complaint with the WTO arguing that section 110(5) contravenes the USA obligations under Berne and TRIPS (108 fn 135).

Makeen’s monograph was published in 2000. It is unfortunate that the timing of publication appears to have prevented Makeen reporting on the outcome of this

[17] *Twentieth Century Music Corp v Aiken* 422 US 151 (1976).

action. The events to which that note relates commenced in April 1997 when the Irish Music Rights Organisation (IMRO) lodged a complaint with the European Commission in respect of s 110(5). IMRO sought the Commission's initiation of a complaint in the World Trade Organisation (WTO) under the TRIPs Agreement, alleging violation by the US of the Berne Convention as a result of the exception. In December 1998 the EC decided to commence such an action in the WTO in respect of s 110(5), as now amended by the *Fairness in Musical Licensing Act* 1998. In June 2000 the WTO Panel's final report was published.[19] That report found that the exception relating to 'apparatus of a kind commonly used in private homes' (now limited to dramatic musical works) in s 110(5)(A) did not offend the Berne Convention. However the Report also found that the specific provisions added by the *Fairness in Musical Licensing Act* 1998 (s 110(5)(B)) did offend Berne.

[18] World Trade Organization, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000, Report of the Panel, 41.
[19] Ibid.