Study unit 2
Is there an international system of copyright protection?

Overview

In this study unit you will determine whether there is an international system for the protection of copyright. You will be introduced to the various international instruments and to the notion of two copyright 'families'.

Learning outcomes

After completion of this study unit you will be able to

- ❑ identify the various international instruments for the protection of copyright
- ❑ understand the relationship between these instruments amongst themselves, and between these instruments and national law
- ❑ understand the basic differences between the two copyright 'families' internationally

Setting the scene

The facts of this episode are those of a decision of the Chancery Division of the High Court of Justice — *The Bodley Head Limited v Alec Flegon (trading as Flegon Press) & another* [1972] RPC 587.

In an action for the infringement of copyright, the plaintiff (a British publisher) sought a court order to restrain Flegon from publishing in English a novel entitled 'August 14', written by the Russian dissident Alexander Solzhenitsyn. The plaintiff claimed to derive its title through Heeb, a Swiss lawyer in whose favour the author had executed a power of attorney. This document had been passed to H in Switzerland through an intermediary. In May 1971, Heeb had entered into a contract with YMCA Press, to whom the author had sent a manuscript of his novel. In terms of this contract, YMCA Press acquired the right to publish a Russian language edition in France. It was published in June 1971. In the same month, Heeb assigned extensive publishing rights in the novel (including United Kingdom

rights of publication and serialization) to Luchterhand, a German publisher. In July 1971, the plaintiff acquired the English translation, publication, and serialization rights for the United Kingdom from Luchterhand, on condition that there would be no published English translation before August 1972. In about July 1971, Flegon published the novel in England in the original Russian text. This was a photographic reproduction of the YMCA Press text. He also proposed to publish an English translation in December 1971. The plaintiff sought to restrain its publication.

Flegon disputed the plaintiff's allegations on the grounds that —

- the publication by YMCA Press in France was not a first publication, as the novel had already been clandestinely published (under a system known as 'samizdat') in a duplicated typewritten form in Russia, which prior publication, by reason of Russia not being a country to which the Copyright Act 1956 extended, prevented copyright from arising in the United Kingdom;

- the court ought not to lend its assistance to a person putting forward claims which were based on acts which he knew to be unlawful according to the law of a foreign country with which the acts were connected;

- the author had under Russian law no capacity to enter into the arrangement with Heeb, and so the agreement with Luchterhand and that between Luchterhand and the plaintiff were invalid; and

- it would be wrong to stop publication by Flegon whilst allowing the plaintiff to continue with its plans for publication.

Brightman J granted the order sought. He held —

- If the first publication of the novel were in France, then copyright subsisted in the novel in the United Kingdom.

- There was no evidence before the court of any clandestine publication of the novel in Russia before the publication in France. It was unnecessary for the

court to decide whether the alleged publication in Russia was merely 'colourable' or 'not intended to satisfy the reasonable requirements of the public', within the meaning of section 49(2) of the Act.

- Neither the various agreements in question nor the power of attorney required anything to be done within Russian frontiers. It did not seem that international comity would be jeopardized if full force and effect were given to the rights acquired by the plaintiff under these agreements.

- It had not been shown that the author did not have the capacity under Russian law to appoint an agent. Any invalidity of the power of attorney under Russian law would stem not from the author's lack of capacity to contract under Russian law but rather from the illegality attached to unauthorized foreign trading. But the contract of agency had not been made in Russia — it was constituted in Switzerland and intended to be governed by Swiss law. The contract had no relevant connection with Russia.

Discussion

An international system for the protection of copyright?

international copyright

It is generally understood that the term 'international copyright' connotes merely a collection of national copyrights conferred on the author by virtue of bi- and multilateral treaties. This is clearly stated by Jon Baumgarten ('Primer on the Principles of International Copyright' in *Fourth Annual US Copyright Office Speaks: Contemporary Copyright and Intellectual Property Issues* (1992) at 470–471:

> 'The term "international copyright" is something of a misnomer, for neither a single code governing copyright protection across national borders, nor a unitary multi-national property right, exists. What does exist is a complex of copyright *relations* among sovereign states, each having its own copyright law applicable to acts within its territory' (original emphasis).

So we now have to determine the sources which regulate these relations between sovereign states. The sources are,

treaties

of course, a number of international agreements (treaties).

Berne Convention

bilateral treaties

Copyright protection on an international level originated by about the middle of the nineteenth century on the basis of bilateral treaties. A number of them were concluded, but they were not uniform or comprehensive.

Berne Union

The need for a uniform regime prompted the formulation and adoption, on 9 September 1886, of the Berne Convention for the Protection of Literary and Artistic Works. This convention is the oldest international treaty in the field of copyright. It is open to all states. Instruments of accession or ratification are deposited with the Director General of the World Intellectual Property Organization (WIPO). Upon accession or ratification a country becomes a member of the Berne Union (article 1).

administration by WIPO

The Berne Convention is administered by WIPO. Its administrative tasks include:

- assembling and publishing information concerning the protection of copyright
- conducting studies and providing services designed to facilitate copyright protection
- making preparations for conferences to revise the convention

revision

The original text of the Berne Convention has been revised several times since its initial adoption. The most recent revision was in 1971 in Paris.

national treatment

no formality

There are three main principles enshrined in the Berne Convention:

- *national treatment* — works originating in one of the member states of the Berne Union must be given the same protection in each other member state as the latter grants to works made by its own nationals (article 5(1))
- *lack of formality* — such protection is granted automatically and is not subject to any registration, deposit, or any formal notice in connection with the publication (article 5(2))
- such protection is independent of the existence or term of protection in the country of origin of the work

independence

(article 5(2)) (there are certain exceptions to this principle)

An appendix to the Berne Convention caters specially for developing countries. They are entitled to introduce to limitations in their national laws:

developing countries

- Once three years have passed since the first publication of a printed work, a competent authority in the country may be empowered to license a national of that country to translate such work into a national language, and publish it, for the purpose of teaching, scholarship, or research (article II of the Appendix). Alternatively, such country may take advantage of a Convention provision (article 30(2)) which allows for the termination of the translation right once ten years have passed from first publication without the copyright owner publishing her own translation (article V of the Appendix).

translation

- If the copyright owner or an associate does not publish a work in a country within a certain period after first publication, the competent authority can license a national to publish (article III of the Appendix).

publication

In both cases, copies of the works in question must be confined to the national market. And any licence must be upon just compensation, judged by the standard of the usual royalty rates between the two countries concerned (article IV.6 of the Appendix).

compensation

Members of the Berne Union can require other members to comply with their obligations by reference of the dispute to the International Court of Justice. While there have been allegations of non-compliance, proceedings of this nature have never been instituted.

disputes

Universal Copyright Convention

The United States of America only fairly recently acceded to the Berne Convention. For long the desire was strong to bring the United States within a general international framework of copyright protection. After the revision of the Berne Convention in 1948 in Brussels, the United Nations

Unesco

Educational, Scientific and Cultural Organization (UNESCO) took the initiative by promoting the Universal Copyright Convention (UCC) of 1952.

The UCC also guaranteed national treatment, but on less demanding conditions about the term of protection, the types of work protected, and the scope of protection (for example, the UCC does not acknowledge any moral rights of authors).

national treatment less demanding

The United States joined the UCC. That country introduced a requirement of notice on published works of foreign authors not first published in America: the symbol ©, the name of the copyright owner, and the year of first publication had to appear on works published in America. Note that these markings are not necessary to secure copyright protection in a member of the Berne Union. Since 1989, then, when America joined the Berne Union these marking requirements no longer apply to foreign authors

formalities

A member of the Berne Union may not leave the Union and then rely on the protection of the UCC, unless it is a developing country (see the Appendix Declaration Relating to Article XVII of the UCC).

The UCC makes special allowances for developing countries (see articles V^{bis}, V^{ter}, and V^{quater}). These allowances are similar to those stated in the Appendix to the Berne Convention.

developing countries

TRIPS Agreement

Professor WR Cornish (*Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 4th ed (1999) § 1-23) writes:

> 'The expansion of trade competition since 1950 has brought ever-increasing advantages to those in the van of innovation. Intellectual property rights, which help to sustain the lead of those with technical know-how, with successful marketing schemes, with new fetishes for pop culture, have come to foster immense commercial returns. The increasing number of patents granted and trade marks registered, particularly in industrial countries, and the upsurge of publishing, record-producing, film-making and broadcasting, stand as some measure of this development. But is some of these fields particularly, success has been accompanied by

> advances in copying techniques which make piracy possible on a scale that is just as new. The resources of existing legal techniques are under considerable strain. This is one reason why today there is a profusion of different and sometimes conflicting demands, some for new and some for improved rights.'

WTO and GATT

One of the first recent occasions for considering the new challenges of advancing technology was the negotiations leading to the establishment of the World Trade Organization (WTO). The General Agreement on Tariffs and Trade (GATT), through the completion of its Uruguay Round, has created the WTO. It administers, among other things, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). (This agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, which was concluded on 15 April 1994 and came into force on 1 January 1995. All states which become members of the WTO become bound to a mutual recognition of a high level of intellectual property protection (article II.2 of the Marrakesh Agreement).

In the present context the following features of the TRIPS Agreement are important:

- *Flexibility of implementation* — members of the WTO are free to determine the appropriate method of implementing the TRIPS provisions within their own legal system and practice (article 1(1)).

flexible implementation

- *National treatment* — each member should accord to the nationals of other members treatment no less favourable than that which such member accords its own nationals with regard to the protection of copyright, subject to the exceptions stated in the Berne Convention (article 3(1)).

national treatment

- *Most-favoured-nation treatment* — any advantage, favour, privilege, or immunity granted by a member of the WTO to the nationals of another country should also be made available unconditionally to the nationals of all other members of the WTO (article 4). Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a member in accordance with provisions of the Berne Convention authorizing that the treatment accorded is

most favoured nation

a function not of national treatment but of reciprocity.

- The TRIPS Agreement incorporates Articles 1 to 21 of the Berne Convention, with the exception of article 6^{bis} on moral rights (article 9(1)).

incorporate Berne

A major step forward has been taken in respect of enforcement. Breach by a member states of the WTO of its TRIPS obligations may lead to the GATT dispute settlement procedure. The outcome of such procedure may, if necessary, be sanctions withdrawing GATT advantages. These may include the suspension of concessions in the same commercial or industrial sector, or even cross-retaliatory measures such as the imposition of quotas or other exclusions on a country's export of goods or services.

enforcement

On 22 December 1995, WIPO and the WTO entered into an agreement in terms of which, among others, substantial legal-technical assistance and technical cooperation are made available to developing countries (article 4) to enable them to adopt the legislation and establish the structures necessary to discharge their obligations under the TRIPS Agreement.

WIPO/WTO agreement

WIPO Copyright Treaty

Since 1991, WIPO convened a series of meeting to explore extensions to the scope of the Berne Convention. These meetings were prompted by rapid advances in technology, especially the establishment of global information networks such as the Internet.

Internet

Professor Cornish (op cit § 9-36) writes:

> 'Over the last five years, the amazing potential of the Internet as a source of on-line services for education, information, entertainment, business and government has flamed around the world and its character has changed rapidly. Parts of it are already being used to supply the stuff of the traditional copyright industries and much more is to come. The publishing, record and film industries face at least partial revolutions in their methods of delivery and they are each searching actively for secure techniques by which material can be obtained from authorised sites only on payment of a fee equivalent to the purchase or hiring of a hard copy of material. At the same time they fear the appearance of pirate sites, and the down-loading and distribution of

> illicit copies, which, on the worst prognostications, could amount to a complete undermining of their commercial positions. However, the possibilities within the new technology for monitoring the use of material is also considerable, and many do not take such a pessimistic view of the future.
>
> Major investigations of the position of copyright material on information superhighways were launched ... internationally ... at WIPO.'

After a lengthy process of consultation organized and sponsored by WIPO, a Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, was convened in Geneva in December 1996 under the auspices of WIPO. On 20 December 1996, the conference adopted two treaties. One of them was the WIPO Copyright Treaty (WCT).

diplomatic conference

For present purposes, these are the main features of the WCT:

- The WCT is a special agreement in terms of article 20 of the Berne Convention (article 1(1)). It is open for signature by any member state of WIPO (article 17(1)). Significantly, the Assembly established under article 15 may decide to admit certain intergovernmental organizations to become party to the treaty (article 17(2)). The European Community has already been so admitted (article 17(3)).

special agreement

- The WCT obliges contracting parties to comply with articles 1 to 21 of the Berne Convention, and with its Appendix (article 1(4)).

intergovernmental organisation as party

- The principles of qualification (see Study Unit 3) stated in articles 2 to 6 of the Berne Convention apply to the new rights accorded by the WCT (article 3).

Berne Convention

The substantive provisions of the WCT will be dealth with in the appropriate study units below.

qualification

Evaluating the WCT, Professor Cornish (op cit § 9-37) writes:

> 'In the end the ... [WCT] made only cautious changes to the international law which will affect copyright on the Internet. That is a desirable outcome, given that the technology is still so novel and its possibilities are

constantly expanding. Beneath the lobbying and in-fighting, lies a complex set of claims about the most efficient ways of eliminating piratical exploitation and about who should bear the costs of organising that process: rightowner and therefore legitimate customer, or those who pay for more general services — notably the customers of telecommunications services. At the same time there is concern that changes are being sought which will interstitially improve the position of rightowners against users across the copyright spectrum. This applies in particular to those (notably scholars, students, and libraries) who in the past have been able to have free access and use of material. In the past owners have accepted (or at least conceded this) as a social contribution in return for the rights granted to them.'

Tunis Model Law on Copyright

Brief mention should be made here of this instrument. An international attempt was made to provide developing countries with guidance in the form of a Model Law. This has become known as the Tunis Model Law on Copyright. It was adopted in February 1976 in Tunis at a meeting of a Committee of Governmental Experts convened by the Tunisian Government with the assistance of WIPO and UNESCO. The meeting was attended by 27 experts from Africa, Asia, and Latin America.

developing countries

The Model Law duly considers the special interests of developing countries both as regards extending protection to fields of special importance to them (such as folklore), and excepting from copyright protection instances where such protection would have produced undue hardship to these countries. To this end, the Model Law allows for a wide range of possible limitations on the author's exclusive rights, in so far as it is necessary for cultural development, especially in the fields of education, scholarship, or research. Here, the Model Law seeks to transpose to domestic laws the special allowances made for developing countries in the UCC and Berne Convention.

folklore

cultural development

The Model Law is compatible with the 1971 Paris revision of the Berne Convention and the revision of the UCC of the same year. Today, the provisions of the Model Law should be approached with caution, as they do not comply in all respects with the demands of the TRIPS Agreement and the WCT.

non-compliance with TRIPS/WCT

Traditionally, a distinction has been made between *droit d'auteur* and copyright — the civil law and the common-law approaches to copyright. Professor Alain Strowel ('*Droit d'auteur* and copyright: between history and nature' in Brad Sherman & Alain Strowel (eds) *Of Authors and Origins: Essays on Copyright Law* (1994) 235) writes:

> 'One the one hand, *droit d'auteur*, often invested with a sacred character, is tied into natural law; on the other, copyright is traditionally considered as a positive right, created by the legislator. In parallel fashion, *droit d'auteur* is often associated with (natural) property, whereas copyright is generally associated with the idea of a legal monopoly.'

droit d'auteur/ copyright

There are three factors which are often said to distinguish between the *droit d'auteur* and copyright 'families':

- *Droit d'auteur* is characterized as a right of property, whereas copyright is seen as having a monopoly basis.
- *Droit d'auteur* is a natural law system, whereas copyright is positivistic.
- *Droit d'auteur* has a synthetic and an open nature, unlike the closed copyright system.

The differences between the two 'families' are reflected in, amongst others, different notions of originality, different rules about the initial ownership of rights, and different approaches to moral rights.

One of the consequences of article 2(2) of the Berne Convention is to facilitate the continued co-existence of these two 'families'. It states:

> 'It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.'

In this course we will deal with copyright systems which belong to the copyright (common-law) 'family'.

Activity 2.1

Traditionally, there has been two comprehensive international instruments to establish an international framework for copyright protection.

- What were these instruments?
- What is the main difference between them as far the requirements for the subsistence of copyright are concerned?
- Which one has gained the widest application on an international level? In what way has it done so? How has the extent of its application increased over the last decade?

After you have answered these questions, read the discussion of this activity in Tutorial Letter 201. This will give you feedback.

Conclusion

You should by now be able to identify the various international instruments relevant to copyright protection, and to determine their relationship to each other. You should also appreciate that copyright, like other intellectual property rights, is *territorial* by nature — the rights of an author in each country is determined by the law of that country, completely independently of equivalent rights governing the sane subject-matter in other countries. From this follows that the rights of an author may be asserted only by the nationals of the country for which they are granted, and by such others as the law also includes. It is for this reason that we have international instruments (essentially, multiparty agreements) in terms of which states undertake to accord copyright protection to the citizens of other states. The principle of national treatment then operates to seek a uniform level of protection for all people, irrespective of their countries of citizenship.