

**Quo vadis, Copyright?**

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# Quo vadis Copyright

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The fourth EBU Copyright Symposium in Barcelona on 31 March 2006

The EBU Copyright Symposium with the groundbreaking title *Quo vadis, Copyright?* was the fourth copyright seminar held by the European Broadcasting Union (EBU), following the previous events in Prague, Vienna and Amsterdam. The list of



participants read like a who's who of European copyright and broadcasting law and meant that an event of high-interest was expected. The participants, who included the executives of the major German collecting societies, were not disappointed. The view over the horizon which EBU Legal Department Director Dr Werner Rumphorst set out in his keynote speech maintained the theory that the world is flat, within the reach of all in this digital age, particularly where the commercial exploitation of copyright-protected material is concerned. Rumphorst emphasized that the immediate needs of broadcasters can be met by effective, collective rights management (retaining the principle of the one-stop shop) and simplification of the procedure for acquiring the necessary rights. He rightly reminded the audience that a balance of interests is guaranteed only if broadcasters are also protected

against unauthorized use of their signals on new media platforms.

The introductory paper in part 1, entitled *The status quo: how did we arrive here?* on the development of copyright law was given by Mihály Ficsor, the former assistant general director of WIPO and the current president of the Hungarian Copyright Council. Ficsor provided a lucid survey of the development of copyright hitherto and the importance of protection of intellectual property in the light of continual globalization. His basic tenets were identical to those of Rumphorst and concluded with the statement that laws protecting owners of intellectual property rights had to take account of all interests and concerns.

The technical director of the EBU, Phil Laven, then explained the development of technical methods of distribution in the light of broadcasters' endeavours to improve possibilities of reception and enlarge their circle of listeners and viewers. His remarks made it clear that, while the Internet posed a major challenge for broadcasting, broadcasting, characterized by fixed times and programme schedules, would still have the edge over every other *experiment in transportation* in future.

The second major topic was *external limitations on copyright* – the “limitations on copyright through competition law and the limitations on competition law through copyright”. Prof. Jan Rosen of the University of Stockholm addressed the problem of the limitations on copyright through freedom of information, citing the examples of Article 27 of the Charter of the United Nations and Article 10 of the European Convention on Human Rights, and of national constitutional law, e.g. Articles 5 and 14 of Germany's Basic Law and Article 2:19 of the Swedish Constitution. His presentation showed that not every

country has a hierarchy of standards which gives precedence to freedom of information. On the contrary, it was revealed that a limitation on copyright in the name of freedom of expression was to be sought in individual cases, in the process of finding a balance between conflicting interests.

Prof. Valérie-Laure Benabou of Versailles-Saint Quentin University considered the external limitations on copyright by competition law and vice versa. Prof. Benabou *referred* to the European Court of Justice rulings in the cases of *Magill* (GRURInt 1995, 490), *IMS Health* (NJW 2004, 2775) and *Tournier* (GRURInt 1990, 622) to demonstrate that competition law can and does act as a limitation on copyright in terms of exploitation of licences, price controls and certain obligations regarding the acquisition of copyright and neighbouring rights.

The third part of the symposium was dedicated to a consideration of *copyright in a globalized environment*. The needs of consumers were represented in an almost revolutionary way by Julien Dourgnon, director of Studies and Communication Department, UFC-Que Choisir, Paris, with the demand for a *global licence*, under the title *Out of control?* Mastery of the digital future will be possible only if traditional distribution paths and the related remuneration are fundamentally put in question and remuneration itself made all-inclusive.

Tom Rivers, of the Rivers Consultancy and a former senior manager at the BBC, explained the EU draft regulation on the law applicable to non-contractual obligations (Rome II). Through looking at Recital 15 of Article 9, sub-paragraph 1 of the planned Rome II regulation Rivers illustrated that extended application of the principle of the country where the broadcast takes place to other online distribution channels, as intrinsically implied by the Television Directive, is an absolute necessity.



The deputy legal director of ZDF, Peter Weber, made it very clear in his contribution to questions of digital rights management (DRM) that the use of DRM by public service broadcasters precludes any obligation to encrypt their signals. DRM has to be in harmony with European cultural expectations and, in particular, must not entail geographical restrictions or infringement of privacy or data protection.

The fourth part of the EBU symposium was dedicated to questions and problems of *rights clearances in the digital age*. James Lancaster, head of Rights and Business Affairs at the BBC, used this opportunity to clarify the position of public service broadcasters, who are utterly dependent upon the use of and recourse to copyright and neighbouring rights. Lancaster summarized the changes which had taken place with the onset of the digital age in the pithy statement:

*Participation is the new in new media.* This made it clear that the expectation for and possibility of comprehensive participation, particularly in radio broadcasts, had also posed increased problems of participation for the broadcasters, who were increasingly demanding answers to questions of media ethics and about whether the legal requirements were still compliant with legislation or whether adjustments were necessary and should be demanded in this respect. According to Lancaster, the peculiarity of the new world, in which the significance of collecting societies plays an ever more crucial role for broadcasters, is characterized by the continuous availability of broadcast content on a variety of different platforms.

During this part of the symposium, Bernard Miyet, the president of SACEM, discussed questions of the acquisition of rights in the digital age, demonstrating the role of collecting

societies and their particular responsibility in the new media landscape.

Jacqueline Minor, EC Director, Internal Market and Services



Directorate General, Knowledge-based Economy Internal Market and Services, was unable to attend in person. Her written statement on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC, EU Official Journal of 21 October 2005, L 276/53) showed that the Recommendation concentrated on an EU-wide grant of licences for a *specific*, copyright-protected *repertoire*, which is necessary for online music shops (i.e. the sale of commercial sound recordings). However, its wording does not preclude application to licences for other European online use. In her opinion, there is a trend *emerging to grant online licences not via any of the existing collecting societies but via new platforms in which societies pool their repertoire for online licensing*. In relation to the music-related online activities of European broadcasters,

the Commission is evidently assuming that the acquisition of licences for meeting on-demand use of programmes has not been clarified sufficiently in the Recommendation and requires further discussion.

The direction which copyright must take in future and the changes which the new media landscape will demand for this purpose were explained incisively by the director of the Max Planck Institute in Munich, Prof. Reto Hilty. His suggestions for best overcoming the challenges of the digital age consisted not only of the presently somewhat utopian demand for shortening statutory periods of copyright protection, but also predominantly of revising the catalogue of exceptions and limitations stipulated in the Copyright in the Information Society Directive, including the three-step test, and reconsidering and introducing an extension of the list of exceptions and limitations in that Directive by so

doing. This demand for a critical distance from the dogma of the restrictive interpretation of list of exceptions/limitations to the benefit of the author (!) can only be welcomed.

The 2006 EBU Copyright Symposium in Barcelona, chaired by Rumphorst, was again provocative and showed that the usefulness of convening the stakeholders at an international level to give copyright an appropriate new meaning as *the legal form of the information age* and to contribute to the balance of interests in the age of the knowledge society. The symposium papers can be consulted on the website at [http://www.ebu.ch/en/union/news/2006/tcm\\_6-43775.php?display=EN](http://www.ebu.ch/en/union/news/2006/tcm_6-43775.php?display=EN).