INTELLECTUAL PROPERTY IN THE DIGITAL AGE

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The idea that an author of a work or of an invention should be able to claim an exclusive right, equivalent to a proprietary right, over his creation gradually came into being in France during the course of the 18th century, as Sir Colin Birss notes. Of course, the King had already been able to bestow upon an author and upon an inventor exclusive rights of exploitation in the form of a privilege, as he did for Clement Marot in 1538 and for Ronsard in 1554. However, this was not a right. In the 17th and then in the 18th centuries the debates intensified and jurists such as Domat (1625-1696) argued that *"the creator of a new invention should receive recompense for the use of his creation"* (The Civil Law in its natural order, vol 1), then Malesherbes, Rousseau, Voltaire, Diderot and many others called for the recognition of a right of exploitation vested in the author, which could be passed on to his heirs for their benefit, highlighting those words of Domat. From 1760 onwards several judicial rulings established this right. The heirs of La Fontaine and of Fénélon were the first to benefit from the right. All that the Revolution did was to build upon these existing developments.

However one must note here the effect that the statue of Anne of 1709 had upon the rights of publishers, or more specifically Parisian publishers. These publishers in Paris wanted the same advantages as their London counterparts, by reference to the writings of English jurists and philosophers, such as the essays of John Locke. These ideas crossed the English Channel. Both the British, who considered that an author could not have rights in perpetuity, and the French, who sanctified an author's work, soon came to the conclusion that a person's right over his work was a very particular right. According to Michel Vivant,[1] this particularity arose, as the French viewed it, from the fact that intellectual property took its source and its extent from the very being of the author, whilst from the British point of view, individual rights were not to result in an undue impoverishment of the public domain. The parallelism of these two approaches is reflected in the extent of the rights that our respective jurisdictions have afforded to authors over the years.

Does this remain the case in the digital age? Are we not witnessing a challenge to these ideas, and with this an erosion of intellectual property rights? Internet

[1] Michel Vivant , droit d'auteur et droits voisins , 3ème édition no11

users in vast numbers pirate the works of others, without compunction or hesitation, considering that, on the Internet, everything is free, in the public domain and that the protection of intellectual property rights is an affront to their liberty.

One newspaper even reported that groups of American grandmothers were engaging in pirating embroidery patterns protected by copyright.[2] All the generations are involved. The sharing of files is prevalent, counterfeiting by new methods such as the one offered by streaming, the practice of setting up links commonplace, thereby facilitating consulting and downloading of countless works, and the justice systems struggle to keep pace with the rapid development of these practices.

Digital methods effectively offer infinite possibilities for the creation of new works out of existing ones, and the authors of these new works are claiming freedom of expression. How to resolve the conflicts between these fundamental rights which are increasingly being invoked in intellectual property disputes.[3] Is the renowned balance of interest that we all rely upon a sufficient response? Is it not essential to conduct an analysis of the difficult suppression of these counterfeiting activities being carried out on such a large scale by means of the internet?

We have had to adapt and coordinate our responses, but we should nevertheless question their efficacy.

Essentially we shall consider here rights of copyright, but a similar analysis could be developed for other intellectual property rights: trademarks, patents and copyrights of designs and models.

The "transformative" work, a term coming from American English, is a digital work developed from a pre-existing work. In French law, it falls within the legal definition of "une oeuvre dérivée", described in Article L. 113-4 u of the Intellectual Property code as being "*the property of the author who has created the work, subject to the rights of the author of the pre-existing work".*

But what characterises these transformative works is the exponential growth of their numbers, due to the substantial development of the technical methods which facilitate their production by permitting every kind of diverse editing, mixing, collage, insertions of films, sounds, photographs, often retouched. One speaks of "mash-up, of "prequel", "fan-fiction", "fanvid", "spin-off", "cross-

[2] Libération, 29 août 2000

[3] Le Conseil d'Etat a publié un rapport sur "le numérique et les droits fondamentaux", portant principalement sur la protection des données personnelles.2014 Documentation française

over", "lip-dub", "supercuts". One goes, for example, from the "anecdotal video" posted on Daily motion by friends shouting "Happy Birthday" to a backing sound of Stevie Wonder's "Happy Birthday" to the mash-up of Christine and the Queens mixed with *Paradis perdu* by Christophe and *Heartless* by Kanyne West.[4] It's "mind-boggling".

The authors of all these digital works claim loud and clear their freedom of expression. But what is the place of freedom of expression, out of which arises freedom of creation, when faced with intellectual property rights?

Two cases illustrate our reply. In the first of these, three photographers, representing the media at a fashion show, published on line in parallel photographs that they had taken. The company to which they had assigned their rights had not been accredited and the Grand Fashion Houses sued them for infringement of rights.

The Court of Appeal of Paris found against the photographers, who appealed unsuccessfully to the Court of Cassation. They then appealed to the European Court of Human Rights, arguing before this Court, as they had done before the Court of Cassation, that the decisions of the French courts infringed their freedom of expression and were not justified under Article 10, §2 of the European Convention on Human Rights (the Convention).

We know that restrictions upon freedom of expression are only permitted to the extent that they are provided for by law, justified by the pursuit of a legitimate interest and proportionate to the desired outcome, in other words rendered necessary in a democratic society.

In a very didactic manner the Court in Strasbourg held that the greater or lesser extent to which freedom of expression required protecting depended upon the nature of that being expressed (the Court distinguished a situation where the publication concerned the commercial interest of a particular individual from that relating to a topic of general interest); and the Court will take into account the nature of the right of the person opposed to the freedom of expression. The fact that copyright is itself a human right has directed the Court to allow national authorities a greater margin of appreciation.

In other words, when what one is seeking to achieve is "the protection of the rights and freedoms of the individual" and these "rights and freedoms" are

[4] Pierre Henaff *L'oeuvre transformative . Sécuriser l'oeuvre transformative sans remettre en cause le monopole de l'auteur de l'oeuvre préexistante* in Communication et commerce électronique , n° 4, avril 2016, page 13 , lexis nexis. Il définit le "supercuts" comme l'assemblage de scènes de films similaires, le "cross -over" comme une oeuvre où se rencontrent des personnages de fiction d' oeuvres préexistantes

themselves amongst those guaranteed by the Convention and its protocols, one must accept that the requirement to protect them can cause States to restrict other rights and liberties which are also incorporated in the Convention. To enable such rights to be reconciled, the Court allows States a "significant margin of appreciation".

In this particular case, given the commercial character of the operation (the photographers had exploited the disputed photographs commercially), and in accepting the margin of appreciation available to the French judge, the Court held that Article 10 had not been breached.[5] (5)

The second case involved the author of publicity photographs of the faces of women wearing make-up and an artist who incorporated these photographs, often having retouched them, into his paintings such that they took up a significant area of the paintings. Mr Klasen, the artist, maintained that he belonged to an international artistic movement under the name of "Narrative Figuration" which claimed to exercise a political critique upon contemporary society. He explained that he had chosen these photographs because, according to him, they represented the objectification of the woman, victim of the consumer society.

Sued for forgery by the photographer, the artist pleaded freedom of expression afforded by Article 10 of the Convention. The artist lost in the Court of Appeal and appealed to the Court of Cassation. He argued that the finding was disproportionate to his aim and that the Court of Appeal should have taken into account, in this particular case, the proportionality of the harm inflicted upon the rights of the photographer, the creator of the original work.

The question was clearly delicate as it brought into question the definition of the limits to be applied to copyright.

Of course, one knows that the method used by the Court at Strasbourg to resolve a conflict of fundamental rights is to put into the balance the interests in question. In the absence of being able to rank rights of equal value, one has to reconcile them; it is a question of a balancing exercise between the interests of the different fundamental rights and freedoms.

However, French law, like the law of a number of countries of continental Europe, is based upon the principle of a closed list of exceptions, of strict interpretation. Directive 2001/29/CE of 22nd May 2001 set out a limiting list of

[5] CEDH , 10 janvier 2013, req. N°36769/08, Ashby DonaldC

exceptions to copyright which did not infringe freedom of expression.[6] (6). *To accept that one can challenge the exclusive right of the author on the basis of Article 10 of the Convention is to diminish the principle of the closed list of exceptions, a key element of the continental European model of copyright.*[7]

In the case in question, the Court of Cassation overturned the finding of forgery against the artist. The court considered, in the following terms, that the judges had not engaged in balancing the interests in question:

> *that in deciding thus, without explaining the actual method of achieving a just equilibrium between the rights in question which resulted in the court's ruling, deprived the decision of its legal basis.*[8]

Similar decisions have been taken by notably the German Constitutional Court and the Belgian Court of Cassation. Let us cite however the decision of the Court of appeal in *London, Ashdown v Telegraph Group Ltd*

> *Rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act…..This will make it necessary for the court to look closely at the facts of individual cases.*[9]

We find this problem again in connection with understanding the nature of active links, whether these are counterfeit or not.

Jhv To create an active link, as Sir Colin Birss also mentioned, is to permit certain information to be extracted from confidential sites, is to allow access to works reproduced on other sites and to facilitate their reproduction…all of this without the owner of the intellectual property rights having given his consent. French jurisprudence has, since the beginning of the year 2000 held that the raison d'etre of the internet and of its functionning principles necessarily implies that active links and intersites can be freely operated. Freedom to establish a link except in responding to abuses resulting from its use, appears inherent to the functionning of the internet.

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[6] en dehors des exceptions de parodie , de caricature et de courte citation

[7] Alexandre Zollinger droit d'auteur est liberté d'expression . Comment procéder à la balance des intérêts in concreto ? Communication et commerce électronique, avril 2017, n°4, p.14

[8] Civ 1ère, 15 mai 2015, n°13-27.391

[9] (2001) EWCA Civ.1142, no 45:

This is a new illustration of this combat of titans being raged between these two fundamental rights and freedoms, on the one hand the freedom of expression and on the other entitlement to copyright.

The European Court of Justice (ECJ), which has undertaken a great deal of work to establish principles for judging the legality of these links (although as Sir Colin Birss points out much remains to be done) calls upon national judges to undertake a balancing of these interests. The ECJ has ruled in a number of decisions that the protection of intellectual property rights is enshrined in Article 17, paragraph 2 of the European Union Charter of Fundamental Rights….(but) it is not a consequence of this provision, nor of the jurisprudence of the Court, that such rights are untouchable and that their protection must be absolutely maintained.

There again, it is incumbent upon the judge to proceed on a case by case basis, to balance these interests and to apply the principle of proportionality. It is for him to find the correct point of equilibrium which permits him to protect intellectual property rights without at the same time impinging upon, for example, freedom of information and freedom of enterprise.

We must agree that the exercise is delicate, sometimes even perilous, for a continental lawyer who, as we have seen, is (or was?) imbued with a legal culture which considered that intellectual property rights take their source and their limits in the actual person of the author, whilst the Anglo-Saxon lawyer is, it seems to me, is more concerned that exclusive intellectual property rights do not constitute undue obstacles to freedom of enterprise.

We meet this same issue again when a judge is asked to grant injunctions to prohibit access in the effort to prevent downloading, and the sharing of files. To what extent can the internet service provider and the website proprietor be held responsible? These questions have given rise to extensive jurisprudence which the ECJ has in part been able to harmonise.

So, concerning injunctions blocking counterfeiting websites imposed upon internet service providers who are intermediaries, the ECJ has stipulated that these injunctions must come vested with several qualities and must ensure a balance of interest between the various fundamental rights and freedoms.

The Court of Cassation has delivered several judgments which have, in the same way, demonstrated that the aim is to find that precise point of equilibrium which guarantees the protection of intellectual property rights without neglecting the

freedoms of information and of enterprise and the intellectual property rights themselves.

On the question of the responsibility of website proprietors, of sites sharing videos such as Dailymotion, You Tube, Google Video, the jurisprudence has gradually become established, after having for a time determined that these proprietors are responsible as editors. The Court of Cassation has now held that the hosts of these sharing sites, who are not involved in creating the content of material posted by the internet user, are not editors and must benefit from the status of web hosts, regardless of the fact that they receive advertising revenue and regardless too of the fact that they undertake tasks of classifying and formatting to render the information and material that they receive more readable (Cass Civ 1st February 2011), jurisprudence which is consistent with that of the ECJ.

Finally, the only pertinent approach consists of establishing if the web host had played an active controlling role and/or if he had knowledge of the content of the material, considerations of a nature to confer the quality of editor of the content upon the web host. In every other case, the web owners benefit from a regime of reduced responsibility provided by the law of 21st June 2004 and the directive no. 2000/31 of 8th June 2000.

However, the situation is not so straightforward. New situations blur these distinctions.

One can cite, for example, in addition to the appearance of platforms which have a hybrid function, the existence of sites called "mirrors" which enable by-passing the removal of domain names and the dereferencing ordered by the courts The web address disappears, but the illegal service remains, simply changing the domain name or even just the geographical situation. For example, the site "megaupload.com" shut down by American justice in 2012 reappeared under the address "megaupload.ma" ("ma" being Morocco).[10]

In addition we have experienced the re-appearance of items that the host has had to withdraw as a result of objections by the owners of the intellectual property rights, but which subsequently have been put online at different addresses. The Court of Appeal held that the host, having already been notified of the rights protecting the said item, had to take the necessary measures to prevent its re-appearance, albeit that the subsequent uploading was from a different source.

[10] Boris Barraud , la crise de la sanction , Droit de l'immatériel , Revue Lamy, n° 128, Juillet 2016,p.128

The Court of Cassation allowed an appeal for the reason that the decision of the Court of Appeal, resulting as it did in imposing upon the hosts a general obligation of surveillance of images that they are storing and of searching for illegal reproductions and to require of them, in a manner disproportionate to the stated aim, the implementation of a blocking facility unlimited in time, was a violation by the above-mentioned principles.[11]

The Court's reasoning is beyond question, but it makes life difficult for the owners of rights to have to go through a new and expensive notification of their rights to subsequent hosts for each new appearance.

In conclusion, I would say that we are not going to escape the necessary examination of the efficacy of the judicial responses that we put in place to regulate this gigantic world of exchanges and of information that now constitutes the internet. I do not believe that intellectual property rights are held in contempt, but they are affected and strongly contested in the digital universe.

The European jurisdictions, unlike those of China, Iran and Saudi Arabia and of many other states, know how to give priority to the protection of privacy and of personal information, and rightly so.

Nevertheless is it not necessary for our criteria for understanding the attacks made on intellectual property rights to be evaluated? We should go further in defining the criteria to take into account when carrying out this "balancing of interests". Where should the point of equilibrium be situated? All of this is within our sphere of competence as judges.

The regime of responsibility for the intermediaries who are internet service providers and website owners or hosts should by the same token be re-examined. However, we know that the proposition which consists of suppressing the regime of reduced responsibility from which they benefit and replacing this with a common law regime, would inevitably have a negative impact on the exercise of fundamental freedoms and what is more would result in countless disputes, without mentioning the astronomical transaction costs.

The pursuit of placing responsibility on the counterfeiters would be neglected, paradoxically to the benefit of the intermediaries. That is to say that the way of reform is narrow, but it is us who must engage it!

[11] Cass Civ 1st, 12th July 2012, n°11-13.669, Idem 11-20.358, 11-13.666.