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Copyright and Free Speech

Comparative and International Analyses

Edited by
Jonathan Griffiths and
Uma Suthersanen

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FOREWORD

Although we use the word 'right' in the phrases 'intellectual property right'[1] and 'the right of free speech', it is used in a quite different sense in the two cases. An IPR is essentially negative and private. It is negative in that it entitles its owner to stop other people doing things, an entitlement which will, if necessary, be enforced by the courts. And it is private because it is vested in a private owner, generally, an individual (real or corporate). The 'right of free speech' on the other hand is neutral or positive. Traditionally, under the common law, I suppose the 'right' rested essentially on the absence of any law, public or private, forbidding the conduct concerned—all that is not expressly forbidden is permitted. But in many countries the law now goes further—providing some sort of positive right of free speech. Such a law may, and indeed is intended to, come into conflict with any other law which is a law suppressing free speech: the First Amendment is an old example and Article 10 of the European Convention on Human Rights, given fresh life in this country by incorporation into domestic law, is more recent.

Legislatures have, of course, in various ways, sought to temper IPRs so that they did not interfere, or interfere too much, with free expression. Hence, for instance, 'fair use' exceptions to copyright. But the exercise has not been entirely successful. Often, for instance, parody (particularly for commercial purposes) has been stopped. I came across a good example when I was still a law student. *Cleopatra* starring Richard Burton and Elizabeth Taylor had been widely advertised by a poster depicting Burton as Mark Anthony standing imposingly by a chaise longue adorned by Taylor. The Carry On team made *Carry on Cleo* starring Sid James and Barbara Windsor. Its poster was a spoof copy of the *Cleopatra* poster, substituting a grinning Sid James for Burton and a saucy winking Windsor for Taylor. An interlocutory

[1] Here I include not only conventional IPRs—patents, designs, trade marks, and particularly copyright, but also what may fairly be called, for present purposes, 'extended IPRs' by which I mean things like the torts of defamation or malicious falsehood and the action for breach of confidence. The *Naomi Campbell* case was about enforceability-or-no of a sort of IPR.

injunction was granted, on the basis of copyright.[2] Ridiculous, but probably right.[3]

Courts, also, have sometimes developed rules to temper interference with free expression. I suppose the best example of this is the rule that an interim injunction will not be granted to restrain an alleged defamation or malicious falsehood where the defendant intends to justify. But there are limits to what courts can do, when faced with an IPR—a *property right*. Hence the importance of a countervailing positive right of free expression. Once such a right can be brought into play, then the court must weigh competing rights—a task which gives more room to favour free expression than merely trimming an IPR or its enforcement.

This book is a magnificent survey of the conflict between IPRs, particularly copyright, and free expression. Jonathan Griffiths and Uma Suthersanen of Queen Mary, University of London are to be congratulated on organizing the Seminar which inspired it and on bringing together this collection of essays.

The Rt Hon Sir Robin Jacob
The Royal Courts of Justice
October 2004

[2] I do not know whether the case was reported—it probably was, in *The Times*, otherwise I would not have known about it.

[3] There is a direct parallel with the famous Warner Bros Legal Department–Groucho Marx correspondence about *Casablanca* and *A Night in Casablanca* ('I am sure the average movie fan could learn in time to distinguish between Ingrid Bergman and Harpo. I don't know whether I could but I'd sure like to try'). The difference is that Warner Bros had no IPR to hang their hat on.

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