

WORLD COPYRIGHT LAW

PROTECTION OF AUTHORS' WORKS,
PERFORMANCES, PHONOGRAMS, FILMS,
VIDEO, BROADCASTS AND PUBLISHED
EDITIONS IN NATIONAL, INTERNATIONAL
AND REGIONAL LAW

With a Glossary of Legal and Technical Terms, and a
Reference List of Copyright and Related Rights Laws
throughout the World

Second Edition

by

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La différence entre la chaussure
et
l'oeuvre littéraire ou artistique

Le travail du cordonnier produit la chaussure,
Le travail de l'auteur produit l'oeuvre littéraire ou
artistique;
La chaussure est faite pour le pied,
L'oeuvre est faite pour l'esprit;
Le pied va vers le tombeau,
L'esprit va vers l'infini:
Voilà la différence.

(Lines dedicated by the author to Valerio de Sanctis, Paris 1978)

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I gratefully acknowledge the permission of the World Intellectual Property Organisation to include in this work material from the texts and tables in WIPO publications.

In the first edition of this work I expressed my gratitude to my wife for the skill and labour she contributed to the preparation of the manuscript and the reference materials. As regards the preparation of the present edition, I feel, even more, the same sense of gratitude: I could not have produced this work without her.

J.A.L. Sterling

Preface to the First Edition

The rights of authors of literary, dramatic, musical and artistic works are, in the common law system, covered by copyright, and in the civil law system by “author’s right”. The rights of performers, producers, broadcasters and others who bring authors’ works before the public are often described as related (or neighbouring) rights.

“Copyright” means many things to many people. To some it signifies a component of the rights of man, deriving from natural law, and sustaining the work of the human mind by protecting authors in respect of all uses of their works. To others it represents a commercially inspired monopoly for the better regulation of the exploitation of the author’s work in the market place. In between are other concepts, each with its own philosophical and juridical justifications. The debate on the place of copyright in the legal system is not merely on the national level, but also covers relationships at cultural, political and commercial levels throughout the world.

One feature is, however, common to all approaches. The discussion concerns works of the mind, and the means by which these are disseminated to the public.

The writer of a text such as the present is faced with a problem which is present at the outset and which gains in gravity as the work continues, namely the immense amount of material on the subject of copyright and related rights which pours from the world’s presses and over the Internet in ever increasing volume. The researcher is inevitably faced with the challenge of selection, and with the necessity of omitting analysis of many questions which could have detailed study. The choice is between attempting analysis of all points which raise problems (with the probable result that the work would never be completed), or choosing for analysis as many as possible of those subjects likely to be of international interest: this course, though leading to some unevenness of treatment, is the one chosen in the Commentary. In sum, the aim of this work is to provide the reader with an overview of the present state copyright and related rights law at the national, international and regional levels, supported by reference materials which are general in content and should lead to an appreciation of the global issues arising from recent developments in technology. Some of the material in the earlier work *International Property Rights in Sound Recordings, Film and Video* (1992, Supplement 1994) is incorporated in the present text, but forms only a minor part of the exposition.

A word may be said here about the availability of sources. There is no dearth of learned text books on the subject, and provided the researcher has a knowledge of English, French, German, Italian and Spanish, a great deal of material covering the common law and civil law systems is readily available. As far as the case law of English speaking countries and France and Germany is concerned, the researcher is well served. Through the tradition of the common law system, extensive case reports covering the United Kingdom and Commonwealth and the USA are readily available. As regards France and Germany, important cases are published (sometimes with reports from other

countries) in *International Review of Industrial Property and Copyright Law* (IIC) and *Revue Internationale de Droit d'Auteur* (RIDA), both of which are found in research libraries throughout the world. International journals such as *European Intellectual Property Review* (EIPR) publish summaries of cases as reported by their correspondents. However, where not included in the international journals, reports of local cases in the civil law jurisdictions are often not readily available internationally. Consequently, a great deal of jurisprudence from civil law countries is at present "born to blush unseen" as far as international access is concerned.

The reader will note that in the presentation of the first Section of the work, consisting of a Commentary on the whole subject, the illustrative examples of national situations are mainly taken from the legislation and jurisprudence of France, Germany, the United Kingdom and the U.S.A., these showing aspects of the civil law and common law systems respectively, and permitting references to case material which is in general readily available. Many other countries have highly developed laws in the area, and impressive heritages of jurisprudence and learned writing. At this stage, space and time prevent a wider coverage, but it is hoped that more references to other legislation and jurisprudence will be included in future editions.

The reader will also note that in a number of instances, comments and references are repeated under different headings, for it seems preferable to follow this method in the case of overlapping subjects, rather than to require the reader to turn constantly to other sections, thus interrupting the exposition.

PLAN OF THE WORK

The work is divided into four Sections.

- Section I: Commentary
- Section II: International and regional standards of protection: comparative summaries
- Section III: Glossary of legal and technical terms
- Section IV: Reference materials

Section I: Commentary

Section I contains the Commentary on the subject as a whole. It is divided into three Parts.

Part I: *Background and basic principles* contains 15 Chapters and is intended to summarise the subject, and explain the basic principles of national laws and international and regional instruments concerning copyright and related rights. The object of the first of the 15 Chapters is to take the reader briefly through the whole area from the beginning, so that those who are not familiar with the subject may gain a general conspectus at the outset, with the more detailed treatment following. It is hoped that the reader who is already expert in the area will nevertheless find this initial exposition of use.

The remaining Chapters of Part I summarise the basic principles of copyright and related rights law, and are presented in accordance with the scheme of analysis generally adopted in this work (see below *Analysis scheme*).

Part II: *National, international and regional protection* contains (i) in Chapter 16, a brief survey of the national systems of protection, in particular summarising perceived differences in this area between the civil law and common law systems, (ii) in Chapter 17, a brief survey of the relevant international instruments, (iii) in Chapters 18 to 24, summaries of the main provisions of the relevant international instruments (Berne Convention, TRIPS Agreement, WIPO Treaties, etc.), (iv) in Chapter 25, a brief survey of the relevant regional instruments (EC Directives, NAFTA and Cartagena Decision 351), and (v) in Chapter 26, a brief description of the relevant aspects of EC law, the harmonisation programme, application of relevant EC Treaty principles and summaries of the provisions of the EC “copyright” Directives, in accordance with the Analysis scheme.

Part III: *Current issues and future prospects* consists of two Chapters, one outlining some of the major issues at present confronting the development of copyright and related rights, and the other proposing some approaches which might be considered in seeking solutions to the problems arising in this area. Of necessity, some of the material in these Chapters is of a transitory or speculative nature, in view of the studies which are taking place, and the rapid changes being brought about by technology and by the advent of the global information society. However, it is hoped that the ideas and reflections in these Chapters may be of assistance in forming an overall assessment of the likely development of copyright and related rights in the opening years of the 21st Century.

Section II: International and regional standards of protection: comparative summaries

Part A of Section II contains comparative summaries of provisions of the relevant international and regional instruments as regards (a) beneficiaries, (b) subject matter of protection, (c) rights afforded, (d) term of protection and (e) national treatment provisions. Part B of Section II summarises the protection granted under the same international and regional instruments to authors, performers, phonogram producers, film producers, wireless broadcasters, cable distributors, publishers, semiconductor topography makers and database makers.

Section III: Glossary of legal and technical terms

Section III presents a Glossary of relevant terms, not intended to be all-embracing, but to define some important terms having particular connotations in the context of copyright and related rights.

Section IV: Reference Materials

The Reference Materials in Section IV consist of

- (a) *Lists of membership* of the various Conventions, etc. (paras 40.01–40.03).

- (b) *Texts of the major international and regional instruments* (Berne Convention, TRIPS Agreement, WIPO Treaties, relevant EC Directives, etc.) (paras 40.10A to 40.40).
- (c) *A Reference List of the basic copyright/author's right/related rights laws* of sovereign States throughout the world, and of their membership of relevant international Conventions, Treaties and Agreements; the situation in a number of associated and other territories is also covered.
- (d) *Summary list of countries having laws concerning recording machine and tape payments in respect of private copying* (para. 79.50)
- (e) *Historic documents*: giving texts of significant documents in the history of copyright, from the Venetian privilege of 1469 to the Berne Convention 1886 (original version).
- (f) *Additional reference materials* dealing with selected topics providing additional background material.

The work concludes with a Bibliography and General Index.

ANALYSIS SCHEME: THE FIFTEEN REFERENCE POINTS

In analysing copyright and related rights law in this work, whether on a national, international or regional basis, 15 reference points are taken into account, as follows.

1. *General overview*: embracing the historical development, and juridical, economic and social factors.
2. *Basis of protection*: the nature of the rights granted, and the juridical, economic and social theories justifying the rights.
3. *Structure of protection*: the way in which the instrument or law is structured from the textual and juridical points of view.
4. *Terminology and interpretation*: the particular meanings of basic terms, and interpretation.
5. *Beneficiaries of protection*: the persons who enjoy rights under the instrument or law, either initially or by some form of transfer or licence.
6. *Subject matter of protection*: the productions, such as works, performances, sound and film recordings, which are protected.
7. *Protection criteria*: the conditions for enjoyment of protection, (e.g. whether a literary work needs to be in writing, and whether tests of originality, nationality or place of publication etc. are applied).
8. *Moral rights*: the rights, such as those of identification and maintenance of integrity, which may be granted to protect the honour and reputation of the author.
9. *Economic rights*: the rights which are granted in order that the

rightowner may control and profit from the exploitation of the production, *e.g.* the right to make copies, or to authorise public performance.

10. *Limitations and exceptions*: provisions limiting the application or scope of rights, *e.g.* in relation to private use or education.
11. *Term of protection*: the term during which the granted rights subsist.
12. *Exercise of rights*: the rules governing the way in which rights are transferred, licensed and applied in practice, contractual provisions and collective administration.
13. *Infringement*: considerations taken into account when determining whether granted rights have been infringed.
14. *Remedies, penalties and enforcement*: the legal sanctions and remedies for, and procedures in respect of, infringement.
15. *Additional legislative features*: additional features include provisions as to procedural matters, constitution and functions of administering authorities (*e.g.* Copyright Office), judicial bodies (Tribunals, etc.), and transitional and applicatory provisions.

The 15 reference points provide the framework of the 15 Chapters of Part I of Section I. Where appropriate, the material presented in Chapters 3–15 follows a basic pattern, beginning with a general appraisal of the topic, followed by a brief survey of relevant provisions of national laws (mainly those of France, Germany, the UK and USA) and the relevant international and regional instruments.

The juridical structure of protection is reflected in points 5 to 14 of the Analysis scheme, and in the “chronological” presentation of the Chapters of the Commentary. Thus laws may grant to beneficiaries (Chapter 5), in respect of certain subject matter (Chapter 6), and on certain conditions (Chapter 7), certain rights (Chapters 8 and 9), subject to certain limitations and exceptions (Chapter 10), usually for a certain term (Chapter 11), such rights being capable of exercise as provided by law (Chapter 12), with infringement of the rights (Chapter 13) rendering the infringer liable to remedies and penalties through enforcement procedures (Chapter 14).

CASES

In general, cases quoted are those which refer to some aspect of copyright or related rights of particular international interest. It must be emphasised that the references to cases are not intended to be comprehensive, but are merely illustrative of particular points, including, in a number of instances, references to “classic” decisions. More extensive examples of applicable cases must be sought in the respective national law text books.

USE OF THE TERM “COPYRIGHT”

The distinction between the terms “copyright” and “author’s right” is described in the Commentary (para. 1.15). When reference is made to a

common law system the term “copyright” is used, and “author’s right” is used when speaking of the civil law system. Sometimes it is necessary to use both terms, in order to reflect the different approaches of the two systems. If a general reference to the rights of authors in their creative works is being made in the Commentary, the term “copyright” may be used, but in such cases both the copyright of the common law system and the author’s right of the civil law system are embraced.

THE NEW DIMENSION

As national barriers disappear, distinctions between national systems become anomalous, and the need to adopt common approaches increases. In the past, writing on national copyright laws has in general been confined to the particular national law under consideration, with occasional references to other systems. Now the whole emphasis must change to one of international consideration of the problems posed by current technological developments. This involves an appreciation of both the common law and civil law systems, and a readiness to adopt harmonised solutions which will take the traditional approaches of these systems fully into account. It is with this approach in mind that the present work is placed before the reader.

Preface to the Second Edition

While the basic structure of the First Edition has been retained, various sections of the work have been considerably expanded, and new material has been added, in particular as regards the following topics:

(a) *Internet issues*: a number of major issues presented by the advent of the Internet are analysed at the appropriate points throughout the Commentary. A summary of the respective issues is given in paragraph 1.30: they include some which are mentioned separately below.

(b) *Case references*: some 170 case references are added to the references in the First Edition, making a total of some 550 case references in all, the new additions including cases in Austria, Belgium, Canada, Denmark, France, Germany, Israel, Italy, Netherlands, Spain, Sweden, United Kingdom, and the United States, together with references to cases before the European Court of Justice, EFTA Court decisions, and cases before the European Court of Human Rights. As in the First Edition, the criterion for mention has been international rather than purely local interest.

(c) *Copyright and human rights*: some description of the issues emerging in relation to the perceived conflict between the exercise of the exclusive rights granted by copyright and the guaranteed human rights of freedom of expression and freedom of speech (paragraph 2.07).

(d) *Private international law issues*: the material in Chapter 3 has been expanded, in particular with reference to Internet issues (paragraphs 3.15–3.31).

(e) *Originality*: the analysis of the criterion of originality has been expanded, together with an overview of current trends in the common law jurisdictions in relation to the “creativity” and “skill, judgment or labour” tests (paragraphs 7.06–7.20).

(f) *The scope of the on-demand availability right*: the scope of the on demand availability right as recognised in the WIPO Treaties 1996 is the subject of extended analysis, particularly in relation to place and time of making available (paragraphs 9.29–9.35).

(g) *The WTO Panel Decision on section 110(5) of the US Copyright Act*: the decision of the WTO Panel concerning the complaint against the United States as regards exemptions to the author’s right to authorise public performance of works is summarised (paragraph 10.14).

(h) *Infringement issues*: infringement in the general context of the Internet is examined, including comment on particular aspects such as linking and framing, peer-to-peer file-sharing, etc., as well as infringement of the on-demand

availability right (paragraphs 13.28–13.41), and summaries of relevant cases (e.g. the *Napster* and *Aimster* cases in the US) (paragraphs 13.48–13.49; see also Addendum below.)

(i) *Limitation of liability of service providers*: the general question of limitation of liability of service providers is examined, together with summaries of the relevant legislative provisions of the US Digital Millennium Copyright Act and the EC E-Commerce and Information Society Directives (paragraphs 13.42–13.47).

(j) *Technological protection measures*: the problems posed by the application of technological protection measures to restrict access to or copying of protected material, and comparison of the respective provisions in the WIPO Treaties, the EC Directives and US legislation (paragraphs 13.50–13.57).

(k) *EC Directives*: summaries are given of the EC Information Society Directive (2001/29) and Artist's Resale Right Directive (2001/84), adopted since 1998 (paragraphs 26G.01 *et seq.*, 26H.01 *et seq.*).

(l) *Evolution of European Copyright and Related Rights Law*: a new section has been added in the form of a Chart with notes showing the degree to which copyright and related rights law has been harmonised in the European Community by virtue of the mandatory provisions of the relevant international instruments and of the relevant EC Directives (paragraphs 26Z.01 to 26Z.05).

(m) *A number of new terms* have been added to the Glossary, including those of particular relevance in the context of the Internet (see paragraph 32.02, also paragraph 9.22).

(n) *International harmonisation of copyright and related rights law*: references to and brief descriptions of initiatives in the area of harmonising international rules on private international law and an international copyright protection system are given (paragraphs 92.01 to 92.08).

In a sense, the writer on current issues of international copyright law is like the person who places his hand in the ever-flowing river of Heraclitus. The moment after he grasps at the point before him, the river has moved on: so the best that can be done is to show the river as it passes a point at a particular moment, and to indicate the direction in which it seems to be flowing. The task of the copyright lawyer is never complete, and after 50 years' work in the area, one still learns every day.

Comments to author

Readers are cordially invited to comment on the material in this work, and additional information will be welcome, by email to j.a.l.sterling@qmul.ac.uk

Status juris

The work is based on material available as at January 1, 2003. In some sections, it has been possible to refer to material which became available after that date.

Updating

Pending publication of later editions, notification of important developments will be posted on the website *www.sweetandmaxwell.co.uk/wcl*. It is proposed to update the website generally at six-monthly intervals, with *ad hoc* notifications in the intervening periods. The first general update is planned for November 2003, and will include references to developments since January 1, 2003, including new cases, further proceedings in cases mentioned in the text, new legislation, etc.

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June 30, 2003

Table of Cases

In general, the references to “SC” are to the respective Supreme Courts, and “CA” to Courts of Appeal. “PC” refers to the Privy Council, the last instance of appeal from courts of certain countries and territories of the British Commonwealth outside the United Kingdom, where the highest instance is the House of Lords (HL). Other references include the following:

COURTS OF FIRST INSTANCE

Belgium: TPI (Tribunal de Première Instance)

France: TGI (Tribunal de Grande Instance)

Germany: LG (Landgericht)

United Kingdom: ChD (Chancery Division)

United States: the various Federal trial courts are indicated by the initials of the particular court concerned (e.g. “S.D.N.Y.” Southern District New York)

COURTS OF APPEAL

Austria: OLG (Oberlandesgericht)

France: CA (following by location) (Cour d’Appel)

Germany: OLG (Oberlandesgericht); KG (Kammergericht) (Berlin)

United States: the Federal Court of Appeals is divided into a number of Circuits, covering the respective groups of States: the respective Court is indicated by the Circuit number (e.g. 2nd Cir.). A reference to “cert.denied” or “cert.dismissed” indicates that the Supreme Court refused an application to review, etc. a Federal Court of Appeals decision or a decision by a State Supreme Court.

COURTS OF HIGHEST INSTANCE

Australia: HC (High Court)

Austria: OGH (Oberster Gerichtshof)

Belgium: Cass. (Cour de Cassation)

Canada: SC (Supreme Court)

France: Cass. (Cour de Cassation) (followed by indication of the particular Chamber etc.)

Germany: BGH (Bundesgerichtshof), or, pre-War, RG (Reichsgericht)

Netherlands: Hoge Raad

Switzerland: BG (Bundesgericht)

United States: SC (Supreme Court). Supreme Court cases are reported in the “U.S.” series, and also in the “L.Ed.” and “S.Ct.” series.

Case report abbreviations include C.M.L.R. (Common Market Law Reports); C.P.R. (Canadian Patent Reporter); E.C.C. (European Commercial Cases); E.C.R. (European Court Reports); F. and F.Supp. (Federal and Federal Supplement Reports (U.S.A.)); F.S.R. (Fleet Street Reports (U.K.)); I.P.R. (Intellectual Property Reports (Commonwealth and other countries)); U.S.P.Q. (United States Patent Quarterly Reports).

The standard textbooks on national laws (e.g. Copinger, Lucas/Lucas, Nimmer, Nordemann/Vinck/Hertin, Schricker etc.) may give case references additional to those shown in the Table; see the respective paragraph references in the Commentary.

An alphabetical list of cases follows the Table.

Australia

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Moorhouse v University of New South Wales (1975) 133 C.L.R. 1; 49 A.L.J.R. 267; 6 A.L.R. 193; [1976] R.P.C. 151 (HC)	13.10
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Telstra Corpn. Ltd v Australasian Performing Right Association Ltd. (1995) 31 I.P.R. 289 (Fed.Ct.); (1997) 71 A.L.J.R. 1312; 146 A.L.R. 649; 38 I.P.R. 294 (HC)	2.30, 9.19
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Austria

"Copyright in Translated Legal Document", OGH, Dec.17 1996: [1999] E.C.C. 131	2.08
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