



Copyright Licensing in Europe

Aurelio Lopez-Tarruella
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Introduction

- Copyright licenses
 - Between authors and exploiters
 - Between rightholders and end-users
 - Between collecting societies and exploiters
- Proprietary models vs. Open models
- Commercialization of a work already c works made under employment contra



Copyright licenses, international conventions and EU Directives

- International character of copyright contracts
- Lack of harmonisation of rules on copyright contracts in international conventions: Berne Convention, WCT, TRIPs (except for Art. 40)
- Almost a lack of provisions on copyright contracts in the 8 existing EU Directives in this field
- There are several differences between legislations: "Copyright Systems" (CS) vs. "Author's Right Systems" (AS)

Copyright licenses, international conventions and EU Directives

- Do differences on the regulation of copyright contracts create obstacles to the proper functioning of the Internal market?
- Do they create legal uncertainty to foreign companies?

Moral rights

- Art. 6 bis Berne Convention
- Moral rights in CS:
 - If they exist they are waivable and transferable
 - “an imposition deriving from int’l conventions”
 - “an obstacle to unrestricted exploitation of rights”
- Moral rights in AS:
 - Rights of paternity, integrity, divulgation, withdrawal from commerce for change of convictions
 - Unlimited in time, non-waivable and non-transferable
 - They are not absolute: in their application, other interests are taken into account

"Calatrava" Case (SAP Vizcaya, 28/07/09)



First ownership

- Works made under employment contracts
 - CS: Authorship belongs to employer, *unless otherwise agreed* (Sec. 11 (2) CPDA)
 - AS: *Presumption* of exclusive transfer of rights to the employer / worker retains moral rights
- Works made under commission
 - CS: Authorship belongs to commissioner, *unless otherwise agreed*
 - AS: *unless otherwise agreed*, copyright ownership remains on the author / the commissioner gets a license that covers the form of exploitation that necessarily derives from the contract and is indispensable to comply with its aim

Special provisions on copyright contracts

- In AS:
 - Copyright contracts are primarily governed by special provisions in copyright statutes: Arts. 43 – 85 [LPI](#); Arts. L 131-1 – 133-4 [CPI](#); Arts. 31 – 44 [UrhG](#)
 - Their aim is to protect the author as the weaker party to the contract
- In CS:
 - Copyright contracts are governed by Contract Law: freedom to contract
 - Just a few special provisions: Secs. 90 – 93 [CDPA](#)
 - Their aim is to guarantee legal certainty

Special provisions on copyright contracts in AS

- Limits to freedom to contract:
 - Contracts on future works
 - Clauses concerning unknown forms of exploitation
 - Transfer of rights without establishing its scope
- Rules on interpretation:
 - “purpose-restricted transfer principle”
- Right of equitable remuneration

Are these differences an obstacle to international copyright licenses?

- Convergence of regulations due to merchantalisation of author's right systems:
 - Legal persons and collective works
 - Limits to the exercise of moral rights in software
 - Software made under commission in Spain: SSTS 17 May 2003 and 18 December 2008
- Choice of law in international copyright contracts

Are these differences an obstacle to international copyright licenses?

- [Regulation 593/2008 \(Rome I\)](#):
 - Freedom to choose the law applicable to the contract (Art. 3) (e. g. "*The Kid*" Case, Cour cass 28/05/63)
 - In the absence of a choice, presumably the law of the residence of the exploiter shall apply (Art. 4)
 - No special provision on copyright contracts
- In the regulation of international contracts, legal certainty and promotion of international commerce prevail over the protection of the author
- But...

Are these differences an obstacle to international copyright licenses?

- National courts can make national interests prevail over interests of international commerce: "*lois de police*" or overriding mandatory provisions
- "*Lois de police*" in Art. 9 (1) Rome I:
"provisions *the respect of which is regarded as crucial by a country to safeguard its public interests, such as its political, social or economic organisation*"
- These provisions cannot be derogated by contract and
"are applicable to *any situation falling within their scope, irrespective of the law otherwise applicable to the contract*"

"Huston" Case (Cour Cass, 28 May 1991)

French rules on moral rights are *loi de police*...

...and are of universal application



Are these differences an obstacle to international copyright licenses?

- It's up to each Member State to decide which provisions can be considered "*lois de police*"
- The higher the number of provisions EU states consider as "*loi de police*" the higher the legal uncertainty surrounding international copyright contracts
 - Moral rights
 - Rules related to contract on future works
 - Right to equitable remuneration
- It's up to each Member State to decide the scope of application of these provisions
- Are interest protected by "*loi de police*" generally shared with other States?

Conclusions

- **Are the differences in the regulation of copyright contracts and obstacle to international copyright licenses?**
 - Only in those cases where applicable rules are "*loi de police*"
 - It's up to each Member State to decide which of those rules are "*loi de police*"
 - In doing so, they must counterbalance national interests with those of international commerce
 - "*loi de police*" provisions should be limited to a few ones: moral rights, provisions on future works, equitable remuneration
 - And they should only be applicable when the rights are exploited in the country that establish them.
- **Is harmonization needed in an international instrument or a EU directive?**
 - Just in those aspects that are really an obstacle
 - However, while the protection of some of interest are generally shared by States, others are not (e. g. moral rights) thus the adoption of harmonised regulation is very difficult

Online resources

- European Commission, DG Internal market, website on Copyright and Neighbouring rights:
http://ec.europa.eu/internal_market/copyright/index_en.htm
- P.B. Hugenholtz / L. Guibault (assisted by M.A.R. Vermunt/M. Berghuis), *Study on the conditions applicable to contracts relating to intellectual property in the European Union*, final report, study commissioned by the EC (May 2002), available at:
<http://www.ivir.nl/publications/other/contracts.html>

Thanks



Aurelio.Lopez@ua.es

LVCENTINVS: <http://lucentinus.blogspot.com>

IP Tango: <http://iptango.blogspot.com>

Magister Lvcentinvs: <http://www.ml.ua.es>