CURRENT ISSUES: NATIONAL, REGIONAL AND INTERNATIONAL PERSPECTIVES

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PART I: GENERAL

A  Introductory

This year 2009 marks the 55th anniversary of my commencement of work in the field of international copyright law, for it was in 1954 that I first took part as a delegate at an international copyright meeting, namely the Berne Union Permanent Committee meeting in Lugano in June/July of that year, at which I was fortunate to meet the great copyright experts of that era: Marcel Plaisant, Rapporteur of the 1948 Berne Convention Revision Conference, Valerio de Sanctis, Eugen Ulmer, François Hepp, architect of the Universal Copyright Convention, Alphonse Tournier, co-founder of BIEM, Georges Straschnov, Jacques Secretan, the then Director of the Berne Bureau, and his successors, George Bodenhausen and Arpad Bogsch.

How gracious these great men were to me, an unknown lawyer making his first appearance among them, and how important that is, encouragement to the young. Since then I have had the years representing a copyright interest (till 1974), of practice at the Bar and (since 1992) of teaching copyright at postgraduate level. You will be relieved to hear that I do not propose to regale you with anecdotes of the past, but rather to consider, as regards copyright, where I think we are going or should be going.

1 LL.B. (Sydney, 1948); Bar of New South Wales (1949); Bar of England and Wales (1953). Professorial Fellow, Queen Mary Intellectual Property Research Institute, Queen Mary, University of London, Visiting Professor, King’s College, University of London. This paper is based on an address given to the British Literary and Artistic Copyright Association, London, on 12 March 2009, and to the Copyright Society of Australia on 3 June 2009. © Text and Appendixes J.A.L. Sterling 2009.

As you will see from the list of headings of this address, I am somewhat like the dramatist trying to contain a mighty battle within confining walls, but may I suggest that you let the challenges “on your imaginary forces work”.3

During the 55 years which I have mentioned, there have been extraordinary developments on the technological level, which have brought into debate the whole question of how, and whether, traditional copyright concepts can cope with the new environment, in particular as regards digital recording and transmission processes, satellite communication and the internet. Looking at the present situation, we see national, international and regional attempts to deal with these developments, but these attempts have not succeeded as regards all the legal aspects involved (for instance in the application of the internet making-available right introduced by the WIPO Treaties 1996), or with the challenges to the exclusive right system posed by the opening of the floodgates of communication through the massive and increasing amounts of protected material available throughout the world on the internet. So what I seek to do here is to summarise the challenges as I see them, and suggest some approaches to be adopted to meet them. I do emphasise that my suggestions are for discussion and by no means submitted as the final, or only, answers.

I use the term “old era” to describe not so much a chronological stage, but what might be called the analogue age, and “new era” to describe the digital age, suggesting 1996 as marking the point when international law made its first attempt to deal with the internet challenges, in the WIPO Treaties.

B Old era approaches

1 DISCRIMINATORY PROTECTION

(a) At the international level4

The Berne Convention in its present version (1971) in general makes copyright protection depend on nationality of the author or place of publication (Article 3(1)), with certain additional territorial-based rules as regards cinematographic and architectural works (Article 4).5 Thus, as far as the Convention is concerned, an

3 Shakespeare, Henry V, Prologue.

4 References herein to international instruments are to Berne Convention for the Protection of Literary and Artistic works 1886–1971; Universal Copyright Convention; Rome Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961; WTO Agreement on Trade Related Aspects of Intellectual Property, 1994 (TRIPS); World Intellectual Property Organisation (WIPO) Copyright Treaty 1996 (“WCT”), WIPO Performances and Phonograms Treaty, 1996 (“WPPT”). Australia is a Contracting Party to all these instruments.

5 See also the nationality and territorial criteria of the Universal Copyright Convention 1972 (Art. II), the Rome Convention 1961 (Arts 2–6) and the Phonograms Convention 1971 (Art.2). Note also the
author’s work which does not fulfil the Convention criteria is unprotected. It was said in justification of this discrimination that these rules would encourage membership of the Convention, but this argument no longer has any validity, if it ever had any:

(i) there are now over 160 countries bound to comply with the substantive provisions of the Berne Convention, and only 11 not so bound (not being Berne, TRIPS or WIPO Copyright Treaty members).  

(ii) Article 27(2) of the Universal Declaration of Human Rights provides that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. Discriminating against authors on grounds of nationality or other grounds breaches this principle, and, it may be suggested, conflicts with natural justice, for why should a human being who is a national of one country be protected, but not a human being who is a national of another country?

(iii) From the practical point of view, discriminatory protection adds to costs of recognition and administration of rights, to the detriment of owners of rights in protected material, and to the financial liability of users.

(b) At the national level

With few exceptions, national copyright laws are on a discriminatory basis. Two reasons may be ascribed for this: firstly, the principle that a national law in general only deals with the actions of its subjects, or actions taking place in its territory, and secondly, because discriminatory protection is imposed by international or regional instruments. It is submitted that neither of these grounds provides sufficient justification for discrimination against authors or owners of related rights.

(c) At the regional level

national treatment provisions of TRIPS (Art.2), the NAFTA Agreement (Art. 1703), and the Cartagena Agreement (Art.2).

6 Afghanistan, Eritrea, Ethiopia, Iran, Iraq, Laos, San Marino, São Tomé e Principe, Seychelles, Somalia, Turkmenistan.

7 References herein to regional instruments are to the North America Free Trade Association Agreement (Canada, Mexico, USA), USA Free Trade Agreements (including US-Australia Free Trade Agreement, 2004), Cartagena Agreement (Bolivia, Colombia, Ecuador, Peru, (Venezuela)) and European Union legislation (including seven European Community “Copyright Directives”). Following the entry into force of the Lisbon Treaty (after the Canberra Conference), the European Community is subsumed into the European Union.
The EC Copyright Directives contain discriminatory provisions (i.e. on bases related to European Community membership), e.g. the Database Directive, 1996 (Art.11) and the Artist’s Resale Right Directive, 2001 (Art.7).

2 BORDERED REGULATION

National laws and rules concerning assessment of infringement, and national practices as regards licensing are based in general on territorial considerations. In general, infringement is assessed according to the law of the country where the alleged infringing act takes place, and licensing for use of protected material is generally on a territorial basis. By means of reciprocal agreements, collecting societies may grant licences for use in several territories, but, as far as I am aware, no single collecting society at present grants licences permitting internet communication and downloading of all the material in its repertoire anywhere in the world (see II D 3 below).

3 EARTH BOUND DISCIPLINE

No international or regional instrument at present deals specifically with the question of infringement of copyright in Space (or, for that matter, in extraterritorial areas on Earth). See C.3 below.

C New era approaches

1 NON-DISCRIMINATORY PROTECTION

It is submitted that all authors, performers, phonogram producers and broadcasters should be granted protection by copyright or related rights and that the present discriminatory rules in this respect should be abolished. The necessary amendments should be made to the abovementioned international instruments, and to national laws and the EC Copyright Directives and other regional legislation.

2 BORDERED AND BORDERLESS REGULATION

It is submitted that present practices as to bordered regulation should in general be retained, but that new procedures for use of protected material in the borderless environment created by the internet should be adopted, where effective procedures are not at present available. The precedent for this approach has been foreshadowed by the internet making-available right granted by Article 10 of the WIPO Copyright and Treaty, and Articles 10 and 14 of the WIPO Performances and Phonograms Treaty (replicated and expanded as to beneficiaries in Article 3 of the EC Information Society Directive). These instruments refer to the authors’ right of communication to the public (as established in the Berne Convention) but add the vital specification,
“including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”, in other words, on the internet. Using this approach, rules for the internet should:

(i) clarify that the persons who make available online are the persons responsible for the websites carrying accessible material and those involved in effecting the relevant transmissions, with authorising or contributory acts of uploaders and link providers (see Part II.B. 2(a) below);

(ii) clarify that making available online takes place at the location of the initial transmission of the accessed signal, and at all points of reception of such signal (see II B. 2(b) below);

(iii) clarify the reach of limitations and exceptions and rules regarding private copying, peer-to-peer communication and upload to social networking sites; and

(iv) distinguish between the transmission signal and the transmission content manifested by the signal, and indicating what rights there should respectively be in the signal and the manifestation.

The application of these rules should lead to recognition of borderless rights with bordered and borderless application, exercise and enforcement of rights.

3 LICENSING

In conjunction with the rules mentioned under (i)-(iv) above, systems or procedures allowing global licensing of material on the internet should be available, while preserving present practices as to licensing on a territorial basis. See II.F. Solution 6 below.

4 ENFORCEMENT

Particular rules as to enforcement of the internet making available right should be developed, permitting internationally enforceable orders in relation to unauthorised use of protected material.

5 COSMIC DISCIPLINE

The new era requires the formulation of rules concerning the creation of and regulation of the use of protected material in extraterritorial areas, including Space.8

D The debate on principles

1 THE JUSTIFICATION FOR COPYRIGHT

Among the arguments justifying copyright may be mentioned:

- Encouragement of creativity
- Recognition of human and moral rights
- Economic benefits
- Protection of investment
- Public interest in creation and dissemination of knowledge and the arts.9

In my submission, the main justification for copyright is that it protects and promotes the creative products of the human mind, and is based on the principles of respect and reward for the creator; such justification implies the necessity to ensure public access to protected material on fair and practical terms.

In the 300 years of copyright history to date, there has been much discussion on the justification for copyright, but in recent years arguments for abolition or restriction of the right have been advanced with increasing vigour. What has caused this? At present we can only surmise, but two factors seem to be prominent in the debate, namely the technical advances that have made protected material widely accessible in easily copyable forms, and the expectation of users to have such material at their disposal anywhere, anytime.

These two factors have led on the one hand to new means of creativity and on the other to massive use of protected material in ways not authorised by the rightowner, in particular unauthorised file sharing and other forms of unauthorised copying. Thus the lines of the pro- and anti-copyright battle are drawn, and it is, I suggest, appropriate to examine the arguments advanced, not by polemic exaggeration, but by logical and objective analysis of the facts before us.

2 THE RIGHTOWNER AND THE DISSEMINATOR

(a) The author and the content provider

A tendency has grown up in recent years to delete the individual author from overall assessments in the field of copyright law. Authorship is regarded by some as a romantic idea, with the authors disappearing in a general mêlée of “content providers” in a sort of supermarket of entertainment and information. The fact that the individual author is the originator, the fons et origo of literary, dramatic, musical and artistic works should never be forgotten, nor should John Milton’s great statement in

9 For fuller listing of justifications for copyright see J.A.L. Sterling World Copyright Law (Sweet & Maxwell, 3rd ed, 2008) (“WCL”) paras 2.27–2.42: for contrary arguments see para.2.43.
"Aereopagitica: “a good book is the precious life-blood of a master spirit”. We should, at all costs, recognise, preserve and protect that spirit.

(b) Rightowner/disseminator partnership

Works, performances and productions lie hidden from humanity unless they are disseminated. Conversely, without such material, disseminators (publishers, producers, broadcasters, website operators) would have nothing to disseminate. At the same time, disseminators are usually rightowners, e.g. performers in their performances, producers in their sound recordings and films, broadcasters in their broadcasts and publishers in their publications. The rights and interests of rightowners and disseminators are thus inextricably entwined. Consequently, I submit that the future of copyright depends for its success on the effective collaboration and mutual recognition of the respective interests of these parties.

3 COMBINING REGULATION AND FREEDOM

In the new era, there is a call for greater freedom for the use of disseminated material, so that new creativity based on pre-existing material will flourish. This fact must be recognised, but such recognition must be linked to the preservation of the rights of those who produce protected material.

E Current issues

1 GENERAL

In Annex I some of the current issues in the field of copyright are listed under three separate headings, to which reference should be made.

As to Section 1, the issues listed may be divided into those relating to legal issues (points (1)-(4)) (diversities in systems and private international law), while the issues under points (5)-(7) (balancing interests of rightowners and the public, discriminatory protection, developing countries) may be regarded as political issues. The use of protected material in Space (point 8) could be regarded as involving both legal and political issues.

2 PARTICULAR, OTHER THAN TECHNOLOGICAL AND INTERNET

As to Section 2, the issues listed under points (1) and (2) concern definitions with important practical implications: the definition of joint authorship (at present often different in different countries) having repercussions both on exercise of rights and term of protection, and the definition of place of broadcast (place of transmission, place of reception, or both) affecting questions of licensing and infringement. Issues under points (3) and (4) concern diversities in the definition of authorship of cinematographic works: is an author of a cinematographic work under the law of one
country entitled to claim protection in another country with difference authorship criteria, and is an employee who is initial owner in one country, entitled to claim protection in a country where, according to the general provisions of the local law, the employer is the initial owner?

Point (5) concerns scope and content of moral rights, a subject on which there are fundamentally different approaches in national laws (e.g. those of the United States and France). Points (6)-(9) relate to questions of protection of databases, audiovisual performances and broadcasts, all the subject of study in WIPO with a view to formulating new international instruments. Protection of traditional works (point 7) is an ongoing issue likely to become of increasing importance as the commercial value of such works increases. Terms of protection for performers and record producers (point 10) are the subject of widespread discussion and the introduction of EU proposals for extension of terms.

The issue as to whether there should be a right to make transformative use of pre-existing material lies at the heart of the debate on the function and purpose of copyright, and is particularly relevant in the context of material made available online (see II below).

Issues in rights management and licensing, including those relating to orphan works and other orphan material (points (12) (13)) raise problems in the fields of definition and of administration, and come to the forefront in relation to online libraries (see 3 below). Decoder cards (point 14) are mentioned as an issue raising, as regards trans-border use, questions of licensing and competition law. On the horizon, we have the problems which will undoubtedly arise in relation to cloud computing.

3 TECHNOLOGICAL AND INTERNET

The issues listed in Section 3 deal in points (1)-(4) with general challenges resulting from the borderless nature of the modern communication environment, issues which arise in general because copyright has traditionally been formulated as a system of territorially based rights, whereas online communication is in principle borderless, but with possibility of territorial limitation.

Specific issues in the online field are listed in points (5)-(10), including the widely discussed issues of the licensing of the use of protected material in library digitisations for online availability, and of liability of internet service providers in point (10).

10 In relation to the European Union, see the UK case Murphy v Media Production Services Ltd.[2007] EWHC 391 (Admin.).

11 See Part II E.1 below. As at 1 January 2010, the Google Book Settlement awaits final approval by the New York District Court (18 February 2010) and if so approved will, undoubtedly mark a milestone in the history of copyright.
Format shifting (point (11)) raises fundamental points as to whether purchasers may, for private purposes, do what they wish with purchased copies. Another fundamental issue arises under point (12), namely whether private copying exemptions allow or should allow circumvention of technological protection measures.

4 PRIORITIES

It is submitted that the issues concerning developing countries, transformative use, rights management and licensing, orphan works and other orphan material, peer-to-peer file sharing, user-generated content and liability of internet service providers should be regarded as of top priority for the finding of rapid and practical solutions if copyright is to be effectively recognised in the new era.

F Current aims

1 UNIVERSAL AVAILABILITY OF ALL KNOWLEDGE

Proposals for the creation of online digital libraries as part of projects to place all material in the field of knowledge and the arts at the disposal of the public raise questions of the practical means of licensing of protected material for such uses (see E. 1. above).

2 Regulated use of all material available online

Hand in hand with the aim of the universal online availability of the contents of libraries, and similar projects, go the desire and requirement of the public to have access to such facilities online by unfettered means. Should such access be free, or subject to payment?

PART II: ONLINE AVAILABILITY OF PROTECTED MATERIAL

A General

Making protected material available online involves the exclusive rights of reproduction and communication to the public, and possibly other rights. It may be said that everyone using the internet makes copies and communicates. The alternatives for the administration of the exclusive rights are:

1 TOLERANCE OF INFRINGEMENT

A right that is not exercised becomes outmoded and liable to repeal – so tolerance of infringement threatens the continuance of copyright as a comprehensive means of protecting creativity and its associated activities and investment.
2 REGULATION OF USE

Regulation of use of protected material online represents an area of copyright and related rights in which many challenges remain to be confronted and resolved, as outlined in B. – E. below.

B Relevant rights

1 INTERNATIONAL, NATIONAL AND REGIONAL LEGISLATION

Clarity in the scope and content of the reproduction, public communication and distribution rights is essential for ordered regulation of copyright and related rights. National, international and regional legislation contains provisions in this regard but leaves many gaps, of which the following problems are examples.

2 SOME PROBLEMS

(a) Who makes available online?

There should be clarity in defining the liability (whether primary, or on the basis of authorisation or contributory infringement) of those involved in making protected material available online, including program providers, file uploaders, hosts, file storers, central index providers, link providers, telecommunicators and accessors (clarifications not provided by the WIPO Treaties).12

(b) Where does making available online take place?

The WIPO Treaties 1996 do not make clear where it is that the making available online takes place. It is suggested that it should be accepted that the points where making available online takes place include the point of initial transmission and all points of reception of the transmitted material.13

(c) Meaning of “publication”

It is submitted that making available online could be held to constitute publication in terms of Article 3(3) of the Berne Convention (1971 version). This may depend on whether it is accepted that making available online constitutes distribution of copies, see below.

(d) Is distribution of copies involved?

12 For detailed listing of potential infringements by those involved in unauthorised making available online, see WCL para 13A.01.

13 For discussion on points (a) and (b), and related issues, with reference to relevant cases in Canada, Germany, USA and other countries see WCL paras 9.29–9.44.
The question has arisen in a number of cases in the United States as to whether making available online constitutes distribution of copies. One of the points of contention is whether the mere placing of material on site for online accessibility constitutes distribution of copies. It is, however, accepted in some decisions that where there is downloading, there is a distribution of copies.

The implications of the decision as to whether, and if so in what circumstances, online distribution of copies constitutes publication of the material involved will affect the administration of rights, both as to ascertaining subsistence of protection (if a distribution constitutes first publication) and as to exercise of the exclusive right to distribute copies, as distinct from the right to communicate to the public: furthermore, definition of the place of distribution (e.g. place of site, place of download or both) will need clarification.

C Limitations and exceptions

Legislation in the United States and the European Union provides certain “safe harbours” for internet service providers (“ISPs”), e.g., release from liability for infringement caused by, or possibly through, specific acts of hosting, or caching, or mere conduit, where certain conditions are fulfilled. There seems to be a general misconception that in some way these provisions provide a general release from liability, but it must be emphasised that release is only obtainable on fulfilment of the respective conditions, and in the case of the requirement of takedown notices, there can be infringing acts unless and until the valid notice is given and acted upon.

The difficulties in international regulation by specific limitations or exceptions are manifold. The factors militating against obligatory international rules in this area are:

(i) the need to adopt provisions which conform to the three step test.
(ii) the need to revise the relevant international instruments (Berne Convention? WIPO Treaties?).
(iii) The Great Divide between the United States “fair use” exception on the one hand and on the other hand the more limited “fair dealing”

\[14\] See WCL para.9.05.
\[15\] For details, see WCL paras 13.42–13.47.
\[16\] Berne Convention, Art.9(2); TRIPS Agreement, Art.13; WIPO Copyright Treaty, Art.10(2); WIPO Performances and Phonograms Treaty, Art.16. For the complexities involved in the interpretation and application of the three step test, see the French Mulholland case quoted in F. Solution 2 below, ProLitteris v AargauerZeitung AG et al, Swiss Supreme Court, 27 June 2007, (2008) 39 IIC 990, and C. Geiger “Rethinking copyright limitations in the Information Society – the Swiss Supreme Court leads the way” (2008) 39 IIC 942.
approach of the UK and other more restrictive approaches of the civil law system, as in France.

In this connection, the area of transformative use is of particular importance. In addition to traditional means of modifying protected material, online manifestations of such material can be digitally altered in ways not previously available, e.g. by addition to, or deletion from, digital images, and “remix” and “mashups”, in particular of audio and visual recordings.

Internet users, young and old, carry out these transforming processes, and the question arises as to whether such activities require the permission of the relevant rightowner, or whether they fall under some exception or limitation such as private copying or parody. The difficulties in answering this question in any particular case are manifold – firstly, because the rules on private copying and permitted transformation differ from jurisdiction to jurisdiction, (see (iii) above), and secondly, because judgment in determining whether a permitted limit is exceeded is by its nature subjective, since there are no specific measuring rules for calculating infringement.

These aspects have in particular received the attention of Professor Lawrence Lessig, who is concerned with “criminalising” of children (and others) as a result of sanctions imposed under the criminal provisions of copyright law concerning infringement; furthermore, Lessig considers that what he calls “amateur creativity” can be stifled by the exercise of exclusive rights concerning copying and transformative use.

Lessig is by no means an abolitionist; he does not “support people using technology to violate other people’s rights”, and believes that it is appropriate “to create mechanisms to make it simple for copyright owners to collect revenues for work made available”, and that “we ought to be enabling an amateur and regulating the commercial”¹⁷, and considers that “Congress needs to decriminalise file sharing, either by authorising at least non-commercial file-sharing, with taxes to cover a reasonable royalty to the artists whose work is shared, or by authorising a simple blanket licensing procedure, whereby users could, for a low fee, buy the right to freely file share”.¹⁸

Certainly one can argue that art is built on transformative use, and that to stifle such use is to stifle art. But that does not mean that such use should be unfettered or uncontrolled, or allowed to bring harm to the creator’s economic or moral interests.

Here, then, in the context of the internet, is the crux of the problem. On the one hand we can envisage laws and court decisions being sympathetic to children, and others, who, in the privacy of their homes remix and mashup the works of others. But what of

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¹⁷ As reported in an interview published in Managing Intellectual Property March 2009, 26–30. I am grateful to Malcolm Langley for reference to this interview.

¹⁸ Lawrence Lessig “Remix: making art and commerce thrive in the hybrid economy” (Penguin 2008) at 271
the communication of such transformations to other persons? Let us consider, first of all, the situation in the analogue world, and assume that Leonardo da Vinci is still alive, and that without authorisation someone publishes in a book a transformation of the painting of Mona Lisa, showing the addition of a long red beard to the lady’s face.

In most countries, the rightowners in the painting will have remedies where the publication is commercial, but even here the “fair use” defence in the United States may run in that country, but not in other countries. Then what about non-commercial use – supposing the user simply makes copies of the transformation and distributes them to all his/her friends, or to all the world? Even if “non-commercial” transformative use is to be permitted, what is “commercial use”? And even if the use is non-commercial, what about the author’s moral rights? If you insult me, you cannot escape liability merely by saying that you did not make money out of your insult.

In the internet context, the same problem arises. One can envisage a blanket licensing system in which (by, or on the analogy of, a Creative Commons licence) the author permits transformative use of the protected material for non-commercial purposes. Even leaving aside the definition of commercial, what is to be done when the transformative use damages the integrity of the work? Surely the author (and the performer) must be able to reserve exercise of the moral rights.

In sum, it is suggested that there is a clear distinction to be made between:

(1) copying and transformation of protected material by a private individual for that individual’s private purposes: such copying should, it is submitted, be permissible without specific authorisation by the rightowners, provided that the material copied or transformed has come into the possession or control of the copier legitimately;

(2) communication of protected material to persons outside the private and domestic circle of the communicator, whether, in the internet context, this is by way of file-sharing, or upload to a social networking site, or otherwise: here it is suggested that, in the global context, licensing is necessary for legitimation. Such licensing can validate communication of the untransformed material, or of the transformed material, but in either case, the licence should, it is submitted, be subject to the exercise of the moral rights concerned. The global licence is necessary because limitations and exceptions applying under specific national laws do not have international application and validity. Preliminary consent case by case does not seem to be a practical

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19 On the difficulty on drawing the line between “commercial” and “non-commercial” see Paul Sugden “How long is a piece of string? The meaning of “commercial scale” in copyright piracy” [2009] EIPR 202

20 Such reservation may be covered in the proposed global licensing system: see F. Solution 6 below.
option. For a proposal which would enable such licensing to take place on a global scale, see F Solution 6 below, and Annex II.

D Cross-border licensing

1 THE NEED TO CO-ORDINATE CONTROL, LICENSING AND ENFORCEMENT

Control of use of protected material should embrace the ability to prohibit or license particular uses. Cross-border licensing should embrace a system which will effectively authorise the use of the protected item concerned for making available online for access anywhere in the world. Enforcement should embrace the ability to pursue and obtain remedies for infringement wherever it occurs. Rights cannot be effectively exercised unless each of these elements is available to the rightowner, or the rightowner’s representative, permitting co-ordinated recognition of rights.

2 THE BLESSING OF OBTAINABILITY AND THE NEGATIVE EFFECT OF UNOBTAINABILITY

In today’s world, uploading and downloading of protected and unprotected material are activities as easily undertaken as breathing in and out. Since such actions may include the associated actions of transforming material which is accessed, as abovementioned, users will expect facilities allowing instantaneous licensing of the intended use, subject to conditions which are accepted as maintainable in the interests of rightowners and the public. If the desired licences are obtainable on equitable terms, the exercise of copyright will be accepted by the public. If such licences are unobtainable, public opinion or influential sections of public opinion may rise against the recognition of copyright itself.

3 MANDATED RIGHTS

(a) Split rights, split ownership, split territorial reach

One of the factors militating against the effective recognition of copyright and related rights in the internet context is that the initial rights comprised in copyright (for instance the reproduction and public communication rights) can be split as to exercise, one person or body administering one right, another person or body another right. Ownership of rights may also be split between different territories.

(b) Split collecting society mandates

Collecting societies historically administer rights for their respective territories and conclude reciprocal licences for the exploitation of their repertoires in other
territories. The terms of such reciprocal agreements give problems, but even when these are overcome, there remains the point that there are rights which are not mandated to a collecting society or societies for all territories.

(c) Compulsory collective exercise?

Article 9(1) of the EC Satellite and Cable Retransmission Directive (93/83/EEC) provides that Member States shall ensure that the right of copyright owners, and holders of related rights, to grant or refuse authorisation to a cable operator for a cable transmission, may be exercised only through a collecting society. The question arises whether a compendious solution to the problem of internet licensing could be achieved by a similar provision that the internet licensing right could only be exercised through a collecting society. However, internationally agreed legislation would be necessary for the effective institution of such a provision, and it is difficult to envisage the achievement of such legislation within the foreseeable future.

4 UNMANDATED RIGHTS

(a) Identifiable non-member material

Non-member material may be defined as material in respect of which the relevant rights are not administered by the collecting society concerned.

A collecting society can (in default of special legislation) only legitimately authorise use of material covered by its mandates or those of societies with which it has the necessary reciprocal agreements. Non-member material can be licensed by the rightowner concerned, but legitimate licensing of such material by a collecting society needs legislation, see (b) below.

(b) Extended collective licensing

Undoubtedly the ability of collecting societies to license the use of material in which the relevant rights are owned by non-members (the “extended collective licensing system”, as applied in Scandinavia) would facilitate the administration of the right of making available online. Such a system may (as in Scandinavia) be used to license the use of orphan material (see (c) below).

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21 For description of some of these problems, and cases before the European Commission in this connection, see WCL para.26.21.

22 For description of the extended collective licensing system, with references to commentaries thereon (including the Scandinavian systems), see WCL para.12.24, and Annex III (3).
Orphan material

The problem of licensing material where the rightowner is unidentifiable or untraceable has been the subject of extensive studies. But no regional or international solution of this problem has yet been reached.

I make so bold as to present at this Conference a legislative proposal concerning the licensing of orphan works and other orphan material under provisions of amendments to the Australian Copyright Act 1968: see Annex III.

5 IDENTIFICATION: THE SINE QUA NON

What is being copied and communicated must be identified, otherwise the use of protected material cannot be properly regulated. How will protected material be identified? I submit that for effective global exercise of the internet right there must be some form of notification of all items of protected material, to an administering body or administering bodies, with linked databases permitting access for rights administration purposes.

All material protected by copyright or related rights can be recorded digitally. So I submit that if I want to protect my creation, performance, recording, broadcast or database in the digital world effectively, I must notify its details to the relevant administering body. Ideally, the notification will include a copy of the item concerned. With computerised facilities, I can make the notification by a touch on a key or a pad. Collecting societies already have extensive and sophisticated databases covering their respective repertoires. It is understood that YouTube also has in its Content Identification and Management System an extensive means of searching and recording data concerning protected material, as provided by rightowners. The availability of a global database of interlinked information concerning all notified protected material is not beyond the bounds of possibility; indeed, it is a development we could see within a relatively short period.

Notification must be distinguished from compulsory registration as a condition of copyright subsistence, such formality being forbidden by Article 3(2) of the Berne Convention.

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23 See WCL paras 12.32–12.37 for general description of the problems involved in orphan material and my proposal for a solution in UK law, online at www.qmipri.org/research.htm. As to the USA, see the US Copyright Office Report on Orphan Works, January 2006, and Bills presented to Congress, S2913, HR 5889. In the UK, the Digital Economy Bill 2009 contained a provision empowering the Secretary of State to authorise extended collective licensing schemes concerning use of orphan works (cl.43) (cf Annex III), but this provision was the subject of debate and was dropped from the Digital Economy Act 2010.

24 See www.youtube.com/t/contentid.
EXERCISE OF RIGHT

(a) Prohibition: With respect to prohibition of use of protected material, we have to take into account the concerns expressed by Professor Lessig; and other writers. Lessig accepts the value of copyright in encouraging and sustaining creativity, but as abovementioned his concerns include:

(i) the challenge of the effective exercise of the exclusive rights of copyright in the modern communication environment, and
(ii) the criminalising of those (particularly children) who copy or communicate without authorisation.25

I believe these concerns must be taken into account in the exercise of copyright in the new era.

Consequently, we need first to establish those conditions in which the exercise of the prohibition right will be justified in the digital (copying) and online (communication) environment.

Here the three step test, now law throughout countries bound by the TRIPS Agreement, including the USA and all countries of the European Union, must be taken into account.

(b) Legitimated use

(i) Potential infringements: where material is hosted online, unauthorised use of such material involves infringement (or authorising of or contributing to infringement) by the uploader, the host, the link provider and the accessor (and by the storer, where the material is stored for use by the host), and possibly, where knowledge of infringement subsists, by the program provider. A multiplicity of separate rights will be infringed by unauthorised use, e.g. in the case of sound recordings, those of the author, the performers and the sound recording producer, and in the case of films, depending on the applicable national law, of the director, performers, producer and others.26

Accordingly, permissions covering a multitude of rights and, at present, from a multitude of rightowners must be obtained to ensure global legitimacy of use.

25See C above.

26 For a detailed description of the potential infringements involved in unauthorised file sharing and file hosting, see WCL para. 13A.01.
(ii) Particular areas: in the context of the internet, two areas need particular consideration in formulating rules for legitimated use:

(i) peer-to-peer file sharing of films and sound recordings;
(ii) upload of protected material to social networking sites such as YouTube, and public communication following such upload.

The questions involved include:

(a) Legitimation of the initial act of sharing, or uploading to site.
(b) Legitimation of hosting, onward transmission and storage facilities.
(c) Legitimation of accessor downloading and subsequent use (e.g. further use of material on a social networking site such as Facebook).

(iii) Individual and collective licensing: two forms of licensing are available:

(a) individual licensing: that is, licensing by the rightowner (or rightowner’s representative) without the intervention of a collecting society as where, for instance, a rightowner:

(i) provides sites with the facility of legitimated download (as in the case of iTunes): whether such facilities will eradicate unauthorised peer-to-peer file sharing remains to be seen, but such an outcome at present seems unlikely;

(ii) licenses the social networking site directly, e.g. where the rightowner has a contract with the site operator permitting online use of specific material on specific conditions: such contracts will only cover the particular networking site concerned;

(b) licensing by collecting societies: here one of the problems will be the territorial scope of the licence.

(c) Peer-to-peer file sharing

I believe that it will be generally accepted that an overall exception for peer-to-peer file sharing will not conform to the three step test – it is not a special case, it affects the normal exploitation of the material and it is prejudicial to the rights of the author, since it deprives him or her of the right to determine the conditions of copying and communicating the work.
So how will peer-to-peer file sharing be regulated? I submit that this can be comprehensively achieved by a system of permission rather than prohibition, see F. Solution 6. below.

(d) YouTube and similar facilities

YouTube and similar social networking sites allow upload of material for making available online. Without the necessary authorisations, such activities involve, where protected material is concerned, infringement of copyright or related rights by the uploader, the host, and the accessor, and possibly other persons (see above).

The status of all material which it is proposed to use on the internet must be identified before such use, if infringement of rights or other unlawful acts are to be avoided.

The preliminary establishment of status of the material concerned in this context, in a rapid and comprehensive manner, is thus essential for the effective control of the use of protected material on the internet.

Systems are already in use for the identification of the subsistence and scope of rights, but there can be gaps in these systems, for instance as regards geographical extent and orphan material, see below. However, we may proceed by considering material of which the protection status is established.

Protected material uploaded to social networking sites may be described as “user-generated” and may consist of various categories of material, including

(i) “User solo material”: the production of the uploader alone: in this case the uploader may, if the production consists of such material alone, and subject to legislative limitations or exceptions, and any conditions imposed by the website operator, determine the conditions of copying and communication, for instance by a Creative Commons or similar licence, or by notification to an administering body;

(ii) “Identified third party non-transformed material”: protected material not created, performed, produced etc. by the uploader. To forbid all such uploading without providing legitimation, or offering of the possibility of such legitimation, in my view adopts an attitude which does not take into account the realities of the present situation.

(iii) “Identified third party transformed material”: While third parties may authorise in advance the uploading of non-transformed material in which they own rights, the licensing of upload of transformed material presents particular problems in two areas,
namely the exercise of limitations and exceptions, and the application of moral rights. A limitation or exception which is applicable in one country may not free an upload from infringement in another country: for instance, an uploading of substantial extracts of a protected work may be permissible in the US within the “fair use” provisions of the US Copyright Act, but not under French law, so that download in France would infringe.

As regards moral rights, it is unlikely that authors would wish to give preliminary permission for transformations which infringe the integrity right, and, indeed, in some countries such permissions would be invalid because of the unwaivability of moral rights. It seems, therefore, that to achieve legitimation in this area the choices are

(a) a system of preliminary reference to the author or performer of all transforming uploads of the work or performance concerned, for decision as to whether moral rights are infringed, and, if so, the necessary takedown (a system which hardly seems practical) 27, or

(b) an internationally accepted exception covering transformative use on social networking sites (a provision which is unlikely to obtain universal acceptance), or

(c) a system of licensing under which (i) the rightowner permits transformative use, subject to the exercise of moral rights in the material concerned, and (ii) the site owner permits upload subject to possible claims for infringement of rights, the uploader to be responsible in this respect.

(iv) “Non-identified third-party material”: For the site operator legitimately to license the uploading of orphan material, some form of universally applicable extended collective licensing would need to be available. National systems for dealing with orphan material may be different. Possibly a solution would be for the site operator to allow upload on the basis of indemnity by the uploader against subsequent claims, and other conditions.

27 Note that, in addition to the moral rights granted to the author by Art.6bis of the Berne Convention, Art.5 of the WIPO Performances and Phonograms Treaty grants the performer certain moral rights of attribution and integrity regarding live aural performances and performances fixed in phonograms.
“Incidentally included material”: It seems possible to envisage a situation where incidental use of protected material in uploads could be covered in the licensing provisions.

Legitimated use may be achieved by direct licensing by the rightowner or rightowner’s representative concerned, or through agreements concluded between collecting societies and the networking site concerned. However, as indicated above, such agreements will not at present necessarily give global cover for access to the online material throughout the world.

E Present studies and procedures

1 EUROPEAN COMMISSION

Among the extensive series of legislative reports, proposals and studies issued by the European Commission are those concerning management of copyright and related rights, and digital libraries.28

Here, I would only mention that, in my view, proposals for the establishment of European Union-wide licences for the online use of protected material do not meet the practical requirements of rightowners, disseminators and users, namely licences which cover global accessibility on the internet. It is of limited use to the prospective licensee seeking geographically unrestricted licences to be offered an EU-wide licence which does not cover access in any country outside the EU.

2 UNITED KINGDOM

Extensive studies and reviews of copyright law, including aspects of such law in the context of online use of protected material have been carried out in the UK: these include the Gowers Review on Intellectual Property, issued by the Intellectual Property Office, 2006, the Department for Business Enterprise and Regulatory Reform (BERR) Consultation on legislative options to address illicit peer-to-peer file sharing, July 2008, the Intellectual Property Office “Rights Agency and P2P”, 2008, the BERR Interim Report “Digital Britain”, January 2009 and “Copyright in the digital world: what role for a Digital Rights Agency?”, March 2009. The proposals in and issues raised by these documents are under continuing study and here I would only mention

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the following passages with which, with respect, I entirely concur, and which are in line with the proposals which I make in this address:

… In the new digital world, the ability to share content legally becomes ever more important and necessary. Traditional mechanisms to identify rights-holders and acquire legal consent to share often need radical updating to meet the near-instant demands of this new world. There is a clear and unambiguous distinction between the legal and illegal sharing of content which we must urgently address. But we need to do so in a way that recognises that when there is very widespread behaviour and social acceptability of such behaviour that is at odds with the rules, then the rules, the business models that the rules have underpinned and the behaviour itself may all need to change … Our aim, in the rapidly changing digital world is a framework that is effective and enforceable, both nationally and across borders. But it must be one which also allows for innovation in platforms, devices and applications that make use of content and that respond to consumers’ desire to access content in the time and manner they want, allowing them to use it how they want, and at a price they are willing to pay.” (BERR Interim Report “Digital Britain”, January 2009, published by The Stationery Office, para.3.2)

The proposal for a UK Digital Rights Agency is not in conflict with the global licensing agency proposal made in F. Solution 6 below: rather it could complement the operation of the global entity. See also the proposals in the Digital Economy Bill (first reading in the House of Lords, 19 November 2009, cf. C4.(c) above.

3 ACAP

Automated Content Access Protocol (ACAP) is “a non-proprietary protocol, developed by publishers, which is designed to ensure that anyone who publishes content on the web, and who wants to ensure that web crawlers used by search engines, and other online aggregators, can read and understand the terms and conditions of access and re-use [is able to do so]”.29 Undoubtedly this and similar systems may contribute to means of control of the use of protected material on the internet, within the context of a global licensing system as proposed hereunder: see F. Solution 6.

29 Quotation from ACAP website at www.the-acap.org, where details of the ACAP system and procedures are available.
By way of example I take peer-to-peer file sharing and social networking sites and consider six possible solutions (there may be others):

Solution 1: Continue as at present

(a) Regarding peer-to-peer file sharing: two streams of activities by rightowners as regards unauthorised peer-to-peer file sharing are at present discernable: (i) licensing of download of specific items from specific sites (e.g. iTunes), and (ii) bringing of legal actions against unauthorised file-sharers, hosts and downloaders.

As to licensed sites it is understood that at present these sites only offer download of protected material on a territorial basis. Since present solutions do not legitimate global download, the internet’s fundamental feature of global access is therefore not satisfied, such satisfaction being, it is submitted, essential for a solution that will be in the interests both of rightholders and the public.

As to the bringing of actions for unauthorised file sharing activities, this is in the global sense ineffective, as witness the fact that, with new technology such as BitTorrent, the problem grows, and does not decrease. Furthermore, legal actions against non-commercial users can create a bad press for copyright, one that prejudices the continuance of copyright as we know it. In this connection, it must be doubted whether the “graduated response” system of enforcement in the French HADOPI legislation (2009), also being considered in the UK, will effectively eradicate unauthorised file sharing. Cf., in the UK, a somewhat similar procedure instituted by the Digital Economy Act 2010.

(b) Regarding social networking sites: As above indicated, it appears that the present systems of individual and collective licensing do not give comprehensive global cover, either because, in the case of individual licensing they relate to limited repertoires, or, in the case of collective licensing because they are territorially limited, or limited as to the rights covered by the licence.

Solution 2: Introduce limitations and exceptions. Limitations and exceptions are the minefield of copyright. Try to extend limitations regarding private copying, and the French will rise in arms and cry “There is no right of private copying”, as the Cour de Cassation has declared.\(^{30}\) Try to cut down limitations and exceptions, by arguing, for

instance, that the US fair use system contravenes the three step test, and the United States will storm out of the room. Far better to leave the international rules basically as they are, and work within them.

Solution 3: Require sites which host protected material to monitor and filter out infringing material. Even if it were possible to introduce effective monitoring and filtering (which is contested), such actions will not, by themselves, regulate unauthorised file sharing, since in the now prevalent BitTorrent system there is no hosting website, no central list of copyable files – but everyone shares by individual exchange of constituent parts brought together through a myriad of transmissions of file segments to the accessor at the end of the process. By all means, as seems to be the present accent in legislative proposals, introduce provisions legitimating ISP activity, safe harbours and so forth – but without the other side of the medal, namely licensing, the eradication of unauthorised material from the internet gives only half the requisite.

Solution 4: Abolish the right to control making available on the internet. To achieve abolition of the right, the WIPO Treaties would have to be amended to delete basic provisions of the instruments (in WCT Article 8, in WPPT Articles 10, 14), national laws granting the right would have to be repealed as would the relevant provisions of the EC Information Society Directive (Article 3). Solution 4 is not a serious contestant, unless rightowners fail to provide practical licensing systems: in the case of such failure, the maintenance of the right itself would indeed be under threat.

Solution 5: Introduce a levy system. It may be that a levy system can provide part, but possibly not the whole of the solution. First and foremost we have to consider its international acceptability, and the modalities of its application.

Solution 6: Provide global licensing of protected material. I believe that it is axiomatic that the solution to the internet challenges, including unauthorised file sharing and the making available online of user-generated content on social networking sites, requires a global solution, not one based on territorial division of rights. The advent of the internet requires changes in copyright licensing procedures to reflect the borderless nature of internet transmission, which permits instantaneous access to online material throughout the world.

The right to make available online needs to be regarded as universal in character, with corresponding licensing facilities covering both reproduction and communication to the public.

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31 Cf. Berne Convention, Art.9(2); TRIPS Agreement, Art.13; WIPO Copyright Treaty, Art.10(1); WIPO Performances and Phonograms Treaty, Art.16(2).

This why I have proposed the GILA System for global internet licensing under which rightowners or their representatives will entrust (either directly or through a collecting society) a central body with the global administration of their rights in the context of internet use (existing practices regarding broadcasts, hard copy publication etc being maintained).³³

In brief, the GILA licence covering global use of protected material on the internet would, with “tailor made” conditions, be available to file-sharers, hosts, storers, social networking site operators and uploaders, broadcasters, the press, and others wishing to upload to or use protected material on the internet.

The advantages of this system are:

1. No need for legislation introducing limitations or exceptions.
2. Legitimated use of protected material, meeting the concerns expressed by Professor Lessig and others concerning “criminalisation” resulting from unauthorised file sharing, and avoidance of disputes concerning infringing uploads on social networking sites.³⁴

In my submission, global and territorial licensing of protected material should be on the basis of freedom of choice for rightholders. Thus a rightholder, or group of rightholders, may wish to license the material themselves, directly to hosts, networking sites etc. However, I believe there can be disadvantages for rightholders in so proceeding, since separate contracts need to be made with a multiplicity of uploaders, hosts or accessors, and users can be reluctant to seek licences from many sources. To an extent, the same applies where collecting societies can only give licences covering certain territories.

It would of course be open to individual rightowners or collecting societies to remain outside GILA. However, it is thought that it will be attractive for the licence seeker, and thus of advantage to the rightowner, to have a central point to which to refer for the necessary licence.

So, it may be asked, if the rights to make protected material available online are, at any rate to a certain extent, to be put in the hands of a central licensing agency, quis custodi et ipsos custodes? Who will control the controllers? Such control is in my view essential so that all concerned can be assured of fair and practical licence terms and that rights are not abused. Possibly one could consider that in case of dispute between the global licensing body and the applicant for a licence, the matter could be settled by the WIPO Arbitration and Mediation Centre, which already has extensive experience in the

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³⁴ See C. above.
internet area through its domain names Dispute Resolution Service, and in any event, I believe that WIPO must be involved in seeking solutions of the issues to which I have referred in the course of this address.

Collecting societies should, in my respectful view, establish a global licensing system on the lines described, or find some other practical and comprehensive method of dealing with the global use of protected material on the internet. Failure to do so will threaten the preservation of copyright in the new era, and success should guarantee the maintenance of copyright in the ever-increasing domain of borderless communication.

We must not be like the Venetian Professors who met every Saturday evening to discuss how to prevent the flooding of Venice by the rising waters, and one evening looked down and saw that the waters had reached their knees.

My plea is that all those who are concerned with copyright as rightowners, disseminators or users should agree on the best way forward.

II THE WAY FORWARD AND CONCLUSION

A The way forward

1 COMBINED APPROACH: RIGHTOWNERS, DISSEMINATORS, USERS

My view of the future of copyright is not confined to the challenges of the internet, but embraces the whole area of the issues in this field. A solution to the problems posed in the analogue and digital areas requires, in my view, collaboration of rightowners and their representatives, disseminators and users. I propose the formation of a universal copyright research alliance to achieve this. The alliance should bring together rightowners, and rightowners’ representatives, disseminators (including broadcasters, internet service providers and search engine service administrators) and representatives of users of protected material.

The object of the alliance would be to undertake research in copyright and related rights issues, to seek consensus on such issues, wherever possible, and to make representations and reports to Governments and relevant national, regional and international organisations, academic and professional institutions, and others, concerning solutions to issues which have been the subject of research by the alliance, including but not limited to those raised by national and transborder communication of protected material. Participation in the alliance would be open to the relevant representatives of the respective sections, and their statements and views on the issues under study would be available for public comment. A convenor would be necessary
to initiate the project, and the alliance would operate through internet communication.

2 FIXING THE GOALS

The goals to be achieved should in my submission provide solutions for the issues which I have described and, in regard to the specific problems raised by the internet, should include

(a) acceptance by rightowners of the principle that the internet making-available right should as far as possible be treated as territorially indivisible and should be mandated accordingly;

(b) establishment of a central licensing agency empowered to license on a global scale the use on the internet of all material protected by copyright and related rights;

(c) within the ambit of global licensing of protected material for use on the internet, provision of conditions permitting copying and transformative use by individuals within the strictly private sphere, with necessity for the relevant licence for file sharing or any further transmission of any protected material whether transformed or untransformed.

In general, a major goal should be the education of the public (including students at the primary, secondary and tertiary levels) concerning the principles of, and practical information concerning the operation of, copyright and related rights.

3 PLANNING

Those interested in the maintenance and effective recognition of copyright should in my view now as a matter of urgency set about planning the achievements of the goals mentioned above. Whether this is done through the abovementioned alliance or otherwise is for those concerned to decide.

B Conclusion

Summing up, I would say that the issues facing copyright generally are, on the one hand, those which might be put in the “traditional” field – issues like the definition of joint authorship, protection of audiovisual performers and broadcasters etc. Of these issues, I believe one of the most difficult is that of orphan works, since the solution will require internationally agreed definitions and procedures to be fully effective. However, the demand of satisfying the needs of the information society will, I am confident, lead to solutions.
On the other hand, the technological issues present a much greater challenge: the challenge is not so much, I believe, as regards enforcement – the collaboration of ISPs and technological tracing measures should ensure that. The negative aspect of enforcement is that it achieves no benefits for rightowners, or for the economy, if it is not matched with effective licensing procedures.

This is why I believe that, in a sense, the future capacity of copyright, as an effective legal discipline, to ensure recognition of copyright and related rights, lies not so much in the hands of the legislators, but, as abovementioned, in collaboration between rightowners and their representatives, disseminators and users. The creation of a global system of internet licensing should, where operating in conjunction with other licensing procedures, ensure the continuance of copyright and related rights and the benefits they bring to rightowners and the public alike.

Thus we may say that the ball is in the court of the collecting societies and disseminators to participate in the collaboration I have suggested. I plead with them to get together, and save copyright from being strangled in the tentacles of technology, or submerged in uncontrolled piracy, to their detriment, and the detriment of the public. Nature (and law) abhors a vacuum, and a present vacuum in copyright is the absence of global internet licensing. I hope that rightowners and collecting societies, in collaboration with disseminators, will fill that vacuum.

In the old era, the approach was “Give the author exclusive rights and let the legislator set the exceptions”. In the new era the approach should, I submit, be “Give the author exclusive rights and offer the rightowner the possibility of effective exercise of those rights by accepting fair and practical terms applicable to the use of protected material in the modern communication environment”. The alternative of uncompromising demand of the exercise of the exclusive right in the internet context will, in my view, result in the continuance and increase of unauthorised use, and, in the final scenario, threaten abolition of the right itself.

At the outset of the address I promised not to lapse into anecdotes. I do want to mention, however, that at the conclusion of the WIPO Diplomatic Conference in 1996, at which the WIPO Treaties on copyright and related rights were adopted, Dr. Arpad Bogsch (Director of WIPO) and I greeted each other, for the last time, had we but known it. “Sterling”, he said “these Treaties are only a step in the history of copyright. You and I will disappear, but copyright will continue.” Well, Dr Bogsch was always right, so that gives us confidence.

Finally: in Tennyson’s great poem *Ulysses*, the old warrior looks back on his life and adventures, and he does not wish to remain in the past, but, in seeking the new, “to strive, to seek, to find and not to yield”: these words may, I suggest, provide the fitting motto for the copyright lawyer in the 21st Century.
ANNEX I

Current issues in international, regional and national copyright
(The listing does not purport to be comprehensive.)

SECTION 1: GENERAL ISSUES

(1) Diversities in national systems
(2) Diversities in international systems
(3) Diversities in regional systems
(4) Private international law
(5) Balancing the interests of rightowners and the public
(6) Discriminatory protection
(7) Developing countries
(8) Use of protected material in Space

SECTION 2: PARTICULAR ISSUES (OTHER THAN THOSE CONCERNING DIGITAL TECHNOLOGY AND THE INTERNET)

(1) Definition and term of protection of works of joint authorship
(2) Definition of place of broadcast
(3) Authorship of cinematographic works
(4) Ownership of rights in employees’ works
(5) Scope and content of moral rights
(6) Protection of databases
(7) Protection of audiovisual performances
(8) Protection of broadcasts
(9) Protection of traditional works
(10) Performers’ and record producers’ terms of protection
(11) Transformative use
(12) Rights management and licensing
(13) Orphan works and other orphan material
(14) Decoder cards
SECTION 3: ISSUES CONCERNING DIGITAL TECHNOLOGY AND THE INTERNET

(1) Challenges to traditional concepts
(2) Challenges to definition and application of rights
(3) Challenges to exercise of rights
(4) Challenges to enforcement of rights
(5) Peer-to-peer file sharing
(6) User-generated content
(7) Content aggregation
(8) Virtual worlds
(9) Online libraries
(10) Liability of internet service providers
(11) Format shifting
(12) Technological protection measures
(13) Cloud computing
ANNEX II

Global internet Licensing: legitimating file sharing and social networking:
proposal for a global system

Part I: General

1 Introductory
Administration of licences for the reproduction, communication to the public, and
distribution, of copies of protected material (including authors’ works, performances,
sound and film recordings and broadcasts) is, in general, conducted on a national
basis, with reciprocal agreements between administering societies. However, online
communication is basically global, and a general licensing system should be available
which enables website operators, and others, to obtain globally effective licensing for
the online communication of protected material.

2 Key issue
The challenge is to establish a general licensing system which enables prospective users
to obtain permissions covering the online availability of protected material throughout
the world, such system to be structured so as to afford, on the one hand, a practical
and effective means of recognising rights in protected material, and on the other hand
giving the public an effective means of prompt obtaining of the necessary licences on
reasonable terms. The key issue is how to achieve this in a way that will provide
legitimation for all forms of use of protected material on the internet, including file-
sharing and social networking.

3 Resolution
A central licensing agency should be established to provide global licensing of online
use of protected material.

4 Proposal
It is proposed that collecting societies establish a central licensing agency (GILA)
empowered to issue global internet licences for the uploading and transmission of
protected material throughout the world. For description of the proposed system see
Part II below.

Part II: The GILA System for Global internet Licensing: summary

A Main features of the system
1 Establishment of a central internet licensing agency by existing collecting
societies, the agency to administer the licensing of use of protected material
on demand on the internet ("the internet right"), without territorial restriction.

2 The structure of the system: the rightowner or rightowner’s representative globally mandates a collecting society (which then accordingly mandates GILA) or GILA directly with the administration of the internet right for the material concerned.

3 Material mandated to GILA forms part of the GILA repertoire. Every item in the GILA repertoire has a GILA Identification Number (GIN), permitting administration of rights in, and tracing of online use of, protected material.

4 The GILA home site contains details of all items of the GILA repertoire, and of the various categories of available licence.

5 The prospective user (including file sharers and user-generated content uploaders) applies online for the required licence. If a global licence is required, this is issued by GILA. If a territorial licence is required, the applicant is referred to the relevant rightowner or rightowner’s representative or collecting society, where this information is available to GILA.

6 Royalties paid to GILA are distributed to the rightowner, rightowner’s representative, or collecting society concerned.

7 Structure, administrative procedures and licence conditions conform to competition rules.

B The licence system in practice

Licences regarding hosting, file storage, file sharing, and social networking involving sound recordings or films, are taken as examples.

1 Website operator, storer, social networking site operator (e.g. YouTube) and internet connection suppliers (ISPs) apply to GILA for a GILA internet Licence and are issued with the appropriate licence, with conditions, including payment terms where applicable.

2 An internet user wishing to share files or upload items to a social networking site applies for a GILA File Sharer or File Uploader Licence to cover specific recordings. The licence is issued with conditions, including payment terms where applicable. The File Uploader Licence may be issued through the social networking site operator.
ANNEX III

Australian Copyright Act 1968: Orphan works and other orphan material: a legislative proposal

Part I: General

1  Introductory

The modern era demands effective and practical means for obtaining licences for the use of all legitimately available protected material (including authors’ works, performances, sound and film recordings and broadcasts). However, the owners of the rights in protected material may be unknown or untraceable (such material constituting “orphan material”).

In the Copyright Act 1968, there are a number of provisions on limitations and exceptions to copyright law, but these provisions do not cover all possible cases where use is intended to be made of orphan material.

2  Key issue

The key issue is how to achieve the establishment of the conditions of legitimate use of all categories of orphan material from the inception of such use.

3  Resolution of the key issue

Legitimation of online and offline use of orphan material should, it is submitted, be effected by legislative provisions giving the necessary coverage for intended use. It is submitted that eight essential conditions need to be fulfilled in order to provide effective and comprehensive licensing of use of orphan material, namely:

Condition 1: Legislative solution
Condition 2: Conformity to existing legislative structure
Condition 3: Conformity to international and regional instruments
Condition 4: Recognition of economic and moral rights
Condition 5: Provision of remuneration
Condition 6: Comprehensive coverage of rights
Condition 7: Operational practicability
Condition 8: Control of licence terms

In practical terms, two cases need to be distinguished: (1) cases where there is a collecting society which administers the right in respect of which permission is needed
for the use of orphan material, and (2) cases where there is no collecting society administering the right concerned.

Existing national systems regarding licensing of use of orphan material include (1) the Scandinavian Extended Collective Licensing (ECL) system, under which national legislation permits accredited collecting societies to license use of non-members’ works on approved terms, (2) the Canadian Tribunal application system (Canadian Copyright Act, section 77), and (3) the compulsory licence system (covering published works) under article 67 of the Japanese Copyright Law.1 The proposal here made provides comprehensive coverage of both cases outlined above and combines the features of the Scandinavian and Canadian systems to provide as rapid and comprehensive means as possible for the licensing of the use of orphan material.2

4 Proposal

The national copyright law should provide that a collecting society managing the relevant right may license, under defined terms, the use of orphan material where the relevant owner is (following reasonable enquiry) unknown or untraceable. If no collecting society administers the right involved, the prospective user should be able to obtain the necessary licence through application to the respective judicial entity (e.g. Copyright Tribunal).

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1 For general summary of the problems involved in licensing of orphan material and of the Scandinavian and Canadian systems, see J.A.L. Sterling World Copyright Law (3rd ed., Sweet & Maxwell, 2008 paras 12.24, 12.32–12.37. For detailed description of the systems of Scandinavia, Canada and Japan, and of proposals considered in Australia and elsewhere, with comprehensive analysis of the issues involved, see Ian MacDonald “Some thoughts on orphan works”, 24/3 Copyright Reporter 152 (October 2006), also available online. See also M. Rimmer “Finders keepers: copyright law and orphan works” (online at www.digital.org.au/alcc/slides/OrphanworksMRimmer.ppt). For details of US proposals see the US Copyright Office Register’s Report on Orphan Works, January 2006, at www.copyright.gov/orphan. The US proposals submitted to Congress (lapsed Bills S2913, HR5889) under which claims of persons suing for unauthorised use of orphan material would be subject to limited damages, did not, it is submitted, provide solutions comprehensively recognising the interests of the rightowners and users, since remedies under these proposals were limited by statute in advance, and on initial use the user would be an infringer. No statutory system for dealing with the licensing of orphan material has yet been adopted in the UK: see British Copyright Council proposal at www.britishcopyright.org/pdfs/policy/2009_001.pdf, and note also the lapsed proposal in clause 43 of the Digital Economy Bill, see main text, II D 4 above.

2 For a parallel proposal in the context of UK law, with detailed description of the operation of the system, see J.A.L. Sterling “Orphan works and other orphan material: proposed amendments to UK Copyright, Designs and Patents Act 1988: the “legitimated use” system” online at www.qmipri.org/research.html.
The amendments to the Copyright Act 1968 as proposed in Part II below concern a system for the legitimisation of the use of orphan material, based on (a) administration through a collecting society, or (b) where no relevant collecting society exists, consent obtained through application to the Copyright Tribunal. It is submitted that this proposal conforms to the eight essential conditions described under 3 above, and as regards Condition 2, the Copyright Act 1968 provides the legislative structure for administration of orphan material by collecting societies (in defined cases and under approved rules). It is emphasised that the proposals are for a basis of discussion, and there may be other forms of amendment to achieve application of these two principles.

Part II: Proposed amendments concerning orphan works and other orphan material

Insert new provisions in the Copyright Act 1968 as follows:

(“Protected material” means any subject matter or performance in which copyright or performer’s right of action exists by virtue of the Act, “declared collecting society” means a body declared to be a collecting society in accordance with the provisions of the Act, and “Copyright Tribunal” means the Copyright Tribunal of Australia.)

Provision 1 Provision that where an owner of a right granted by the Act has not transferred management of such right to a declared collecting society and where the identity or whereabouts of such owner cannot be ascertained by reasonable enquiry, a declared collecting society which manages rights of the same category shall be deemed to be mandated to manage such right in accordance with a licence scheme approved by the Copyright Tribunal, and a use covered by a licence validly issued by such society under such scheme as so mandated shall be treated as licensed by such owner.

Provision 2 Provision (a) that the Copyright Tribunal may, on the application of a person wishing to use an item of protected material, give consent to such use in a case where the identity or whereabouts of the person entitled to exercise the right to authorise such use cannot be ascertained by reasonable enquiry, and where no declared collecting society is mandated in accordance with Provision 1, in respect of management of rights of the category concerned, and (b) that such consent has effect as consent of the person entitled to exercise the right to authorise the use concerned.
Provision 3  
Provision that no civil or criminal liability under the Act will result from issuing of, or acting in accordance with, a licence granted under Provision 1, or acting in accordance with consent given under Provision 2.

Provision 4  
Provision that a rightowner to whom Provisions 1 or 2 apply, has the same rights and obligations, resulting from any relevant agreement between the licensee and the licensing body, as have rightowners who have transferred management of their rights to that licensing body.

Additional Provisions  
Provisions concerning relevant functions and powers of the Copyright Tribunal, conditions to apply to licence schemes, claims by revenant rightowners and period within which such claims must be made etc.
ANNEX IV

Asian Pacific Copyright Association (APCA)

Proposal for formation

Part I: Introductory

The Pacific Region as a whole may be seen as composed of the regions to the west and east respectively of the International Date Line (IDL). The region to the west of the IDL may be called the Asian Pacific Region, including Russia, China, Korean peninsula, Taiwan, Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, Brunei, East Timor, Japan, Philippines, Australia, New Zealand, Papua New Guinea and Pacific island States, e.g. Fiji. The region to the east of the IDL may be called the Eastern Pacific Region, including Canada, United States, Mexico, Panama, Colombia, Ecuador, Peru, Chile, the Hawaiian and Marshall Islands, Samoa etc.

All countries in the Pacific Region have copyright laws, and it is thus possible to envisage an overall association of countries of the Asian Pacific Region on the one hand and of the Eastern Pacific Region and the other, both coming together in a Pacific Region Copyright Association. That, however, is a long term prospect and irrespective of whether it is eventually achieved it is submitted that, as far as the Asian Pacific Region is concerned, the formation of the Asian Pacific Copyright Association (APCA), to provide a forum for the discussion and seeking of consensus on copyright issues in the region, will be of immediate value to the peoples of the whole area, who at present speak on copyright with different voices, often unaware of the views and needs of other countries in the region.

From the international point of view, it is notable that the European Union consists of 27 countries with facilities to formulate common copyright policies throughout the Union. With EU membership including countries such as the UK, France and Germany, which have influence in the copyright area, this gives the European Union a notable strength of negotiation in putting its views on copyright at the international level. There are also the provisions regarding copyright in the North American Free Trade Agreement (NAFTA) embracing Canada, Mexico and the USA, and in South America in the Cartagena Agreement.

In the Asian Pacific Region, there is at present no regional copyright association, yet the Region includes a large percentage of the world’s population, and its countries are bound by economic and other ties: they also have important cultural traditions and authors, artists and musicians of world renown. The copyright laws of the region are also of interest, representing or reflecting, as they do, the three main traditions of copyright legislation: the common law system (e.g. in Australia, Malaysia, New Zealand, Singapore), the civil law system (e.g. in Cambodia, Russia, Vietnam), and
systems combining features of the common law and civil law systems, and additional features (e.g. China, Japan).

Copyright law, or laws related to copyright, protect and foster the maintenance and protection of the rights of authors and of those engaged in the performance, production and dissemination of creative works, including performers, film and record producers and broadcasters.

Because of modern means of communication, including satellite broadcasting and the internet, national copyright laws need to be assessed in the light of international and regional considerations, as well as national. In addition, the advent of the internet and the facilities it offers renders it essential to ensure that material protected by copyright is accessible by the public on fair and reasonable terms, and in accordance with systems that guarantee, on the one hand, the preservation of the interests of rightowners, and on the other, the recognition of the public interest in ready access to all available material.

It is suggested that the nations of the Asian Pacific Region should, through their respective governments, academic and professional institutions, organisations representing authors, performers, film and sound recording producers and broadcasters should, in conjunction with those representing other disseminators of protected material (including internet service providers), and with representatives of the public interest and individuals interested in the maintenance of copyright, form the Asian Pacific Copyright Association (APCA) with the objective of promoting the maintenance and development of copyright and related rights in the Region.

The Association should seek recognition by the World Intellectual Property Organisation, the World Trade Organisation, UNESCO, and other international bodies so that it can put forward the views of APCA and ensure that the needs and concerns of the people of the Asian Pacific Area in the field of copyright and related rights are taken into consideration by the international community in all discussions and international treaty negotiations concerning such rights.

It is suggested that a Planning Committee be set up to forward the implementation of this proposal, with a view to holding a foundation meeting. As a start, prospective National Groups can be formed before the foundation of the Association, and two or more such Groups could effect such foundation.

**Part II: Suggested structure and procedure**

The following is suggested as a basis for discussion in planning the structure and procedure of APCA.

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A  General

1  Constitution and objective

An association with the objective of promoting, through legislation, dialogue and education, the maintenance and development of copyright and related rights in the Asian and Pacific Region (i.e., that region embracing the countries and territories located in or bordering on the Pacific Ocean west of the International Date Line, including Russia, China, Korean peninsula, Taiwan, Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, Brunei, East Timor, Japan, Philippines, Australia, New Zealand, Papua New Guinea and Pacific island States, e.g., Fiji).

2  Membership

Membership of the Association to be open to any person or organisation located in the Asian Pacific Region, and interested in the objective of APCA. Associate membership to be open to interested persons or organisations located outside the area (e.g., in Canada, India, U.S.A.)

3  Organs and Officers

a  General Assembly of members of the Association.

b  Officers: President, Vice Presidents, Secretary General: elected by General Assembly.

c  National Groups consisting of members of the Association located in the respective countries.
d Regional Council consisting of the Officers and of delegates of the National Groups, one delegate per country.
e Executive Committee consisting of the Officers and of persons appointed by the Regional Council.
f Secretariat of the Association, headed by the Secretary General.

4 Meetings
Meetings of the General Assembly, the Regional Council, the Executive Committee and National Groups to take place in accordance with the respective rules of those bodies.

5 Finance
The funds of the Association to be constituted by membership fees, donations and subventions, and administered by the Secretariat.

6 Areas of activity
The areas of activity of the Association to include the following items, as determined and developed by the organs of the Association:

a APCA website to include Association documents and material on current issues, national, regional and international developments, etc.
b Establishment of common positions of countries of the Asian Pacific Region regarding representations on specific issues in regional and international conferences and initiatives on copyright and related rights.
c Research in copyright and related rights laws of the Asian Pacific Region including preparation of “Asian Pacific Copyright Guide” and other material on copyright and related rights.
d Participation in international discussions and negotiations concerning copyright and related rights.

B Planning Committee
A Planning Committee to be established to initiate the steps necessary for carrying forward the proposal for formation of the Association, and the ways and means to accomplish this.

C Foundation and Constitution
Two or more prospective National Groups to found and adopt the Constitution of the Association.