

Creative Industries: Getting our message across anti-copyright waters



A Report from the CEPIC Interactive Seminar in Dresden, June 2009
by Angela Murphy

CEPIC started its seminars off this year with a hard-hitting and informative seminar about one of the greatest challenges facing our industry today – the increasing incidence of copyright infringement and the difficulties faced by those seeking to combat this in today's technology-led world.

Two of the most significant issues to which both panellists and audience were asked to respond were the recent 'Pirate Bay' ruling in Sweden which found against the libertarian founders of the Pirate Bay file-sharing site. (For a legal comment on the case see <http://www.computerweekly.com/Articles/2009/04/22/235748/the-pirate-bay-case-your-questions-answered.htm>); and, secondly, the Google Books Settlement that took place between Google Books and the Authors' Guild and which, if approved, will have a dramatic effect on 'fair use' provisions in the US and elsewhere (see the following link http://www.slideshare.net/laurenpressley/google-book-settlement-life-photo-archive-presentation?src=related_normal&rel=1301789 the report on the Copic Orphan Works Seminar and Jessica Saenger's presentation on Orphan Works).

To discuss these issues, CEPIC gathered together an impressive group of industry experts representing varying interests. These included Auke Haagsma of ICOMP, a newly-formed organisation sponsored by Microsoft that has been formed to represent the online interests of the creative industries, particularly in relation to intellectual property rights; Mike Holderness, representing the interests of individual creators via the European Federation of Journalists' Unions; Jessica Saenger, legal counsel to the Börsenverein des Deutschen Buchhandels (BÖV); Nancy Wolff who acts as the legal counsel to PACA, the American picture agency organisation; and the seminar was organised, arranged and moderated by Linda Royles, former chief executive of the British Association of Picture Libraries and Agencies (BAPLA). After a short presentation from each member of the panel, they were asked to discuss some of the main issues of the day – and to look at potential solutions.

Auke Haagsma started the seminar by making a strong case for businesses involved in internet commerce to join ICOMP - the Initiative for a Competitive Online Marketplace (<http://www.i-comp.org/>) - and emphasised the need for all sectors of the creative industries to both collaborate and become more active if they wanted to defend their individual rights and preserve the industry. Senor Ferrao emphasised the need for creators and their agencies to realise the importance of understanding and tackling these issues right now, especially "at a time when Web 1.0 is becoming Web2.0 and users are becoming creators". The attitudes of the creators of user-generated content were also highlighted by journalist, Mike Holderness as he described the astounding lack of awareness among young creators of the need to enforce copyright law. In particular, he gave the example of the author of a strongly anti-copyright online article who had approached him for help when he found that a newspaper had copied his article, re-edited it and published it without payment.

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Mike's feeling is that the best route to changing current attitudes is to point out that copyright law not only preserves copyright but also the human and moral rights of the creator. A major concern was the potential for the Google case to have a devastating effect on the creative industries. Creators needed to be made aware that intellectual assets were not just 'property' to be traded but that copyright law protected their individual rights to decide how, where and by whom this work could be used and published. Indeed, Mike strong rights for authors are just as essential for those who do not want to earn money from their creations as they are for those who make a living from their work. Research shows that people are willing to pay for content when they know that the creator is getting a fair share of the income.

Next up was Jessica Saenger who highlighted the problem of engaging publishers in the current debate over copyright. It is essential that publishers were engaged with the issues they were often appalled by their implications and the IPA (International Publishers Association) had noted that concern was building within the publishing community.

Remaining inactive was no longer an option for small publishers at a time when Google Books are scanning books indiscriminately. As the book industry enters the digital age – revenue from digital products would become increasingly important. Many of BDB's members are small creative businesses – sometimes publishing only 10 books annually – who realise too late that these issues also affect their businesses. Undefended attacks on copyright will lower the incidence of quality content and this may disappear if the incentive to publish disappears. Publishing industries need to come up with attractive, exciting products - quality that is worth paying for.

The view that the quality of creative work would decline was held by all members of the panel. Nancy Wolff explained that in her work as an IPR attorney with a specialist New York firm and as legal counsel to PACA, she had been facing the tension between the public's desire for uncontrolled access to all content and the need to protect copyright for many years.

The US copyright laws were designed to encourage the advancement of arts and sciences by giving incentives to creators that were based on their having the exclusive rights to exploit their work. It also enshrined the author's right to make works available or not available. This long held attitude was now under attack from the so-called libertarians who demanded universal access to information without payment. This was becoming increasingly hard in an environment which saw even well-educated attorneys believing that content found on Google images was in the public domain – and thus that everyone had the right to use it.

The ensuing sense of entitlement led many people to ignore the rights of the creator. As a result, creator's rights are being left out of the copyright discussion – and file-sharing sites and large corporations such as Google feel they have the right to take other people's work and add value to it in order to promote their own income streams.

The voice of the creative sector has been lessened – not only by the very loud voice of the technology sector but also by the emergence of too many disparate voices. It was now critical for those in the creative industries to use the power of cooperation to fight back. In the US, for example, they have formed a Copyright Alliance to try and educate those in the administration. Nancy also pointed out that the moral rights provisions in the US were weaker than those in Europe so that they were not so able to use that line of defence.



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Finally, she agreed with Jessica that without stronger copyright provisions we were bound to lose the vital professionals in the creative community – just as the US were already losing large numbers of newspapers and magazines.

It was this question of quality and authority that the panel felt we would lose when they answered Sylvie Fodor's question about the continuum of creativity. It was not that creativity would disappear but those professions that could only flourish when supported by professional media, such as journalism and documentary photography. In these circumstances journalism was supported by the concept of the journalists' reputation – in this environment you are only as good as your last story – and accuracy and honesty are key to this. On the internet, there is no mediator and there are few ways to judge whether a 'news' story is either fabricated, the truth or, indeed, a PR-driven story.

The second half of the seminar focused on the remedies that remained for copyright infringement and the main factors that operated against these remedies – namely money and bureaucracy. The main questions posed were:

- What is the appropriate approach to copyright infringement?
- What action can be taken to defend your rights?
- How do you enforce your right? Indeed, is it possible for an individual author to defend their copyright?

One of the dilemmas posed in this part of the seminar was the impossibility of defending your rights without having to acquire a great deal of detailed legal information, supported by a large fund to pay for legal support and advice. Conversely, corporations could always raise a good deal of finance.

Secondly, publishers and others in the creative industries had to accept, when resisting Google's digitisation programme, that Google was also the main way in which they could drive traffic to their websites. This in turn makes it even more difficult to assert rights claims. As Auke noted, this was the dilemma faced by a small Belgian publishing house that took on Google and won the right to order Google to take down their content. Although they won their case, they also had to suffer a resulting decline in web traffic and can no longer use Google to advertise their own services. This was a clear example of dealing with the 'frenemy' – the word that Sir Martin Sorrel, head of advertising giant WBP, has used to describe the Google corporation which is simultaneously a friend and a competitor.

For some panellists, criminal law was the way forward. In France, legislation now allows the state to enforce criminal proceedings against violators. However, this is predicated on the maxim 'three strikes and you're out' so that, once large scale downloaders have received notice, they must take down content and will be heavily fined if they violate copyright law up to three times.

Another issue that the panellists agreed on is that we can no longer rely on case law created by individuals. Bringing an action against copyright infringement is an expensive business unless you are a corporation and corporate actions are generally perceived to be counter to individual rights. Most of the panellists therefore felt that it would be better if these cases could be dealt with by the state under criminal law as long as the law was imbued with greater clarity.

Google invades people's privacy and Google, and indeed other web services, generate huge worries about data protection. However you monitor web usage, you are inevitably also monitoring individual usage.



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In assessing the issues around copyright protection, Jessica Saenger also introduced the notion that, at the moment, it was not really in an ISP's interest to cooperate over copyright violation. ISPs make money from bandwidth – much needed when you download movies, images and film so it is in their interest to increase traffic. As the vast majority of traffic is illegal downloading, ISPs are unlikely to oppose this.



In summary, the Publishers' Association felt that it was important to win the cooperation of ISPs; to avoid bring criminal charges against individuals; and to target those companies that were building large businesses on the back of copyright violations.

Asked to comment on the Pirate Bay case, Mike Holderness pointed out that Pirate Bay is one of a long succession of sites that helps people to share creative works illegally. The three defendants in the case actively encouraged users to download but specifically declare that they take no responsibility for the legality of any of the content. They are currently appealing against a successful prosecution in Sweden. Mike was concerned that this case would give them undue credibility and that criminal convictions would make martyrs of them – a more successful outcome might be to enforce licensing fees from content owners..

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Nevertheless, Mike pointed out that individuals could do little to enforce their rights themselves at the moment as they would be faced with enormous costs – the legal remedy was – at best – the payment of a licence fee. The question of costs was not addressed. As Nancy added, your copyright is only as valuable as your ability to enforce it. The question of your loss of commercial revenue was not taken into consideration. As long as ISPs refuse to take responsibility and remedies are weak, the defence of copyright will continue to be problematic.

Even if litigants only want material removed from the web rather than monetary redress, this can be very problematic. Complex forms must be completed and a 'Fair Use' analysis has to be commissioned. Indeed, it may even be virtually impossible to track down the hosts of infringing sites as they may be hidden in a network of false host sites. As a result, content taken down on one site may simultaneously pop up in another place. This may involve the industry in a great deal of expense doing research and sending take down notices. In order to remedy these issues, all the panellists agreed that the creative industries now need to coordinate their responses and their knowledge far more actively. Trade organisations are engaged in collecting information from infringed parties so that they can coordinate their efforts more in the future. CEPIC recently announced its membership of ICOMP and restated its support for the campaign to "foster creativity and innovation through the protection of intellectual property." For more details of Copic's announcement see

http://www.ceplic.org/english/news/2009/090529_icomp.php?navid=

Finally, the panellists stated how important it was that the bodies concerned should declare that they were defending the individual rights of the creators – and thus their livelihoods. Nancy Wolff pointed out that this was strategy that was being used by the Motion Picture Association whose publicity included interviews with the individual cameramen, sound recordists, and others whose livelihoods were being threatened by such copyright theft.

The session ended with a reference to the issues raised by the recent Google Books settlement between Google and the Authors' Guild, where a settlement behind closed doors may not have produced the results that were particularly helpful to the industry as a whole. This subject was dealt with in more detail in the Orphan Works seminar.

In summary, one of the main points to come out of the seminar were the need for both individuals and organisations to make themselves more aware of current debates and to become actively involved in them. If they do not, society as a whole may lose some of the rights that currently underpin the creative community. It is also crucial that academics acknowledge the part that commerce plays in financing the institutions that foster both academic freedom and creativity. 'Free' resources only come at a cost and society must find a way to resolve these issues without destroying creators' means of making a living from their creativity.



Fostering an online community to defend these rights was an important component in this work as was the need to inform policy makers about the issues involved. In this respect a judicious use of the law was required so that this movement was not seen as attacking the individual rights but rather as defending them.

Chair: Linda ROYLES, Rights and Strategic Consultant

Speakers:

- Auke HAAGSMA, Seminal Consulting bvba, [ICOMP](#), Initiative for a Competitive Online Marketplace
- Mike HOLDERNESS, National Journalist Union (UK), member of the [European Federation of Journalists](#)
- Jessica SÄNGER, [Börsenverein des Deutschen Buchhandels](#) (GER), member of the European Publisher Association
- Nancy WOLFF Esq., [PACA](#) Legal Council (USA)

Briefing and Report: Angela Murphy

Angela Murphy is a digital image management and rights expert with over twenty years experience of the image business, first as a freelance researcher and editor, and later as a commercial picture library manager for a group of national museums. She now works as a consultant carrying out digital asset management audits and advising on a wide variety of image management and rights issues.

Clients have included the Time Out Group, the Labour Party, Getty Images, and the Courtauld Institute and she acts as an advisor to a consortium of Cambridge University institutions on their options for digital image and rights management, including the University Library and the Fitzwilliam Museum. She is currently working on a JISC-funded project for the Scott Polar Research Institute in Cambridge.

Angela is a founder member of the Museums and Galleries Copyright Group and is on the IP Advisory Board of the Collections Trust. She also contributes to rights issues and metadata standards via BAPLA, CEPIC and IPTC and IKOS.

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