

Fordham International Law Journal

Volume 18, Issue 3

1994

Article 13

J.A.L. Sterling, Intellectual Property Rights in Sound Recordings, Film & Video

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Abstract

On the whole, Intellectual Property and its First Supplement are highly valuable, particularly for those who must rely on quick and precise information in respect of a broad range of questions concerning the protection of sound recordings and films. International copyright law has become, during the past ten years, one of the most fascinating areas of international law. Although copyright has been of marginal interest to the general public for a long time, its inclusion in the GATT/TRIPs Agreement as well as the recent dispute between the United States and China has increased the general public awareness of the importance of international copyright.

INTELLECTUAL PROPERTY RIGHTS IN SOUND RECORDINGS, FILM & VIDEO. By J.A.L. Sterling. Sweet & Maxwell, London, UK, 1992. lxiii + 721 pp. ISBN 0 421 45470 9. First Supplement, 1994. xli + 189 pp. ISBN 0 421 50420 X. Main Work & Supplement ISBN 0 421 53190 8, Hardcover (Main Work) & Paper (Supplement). UK£165.00.

*Reviewed by Silke von Lewinski**

International copyright law has become, during the past ten years, one of the most fascinating areas of international law. Although copyright has been of marginal interest to the general public for a long time, its inclusion in the GATT/TRIPs Agreement¹ as well as the recent dispute between the United States and China² has increased the general public awareness of the importance of international copyright.

In addition, the rapid development and application of new technologies, such as electronic databases and the information superhighway, necessitate new forms of protection. Consequently, one must develop new ways to interpret existing provisions or create new provisions of copyright law.

The economic impact of copyright has become increasingly visible and important. Sound recordings and films are more and more exploited around the world, including in developing countries, albeit often without any protection being granted or respected. Campaigns to combat piracy have become necessary. Among the forerunners in the push for strong intellectual property rights is the International Federation of Phonographic In-

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1. See General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 (1994) (including annexed Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeited Goods ("TRIPS"), 33 I.L.M. 81 (1994)). The treaty was signed at the Marrakech Ministerial Meeting on April 15, 1994. Alan Riding, *109 Nations Sign Trade Agreement*, N.Y. TIMES, Apr. 16, 1994, at 35.

2. See, e.g., *US Announces Special 301 Sanctions Against China*, FIN. TIMES MUSIC & COPYRIGHT, July 6, 1994, at 1; *Les Etats-Unis Menacent la Chine de Sanctions Commerciales*, MONDE, Jan. 3, 1995, at 18.

dustry ("IFPI"), which commissioned a study from J.A.L. Sterling. Augmented and updated, that study ultimately matured into *Intellectual Property Rights in Sound Recordings, Film & Video* ("*Intellectual Property*"), reviewed herein.

The main work is divided into two parts. Part I contains analyses of the processes and uses of sound recordings and films as well as discussions of the legal systems of protection under national and international law.³ Part II includes a synopsis of laws, charts, and other reference material.⁴ The velocity of the above mentioned developments is shown by the mere fact that a supplement of 183 pages ("First Supplement") was issued only two years after the main work.⁵ Most additions have been made to Part II.⁶ Additions of the First Supplement refer to the respective paragraph numbers in the main work. Consequently, in order to obtain complete information on a certain topic, one must simultaneously consult two books and compare the texts, in order to learn which parts of the main work are no longer valid, which parts must be replaced by the information of the First Supplement, and which parts must merely be augmented by the text of the First Supplement.

From one perspective, this procedure allows the reader to follow the chronology of legal developments instead of simply being informed about the current status of the law. From a practical viewpoint, however, this procedure might not be the most convenient one for the user of the book. Indeed, considering that future developments will likely continue to be just as rapid as during the past years, the adoption of a looseleaf edition appears more practical for the reader than having two or even more supplements to the main work. Barely three months after the publication of the First Supplement, several important changes have already occurred, which could not yet be included

3. J.A.L. STERLING, *INTELLECTUAL PROPERTY IN SOUND RECORDINGS, FILM & VIDEO* 1-409 (1992) [hereinafter *INTELLECTUAL PROPERTY*].

4. *Id.* at 411-702.

5. J.A.L. STERLING, *INTELLECTUAL PROPERTY RIGHTS IN SOUND RECORDINGS, FILM & VIDEO, FIRST SUPPLEMENT* (1994) [hereinafter *FIRST SUPPLEMENT*]. Whereas the main work was based on material available as of October 31, 1991, the Supplement is based on material available as of January 1, 1994, and includes material that became available after that date. See *FIRST SUPPLEMENT*, *supra*, at vii.

6. Whereas the materials included in Part II of the main work account for 290 pages out of 702 pages, the materials added by the First Supplement to Part II comprise 133 pages out of 183 pages.

therein. These developments include the adoption of the new Belgian Copyright Act of June 30, 1994,⁷ and the adoption of the Spanish law for the implementation of the EC Rental Rights Directive.⁸

Part I of *Intellectual Property* is divided into ten chapters: an introductory survey in particular on the scope of the commentary; a chapter on the recording processes explaining in generally intelligible terms the technical basis and steps of producing sound recordings and films; a chapter on recording descriptions including discussion of terms and short descriptions of certain categories of recordings, such as digital or sample recordings and computer-simulated motion pictures; a chapter on recording uses and corresponding rights presenting the rights of reproduction, adaptation, distribution, communication, and moral rights in respect of sound recordings and films in general as well as by reference to certain national laws (mostly the Copyright Acts of the United States, the United Kingdom, France, and Germany), international conventions (the Berne, Universal Copyright, Rome, and Geneva Phonograms Conventions, but not the TRIPs Agreement or other international or regional Agreements), and the WIPO Draft Model Provisions; a chapter on legal terminology analyzing the different usages of basic terms at the international level as well as within the framework of different concepts and national laws; chapters on the basis and structure of protection and on national laws and the international conventions presenting a survey of national laws and international conventions or other instruments; a chapter on comprehensive protection proposed by the author as a model for an adequate protection; and chapters on challenges to the establishment and exercise of rights and on a summary and conclusions of the main submissions, with references to the foregoing chapters.

7. *Loi relative au Droit d'Auteur et aux Droits Voisins*, *Moniteur Belge*, July 27, 1994, at 19,297. Most of this law came into force on August 1, 1994, together with the *Loi transposant en droit belge la directive européenne du 14 mai 1991 concernant la protection juridique des programmes d'ordinateur*, *Moniteur Belge*, July 27, 1994, at 19,315 [law implementing the European Directive of May 14, 1991 on the legal protection of computer programs].

8. *Ley 43/1994, de 30 de diciembre, de incorporación al Derecho español de la Directiva 92/100/CEE, de 19 de noviembre de 1992, sobre derechos de alquiler y préstamo y otros derechos afines a los derechos de autor en el ámbito de la propiedad intelectual*, B.O.E. No. 313, Dec. 31, 1994, at 39,504, item 28,969.

One of the merits of *Intellectual Property* is the comparatively large coverage of questions of technologies, not only in Chapters 2 and 3 on the recording processes and descriptions, but also, for example, in Chapter 4 on the different uses and corresponding rights. Uses such as sampling, re-mastering, and colorization are explained in a concise manner, focussing on those elements essential to the legal protection. In a concentrated manner, Sterling raises the different questions of law that may arise in relation to such new techniques.⁹ Mostly, such general questions and, in some cases, answers are given separately for the national laws of the copyright system and the author's right system. Appendix A to Chapter 4 concerning "Computer Law affecting recordings" is also very useful. Because computer programs are increasingly involved in the process of producing or using sound recordings and films, this overview on the rights in computer programs, databases, computer-generated works, semiconductor topographies, and on the use of sound recordings and films in such "computer material" in the transient or storage processes of computers is highly valuable. This value is increased because there is relatively little literature on the relation between sound recordings or films and computer programs, for example on the overlapping of rights.

Of course, *Intellectual Property* cannot and does not intend to provide a full discussion of the problems and possible solutions in the field of new technologies. What it does offer, however, is a compilation of the main technical facts and legal questions as well as some solutions proposed or drawn from national laws. Partly, one might have wished to obtain more references to special literature, for example regarding electronic access.¹⁰ Although the First Supplement adds selected references to the literature and case law,¹¹ such references are minimal and seem to be selected primarily from the journals, *European Intellectual Property Review* and *Entertainment Law Review*, distributed by the same publisher as *Intellectual Property*. A large number of equally valuable contributions, for example in French and German journals, have been published and would be accessible to most multilingual readers.

9. INTELLECTUAL PROPERTY, *supra* note 3, at 77-80.

10. *Id.* at 142.

11. *See, e.g.*, FIRST SUPPLEMENT, *supra* note 5, § 4.14, at 3.

The reader should not forget that *Intellectual Property* originates from a study commissioned by the phonographic industry. In particular, Sterling expresses the view that "the category of phonographic work should be recognised as a separate and distinct subject of protection by copyright and author's right, where the phonographic production results from creative input."¹² In this context, he refers to Section 6.15 of the main text, which elaborates a new concept of "phonographic works" apparently modelled on the situation of the cinematographic work. He proposes that sound recording engineers, editors or studio producers contribute creative elements to the "phonographic works" and may be regarded therefore as co-authors of such works. He presumes that the producer would acquire the rights of sound recording engineers and others employed by him or under contract with him. At the end of this paragraph, Sterling goes even further by proposing that "the producer . . . may be declared by law, or entitled by legislative or contractual provisions, to be the owner of or exercise the rights of the individuals producing the creative elements of the recording."¹³

This proposal should be seen in the context of the long-standing phonographic industry campaign that envisages the international recognition of a copyright (instead of a mere neighboring right) for producers of sound recordings. Perhaps because neither the TRIPS Agreement, nor the WIPO negotiations on a Possible Protocol to the Berne Convention¹⁴ has reached this goal, Sterling may attempt to reach the same result through a different legal apparatus. Instead of claiming a proper copyright protection for producers of sound recordings themselves, the proposed scheme appears to claim such protection for sound engineers and others primarily in the employment of the producers. As their rights would be by contract or even through a legal, irrebuttable presumption of transfer or exercise of rights regularly devolve upon the producer, the producer would in essence automatically benefit from a (derived) copyright. Although the knowledgeable reader should be aware that this

12. FIRST SUPPLEMENT, *supra* note 5, at 32.

13. INTELLECTUAL PROPERTY, *supra* note 3, at 202.

14. See Silke von Lewinski & Thomas Dreier, *Erste Sitzung des Sachverständigenausschusses der WIPO über ein Protokoll zur Berner Konvention zum Schutz von Werken der Literatur und Kunst (Genf, 4.-8.11.1991)*, GRUR INT. 1992, at 45 (reporting on discussion at WIPO-Committee of Experts, Geneva, November 4-8, 1991)

idea of a "phonographic work" is a product of the phonographic industry rather than a generally accepted concept, the book does not make this clear to every reader. Unambiguous statements regarding the nature of this concept as a proposal, as well as statements indicating the low chance for such a concept to be accepted by legislators at least within the author's rights system, are lacking.

Finally, some remarks should be made about the main additions to Chapter 7 (national laws and the international conventions) by the First Supplement. The decision of the European Court of Justice ("ECJ"), in the *Phil Collins* case,¹⁵ has been summarized (rather than discussed, as announced in the advertising leaflet) by a short presentation of the facts and the legal situation under German law. The text additionally provides the preliminary questions by the court to the European Court of Justice and the rules of the judgment issued by the ECJ, as well as a short explanation of the main consequences of the judgment.¹⁶ Further, the main contents of the EC Directives, which have been adopted after the publication of the main work, has been accurately summarized.¹⁷ The TRIPS Agreement has been presented in an even shorter form.¹⁸ A similar style of presentation has been chosen for NAFTA.¹⁹ The discussions on a Possible Protocol to the Berne Convention and on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms in the framework of WIPO have been primarily presented by references to the reports in the journal, *Copyright*, and by an indication of the main items discussed.²⁰ Although the EEA Agreement has been included under the heading "Other International Instruments and Developments,"²¹ mention of the numerous bilateral agreements between the European Union and Eastern and Central European countries that are obliged, to differing extents, to implement the European

15. *Phil Collins v. Imtrat Handelsgesellschaft mbH*, Joined Cases C-92, 326/92, [1993] 3 C.M.L.R. 773.

16. FIRST SUPPLEMENT, *supra* note 5, at 11-13.

17. *Id.* at 18-28.

18. *See, e.g., id.* at 29 ("Article 1. Members must give national treatment to the nationals of other Members."); *id.* at 30 ("Articles 63-64. Dispute prevention and settlement").

19. *Id.* at 33-35.

20. *Id.* at 30-32.

21. *Id.* at 32.

Community directives into their national laws, might have been worthwhile.²² Also, as another interesting international development in the geographical vicinity of NAFTA, one could have mentioned the adoption of the "Decision 351" of December 17, 1993, on a common regulation on copyright and neighboring rights of the Andean Pact.²³

The fact that so far a number of critical remarks have been made is certainly misleading. On the whole, *Intellectual Property* and its First Supplement are highly valuable, particularly for those who must rely on quick and precise information in respect of a broad range of questions concerning the protection of sound recordings and films. Among the main merits of this work are the tremendous effort of compiling the latest information on the laws of over 140 countries, the short form of presenting national laws and international conventions combined with a selection of references to specialized literature and the most recent case law. In addition, all essential questions in respect of the protection of sound recordings and films, as well as the work and performances included therein, are dealt with in a clear, compact way.

22. See Silke von Lewinski, *Copyright Within the External Relations of the European Union and the EFTA Countries*, [1994] E.I.P.R. 429.

23. Decision of the Commission of the Agreement of Cartagena of December 17, 1993, GACETA OFICIAL DEL ACUERDO DE CARTAGENA, X-No. 145, Dec. 21, 1993. For commentary on this decision, see Silke von Lewinski, *Urheberrechtsharmonisierung im Anden-Pakt -interessant auch für Europa?*, GRUR INT. 1994, at 470.