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*HAS 2006 BEEN SUCCESSFUL FOR COPYRIGHT PROTECTION?*

*LUIS SCHMIDT PRESENTS A GLOBAL REPORT LOOKING AT HOW EACH COUNTRY HAS TACKLED COPYRIGHT ISSUES IN 2006*

The year of 2006 has been a challenging one in terms of how media has impacted copyright laws around the world. Digital technologies for reproducing and disseminating works-of-authorship have continued to raise legal questions due to the level of sophistication that they have achieved. However, not only new technologies have triggered defiance to copyright law during the 2006. Courts and other government authorities have been quite active by revisiting traditional copyright principles and fundamentals, or by embracing piracy and infringement, not only within a high-tech environment, but also (and perhaps more evidently and consistently evidenced) within down-to-the earth fields accessible to everybody in every corner of the world.

The judicial quote for this year shall go to Mr. Justice Peter Smith who ruled the verdict in connection with the UK case *Da Vinci Code*<sup>1</sup>. Mr. Justice Smith's fine contribution was making it clear that copyright law has limits aiming at ensuring that human creativity is preserved:

*"It would be quite wrong if fictional writers were to have their writings pored over in the way the Da Vinci Code has been pored over in this case by authors of pretend historical books to make an allegation of infringement of copyright. I accept that if that was allowed to happen it would have a serious impact on writing".*

In order to give a glimpse about what it would appear as the most relevant happenings in the year 2006, it would seem appropriate to analyse the global picture from a legislative and judiciary perspective.

**Global legislative update.**

During 2006, various countries have moved for novel statutes or for amendments to their existing ones, for different reasons or purposes, but in general for making them compatible with TRIPS or treaty obligations in general. Enforcement has signified a particularly important issue for a number of countries looking to strengthen sanctions in order to deter copyright piracy. Many governments have spearheaded the move to increase their enforcement and protection systems.

The following are examples of legislative developments or policies adopted on the enforcement side:

- In **China**, Commerce Minister Bo Xilai has stated officially that the country will continue to promote the protection of IPR to enhance economic growth in order to benefit both foreign and local industries<sup>2</sup>.
- In **Hong Kong**, after a two-year consultation process, a bill of amendments was published on 17 March 2006, in the Hong Kong Government Gazette and introduced into the Legislative Council on 29 March 2006<sup>3</sup>. The major provisions of the bill include:
  - maintaining the existing scope of the criminal offence provisions relating to the possession of infringing copies of copyrighted works for use in business;
  - providing new civil and criminal liability to enhance protection for copyright owners;
  - improving the copyright exemption system to add certainty for users and allow them to use copyright works more flexibly under certain circumstances, without to unreasonably prejudice the rights of copyright owners;
  - relaxing legal provisions against parallel importation to meet the community's aspirations for free use and circulation of parallel imported copyright works; and
  - strengthening enforcement efforts against copyright offences.
- In **Malaysia**, 2006 has represented the year of the most aggressive campaigns ever launched in connection with software and film piracy, having the ultimate purpose to eradicate the making, selling or using of unauthorized products. On the one hand, the Business Software Alliance implemented the "2006 Ops Tulen Campaign" (Operation Genuine Campaign), with the support of the Ministry of Domestic Trade and Consumer Affairs. On the other hand, the Motion Picture Association launched "Operation Red Card", an Asian-wide anti-piracy initiative to protect the sale of cinema movie tickets and legitimate home video products. As a matter of fact, "Operation Red Card", released for the Soccer World Cup, resulted in reportedly 455 raids, 422 optical disc burners seized, 1,176,003 unauthorised optical discs seized and 128 people arrested".

- In **Paraguay**, a bill was submitted to the National Congress. Amongst other relevant amendments it considers extension of prison sanctions from three to five years as well as increased fines<sup>5</sup>.
- In **Spain**, legislation was approved in a statute identified as "Ley 19/2006" of 5 June 2006, published at BOE 1346, with the purpose to provide enhanced of legal tools to fight against piracy. The law provides, in essence, legal means to protect IPR and their enforcement by criminal and civil actions. In keeping with this, the "Ley 19/2006" has reformed statutes of Congress, like the Copyright Law, the Civil Law and the Criminal Procedures Law.
- In **Taiwan**, the Copyright Act has been adjusted to meet Penal Code threshold provisions by eliminating requirements "that makes repeated instances of a specific type of act carried out by an habitual offender subject to weighted penalties"<sup>7</sup>.
- In the **UK**, the government has approved the Intellectual Property Regulations 2006/1028, to modify existing provisions of IP statutes, in compliance with the European IP Enforcement Directive<sup>8</sup>.
- The **USA** has also moved for improving enforcement provisions at various levels. Firstly, the local congress in California passed a statute that lowers the standard to find copyright infringement felonies of musical works reproduced in CDs from 1,000 copies to 1009. Likewise, the government has been working on a proposal to raise civil and criminal sanctions of copyrighted products. The proposal went to the extent of imposing criminal penalties for "attempting to infringe a copyright", independently if the result of that is successful<sup>10</sup>.
- In **Vietnam**, a new law on IP entered into force in July 2006 that will be mainly devoted to the enforcement of rights by virtue of administrative actions<sup>11</sup>.  
Examples of bills passed by countries' governments or under current analysis are as follows:
  - **China** is in the process of legislating the following regulations or interpretations:
    - Measures for payment of legitimate license royalties for broadcasting;
    - Regulations on copyright protection of folklore; and
    - Supreme People's Court interpretation of issues relating to the application of the law in connection with the civil case of MTV copyright disputes.<sup>12</sup> In addition, the government in China has created a regulation to protect rights in reference to the right of network dissemination of information, which came into force on 1 July 2006.
  - The **French** Assemblée Nationale has approved a certain law to implement

Directive 2001/29/EC that if confirmed by the Senate, will bring a major struggle with Apple Computers and the US government that is backing the latter company's position. The discussion originates from the "*Mulholland Drive*" case, decided by the Supreme Court<sup>13</sup>. In essence, the parliament has designed a rule that would force Internet music providers to relinquish control of their digital rights management technologies so that content services become compatible with any mp3 or other digital players. The foregoing would naturally force Apple to amend its iTunes service to work with any rival players to the iPod. Apple has argued that the foregoing would result in state-sponsored piracy since users of players other than iPod would get content for free. However, the French government has viewed the measure as a means to avoid restrictions to competition under national and European laws<sup>14</sup>.

- The **Malaysian** government has Integrated a committee, comprising of a Federal Court judge and representatives from the Bar and the Attorney's General Chambers, that is currently looking into the possibility of according statutory recognition to mediation as a dispute resolution mechanism. The document serving as the basis of discussion has been called the Mediation Act and is tipped to provide for both voluntary and court-directed mediation and would address certain type of disputes, including IPR disputes<sup>15</sup>. In terms of an IP policy. Malaysia has continued to discuss the adoption of a specialised IP Court, expected for next year, to tackle down the backlog of nearly 800 IP cases in the courts. In addition to that, the Multimedia Development Corporation has launched Creative Commons licensing process in Malaysia and the public is now able to license their works under Malaysian law<sup>16</sup>.

- The local Congress of the **Mexican** Federal District approved on 20 May 2006, legislation to protect human personality and likeness. The law has been entitled Law of Civil Liability for the Protection of the Right to Private Life, Honour and Image, and has the purpose to protect the name, image, honour and intimacy of persons. The Privacy Law searches for a balance between privacy and personality rights, on the one hand, and freedom of speech, right to information and right to inform, on the other. In keeping with this, it has entered into a detailed analysis of notions such as personality rights, right of privacy and private life, right to intimacy that protects people's activities in a private environment, right to be treated honourably, right of likeness or image having a personal — rather a commercial or publicity — connotation or meaning.

- **Spanish** government has approved "Ley 23/2006" of July 7, 2006, published at BOE No. 162, with the purpose to align Spanish copyright legislation in force

with the standards of European Directive 2001/29/CE on the harmonisation of certain aspects of copyright and related rights in the information society. The new text has been centred to situations created within the context of new technologies. After a long discussion, Spanish Congress adopted traditional concepts like patrimonial rights in response to the challenge posed by information society. Accordingly, Reproduction, distribution and public communication right rules were made consistent to meet digital technology demands. The bill incorporated a so-called right of "Interactive access" ("puesta a disposición interactiva"), to be considered as a modality of the more general public communication right. Likewise, the bill has addressed sensitive topics like private copy levies — for analog equipment and digital rights management, as well as rights and restrictions in connection with databases. Finally, the bill adopted a digital language to protect neighbouring right holders as well as a system of legal actions against Internet intermediates<sup>17</sup>.

### **Global judicial update**

2006 has reported interesting court decisions in a number of specific fields. In some way this years' outcome would seem to continue the trend that started some time ago in connection with disputes in the digital industry. However, battlefields have also emerged to witness fights between creators and users and even between creators themselves.

Likewise, it is quite perceptible celebrities have apparently decided to confront photographers or publishers that employ their image without consent or use undisclosed information.

### **Idea/Expression Dichotomy**

- In what perhaps would be the most publicised case of 2006, due to the popularity of the property involved, Michael Baigent and Richard Leigh, the writers of the 1982 book entitled "*The Holy Blood and the Holy Grail*", brought an action before the courts in **England** against publisher Random House, claiming that Dan Brown, author of the book *Da Vinci Code*, had copied the central theme of the latter book's story. The defendant based its defense on the principles of idea/expression and that he had no access to the plaintiffs' title. Mr. Justice Peter Smith, acting as the judge for this case, was not convinced that defendant did not have access to the work and stated that that there was copying, but not to the extent to find copyright infringement under the laws of the United Kingdom. Mr. Justice Smith further manifested that in the end, the defendant had used the plaintiffs' book on a general level of abstraction, by having taken "*ideas and facts without any of the architecture*", and accordingly,

he did not do something wrong<sup>18</sup>.

- Also in the **United Kingdom**, on 20 January 2006, a court resolution was handed down in the Nova cases. Defendants were again the winners in a litigation addressing issues like substantive copying and the idea/expression dichotomy in video games. Mr. Justice Kitchin resolved that defendants had not made a substantial copy of plaintiff's works and although the former had employed some of the game's features use was just made in a general sense. It is clear that UK courts have continued in the view that copyrighted works can convey unprotected ideas *"either because they have no connection with the literary, dramatic, musical or artistic nature of the work in question, or because they are so commonplace as not form a substantial part of the work"*<sup>19</sup>.

- The idea/expression dichotomy has also been analysed by the courts of other jurisdictions. In **Argentina**, plaintiff "ABC Fútbol" holder of the copyright rights on a board game about soccer, sued defendants "Vitólo" and "Tele Red Imagen S.A. for the reproduction and distribution of another soccer game called "Super Fútbol 6". The court in Buenos Aires found that the games were not similar and that defendants had relied on the general or "public" idea of a soccer game played on a board, but having other characteristics, like the different rules, the players and the form that the game is played<sup>20</sup>. In **Switzerland**, the federal court clarified that the technical photographic process of a photograph is not determinant to find out whether a similar photograph is a reproduction of the original one, but only the result, that is the picture in itself, shall be regarded the expression of creativity. The Judge found that by using the technical process of a photograph the defendant did not exploit the creative expression<sup>21</sup>. Nonetheless, the Swiss courts have reported another 2006 case, in which the court adopted a rather contrary approach. In that case the court recognised that the technical features that the photographer employs for taking a picture contribute to express the idea by enhancing the liberty of creation<sup>22</sup>. Finally, in the **United States**, Walt Disney has also been sued for stealing the central theme of literary or other works. In particular, Royce Mathew, creator of a character named *"Will Turner"* and a pirate ship called the *"Black Pearl"*, filed a complaint before a district court in Los Angeles, claiming that the story of the film "Pirates of the Caribbean: The Cruise of the Black Pearl" infringes upon his copyrights on the characters. The case is currently pending<sup>23</sup>.

### **Rights of Publicity or Privacy**

- In China, an athlete was successful in bringing infringement action against a magazine that had published his photograph next to the advertisement of a

department store. The Beijing court decided that the proximity of the two photographs within the magazine clearly suggested a connection between the athlete and the department store, and that counted as a commercial use of the portrait<sup>24</sup>. In the United States, specifically in a district court in the State of Colorado, Amazon, Inc. was unable to show, under the theory of "injury in fact", that Cannondale, a bike competition team, published in a catalogue a picture of a famous bicycle racer named Melissa Giove, after she had left the team. The judge considered that in addition to any claim in support of the non-authorisation of the picture. The plaintiff should have proved injury and since it was unable to produce evidence in this respect, the complaint was finally dismissed<sup>25</sup>.

### **Copyright in Digital Formats**

- In **Australia**, the High Court determined that record companies are entitled to contempt court proceedings against Sharman Networks, owner of the Kazaa file sharing system. Last year copyright owners of the sound recording shared through the Kazaa system adopted a strategy for taking action against ten defendants, inasmuch as warnings used to promote the legal use of copyrighted music files or technological measures employed as a filter had not been enough in the end to curtail infringement. Accordingly, Kazaa was forced to pay damages and to introduce technological measures to prevent infringing use of copyrighted works<sup>26</sup>. The record companies started contempt proceedings that were challenged by defendants, including Sharman networks. The full bench of the Australian Federal Court rejected the claims.

Justice Branson actually intervened: *"The evidence when adduced might establish, for example, that the infringing respondents jointly decided that neither they, nor any of them, would accord any respect to the orders made by the primary judge on 5 September 2005 but rather, both individually and together, they would encourage existing Kazaa users to continue copying the sound recordings and recruit new Kazaa users to do the same"*<sup>27</sup>.

- **China** tested for the first time a case of network dissemination. The Xiamen People's Court actually sentenced infringers. Yilong Huang and Zengcai Chen, to one-year imprisonment and a fine of RMB 10,000 (approximately USD 1,250). The court felt that, after having premeditated it, Yilong Huang rented a server from Xiamen Xinfeiyang Information Systems Engineering Limited and built a music website. Without the authorisation of copyright owners the website uploaded a large quantity of musical works from Baidu, amongst other services, to provide to its registered membership for a fee, services like searching, on-line

tuning and downloading. Zengcai Chen was responsible for the website's maintenance. They made profits from charging membership and maintenance fees. It was ascertained that the website was loaded with 12,708 registered members, including 1544 charge members as well as 10,847 songs. It was also evidenced that the infringers had obtained illegal profits of RMB 57, 095.24 (approximately USD 7,142). The infringers were arrested and then convicted, since the Judge in charge of the criminal trial believed that they had actually committed a copyright crime. This is the first case relevant in China regarding network dissemination<sup>28</sup>.

- In **France**, the famous "*Mulholland Drive*" decision has challenged the country's copyright system. The case deals fundamentally with private copying and technological measures of protection issues. It concerns a TPM inserted in a movie's DVD, in order to prevent the users from making copies out of the DVD that they would purchase in the market. One purchaser filed an action against the producer of the "*Mulholland Drive*" film by stating that the technology prevented him from making a private copy of the same. The defense was sustained on the "three step test" of the Directive 2001 /29/EC and the Supreme Court of France backed that position by stating that private copying exception cannot be an obstacle to the use of TPMs<sup>29</sup>.

- In **Hong Kong**, a person was convicted of copyright infringement for distributing three Hollywood films using Bit Torrent. In that ruling, which had been widely considered a landmark case, as it was the first action against peer-to-peer file sharing in Hong Kong, the Tuen Mun Magistrates' Court sentenced Chan Nai Ming to three months imprisonment. However, the case is currently under appeal, which began on 26 September 2006 <sup>30</sup>.

### **Creative Common Licenses**

- In **Spain**, a first instance court in the city of Badajoz, declared that Mr. Ricardo Andrés U.F., was not liable to the charges of infringement and damages claimed by the collecting society "Sociedad General de Autores y Editores" (SGAE). SGAE brought an infringement claim against the defendant, the owner of an establishment called "Disco Bar Metropol", since he was making a public performance of musical works pertaining to the repertoire of the collective society. The defendant denied having used works of composers that the plaintiff could represent, and that he was rather standing on the benefit of creative common licenses. The judge, Mr. Luis Cáceres Ruiz, found that as the defendant was able to show, on *prima facie* grounds, that he had not used works administered by the plaintiff (because of the creative commons license that it

holds), it was the latter who had the burden of proving the contrary. The plaintiff was unable to show that the defendant used musical compositions of its catalogue and the court decision was rendered in favour of the latter, including an account of trial costs<sup>31</sup>.

### **Quotation exception**

- In **Switzerland**, in a 2006 decision<sup>32</sup>, the Federal Court has confirmed the principle that under specific conditions, a communicated work can be quoted in its integrity. In general, the quotation exception has been construed restrictively, in the sense that the quotation is permitted only for the purpose of illustrating or explaining a work. Furthermore, the court denied explicitly that a copyright infringement could be justified under freedom-of-expression concerns. The court considered that these liberties have been taken into account already by the legislator, and there is accordingly no obligation or duty to modify the balance.

### **Derivative work rights**

- In **Peru**, Eli Lilly and Company, filed a copyright infringement complaint before the administrative agency called INDECOPI, against Nordic Pharmaceutical Company, S.A.C. The reason of the claim was that defendant made an unauthorized translation from English into Spanish of two clinical studies<sup>33</sup>, for the purpose of using said documentation in a bidding arranged by the Peruvian Army Health Division. The plaintiff requested application of administrative remedies like fines as well as a declaration of infringement and the awarding of litigation costs. The defendant brought defenses both at a formal and substantive level, claiming fair use in that it should be entitled to use clinical information pertaining to third parties, for the making of pharmaceutical products as otherwise the defendant would not have the chance to participate in tenders and compete against the plaintiff. INDECOPI found that the clinical trials were indeed copyright subject matter and that the plaintiff had as a result a patrimonial right to control over the derivative works that third parties made of the clinical studies, including the translation thereof into different languages. INDECOPI further analysed the fair use regime of the Peruvian Copyright Law, and by application of the "*three steps test*":

- exceptions are expressly contemplated in the law;
- that use of the work is not made in attempt to normal forms of exploitation of the work concerned; and
- use does not represent a harm to the author's interests (determined that the defendant had infringed the plaintiff's right to transform the work and imposed

exemplary fines)<sup>34</sup>.

From the above it can be concluded that the year of 2006 has been a rather productive one globally. Both in terms of the number of bills discussed at congress level, in a quite significant number of countries, and also in terms of the number of cases that parties all around the globe brought before the courts. Disputes between users and rights holders have been sorted out and judiciaries and governments have again dealt with the issues in a fairly successful manner. The challenge for the future will be to ensure that copyright laws are enforced to the extent that holders of rights get satisfactory protection. But more importantly that the system continues to improve in adopting formulas for equally balancing the right of copyright owners and those of the users and disseminators of the works and other cultural products, all to the benefit of society at large.

### Notes

1 *Da Vinci Code Verdict* Announced. Copyright World. May 2006. p. 6.2 *China To Up its Game*. Copyright World. May 2006. p. 6.

3 Complete text at <http://www.legco.gov.hk> . Source: Ms. Ella Cheong and Joerg Sosna of Ella Cheong (Hong Kong).

4 Source: Ms. Karen Abraham of Shearn Delamore & Co., Kuala Lumpur, Malaysia.

5 Source: Ms. Jacqueline Querciola and Bárbara Dollstadt of Berkemeyer, Asunción, Paraguay.

6 Source: Mr. Luis Larramendi and Ms. Elisa Prieto Castro of Elzaburu, Madrid, Spain.

7 Source: World Copyright Law Report

8 Source: World Copyright Law Report.

9 Source: World Copyright Law Report.

10 Source: World Copyright Law Report.

11 Source: World Copyright Law Report.

12 Complete text at [http://www.lawinfochina.com/displaySource: Ms. Ella Cheong and Joerg Sosna of Ella Cheong \(Hong Kong\).](http://www.lawinfochina.com/displaySource: Ms. Ella Cheong and Joerg Sosna of Ella Cheong (Hong Kong).).. asp?db=1 &id=5224.

13 *Infra*, at footnote 29.

14 *Bill Promotes Piracy*. Copyright World. May 2006. p. 7.

15 Source: Ms. Karen Abraham of Shearn Delamore & Co., Kuala Lumpur, Malaysia.

16 Id.

17 Source: Mr. Luis Larramendi and Ms. Elisa Prieto Castro of Elzaburu, Madrid, Spain.

18 Da Vinci Code *Verdict* Announced. Copyright World. May 2006. p. 6.

19 *In Off The Red*. Copyright World. March 2006. p. 6.

20 Expte. 99008/2001- "Salinas Analia Haydee c/ Tele Red Imagen S.A. y otros s/daños y perjuicios" - CNCIV - Sala K - 21/06/2006 Source: Mr. Dámaso Pardo and Julio Francisco Lago of Pérez Alati, Grondona, Benitez, Arntsen & Martínez de Hoz, Buenos Aires, Argentina.

21 ATF 130 III 714, Christoph Mieli case. Source: Mr. Alexandre Weith of Bugnion S.A., Geneva, Switzerland.

22 ATF 130 III 168, Bob Marley case. Id.

23 Is Walt *Disney Sailing Info Hot Water?* Copyright World. September 2006. p. 6.

24 Source: World Copyright Law Report.

25 Amazon, Inc. v Cannondale Corp. No 99 CV 00571 (EWN), 2006 WL 650682 (D Colo March 10, 2006).

26 Joseph, Paul and Pratt, Giles. Copyright Goes to *the Ball*. Copyright World. February 2006. p. 22.

27 Kazaa Contempt *Suit Given the Thumbs Up*. Copyright World. May 2006. p. 7.

28 Source: Ms. Ella Cheong and Joerg Sosna of Ella Cheong (Hong Kong).

29 Bénard, Laétitia and Rudoni, Alexandre. *Rights Owners and Users Fail to Agree on Reform*. Managing Intellectual Property June 2006

30 Source: Ms. Ella Cheong and Joerg Sosna of Ella Cheong (Hong Kong).

31 364-JPI (Badajoz) S 17 Feb. 2006. - Ponente: Cáceres Ruiz, Luis. Source: Mr. Luis Larramendi and Ms. Elisa Prieto Castro of Elzaburu, Madrid, Spain.

32 ATF 131 111 480. Source: Mr. Alexandre Weith of Bugnion S.A., Geneva, Switzerland.

33 Identified as: Summary ID No.2551 - Clinical Study Summary: Study F1D-Us: HGHQ (pages 368-378 of defendant's file), and Summary ID No.1028 - Clinical Study Summary: Study F1D-MC-HGEH (pages 396-409 of defendant's file).

24 Resolución No. 0272-2006/ODA-INDECOPI. Expediente No. 001120-2005/ODA. Source: Mr. Carlos Fernández-Dávila of Fernández-Dávila & Bueno, Lima, Perú.

