Copyright World
last word column, November 2006

FLASH MOBBING
MARTIN KRETSCHMER EXPLORES WHERE INFRINGEMENT ADDS VALUE

London Liverpool Street Station, Wednesday, 11 October 2006, 7pm. As commuters make their way home, rushing to catch their trains, movement erupts on the concourse. Hundreds of mobile clubbers have arranged by word-of-mouth to dance, each to their own tune, into another London night. Plugged into various MP3 players and Pods, a collective musical experience is created, a parallel private universe in a public place: “flash mobbing”.

There are no legal concepts on the basis of which the music industry could have created a revenue stream from the Liverpool Street happenings. There was value, but no copying or distribution. A public performance certainly took place – but of what? A new urban craze once again had escaped the clutches of copyright law.

Under the paradigm of exclusive rights that governs the global copyright regime at least since the incorporation of the Berne Convention into the TRIPS Agreement (1994), the full value of every production in the literary, scientific and artistic domain is awarded to the author (in practice: successors in title, i.e. corporations). Exceptions to exclusive rights are only permitted “in certain special cases”, provided that they “do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder” – Article 13 TRIPS adapted from the three-step-test of the Berne Convention (where Art. 9(2) only applies to the reproduction right).

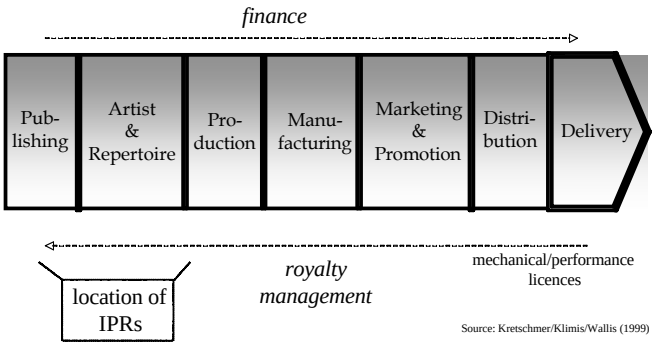
Music, as a particularly malleable social and cultural phenomenon has always had a tendency to trouble copyright law. Estonian samples turn up hip hop; bootlegs are shared on peer-to-peer networks most of us never knew existed; parodies and remixes are posted on every other video website. Occasionally, copyright law has succeeded in forcing the genie back into the bottle. The techno scene of the 1990s, organising spontaneous raves on open fields, eventually migrated back into licensed clubs. Napster, the original file-sharing network, was closed down in 2001 and re-emerged as a legal, if low key subscription site.

Google’s October purchase of YouTube for the little change of $1.65bn, and similar deals by Yahoo ($1bn for FaceBook) and Murdoch ($580 for MySpace) may indicate that the time of exclusive rights is up. In an important sense, the audience of network websites has been built on copyright infringement. In the case of YouTube, the chief attraction is up-loaded video content that has been pilfered and modified from TV and DVDs.

A change in the value chain

The era of exclusive rights corresponded to a linear model of industrial production. Value was created from input and output logistics, as well as superior customer knowledge.

Music: The industrial value chain



In the world of user generated networks, value does not stem from sniffing out the latest trends and serving those to many more customers, but from enabling users to be the latest trend.

Even if this diagnosis was correct, the owner of valuable copyrights can always say NO. That's the nature of exclusive rights. If I am Universal or Warner, I'll sue you – reasserting control over my value chain. Recall: this had been the right owner's response to Napster, Grokster and Kazaa.

Google's deals

Why did Google feel it could take a copyright risk where Bertelsmann expensively failed when it invested in Napster? Google has existing relationships with major right holders that it appears to be able to use, extending for example a deal with Warner under which Google already could show music videos, artist interviews and other footage for free in return for an advertising revenue share. Universal signed a similar distribution deal only days after it announced it would sue YouTube. Major right holders obviously feel they have something to loose if they were to obstruct Google's ambitions.

Can we assume that revenue share, rather than licences based on exclusive rights, will be the new copyright business model? As the law stands, we cannot be sure. Many a prospective carpet begger will acquire rights from smaller right owners with little to loose. Google may still be sued to the wall. Even in negotiations with major corporate right owners, many obstacles remain to be to cleared (see Google Print). However, it is my hunch that flash mobbing is the future. Where value shifts, the law will eventually follow.

About the author

Martin Kretschmer is Professor of Information Jurisprudence and Joint Director of the Centre for Intellectual Property Policy & Management (www.cippm.org.uk) at Bournemouth University, UK. He is also project director (with Prof. Lionel Bently) of a major Arts and Humanities Research Council (AHRC) project on copyright history at the Centre for Intellectual Property & Information Law, Cambridge University (2005-7). Previously, Martin was consultant editor at BBC Worldwide (1994-5) and a faculty member at City University's Cass Business School, London (1996-9).