

THE SCOPE OF COPYRIGHT

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EXECUTIVE SUMMARY

This paper considers the scope of copyright in the light of the so-called “digital (or Internet) revolution” of the last twenty years, and raises some issues about the future shape of the law which seem to require further investigation and reflection. In particular, it argues that much of the reform of copyright law which has occurred since the mid-1990s has been driven by the concerns of what we call the “entertainment industry”, the producers of recorded music, films and software games, responding to the problems of rampant piracy facilitated by the very digital technology in which the original products now typically appear. This sector has used these reforms to their best advantage, pursuing actual and perceived infringers through the courts where domestic legislation allows, and resorting to self-help measures to supplement and sometimes override the statutory framework where that environment is found wanting. The legal reforms are however general in nature, and not confined in their impact to the entertainment industry or even necessarily to digital products. Relatively little has been heard as yet about the impact the policies will have upon the interests of education and research and the sectors, private and public, which support and provide for these interests. Copyright law has given a special place to these interests through exceptions and limitations woven into the fabric of the law since the nineteenth century. But these exceptions and limitations, which are in any event interpreted rather variably in the world’s legal systems, have been under gradually increasing pressure in the reform of copyright: in the EU (EU); notably, many have been made optional for Member States. The effect of the resultant changes in the law outside the entertainment industry has been little considered or studied.

Digital producers have not relied on copyright law alone for their protection from piracy. As already noted, digital technology is a double-edged sword, in that it enables both the creation of exciting new products and their unauthorised, rapid and perfect multiple copying by pirates. In favour of the producers, however, is the fact that the technology allows the building into products – and also now into the hardware needed to play the products - of devices that protect against such unauthorised copying, and that may indeed bar even access to the product until such conditions as may be imposed upon access are met by the would-be user. This is particularly important with regard to Internet-based dissemination of digital products, but its significance is not confined to that arena, as shown by recent experience with DVDs. While clearly these protective devices are of critical importance to the creation of markets using the new forms of distribution made possible by the Internet and digitisation, and have therefore themselves received specific legal protection as part of the reform of the law of copyright, further questions are raised about the effect on the established copyright exceptions and limitations, especially in sectors outside the entertainment industry. That such questions are of importance is confirmed by the admittedly ambiguous provision in European legislation requiring Member States to ensure that the private use exception is made available to the public where it has legal access to the protected work.

The paper thus concludes by suggesting that there are now at least three major questions of policy and fact requiring further investigation:

- **how is policy for digital dissemination being interpreted in sectors not concerned with entertainment, (e.g., education and research, and supporting industries such as libraries and archives; i.e., how are producers exercising their rights here?);**

- **what impact is that having on the digital delivery of content?**
- **is the copyright policy that has been followed in recent reforms suitable for digital dissemination of works in those sectors outwith the entertainment industry?**

More specifically, a **programme of further empirical research is proposed**, aimed at finding out what is actually happening in the education and research sectors in Europe, with particular focus on the following matters:

- *the implementation of the optional copyright exceptions and limitations in the Member States of the EU, and the perceived impact of the choices made upon the education and research sectors*
- *the use and impact of digital and other technologically based protective devices with regard to the education and research sectors, including the contractual provisions deployed alongside the use of such devices*
- *the interaction between copyright exceptions and limitations, protective devices and associated contracts, and government regulation of the area.*

INTRODUCTION

1.01 A major issue for copyright lawyers at the present time is how to deal with the rapid development of the Internet and the prospect of the 'information superhighway', world-wide telecommunications systems which permit the rapid, indeed virtually instantaneous transmission around the world, at times chosen as much by individual recipients as by transmitters, of information and entertainment in digital form which had previously been distinct types of media – words written and spoken, pictures still and moving, sounds going beyond words, and combinations thereof. The issues are manifold. Is the ease of perfect reproduction and manipulation of material in the digital form used by our communications systems the death-knell of the whole basis of copyright? Are we at least going to have to reconsider such fundamentals of copyright law as what constitutes publication, copying and public performance, or the old distinctions between categories of work such as literary, artistic, sound recording and film? What rights should users enjoy? Are the rights accorded them in the analogue world so ill-defined that they will undermine the utility of copyright as a source of income for digital authors and their publishers? Will we see the emergence of a genuine market-place in which producer and user bargain about the price for individual transfers of information and cultural goods, rather than requiring intermediaries such as publishers? Given the ready flow of material across national frontiers, does the international harmonisation of copyright laws need intensification? Should the classic rules of private international law on jurisdiction and choice of law be adapted to enable a party confronted with infringements in another country to sue effectively in his own country and have judgments recognised abroad?

1.02 Copyright first developed in the early modern period as a response to the growth of the printing technology which facilitated the rapid multiplication and distribution of copies of written works. Change in the law has continued to be driven by technological

advance in the means by which works can be presented to the public at large, and protection has been extended and adapted to cover photography, cinematography, sound recording, broadcasting, cable transmissions and computer programs. So there is no reason to suppose that, if the Internet does in fact present new problems for copyright, the law cannot be adapted to deal with them.¹ The practical benefit of working within the copyright mould is the continued applicability of the international regime under the Berne Convention and other treaties which ensure potentially world-wide protection for rightholders (a vitally important point in relation to the global Internet).

1.03 A second preliminary point concerns the functions of copyright. Two major conceptualisations of this can be identified in the world's legal systems. The Anglo-American or Common Law tradition emphasises the economic role of copyright. Protection of copyright subject-matter against unauthorised acts of exploitation enables right-holders either to go to market themselves with a product based on the material, or to grant others, by outright transfer or, more typically, by licence, the right to do so for whatever seems an appropriate price. In the absence of copyright, which would enable free-riding by would-be users, it is unlikely that producers of the material would earn any return for their work, and without that incentive production would dry up or slacken significantly. Copyright is thus essentially a response to market failure, a means by which socially beneficial activities can be made financially worthwhile. It rests ultimately upon the general or public interest.²

¹ Contra the views of, e.g., John Perry Barlow: see his *Selling wine without bottles: the economy of mind on the global Net*, in P Bernt Hugenholtz (ed), *The Future of Copyright in a Digital Environment* (1996), 169-187. See further L Bently and B Sherman, *The Making of Modern Intellectual Property Law* (1999), and Computer Science and Telecommunications Board and National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (2000), henceforth *Digital Dilemma*.

² See further G Davies, *Copyright and the Public Interest* (1994). A new edition of this book was expected at the time of writing.

1.04 In contrast, the Continental or Civil Law tradition sees copyright as springing from the personality rights of the individual creator of the subject matter. Companies and organisations as such cannot be creators. This perception is reflected in the name ‘author-law’ given to the topic by the various Continental systems - *droit d’auteur*, *urheberrecht*, and so on. Protection is given out of respect for the individual’s creative act of production, and extends beyond the merely economic to the so-called ‘moral rights’: the right to be identified as the creator of a work, the right to have the integrity of a work preserved, and others. Copyright is thus rooted in protection of the individual personality and interests of the author as expressed in her work.

1.05 The distinction between the two conceptualisations is sometimes summarised by saying that the Anglo-American tradition is centred on the entrepreneur, the Continental one on the author. It is reflected in various rules: for example, where the Anglo-American tradition gives copyright protection to media works such as sound recordings and broadcasts, the Continental tradition uses a separate group of ‘neighbouring rights’ for these non-author works. Again, where the Anglo-American tradition vests first ownership of copyright in the employer of an author making a work in the course of employment, the Continental tradition always gives it to the author. In the present context, a significant aspect of the distinctness of the two traditions is their stances in relation to what may be called ‘user rights’ or ‘exceptions to copyright’; that is, those activities in which members of the public may engage with regard to copyright works without any authorisation from the rightholders concerned. The Anglo-American tradition allows ‘fair dealing’ or ‘fair use’ for free in areas where it is thought that the public interest in the dissemination of information and ideas outweighs the interest of the rightholder in earning reward from the exploitation of the work and the public interest in encouraging the author’s activities. In contrast, although the Continental traditions typically permit private copying, the author still receives

remuneration by way of levies imposed upon the sale of the equipment that enables the copying to take place.³ In this context, as one Dutch writer has commented: *‘Viewed from the perspective of public interest, limitations are inherent to copyright law, viewed from the perspective of the copyright owner’s interest, they are exceptions to copyright law’*.⁴ Thus, on the Common Law hand, a property right is never considered as granted in those parts of works subject to fair dealing or fair use. On the other, Civil Law, hand, in the authors’ rights systems, the property right is given, but is thereafter limited.

1.06 But it is important not to over-emphasise the significance of such distinctions. Continental copyright laws are also a basis for market operations, while the author plays a fundamental role in Anglo-American copyright laws, where moral rights are now also developing.⁵ Membership of the Berne Convention, which has been the basis of international copyright since 1886 and sets minimum standards for national copyright legislation, has embraced countries from both traditions for most of its history and since 1989 has included the USA.⁶ The convergence promoted by the Convention’s minimum standards has been further advanced by the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁷ and by two WIPO Treaties of 1996, the Copyright Treaty,⁸ and the Performance and Phonograms Treaty. During the 1990s, even more fundamental steps towards convergence were taken within the EU, by a policy of harmonisation of copyright law in its Member States through a series of Directives, now

³ See further below, §§ 4.22-4.24.

⁴ F W Grosheide, *Mass Market Exploitation of digital Information by the Use of Shrink Wrap and Click Wrap Licenses. A Dutch Perspective on Article 2B UCC*, in F W Grosheide and K Boele-Woelki (eds), *Molengrafica: Europees Privaatrecht* 1998.

⁵ In the UK see Copyright, Designs and Patents Act [CDPA] 1988, ss 77-89. The USA has not enacted moral rights as such but other rights granted in USA law have been accepted as satisfying the requirements of the Berne Convention on this matter.

⁶ See appendix I.

⁷ See appendix III.

including one dealing with the copyright problems posed by the Internet⁹ (the Infosoc Directive). The global effects of these problems mean that purely national responses are inadequate, and that a convergent approach is required; but nonetheless the deep-seated differences in basic concepts have an effect upon international discussions, the outcome of which may sometimes reflect a somewhat uneasy compromise between the competing schools of thought.

1.07 The immediate relevance of noting copyright's economic functions, however, is that its deployment to protect material on the Internet is an important element in enabling the medium to realise its commercial potential. It has to be recognised at once that a large amount of material is placed on the Internet by its originators so that it can be accessed and used freely by others. Governments, commercial and other organisations, and individuals want to draw the attention of others to themselves and their products, and to provide information and material without specific charge, in fulfilment of their perceived functions in society or for other reasons. The existence or otherwise of copyright in what is placed on the Internet by such parties will be of no or very limited relevance to them. The Internet publication will either contain an express permission to access, use and reproduce, or one that can be implied from the circumstances in which the material is made available.

1.08 But what is true of some will not hold good for all those who publish on the Internet. For many, the Internet is the latest means by which information and entertainment products created at substantial cost may be made available to the world at a price reflecting that cost plus the crucial element of profit, without which business loses its *raison d'être*. But the ease of high quality reproduction, onward distribution and

⁸ See appendix IV.

dissemination of digital material poses as much of a threat as an opportunity to such entrepreneurs. Copyright protection therefore helps to make a market that would otherwise be limited to those who were unaware of their right (or ability) to copy. It is, in other words, a vital strand in the creation of a legal environment appropriate for electronic commerce, just as it has always been for those whose business is the creation and publication of entertainment and information products in analogue form, such as books, records and films; but perhaps even more so now in the digital setting.

1.09 The debate about the role and scope of copyright in this context was sparked by contrasting visions of what the Internet and, following it, the ‘information superhighway’ should be about. For government and commercial interests, it was a means of economic development. At a bare minimum, the Internet was a marketing and advertising device capable of reaching an ever-widening number of consumers and buyers. All kinds of producers could in effect set up shop on the Internet. A good example is Amazon.com, the on-line bookshop, offering traditional products (books and so on), but being in touch with its customers through electronic communication across the web. But the technology which underlay the Internet – the digitisation of information and material of all kinds – also created the possibility of new types of electronic product and services which could be traded primarily on the Internet. Computer programs and games were the most familiar type of digital product before the Internet took off; these could now be made available on the Internet for downloading directly to computers linked to the relevant website. Also familiar by the end of the 1980s were the digital CD-Roms which were largely replacing analogue cassettes and the still-surviving vinyl record as the primary means of disseminating recorded musical performances. The Internet opened up the possibility of a

⁹ See appendix V.

kind of global jukebox¹⁰ from which music enthusiasts could download to a local computer at any time whatever took their fancy. From music it was but a short step to films, albeit if a full-length feature the latter required far more digital capacity in both the carrier and the player – a technical problem solved for the moment by the technique of compression and the development of the ‘digital versatile disk’ (the DVD). Digitisation also enabled the rapid development of the multi-media product, combining written text with sounds and images still and moving. A well-known example of this is Microsoft’s Encarta encyclopaedia, but there are innumerable others.

1.10 The key point in all this was that, by contrast with the analogue world in which, although copying was easy, the copy was invariably less good than the original, the digital work would always copy perfectly. The downloader would get as good a version as the master on the original site – and would get it increasingly easily and quickly as the technology moved on. The Internet thus provided a tremendous new way of reaching consumers of information and entertainment products in the comfort of their own homes. But the difficulty also facing those minded to exploit these opportunities was precisely the ease and speed of digital reproduction. How could consumers be made to pay for the material they downloaded in this way? How could pirates, those making copies for their own commercial gain without the authority of the originator, be stopped from exploiting the technology and thereby undercutting the latter’s market? The problems with which the Internet confronts copyright owners can be very well illustrated by the Napster case in the USA.¹¹ The arrival of MP3 software in the late 1990s enabled the conversion of material recorded on CD (in particular music) into highly compressed computer files postable on and downloadable from the Internet. Napster Inc was a company which

¹⁰ For this image see Paul Goldstein, *Copyright’s Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox* (New York, 1994), especially chapter 6.

made available for downloading from the Internet its proprietary MusicShare software. This uploaded to the Napster servers a list of all MP3 files on the hard disk of the user's computer, while that person was enabled to search the servers, which contained master indices of the locations of music files on the hard disks of all users of the service. Using these indices, users might then freely download to their own computers copies of the files they wanted, directly from the hard disks of other users. In early July 2000 there were said to be 8 million users of Napster's services in the USA, each one exchanging on average about 20 songs per month, while in the UK, the number of users had increased from 217,800 in May 2000 to 464,300 in June. Although Napster itself did not make any copies of the files, it was at this point that litigation at the behest of copyright owners began the process of curbing the company's activities, a process the stress and expense of which has now driven Napster into bankruptcy. Napster's liability was founded, not upon their own infringement of copyright, but rather upon the holding that they enabled such infringement by others – the USA equivalent of the UK concept of 'authorisation of infringement', which is likewise infringement under the Copyright, Designs and Patents Act 1988.

1.11 A pragmatic answer to these problems was provided by the technology itself: the product could be locked behind technological barriers (or 'walls' or 'fences') – encryption, so-called 'water-marking', passwords and so on – requiring authorisation and payment through electronic means before they could be opened up or set aside. Following the recent case of *Universal Studios Inc v Corley* in New York,¹² we can also illustrate what is meant by referring to the 'content scramble system' (CSS) protecting DVDs:

¹¹ *A&M Records v. Napster* 239 F.3d 1004; 2001 U.S. App. LEXIS 1941; Amended Opinion Reported at: 2001 U.S. App. LEXIS 5446.

CSS is an encryption scheme that employs an algorithm configured by a set of 'keys' to encrypt a DVD's contents. The algorithm is a type of mathematical formula for transforming the contents of the movie file into gibberish; the 'keys' are in actuality strings of 0's and 1's that serve as values for the mathematical formula. Decryption in the case of CSS requires a set of 'player keys' contained in compliant DVD players, as well as an understanding of the CSS encryption algorithm. Without the player keys and the algorithm, a DVD player cannot access the contents of a DVD. With the player keys and the algorithm, a DVD player can display the movie on a television or a computer screen, but does not give a viewer the ability to use the copy function of the computer to copy the movie or to manipulate the digital content of the DVD. (Opinion, pp. 10-11)

1.12 A legal answer to the problem of ensuring that the user paid for strictly defined rights of use was multi-faceted. First, make certain that the law of copyright applied to the Internet and that material placed there enjoyed copyright and unauthorised copying thereof was infringement. Second, and perhaps even more important, was the grant of the law's protection to the technological systems of protection against acts of circumvention and against making available devices that could be used to circumvent the anti-circumvention measures. Further, the trans-national character of the Internet entailed a law of copyright which was substantially the same everywhere. Enforcement might be difficult, but the existence and application of copyright combined with the anti-circumvention measures would send a message to consumers and pirates alike, and provide a basis, as copyright has always done, for charging those who would make and/or own copies of works under the protection of the law. This leads to another point. Because users tend to access works on a one-to-one basis, so contractual conditions can be placed on, not only access to the

¹² Universal City Studios Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); 2001 U.S. App. LEXIS 25330; As Amended January 29 2002.

underlying work, but also use of the work. Copyright and technical protection measures are thus bolstered and reinforced by contract terms.

1.13 The alternative, anti-copyright, anti-protection vision of the Internet may be dealt with more briefly, since by and large it has not made its way into the WIPO Treaty or the legislation which has followed around the world, perhaps least of all into the InfoSoc Directive. The vision is of a global commons of information, ideas and entertainment, to which all – or at any rate all those who can afford or have access to an Internet link (the problem of ‘digital inclusion’) – have a right of unfettered use and enjoyment. The worlds of the computer hacker and the anti-capitalist are underpinned by this vision.

1.14 Between these two extremes lies a conundrum for the law of copyright as it applies to digital dissemination. Copyright has never been a full property right or monopoly. Neither has copyright been about perfect control over copies of creative works.¹³ Rather, there have always been a number of limitations and exceptions which evolved, not only to give the author sufficient incentive to produce new works to satisfy the public interest, but also to ensure that parts of existing creative works are available to build upon in the creation of new works. This need to place some limitation on copyright was recognised by the framers of the Berne Convention. Numa Droz, the Swiss president of the first Diplomatic Conference in 1884, told the delegates that *‘limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not*

¹³ L Lessig, *Intellectual Property and Code*, (1996) 11 *St John’s J Legal Comment* 635, 638. ‘While we protect real property to protect the owner from harm, we protect intellectual property to provide the owner sufficient incentive to produce such property. ‘Sufficient incentive,’ however, is something less than ‘perfect control.’

degenerate into abuses,¹⁴ It has already been noted that there is a difference between the Anglo-American and Continental systems regarding the way in which these exceptions or limitations operate, with the former taking them to be rather a limit on the grant of property whilst, by contrast, the latter perceive them rather as an exception to the property right granted. Equally there are differences in approach with the way in which they operate in domestic law, with the US and the UK favouring broad fair use or fair dealing provisions but the Continental systems focussing rather on narrow, limited categories. The policies at domestic level underpinning these provisions are often far from clear. In a number of cases an exemption might simply be the result of political bargaining rather than principled development. Indeed, the list of limitations to be found in the Infosoc Directive, together with the protracted process of drafting that instrument, suggests that many are included (or excluded) for pragmatic political reasons rather than principle. On matters of principle, the ‘three-step test’ to be found in the Berne Convention and other instruments is often called upon to justify or to refuse a specific measure. The test provides that limitations or exceptions to exclusive rights must be:

- (1) confined to certain special cases;
- (2) that these cases must not conflict with the normal exploitation of a work;
- and
- (3) that these cases must not unreasonably prejudice the legitimate interests of the right holder.

1.15 This test was the focus of much deliberation by the WTO panel of arbitrators in the case brought against the USA by the EU concerning section 110(5) of the US

¹⁴ WIPO 1886, Berne Convention Centenary 1986, Geneva 1986, 105.

Copyright Act 1976, as amended by the Fairness in Music Licensing Act 1998.¹⁵ The three-step test originated in Berne because, as indicated above, it was recognised by the framers of that Convention that copyright could be a very strong right, and thus should be limited on grounds of public policy, quoting specifically ‘the ever growing need for mass instruction’. The three-step test appears more suited to Continental copyright systems with their closed categories, than it does to either the UK or the USA, with their more open-ended and thus less legally certain notions of fair dealing and fair use. A proposal to add a more open-ended fair dealing provision to the Infosoc Directive failed. However, the question must arise as to the extent to which this closed category of exceptions in the Infosoc Directive is actually suited to the digital era. In 1886, when the Berne Convention was finalised, clear concern was expressed in relation to education of the masses. That was at a time when imperfect copies of works could rarely be made. But now, in an era when perfect copies can be made, but the potential for control to prevent those copies from being made is greatly increased, is the test originally to be found in the Berne Convention, and now repeated in the latest Treaties one that is suitable for the information age? Leading on from there is the question as to whether the exceptions to be found in the Infosoc Directive – deriving at least in part from the three-step test – are what is needed either to protect authors or to stimulate creativity and provide a reward for investment? This question becomes all the more acute when looking to the accumulation of copyright, technical protection measures and contract as tools supporting the dissemination of creative works. How are these measures in the Directive being interpreted and implemented in domestic law? What effect is that then having, not only on the education sector, but

¹⁵ 17 U.S.C. § 110.

on all aspects of society where works are used for the advancement of knowledge, whether by authors, by educators or by researchers?

1.16 It should be stressed that the limitations or exemptions to be found in the law are not the only means by which the property right in creative works is limited. Thus for example some material is never protected by copyright. In UK law a single word is not protected because it is not a literary work, nor is an unoriginal artistic work; some material which once was copyright no longer has it because the term of copyright has expired; and users may do certain things with copyright material without the licence of the copyright owner – for example, make a copy for private study and research, perform the work in private, record a film on TV to watch it at a more convenient time, or quote a work for purposes such as criticising it or reporting the news.¹⁶ These limitations, collectively referred to as the public domain, have been a feature of the legislation since copyright was first placed on a statutory footing. If content owners disseminate their work in encrypted form, controlling both access to and use of that work, how then can the public domain be accessed and used by the copyright creators of tomorrow? How is the public domain to be treated in the digital world of the Internet?

1.17 Given the global reach of the Internet, and its social and commercial significance as the network matures into the information superhighway, it has seemed necessary to take international action to enable copyright law to respond and adapt in a reasonably uniform and harmonised way around the world. The USA took the initiative with a report in 1995 by its Information Infrastructure Task Force entitled *Intellectual Property and the National Information Infrastructure*. The EU, concerned to harmonise the diverse copyright laws of its

¹⁶ See appendix VI.

Member States, followed suit with Green Papers in 1995 and 1996.¹⁷ The latter year also saw the completion, under the auspices of the World Intellectual Property Organisation, of a Copyright Treaty additional to the Berne Convention, and specifically aimed at some of the most troublesome issues.¹⁸ Many of these initiatives are now bearing fruit in local legislation, actual and potential, around the world: for example, the Digital Millennium Copyright Act 1998 in the USA¹⁹ and the Copyright Amendment (Digital Agenda) Act 2000 in Australia.²⁰ In the EU, the Infosoc Directive was first proposed late in 1997.²¹ It subsequently made its way slowly through the Union's co-decision legislative procedures, involving complex inter-action between the European Commission, the Council of Ministers and the European Parliament before finalisation and promulgation in May 2001.²² Also now through the legislative process is a Directive on electronic commerce, which contains significant provisions on the problem of liability for provision of on-line services of relevance to copyright, in particular on 'caching'.²³ Although beyond the scope of this paper, it is noteworthy that currently under discussion are proposals to revamp the rules of international private law on jurisdiction and choice of law. At present, a multi-national infringement of copyright, such as that which occurs when music files are swapped over the Internet between individuals²⁴ would have to be litigated against many different defendants in many different courts and thus applying many different laws. As a result of the consequent difficulties faced by copyright owners, rules that would streamline and consolidate both matters of jurisdiction and choice of law are currently circulating at

¹⁷ Copyright and Related Rights in the Information Society, COM (95) 382 final; Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society, COM (96) 568 final.

¹⁸ For a general comment see T C Vinje, 'The new WIPO Copyright Treaty: a happy result in Geneva', [1997] 5 EIPR 230-236.

¹⁹ See appendix VII.

²⁰ See appendix VIII.

²¹ Brussels, 10.12.1997, COM(97) 628 final; OJ 1998, C108/6.

²² European Parliament and Council Directive 2001/29/EC of 22 May 2001, OJ 2001, L167/10.

²³ European Parliament and Council Directive 2000/31/EC of 8 June 2000, OJ 2000, L178/1. Note recital 50 in this proposal, stating that 'it is important' that the copyright and the E-Commerce Directives 'come into force within a similar timescale'.

²⁴ For further information on this type of activity see the discussion on P2P networks at § 2.05.

both international and domestic level. Suffice it to say that the proposed changes are far from free from controversy and are unlikely to be accepted at least within the short term.

1.18 A further, related, development has been the implementation in a number of systems around the world of special regimes for the protection of databases. In a number of jurisdictions interpretation of these laws has not only given rise to conflicting jurisprudence but also raised concern in relation to the extent and strength of these provisions in the digital era. Databases, generally defined as a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means,²⁵ have long been accorded protection under the Berne Convention;²⁶ but that protection has generally been held to apply only to the selection and arrangement of the contents, and not to the contents themselves. In 1996, the EU enacted a specific instrument, the Database Directive,²⁷ not only protecting the structure of the database by way of copyright, but also according a separate sui generis database right against extraction and re-utilisation of the contents. This instrument has been used in many of the Member States of the EU by litigants seeking to protect the content of websites from unauthorised extraction and re-utilisation.²⁸ The cases show conflicting and often confusing outcomes, all of which have implications for the digital dissemination of information and works. Those countries, such as the USA, Japan and Australia, which do not have a specific regime of protection for the contents of databases, have attained similar outcomes by other means.²⁹ Australia, for instance, protects databases (including apparently the contents) by way of copyright. The USA had

²⁵ Database Directive Article 1.2 CDPA s 3A. The focus on the economic interests of the compiler of the database are reminiscent of the economic theory underpinning copyright law: property rights are required for economic efficiency.

²⁶ Berne Convention Article 2(5).

²⁷ Directive 96/9/EC of 11 March on the Legal Protection of Databases; 1996 OJ L77/20. This followed on the action plan set out by the Commission in 1991 COM (90) 584 final 17/1/1991 in which the European Commission proposed to harmonise national laws within the EU on the legal protection of databases.

²⁸ See appendices IX-XI.

²⁹ See appendices VII, VIII and XII.

developed the concept of trespass to chattels as well as managing to attain a similar result by way of contractual terms obtained when distributing the database commercially. However, the rationale for protecting database content is far from settled. Protection generally goes far beyond what might be expected under copyright, in that pure information is often the subject of the right. The effect on the development of research has yet to be measured, although, with proprietary rights extended in this way, the impact must be more than negligible. That the development is controversial can perhaps best be understood by the failure to agree a standard for protection in this area at international level evidenced by the breakdown in negotiations at WIPO in 1996 which had been aimed at developing a Treaty for the protection of databases.

THE MARKET RESPONSE

2.01 A disinterested onlooker could be forgiven for thinking that, after all the activity just described, the important decisions as to copyright policy for the digital era have already been made, leaving little further needing to be settled. The purpose of this part of the report is to analyse what has been happening in relation to digital dissemination and the new copyright laws by reference to news stories, litigation and legislative enactments, mostly emanating from the USA. That is not only because the USA is home to the largest entertainment industries and is a net exporter of creative products; in addition, the USA has already implemented the majority of the changes to domestic legislation required in terms of international obligations and is thus, to some extent, the testing bed for these new laws and their effects on commercial and consumer practices. That is not to say that other jurisdictions should in any way be ignored when considering these issues. As will be seen when looking to the country reports appended to this paper, there has been much legislative and judicial activity in most of the jurisdictions covered. However, the market response from the USA serves as an example of what could happen

in relation to the digital dissemination of information should rightholders be tempted to push to extremes the exercise of the opportunities (for rightholders) offered by digital dissemination.

2.02 The law of copyright supports a diverse range of both industries and products made available by those industries. Some of the best-known are the music and film industries, producing recorded music and films and falling mainly under the loose head of entertainment. Also particularly important in the digital age is the software industry; computers would not function without software, but equally many products are used for the purpose of entertainment. In addition, the publishing industry plays a vital role, producing a vast range of literary works such as books for both enjoyment and the dissemination of knowledge.

2.03 The important point from this discussion is that the products created by these industries tend to be used in different ways in the market. The film and music industries incline towards producing works designed for entertainment rather than for the advancement of research and education. Software is also used for entertainment purposes. These products are 'consumed' by the end user. The publishing industry on the other hand plays an active and important role in the advancement of knowledge. Books and other literary works are the lifeblood of this sector. That is not to say that the entertainment industry is excluded from the process of research and education, any more than it is to say that the publishing industry has no role to play in entertainment. Plainly that is not true. But it is the case that the emphasis in each might be different, with one sector having a greater role to play as regards the purpose for which their products are created than the other. A further point is obvious, but nonetheless important. All of

these products can be digitised and disseminated over the Internet in the form of digital bits. The product that the final consumer receives is as perfect as the original.

2.04 An appreciation of the uses to which these products are put can perhaps help to explain why it has been the music, film and software industries which have been the most concerned about the growth of the Internet.

2.05 An early case in the USA about software was of concern that industry. Software files were being uploaded on to bulletin boards and downloaded by other users. In this case the bulletin board owner actively encouraged this activity. Existing US law was found to be adequate to cope with the behaviour, finding contributory infringement by the bulletin board owner who was ordered to cease these activities.³⁰ But developments in the technology that makes up the Internet gathered pace. The most high profile case to date concerned the music industry, digital music files (MP3's) and Napster, discussed above.³¹ But Napster is not the only file-sharing system. Other file-sharing software, described as 'peer to peer' (P2P) systems, which allows users to copy MP3 files directly from the hard drive of another without the need to rely on a central index, has been proliferating in 2002. A survey by Websense (a US company) indicates that the number of file-swapping web sites had grown 535% in the year to April 2002.³² A recent European report suggested that some 10.7 million Web surfers in Western Europe visited the web sites of Kazaa and Audiogalaxy (both well-known P2P systems) in January 2002. By the end of March, that number had risen to 11.3 million.³³ A report by the Yankee Group predicts that digital distribution of music through P2P services will

³⁰ *Sega Enterprises v Maphia* 857 F Supp 679 (ND Cal, 1994); US District Court for the Northern District of California, 16 Dec 1996

³¹ See § 1.10.

³² <http://www.websense.com/company/news/companynews/02/emea/042902.cfm>

³³ <http://www.newsbytes.com/news/02/176016.html>

continue to thrive, peaking in 2005. The report foresees 7.44 billion unlicensed audio files swapped in 2005 among consumers aged 14 and older.³⁴ The International Federation of the Phonographic Industry (IFPI) has reported that sales of bootlegged music grew by nearly 50% worldwide in 2001, at least in part supported by the use of P2P systems.³⁵ There is also evidence that MP3 files containing music by some artists is available on the Internet even before the official release date.³⁶

2.06 The music industry has moved swiftly to curb the activities of at least some of the providers of the P2P systems. Those responsible for Audiogalaxy have agreed to filter works protected by copyright works as part of a legal settlement with the recording industry.³⁷ On the other hand, Kazaa, mentioned above, has announced that it cannot afford to continue defending itself in the lawsuit brought by the big record labels and movie studios and that it will accept a default judgement.³⁸ A further significant response to this increase in file-sharing has come in the form of reports that users of programs such as AudioGalaxy have been finding 'fake' MP3s popping up on file-sharing networks. The effect of this is to frustrate the practice of finding authentic music files online. It has been suggested that these fake files might have been deliberately placed on the networks by music companies to annoy file-swappers.³⁹ To date, then, the attention of the entertainment industries has been fixed upon the makers of the P2P systems. However, recent reports suggest that this strategy is changing: that individuals are now the focus of activity, both by way of being sued for infringement of copyright, and

³⁴ <http://news.com.com/2100-1023-949724.html>

³⁵ <http://news.com.com/2100-1023-935120.html>

<http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3448241.htm>

³⁶ <http://news.com.com/2100-1023-923472.html>

³⁷ Under the settlement, Audiogalaxy must obtain permission or consent from a songwriter, music publisher and/or recording company to use and share copyrighted works.

http://news.com.com/2100-1023-936932.html?tag=fd_top

<http://online.wsj.com/article/0,,SB1024354324958973360,00.html>

³⁸ <http://www.newsbytes.com/news/02/176726.html>

<http://news.com.com/2009-1023-920572.html>

through the use of criminal penalties where these exist in domestic legislation.⁴⁰ The effect on the user community remains to be seen.

2.07 The examples given above concern the music industry. That is because MP3 files are relatively small in terms of digital bits. That in turn means that they can be swapped over the Internet fairly quickly, as they do not need a vast amount of bandwidth (capacity on the wires that are the nerve-system of the Internet). Swapping films on the other hand requires much greater bandwidth. This is now increasing as investment is made in the networks forming the Internet. With this increase there is evidence that Internet users are managing to obtain copies of films with greater ease than was previously the case. Both the Star Wars and Spiderman films released in 2002 were available on the Internet either before or shortly after their release. A report by Viant (a US research company), entitled the Copyright Crusade II, claimed that about 10 million people had attempted to download copies of those films, and that of those, between 2 and 3 million successfully finished the operation, allowing them to watch the whole product.⁴¹ The same company estimates that between 400,000 and 600,000 film copies are downloaded daily. This figure, they say, is up at least 20% from last year.⁴²

2.08 The Business Software Alliance (BSA) has also produced figures to suggest that the incidence of sharing computer programs is on the increase. It has asserted that in 2001 40% of software programs world-wide were copied and used without authorisation. That, they say, marks a slight increase from 2000.⁴³

³⁹ http://salon.com/tech/feature/2002/06/10/eminem_mp3/index.html

⁴⁰ <http://news.com.com/2100-1023-949533.html> In the USA the No Electronic Theft Act 1997 makes it a federal crime for a person to share copies of products protected by copyright with friends and family members if the value of the work exceeds \$1,000.

⁴¹ <http://www.qlinks.net/items/qlitem13831.htm>

⁴² <http://news.com.com/2100-1023-928426.html>

⁴³ <http://www.bsa.org/usa/press/newsreleases//2002-06-10.1129.phtml>

2.09 It is notable that in the USA the trade organisations representing the music and film industries are both led by what might be called ‘high-profile’ individuals who have seemingly unlimited budgets. In the case of the music industry the umbrella organisation, the Motion Picture Association of America (MPAA), is led by Jack Valenti, and the Recording Industry Association of America (RIAA) by Hilary Rosen . Both have been active in bringing the plight of their respective industries before lawmakers and the public. The BSA, the software industry organisation, seems to lack a similarly high profile personality. Consequently, although they do have major concerns over the sharing of unlicensed software, they appear to have made less of an impact on policy makers and the public.

The impact on company profits

2.10 The actual effect on company profits of swapping works over the Internet is extremely hard to determine. The statistics and counter statistics thrown out by the industry are accompanied by high rhetoric, notably from some US commentators. Only recently Republican Congressman Bob Goodlatte said that legislators and law enforcers would have to fight and win a ‘war’ against online piracy in order for the digital marketplace to have any chance of realising its full potential. Goodlatte cited then recently released recording industry data showing that record sales fell 10% in 2001.⁴⁴

2.11 Perhaps predictably, reports prepared on behalf of the copyright industries tend to argue that not only have the sales and swapping of bootlegged music grown significantly, but that this activity is increasing in the film, music and software sectors. Thus the International Federation of the Phonographic Industry (IFPI) has reported that

sales of bootlegged music grew by nearly 50% worldwide last year.⁴⁵ Equally, the industry, keen to argue that returns from like products have fallen, has reported that revenue from global music sales fell 5% in 2001, to \$33.7 billion. The IFPI argues that the reason for the decline is ‘the fact that the commercial value of music is being widely devalued by mass copying and piracy’.⁴⁶

2.12 But studies emanating from what might be considered independent sources suggest that the picture is not as clear as the entertainment industry might like to paint it. Some indicate that file-sharing does not decrease sales, but has rather the opposite effect – that of increasing sales. A report compiled by Jupiter Media Metrix argues that experienced file sharers actually increase the amount of money they spend on CDs as they use services such as Kazaa.⁴⁷ The Economist has published data which suggests that, while the revenues from global sales of CD’s might fall from \$35 billion in 2000 to \$31 billion in 2003, receipts from DVD’s and videos are forecast to rise from under \$20 billion in 2000 to over \$30 billion in 2003, and games software from \$12 billion to \$19 billion over the same period.⁴⁸

2.13 The truth about whether sales are increased or decreased as a result of file-sharing on the Internet is unlikely ever to be definitively established. External factors, such as the state of the economy, and the easy availability of CD’s in the form and containing the tracks that users want, will also have a bearing on the sales of pre-recorded music, films and software. There is also a tendency by the copyright industries

⁴⁴ <http://www.newsbytes.com/news/02/175995.html>

⁴⁵ <http://news.com.com/2100-1023-935120.html>

<http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3448241.htm>

⁴⁶ SOURCE?

⁴⁷ <http://www.nytimes.com/2002/05/06/technology/06MUSI.html>

<http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3192442.htm>

⁴⁸ The Economist 22/6/02 Console Wars

to argue that every copy made through the medium of one of the file-sharing mechanisms is a lost sale. That begs the question as to whether the person who has made the copy would actually pay to acquire a legitimate copy.

2.14 Whatever the truth behind the statistics, it is the case that file-sharing has been on the increase. File-sharing results in swapping of creative works outwith the control of the copyright owner. It is to finding some way to counter this lack of control that the copyright industries have turned their attention.

REFORMS TO COPYRIGHT LAW FOR THE DIGITAL ERA

3.01 As noted above,⁴⁹ there have been a number of different areas of copyright policy and law that have been the subject of recent attention. The purpose of this part is to describe those reforms in more detail and to analyse the effect that they have had in the market. For the copyright industries, and for the purposes of this discussion, three reforms have been particularly important.

Public communication rights

3.02 The first is the inclusion of measures in international treaties and domestic law which recognise that a creative work may now be disseminated without being embodied in any tangible medium: in other words, providing exclusive rights for copyright owners over the movement of digital bits. This has been effected through having included in the WCT new definitions of 'making available to the public' and 'communication to the public' (public communication rights).⁵⁰ These measures are based upon the fact that much communication in the digital era takes place on a one-to-one rather than on a one-to-many basis. Domestic laws drafted prior to the digital era were typically built around

fairly narrow definitions of ‘broadcasting’, ‘cable-programming’, ‘in public’ and the like, which (depending on interpretation by the courts) might or might not be adequate to cover digital dissemination.⁵¹ The new definitions mean that, as communication rights are exclusive to the copyright owner, relevant one-to-one communications can become chargeable transactions when licensed to a user.

Technical protection systems and anti-circumvention measures

3.03 The second major reform is in relation to the anti-circumvention measures discussed earlier.⁵² These measures have been drafted to protect the technical protection systems that copyright owners might use to prevent a creative work being accessed, used or copied without their permission. These systems (which consist of some form of encryption such as CSS⁵³) are called by a variety of names, including digital rights containers, content management systems and technical protection systems. The new laws do not require copyright owners to use these encryption measures. Rather their circumvention is outlawed, along with the selling or circulation of any products or devices that could be used for circumvention. These measures are the most important to copyright owners in their search for control over the dissemination of their works. Equally, it is these measures that make access to and use of material that falls into the public domain so difficult.

Internet Service Provider liability

3.04 The third area over which copyright owners have sought to exert control is Internet service provider (ISP) liability. ISP’s act as the gatekeepers to the Internet for

⁴⁹ See § 1.17.

⁵⁰ See appendix IV.

⁵¹ See country appendices to this report.

⁵² See §§ 1.11-1.12.

⁵³ See § 1.11.

many users. Furthermore, many works protected by copyright are made available on the servers owned by ISP's. If copyright owners could require ISP's to remove from their servers works which infringed the copyright, this would help the former to their goal of controlling dissemination by removing unprotected works from general availability. To this end, a number of laws have been drafted to deal with ISP liability.⁵⁴ Generally these laws provide that ISP's will not be liable for the content that they host (which could be films, software or MP3 files placed there without authorisation), if they remove that content when they know that it is there. If they do not, then they will themselves become liable for infringing copyright. Liability is based broadly on the concept of authorisation of infringement (UK standard), or on vicarious and contributory copyright infringement (US standard). In practice what happens is that the copyright owner 'polices' the Internet, and if infringing content is discovered on the servers belonging to an ISP, a notice is sent to that ISP requiring the infringing content to be removed. This has become known as the 'notice and take-down procedure'.

3.05 Further questions arise over the provision of links taking a surfer from one homepage to another. Could an ISP which hosts a page for a third party containing links to infringing material itself be liable for infringement of copyright? If it were possible to remove, not only allegedly infringing material, but also any links on sites which took to surfer to other allegedly infringing material, then the copyright owner would have a powerful weapon to use in a quest to have such material removed from the Internet. This is all the more so if the ISP – a relatively easy target – could be held liable for infringement if such links were not removed. The attempts to obtain definitive answers to the question of liability have led to a number of conflicting cases.⁵⁵ Certainly some jurisdictions have enacted specific legislation to provide immunity for the ISP so long as

⁵⁴ see appendices 00

certain procedures are followed;⁵⁶ but in itself that does not necessarily mean that the ISP would be liable if the links were not removed. Other questions arise about the interpretation of the Database Directive, discussed above,⁵⁷ and about liability for linking. A number of cases within Member States of the EU have now held individuals liable for deep-linking to web sites on the basis of the sui generis right protecting against unauthorised extraction and re-utilisation.⁵⁸ Whether similar liability could attach to the ISP remains to be seen.

Contract

3.06 A final area in which the law has not so much been reformed, but is rather being used to exert control over access to and use of creative works, is contract. It was noted above that because works disseminated in digital form, whether over the Internet or on DVD or CD Rom, tend to be used on a one-to-one basis, so contract conditions set up by the copyright owner can be used to govern both access to and use of the underlying work. A current and important debate, the answer to which is far from clear, is over the extent to which contract conditions could alter the boundaries of copyright as set out in the legislation of individual states. This question becomes particularly acute in relation to the limitations and exceptions to be found in the law. If, for example, one Member State of the EU chose to incorporate into domestic law an exception to be found in the Infosoc Directive, permitting a work to be used for the purposes of parody and pastiche, could the copyright owner then make it a valid condition of access to and use of the work that it was not to be used for these purposes? If such a clause is valid, then it would suggest that copyright owners, rather than regulators and legislators, determine the limits of the copyright monopoly in the digital era. Although enforcement of the

⁵⁵ See country appendices to this report.

⁵⁶ United States Copyright Act s 512(d)

⁵⁷ See § 1.18.

contract terms may be difficult, as a result of the uncertainty surrounding this area, it may be that copyright owners find themselves with a potentially far-reaching means of control over creative works, the exercise of which may operate ultimately to override policy choices made through domestic and international law-making processes.

THE REGULATORY PARADIGMS

4.01 To understand fully the pursuit by the copyright industries of unauthorised copies found on the Internet, it is useful to consider the activity within two frameworks. The first is the type of regulation that is relevant to the particular issue. The second relates to what aspect of dissemination is targeted by the copyright owner. A third important point to bear in mind, which has been discussed above, is what sector of the industry is involved. Categorising the activity in this way can help, not only to explain the behaviour of the copyright industries, but also to analyse what policy is being pursued. This second aspect is particularly important to determine two issues. First, whether it is the policies as reflected in the legislative instruments that are having an effect in the marketplace, or whether the copyright industries are regulating their own behaviour, independent of any legislative intent. Second, it is helpful to be able to analyse what effect this activity is having on the market for copyright products.

Type of regulation

4.02 In terms of regulatory paradigms applicable to Internet (and other) governance four different types emerge. The first, multi-state regulation, has clearly been used in defining copyright policy. The WCT and the WPPT finalised in 1996 are often-cited examples of how regulation can work at the multi-state level. These Treaties were the result of a lengthy period of negotiations, and both came into force in 2002, having

⁵⁸ See appendices X and XI.

attained the required number of signatories. However, if 'international' harmonisation of copyright law and policy in the digital age is regarded as an important goal, then international Treaties may not provide the ultimate answer. In most contracting States, these Treaties are not self-executing but must be incorporated into domestic law. Further, they provide obligations regarding the minimum standards that must be laid down. States can choose higher levels of protection. Thus there is also a tier of single-state regulation in which there is scope for domestic policies to be reflected, but the result of which may be uneven treatment. That is precisely what has happened in implementation of the international anti-circumvention provisions. In both the US legislation and the InfoSoc Directive the standards of protection in the anti-circumvention provisions exceed those to be found in the WCT. The WCT requires the outlawing of circumvention where it is not authorised by the rightholder or permitted by law. There is no reference to activity 'permitted by law' in either the US provisions (the Digital Millennium Copyright Act 1998 (DMCA)) or the Infosoc Directive. In both cases it is unlawful to circumvent a technical provision per se, no matter the purpose for which that circumvention may be carried out (e.g. fair dealing/use). Thus regulation in both is at a more draconian standard than that set at international level. Other signatory states to the WCT, such as Australia⁵⁹ and Japan,⁶⁰ have preferred to regulate at a level more akin to be found in that instrument.

4.03 Another example is the adoption of the public communication right. The USA has made no amendments to domestic law to reflect these obligations, arguing that domestic law was already sufficient to meet the obligation. By contrast, the Infosoc Directive contains an article designed to implement the standard.⁶¹ Finally, the Infosoc

⁵⁹ See appendix VIII.

⁶⁰ See appendix XII.

⁶¹ See appendix V

Directive has gone further than the WCT, choosing also to regulate in the area of limitations and exceptions to user rights under the pretext of harmonisation of this area.⁶² However, that outcome is unlikely, given that the Directive's provisions are permissive rather than mandatory, leaving Member States the option of which (if any) to implement in domestic law.

4.04 So broad policy goals apart, it remains for individual states to dictate their own copyright policy – albeit within the standards and parameters set at international level.

4.05 There is a further regulatory mechanism, peculiar to the Internet, given its dependence on standards necessary to make it function. It is to be found within the code of the Internet itself. Lessig has expressed this type of regulation in a famous sentence – “‘the code’ (i.e. the law) is in ‘the code’” (i.e. the architecture that makes up the Internet). The issue in terms of the code (the architecture) then becomes – who regulates what? The argument is that those who write the code that drives the Internet can make it function in such a way that it does not follow (or does not necessarily follow) the code set by legislation. For instance, domestic legislation may permit a user to make a copy of a protected work for personal use. But those who write the code (which is likely to be under the control of the content owner) may dictate that no copy of that work can be made at all. The result is that those who write the code determine what uses can be made of the work. This may ignore policy choices reflected at international and domestic level.

4.06 The final example of regulation that can be seen in relation to digital dissemination is self-regulation whereby copyright owners can determine what uses may be

⁶² See appendix V

made of a creative work through, for example, codes of practice. Code is a type of self-regulation in that it is up to the copyright owners to dictate uses of work by writing code as they wish. But this may be still further supplemented, notably by contract with prospective and actual users. As suggested above,⁶³ regulation by contract (the terms of which may be dictated by the copyright owners) could become particularly prevalent in connection with digital dissemination. If a work is disseminated in tandem with a technical protection system, and bearing in mind that work will be accessed by a user on a one-to-one basis (i.e. the user sitting in front of his/her computer), then it is perfectly feasible for the copyright owner to require a user to enter into a contract containing terms governing the use of that work (for instance, by clicking on an 'I agree' icon). If the user does not agree to the terms, then the user will not be permitted by the copyright owner, via the encryption system, to gain access to the work. The technical protection system, combined with the anti-circumvention provisions, may be more effective in controlling use of the work than the contract terms. One can ignore contract terms (although that is not necessarily good policy). It is much more difficult to decrypt an encryption program. Nonetheless, the copyright owner has another tier of regulation to use in dictating the use to which the work is put. As with the technical protection system, the terms contained in the contract may or may not follow the contours of copyright legislation.

What is being regulated?

4.07 It is important to consider, not only the types of regulation that are being used in the dissemination of creative works over the Internet, but also what is being regulated.

More specifically, on what targets have copyright owners set their sights when seeking to exercise control over dissemination of creative products? Three can be identified:

⁶³ See § 3.06.

- content (digitised products, web pages etc)
- hardware making up the Internet (computers, servers and wires)
and
- access to the Internet (by way of ISP's).

Each of these gives rise to examples of the different types of regulatory mechanisms, which are not mutually exclusive. For instance, provisions as to ISP liability are to be found within EU instruments and US domestic law, but their behaviour is also shaped by codes of conduct drawn up by the industry. For ease of analysis, the reported activity will be grouped under the heads of content, hardware and access. In each the different types of regulation used will be highlighted.

Content

4.08 It has already been noted that the anti-circumvention provisions are one of the most important measures for copyright owners.⁶⁴ That is because these measures allow copyright owners to encrypt their works, making them accessible and usable only by grace of those same owners, whether through special decryption measures where the use is authorised by the copyright owner, or through contract terms. This has meant that, where a user has sought to circumvent the technical controls without the authorisation of the copyright owner, the owner has immediately used the provisions to challenge that circumvention. There appears to have been less emphasis so far on the enforcement of contract terms.

4.09 Two particularly high-profile cases illustrate the zeal with which the industry has been willing to pursue the infringers.⁶⁵ The first concerns the film industry and the

⁶⁴ See § 3.03.

⁶⁵ See also appendix VIII.

encryption program CSS described above.⁶⁶ This case started in Norway where a student, Jon Johanson, wrote the DeCSS decryption program designed to overcome the encryption controls (CSS) on DVD's. Eric Corley gave details of the DeCSS on his website, 2600.com. The MPAA sued Corley, using the anti-circumvention provisions in the DMCA, and was successful.⁶⁷ The Court rejected the argument that the purpose of the DeCSS program was to allow purchasers of the DVD's to play them on computers running the Linux operating system, and was an instance of fair use.⁶⁸ A second case, also concerning the anti-circumvention provisions, occurred where a Russian programmer, Dmitry Sklyarov, was arrested on arrival in the USA to present a paper at a conference. His alleged crime was that he had written a program that could decrypt the technical controls surrounding Adobe's e-book reader. This machine allowed one to download e-books from the Internet, but only subject to terms and conditions. The encryption program incorporated in the reader only allowed a user to 'use' the e-book in the ways dictated by the technology supplemented by the contract terms. Although Sklyarov has since been allowed to return to Russia, the company for which he worked has now been charged with the same offence.⁶⁹

4.10 Some are sceptical about the effectiveness of the encryption programs written by copyright owners. These programs are not only used in connection with Internet dissemination, but, as discussed above,⁷⁰ they are also used in connection with DVD's and latterly with music CD's. Sony, for example, recently released music CD's containing encryption designed to prevent these being 'ripped' (copied) and 'burned' onto other CD's. This activity caused problems for a number of purchasers, in that the

⁶⁶ See above § 1.11.

⁶⁷ *Universal City Studios, Inc. v. Reimerdes* 00-9185 Second Circuit Court of Appeals

⁶⁸ See appendix VII

⁶⁹ For the documents relating to this case together with comment see http://www.eff.org/IP/DMCA/US_v_Elcomsoft/

CD's could not be played on a computer CD drive. Further, if an attempt was made to play one on an Apple MAC computer, the machine seized up.⁷¹ This has prompted a number of jurisdictions to require the placement on CD's of labels stating that they are copy protected. Notable examples are Australia⁷² and Japan.⁷³ In the USA, the practice has engendered a class-action lawsuit claiming that the CD's are defective.⁷⁴ Further, it did not take users long to find a way around the encryption. In the case of Sony's CD's, it was as simple as scribbling around the rim of a disk with a felt-tip marker. Some claim that tape or even a sticky note can be used to cover the security track.⁷⁵

4.11 Of all the domestic legislation enacted to date containing anti-circumvention provisions, it is the DMCA which has attracted most attention. Recent reports highlight some of the 'unintended' consequences of the legislation. Apart from the Sklyarov case noted above, the DMCA has also

- been used as the basis upon which to make threats against a US university professor who wished to publish a paper on circumvention of controls used to defeat watermarking technologies used in conjunction with dissemination of digital music;
- caused academics from jurisdictions outwith the USA to decline to publish results of research which could be said to contravene the terms of the Act;
- led scientists from outside the USA to express concerns about travelling there lest their work could be found to contravene the DMCA and thus render them liable to arrest if they entered US territory;

⁷⁰ See § 1.11.

⁷¹<http://www.newscientist.com/news/news.jsp?id=ns99992271>

⁷² <http://www.zdnet.com.au/newstech/security/story/0,2000024985,20264595,00.htm>

⁷³ <http://www.japantoday.com/e/?content=news&cat=4&id=212208>

⁷⁴ <http://news.com.com/2100-1023-936527.html>

⁷⁵ <http://www.wired.com/news/technology/0,1282,52665,00.html>

<http://news.com.com/2100-1023-918273.html>

- made publishers require indemnities from authors lest anything in a published article should result in liability under the DMCA;
- led to requests for certain discussions to be removed from newsgroups where it might concern anti-circumvention activity;
- been used to deter intrants to the market where a product might be based on reverse engineering of a software program (although this is lawful in the US).⁷⁶

Whether all or any of these consequences were or could have been foreseen when anti-circumvention legislation was first discussed at international level must be a moot point. The entertainment industry has certainly interpreted the legislation to its advantage, using it to shape the way in which content is delivered.

4.12 The entertainment industry continues to lobby for further legislation to help it in pursuit of the goal of removing infringing content from the Internet. A Bill has been proposed in the USA⁷⁷ to exempt copyright owners from all civil and criminal liability if they themselves take action to block the dissemination of works in P2P systems. Predictably the response FROM? has been swift, with the measures having been described as amounting to government-sanctioned vigilantism.⁷⁸

4.13 The anti-circumvention measures, P2P systems and unauthorised sharing of music files are not the only concerns taxing content companies. New and legitimate businesses depend on making use of existing works; for example, net radio stations. It will be recalled that there is an obligation to introduce (where not already present) public communication rights for content owners. These are particularly important for the

<http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3301206.htm>

⁷⁶ http://www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf

⁷⁷ H.R. 5211

⁷⁸ <http://action.eff.org/action/index.asp?step=2&item=1776>

music industry as it now means that, when music is played over the Internet, a chargeable event occurs. Consequently, there have been negotiations in some jurisdictions (notably within the USA) as to the licence fee payable by these net radios for streaming music over the Internet. Needless to say, the amount of the levy is controversial. The radio stations argue that if the levy is too high it will force them out of business. Content owners, on the other hand, argue that they must be compensated fairly for their content. In a recent decision, the Librarian of Congress set a royalty fee of 0.07 cents per-song per-listener. Predictably, the record companies assert that the fee is not enough to compensate them for the value broadcasters derive from their works, while the net radio stations claim that the size of the fee is likely to drive them out of business.⁷⁹

4.14 When looking at the types of regulation underlying these scenarios, it becomes apparent that the legislative provisions against circumvention are of the utmost importance to the copyright industries. As discussed above,⁸⁰ these are to be found both in multi-state regulatory instruments (the WCT⁸¹) and domestic legislation (e.g. DMCA in the USA,⁸² the Copyright Amendment (Digital Agenda) Act 2000 in Australia,⁸³ and the Japanese Copyright and Anti Unfair Competition Laws⁸⁴), albeit that the standards differ. However, those same regulatory provisions reinforce aspects of both self regulation (contract) and code (the encryption programs). What is also particularly noticeable is that the anti-circumvention provisions themselves form an extra level of protection for creative works, over and above that derived from copyright law. This conclusion stems from the fact that there may be no need to reproduce a work (i.e. infringe the exclusive right of the copyright owner) before liability can attach under the anti-circumvention

⁷⁹ <http://www.washingtonpost.com/wp-dyn/articles/A20412-2002Jun20.html>

⁸⁰ See §§ 1.17 and 3.03.

⁸¹ See appendix IV.

⁸² See appendix VII.

⁸³ See appendix VIII.

provisions. This might, in turn, lead to a question as to the proper place of these anti-circumvention provisions in copyright policy. This becomes all the more acute when it becomes apparent that there can be no question of a user engaging in fair dealing or exercising any one of the other 'limitations/exceptions' to be found in the law of copyright unless access can be gained to that work. The issue then becomes the exercise of the balancing features within the law of copyright that copyright policy has historically insisted upon to meet the interests of the author, the entrepreneur and the user. Whether these balancing interests need be the same in the entertainment industry as those parts of the industry more geared towards research and education will be considered below.

The hardware

4.15 The technological protection systems developed by the copyright industry are most effective if the hardware used to access and copy the works also forms a part of the measures. For instance, an encryption code in the work that prohibits access is more effective if the work has to be run through a chip embedded in a computer which decrypts the work, rather than simply relying on the code itself. It is for this reason that sectors of the copyright industry are seeking to negotiate with the electronics industry to ensure that such mechanisms are built in to the hardware. Some headway has already been made in persuading parts of the electronic industry to include copy protection mechanisms into the hardware in particular where the devices will be used to listen to music, although these initiatives are based on agreement rather than any form of legislative requirement. It has to be said that consumers are less than impressed as to the attempts to include copy-control mechanisms into the hardware.⁸⁵

⁸⁴ See appendix XII.

⁸⁵ <http://www.wired.com/news/mp3/0,1285,52895,00.html>

<http://www.wired.com/news/business/0,1367,53008,00.html>

4.16 Attention has now turned to the film industry, and the attempts being made by their representatives (MPAA) to have copy-control mechanisms inserted into hardware. The MPAA has recently identified two particular goals.⁸⁶ The first is to have an invisible digital file attached to all digital television broadcasts. This flag would then dictate under what conditions the home viewer could record or retransmit this flag. Digital televisions and video recorders would need to be built to recognise the flag, and act in accordance with the instructions. This goes some way to explain why the film industry has challenged the recent appearance of a digital video recorder (DVR) on the marketplace produced by Sonicblue. This company made a DVR which allowed television watchers to pause, fast-forward and record television shows. Sonicblue was immediately sued by the film companies. In a controversial ruling, that was very quickly overturned, the judge required Sonicblue to record the activities of its users.⁸⁷ The jockeying for position has however highlighted a number of different alliances within the industry. TiVo, which markets a competing DVR, has incorporated copy control mechanisms into its product, and is said (by Sonicblue) to be working for the film industry. By contrast, Sonicblue sees itself as championing the interests of the consumer.⁸⁸ In a final twist to the tale, the Electronic Frontier Foundation (EFF) has launched a lawsuit against more than two dozen entertainment companies on behalf of five consumers who own DVR's. The suit asks the court to declare activities such as recording and fast-forwarding legal.⁸⁹

4.17 The second goal has been in relation to controlling the proliferation of P2P systems. To this end the MPAA would like systems to support the inclusion of watermarking technology in all consumer products. While the electronics industry agrees

<http://www.guardian.co.uk/internetnews/story/0,7369,727794,00.html>

⁸⁶ <http://www.washingtonpost.com/wp-dyn/articles/A6410-2002Jun18.html>

⁸⁷ http://www.fenwick.com/About_Fenwick/Privacy_Documents/Replay_Review_Decision_C

⁸⁸ <http://www.wired.com/news/business/0,1367,53008,00.html>

⁸⁹ http://www.eff.org/IP/Video/Newmark_v_Turner/20020606_complaint.htmlTV

that this is the only effective technology against P2P file-sharing, they also believe that these can be easily hacked. Thus the electronic industry would prefer the film industry to develop a business model that would keep 'honest people honest' rather than depend on technology for the solution to this problem. There are signs that this is at last happening, at least in the music industry. Subscription services are now being offered where music companies will allow a user to listen to a track for a monetary return. Terra Lycos is set to offer such an online music subscription service in unencrypted format. Lycos Rhapsody will offer access to more than 10,000 albums but will not allow users to download the music or burn it onto CDs.⁹⁰ Universal has decided to offer digital singles and CDs through online retailers and Sony is to allow CD burning on downloaded songs.⁹¹

4.18 There is certainly little love lost between the electronics and entertainment industries, the recent round of negotiations being the last in a long line of attempts to reach some compromise where all players are involved in the control of digital dissemination. Around 1998 the record industry and some technology companies joined together to try and develop a product which would wipe out 'free' copying of music files on the Internet. This was called the Secure Digital Music Initiative (SDMI). The aim was to have SDMI-protected CDs and SDMI digital music downloads playing only on SDMI-compliant devices. However, the consortium failed to agree on standards, the record companies competed for dominance, and the electronic manufacturers were impatient to get their products to market.⁹² The result is that there is no 'common' standard for the dissemination of digital music files. This might result in consumers having to acquire different hardware depending on the product in question. The same

⁹⁰ <http://news.com.com/2100-1023-934817.html>

⁹¹ <http://www.latimes.com/technology/la-000041304jun12.story>

⁹² <http://www.qlinks.net/items/qlitem13699.htm>

experience has beset the film industry. Despite attempts, it appears that the content industry has been unable to attain agreement with electronic companies on controls over digital television. Dissenters include not only the electronic companies, but also software companies such as Microsoft, and civil liberties groups.⁹³

4.19 Perhaps in response to the failure to reach accord with all sectors of the electronic industry, some 'content' owners are considering producing their own electronic products for the dissemination of content. AOL and Time Warner propose to market a set-top box will not include ad-skipping features and is likely include copy-protection technologies.⁹⁴

4.20 But this strategy is already evident in the software games console market, where a number of players compete. The most popular products are Microsoft's Xbox, Sony's Playstation and Nintendo's GameCube. These companies now aim to develop those devices on which computer games are currently played into a network of consoles through which all kinds of entertainment content (films, music and games) can be distributed.⁹⁵ This helps to explain Microsoft's determination to pursue those who have created the means by which a modified version of the Xbox can play music and swap videos over the Internet.⁹⁶ It also clearly illustrates a move towards vertical integration by the content owners.

4.21 Perhaps the most far-reaching proposal to date to force manufacturers of electronic products to include copy protection measures in hardware has emanated from

⁹³ http://bpdg.blogs.eff.org/archives/cat_bpdg_drafts.html
<http://www.nytimes.com/2002/06/05/technology/05DIGI.html>
<http://online.wsj.com/article/0,,SB1023248936950557600,00.html>

⁹⁴ <http://news.com.com/2100-1023-912561.html>

⁹⁵ The Economist 22/6/02 Console Wars

the USA, where a Bill to this effect has been proposed, the Consumer Broadband and Digital Television Promotion Bill. The legislation would require that copyright-protection mechanisms be embedded in PCs, handheld computers, CD players, and anything else that can play, record, or otherwise manipulate digital information.⁹⁷ Perhaps unsurprisingly, the Bill has encountered a good deal of opposition both from the electronics industry and from consumers. Whether it becomes law in either its current or a modified form remains to be seen. It should be stressed, however, that even if it does pass into law, it is an initiative of a single state and would thus have no impact on the manufacturers of these devices world-wide unless they wished to export to the USA.

Hardware levies

4.22 Another area in which there has been a good deal of activity, and which has implications for hardware, is levies. These have long been a feature in a number of jurisdictions.⁹⁸ They have mainly affected recording media, for instance blank tapes and cassettes. The purpose of these levies is said to be to compensate copyright owners for copies made by individuals, usually where there is a provision in national law permitting private copying for a specified purpose. More recent attempts have been made in a number of jurisdictions to impose a system of levies on computers.⁹⁹ There are however a number of difficult and unresolved issues. The first is that, as mentioned, these levies have normally existed to compensate copyright owners for private copying, where that is permitted. It would appear that the purpose of these 'new' levies would rather be to compensate copyright owners for unauthorised copying, but not to legitimise making copies.

⁹⁶ <http://news.com.com/2100-1040-935092.html>

⁹⁷ http://www.businessweek.com/bwdaily/dnflash/mar2002/nf20020327_2364.htm

⁹⁸ See for example appendices IX-XI.

4.23 By way of illustration, the makers of P2P systems recently made a call that a compulsory licence should be introduced to ensure that the copyright owners are compensated for peer-to-peer activities. Hilary Rosen, President of RIAA, called the proposal ridiculous.¹⁰⁰

4.24 The second point is that, as discussed above,¹⁰¹ copyright owners have been active in developing technological controls to prevent copying except (presumably) at a price. A system of levies as proposed might thus appear to penalise the 'honest' computer user, who would have to pay not only the uplift on the hardware, but also for the legitimate use.¹⁰² There is no doubt that, within Europe at least, there will need to be a rationalisation of the levy system in response to the implementation of the InfoSoc Directive which permits copies to be made, but also legitimates 'fair compensation' for the right holder.¹⁰³ Careful analysis will need to be made of how the existing and proposed levies actually work in practice.¹⁰⁴

4.25 As with control over content, a number of different types of regulation become apparent in attempting to exercise control over the hardware. The development of 'code' is most visible at the content and hardware levels, backed by sanctions against circumvention at both the multi-state and single-state level. However, because the target is often control over access, once that is achieved the actual delivery can be determined by both the content owners through the use of code and contract. An example is the 'advertisement-skipping' techniques available with some DVR's. This tends to suggest

⁹⁹ <http://www.thestandard.com/article/display/0,1151,18268,00.html> and see appendices 00 and 00

¹⁰⁰ <http://www.usatoday.com/life/cyber/tech/2002/05/14/music-kazaa.htm>

¹⁰¹ See § 1.11.

¹⁰² www.tdctrade.com/alert/eu0104a.htm

¹⁰³ <http://www.zdnet.com.au/newstech/security/story/0,2000024985,20245152-1,00.htm>

¹⁰⁴ <http://www.tdctrade.com/alert/eu0205a.htm>

that the entertainment industry is seeking to set its own norms for the dissemination of content.

Access

4.26 The third area over which the entertainment industries are seeking to exert control is access. Access refers not only to access to a particular work protected by a technological protection system as discussed above, but also to access to the Internet. As already indicated, there are both regional and national initiatives in place to deal with liability of ISP's for content placed on their servers which infringes copyright.¹⁰⁵ If the ISP places the material there, then it will be liable. However, if the material is placed by a third party, then the ISP will not be liable so long as it has no knowledge that the content is there, and if it is removed once the ISP does become so aware and copyright is infringed. This enables the entertainment industry to remove infringing content at what might be considered the 'choke' point on the Internet. As a result of the active policy pursued by the representatives of the entertainment industry, and because ISP's face potential liability if infringing material remains on their servers, much material is removed. For instance, the BSA has said it is using special software to scan the Internet for unauthorised software being traded on P2P networks, Internet Relay Chat channels and Web and FTP sites.¹⁰⁶ The MPAA also uses a software program to identify web sites containing films placed there without authorisation.¹⁰⁷ The BSA has said that, having located allegedly infringing material, it issued 4,400 notice and takedown requests in Europe in 2001, achieving 97% compliance.

¹⁰⁵ See § 3.04.

¹⁰⁶ <http://www.newsbytes.com/news/02/176800.html>

¹⁰⁷ <http://www.washingtonpost.com/wp-dyn/articles/A5144-2002Jun18.html>

4.27 Some ISP's are concerned with protecting their customers, on occasion going to the lengths of requiring those who serve the notice to prove conclusively that the content in question infringes copyright. However, courts seem willing to require the ISP to accede to the takedown request, perhaps sometimes based on evidence that might be insufficient to prove infringement.¹⁰⁸

4.28 The international framework has also been important to content owners in their quest to have allegedly infringing works removed from the Internet. There is no doubt that because some consensus has been attained at international level, states have been willing to respond to requests for assistance where allegedly infringing works are available on servers in a jurisdiction outwith that of the content owner. Thus when the MPAA discovered a video-on-demand service stationed in Iran from which users could rent films for three days in return for a payment of up to \$1.50, it used its international arm (the MPA) to help stop this activity. The video-on-demand service was run using servers in the Netherlands apparently because the Internet connectivity is insufficient in Iran. The MPA worked with its ISP in the Netherlands to have the site shut down.¹⁰⁹ This does beg the question as to what the MPAA could have done had the servers been based in Iran.

CONCLUSION

5.01 From the above discussion it becomes apparent that to date the entertainment industry has been most active in developing, using and enforcing the means at their disposal to control digital content. The targets have been

- the integrity of technical protection systems

¹⁰⁸ <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3487654.htm>

¹⁰⁹ <http://news.com.com/2100-1023-933558.html>

- the development of channels to secure content from digitisation through to the end user
- having allegedly infringing content removed from the Internet where found.

5.02 This raises the critical question about how those other parts of the copyright industry (such as publishing) whose activities might more generally be considered to contribute to education, research and the advancement of knowledge, might react to the digital dissemination of their works. This is true also for how the strategy that they choose will impact on the provision of services by libraries and archives whose activities support this sector. Will the publishing and other industries be as active in content protection as the entertainment industry has been even where their products are to support research and education? Or will these parts of the industry recognise that there might be benefits to be had from a more relaxed regime of protection? It would appear that there is nothing to stop the publishing sector from following the same route as the entertainment industry. The activities pursued in that sector do appear to be within the letter of the law, at least as embodied in domestic (single-state) legislation – although, as discussed,¹¹⁰ many states have chosen to legislate at a standard in excess of that required at international level. However, this has been supplemented by initiatives taken by the entertainment industry that go beyond even domestic legislation, whether through contractual terms, or more commonly, by writing the terms of dissemination into the code through which the content is delivered. To date there is no suggestion that this is unlawful in terms of copyright law. However, their combined implementation is starting to make commentators question whether the public interest goals historically pursued through the development of copyright policy might have been overtaken by the desire to

ensure that the Internet, as a means of communication, is as friendly to the interests of copyright owners as possible. To return also to a question already raised, what about the public domain?

5.03 The framework is now in place within which the entertainment industry can fight its own battles. It is tempting to say, let them carry on. That is not to belittle the problems faced by that sector. It is however to reiterate the point that works protected by copyright serve very varied needs. Entertainment products tend to be consumed. Other creative works serve to enrich and enhance knowledge and thus form the platform from which advancements are made for the benefits for the whole of society. The rampant piracy dogging the entertainment sector is unlikely to trouble the research and education sector to the same extent. A recent survey carried out by the European Commission and Eurostat looking to the diversity of the cultural habits of Europeans confirmed that both television and cinema were important to all Europeans, but fewer read books on a regular basis. Of those that do, the majority were for entertainment purposes.¹¹¹ Further, the commercial reality is that the entertainment industry has huge resources at its disposal. It has lobbied long and hard at international, EU and national level to shape policy decisions to meet its own ends. It has the resources to use those laws in pursuit of its goals. Much more problematic now is the question as to how those same laws will impact on the building blocks of knowledge. This part of the copyright industry is far less cohesive in terms of being a lobby group, and equally, it has far fewer resources at hand to use to lobby for specific outcomes. One good example of this in the European sphere, has been the debate over the exceptions and limitations which were, or were not, to be included in the Infosoc Directive. The aim of the entertainment

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¹¹¹ http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/667|0|RAPID&lg=EN&display=

industry was to have as narrow categories as possible. By contrast, those arguing on behalf of the education, library and research sectors would have preferred to have seen as broad permissions as possible, whilst respecting the interests of authors. The debate is further complicated through the adherence to the Berne three-step test resulting in at times odd alliances between those from author's rights systems and rightholders.

5.04 Three questions thus arise:

- **how is policy for digital dissemination being interpreted in sectors not concerned with entertainment, (e.g., education and research, and supporting industries such as libraries and archives; i.e., how are producers exercising their rights here?);**
- **what impact is that having on the digital delivery of content?**
- **is the copyright policy that has been followed in recent reforms suitable for digital dissemination of works in those sectors outwith the entertainment industry?**

5.05 These most pressing questions need to be answered at a European level sooner rather than later. The InfoSoc Directive is due to be implemented into the domestic laws of Member States by 22 December 2002. That Directive contains a number of critical provisions regarding anti-circumvention measures, as well as complicated procedures designed to enable a user of a work protected by copyright exercise a number of the limitations/exceptions to be found in that instrument. These limitations/exceptions in turn are merely permissive, so disparities in implementation in Member States might have important consequences. For instance, if one state were to permit the use of a work for parody, but another did not, would the content provider simply bar access to that work through code and/or contract in the state where that limitation/exception had not been

enacted? Or will the content owner go to the difficulty and expense of writing code that will conform to the domestic legislation of each Member State?

5.06 To this end it is suggested that empirical research is essential to find out what is happening in the research, education, library and archival sectors in Europe with the implementation of the Infosoc Directive with particular focus on:

- *the implementation of the optional copyright exceptions and limitations in the Member States of the EU, and the perceived impact of the choices made upon the education and research sectors*
- *the use and impact of digital and other technologically based protective devices with regard to the education and research sectors, including the contractual provisions deployed alongside the use of such devices*
- *the interaction between copyright exceptions and limitations, protective devices and associated contracts, and government regulation of the area.*

APPENDICES

INTRODUCTION

The Appendices to this paper are intended to provide the basic legal information upon which the more general comments in the main text are based, and to illustrate something of the framework within which copyright has developed internationally and by which its future development will inevitably be constrained to some extent (because the international framework is established mainly through treaties, the adjustment of which is a slow and very long-term process). We have tried to highlight the response of copyright law to technological change and development, and in particular to the digital revolution of the last twenty years. Where possible, we have highlighted examples from the decisions of the courts on disputes arising from concerns related to digital products.

We begin with the main international treaties – Berne, Rome, TRIPS and the WIPO Treaty of 1996 – and then provide an account of the most relevant parts of the Copyright and the Information Society (Infosoc) Directive of 2001, which will be the basis of change in the copyright laws of the Member States of the EU due to be completed in December 2002, and which goes somewhat beyond the scope of the 1996 WIPO Treaty. Next we consider the law of the United States of America, which may be considered the starting place of the digital revolution, and where the law has most often dealt with disputes arising from that revolution. This experience has informed much of the debate about the law around the world. From this we move on to describe the position in some of the leading Member States in the EU – the UK, France, Germany and the Netherlands – prior to the implementation of the Infosoc Directive; here there can be seen the additional complication, in respect of European harmonisation, of the contrasting perceptions of copyright law in the Common Law

and the Continental legal systems. Finally, we turn to countries which have been confronted only with the problems posed by digitisation and the Internet and the need to comply with the WIPO Treaty of 1996. We have chosen two such countries whose experience seemed likely to be particularly rich and relevant – Australia and Japan – and have also had an opportunity to investigate the position in South Africa, a country possessed of a modern economy and a copyright law, but also in direct contact with the problems of digital and technological exclusion in relation to the great majority of its people.

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I. THE BERNE CONVENTION

In its present version the Berne Convention extends protection to literary and artistic works, defined to include 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression' [Art 2(1)]. These include cinematographic works and photographic works ('to which are assimilated works expressed by a process analogous to' cinematography/photography respectively); but not sound recordings, broadcasts, cablecasts and computer programs as such. It is left up to Member States whether works to be protected must be fixed in some material form [Art 2(2)] or whether protection extends to works of applied art and industrial designs and models [Art 2(7)]; but 'collections of literary or artistic works ... which, by reason of the selection and arrangement of their contents, constitute intellectual creations' are to be protected as such [Art 2(5)].

Berne provides for inalienable moral rights of the author of a work 'to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation' [Art 6bis(1)]. There is *droit de suite* in respect of original works of art and original manuscripts [Art 14ter].

Authors of literary and artistic works have under the Convention 'the exclusive right of authorising the reproduction of these works, in any manner or form' [Art 9(1)]. In addition, authors of dramatic, dramatico-musical and musical works, all of which are within the category 'literary and artistic works' [Art 2(1)], enjoy the exclusive right of authorising (i) 'the public performance of their works ... by any means or process;' and (ii) 'any communication to the public of the performance of their works' [Art 11]. Authors of literary works have the exclusive right of authorising 'public recitation ... by any means or process' of their works, and the communication to the public of recitations of their works [Art 11ter]. Authors of literary and artistic works also have the exclusive right to authorise

broadcasting of their works or other wireless diffusion of signs, sounds or images; public communication by wire or rebroadcasting; or public communication by loudspeaker or analogous instrument transmitting the broadcast of the work [Art 11bis].

Berne provides for the possibility of exceptions to the right of reproduction in Article 9(2), providing what is sometimes referred to as the 'three-step test': the permission to reproduce a work is (1) to be 'in certain special cases'; (2) not in conflict with a normal exploitation of the work; and (3) not in unreasonable prejudice of the legitimate interests of the author. Article 10 goes on to provide for 'certain free uses of works' as follows (the use in both cases to mention the source and the name of the author if it appears thereon):

- utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications quoting from a work already lawfully available to the public, provided that the quotations are compatible with fair practice and to an extent not exceeding that justified by the purpose;
- broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice.

Article 10bis gives 'further possible free uses of works':

- in relation to articles published in newspapers or periodicals on current economic, political or religious topics, and broadcast works of the same character, reproduction by the press, broadcasting or communication to the public by wire, provided the source is indicated;
- for the purpose of reporting current events by means of photography, cinematography, broadcasting or public communication by wire, reproducing and making publicly available literary or artistic works seen or heard in the course of the event, to the extent justified by the informatory purpose.

II. THE ROME CONVENTION

The Rome Convention 1961 continues to provide the basic international framework for the protection of performers, phonograms and broadcasts. Performers rights may be left on one side for present purposes. The Convention provides little detail on the substance of the protection to be granted to phonograms and broadcasts. Under Article 10 producers of phonograms enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms. By Article 13 broadcasting organisations enjoy the right to authorise or prohibit rebroadcasting, fixation, or reproduction of fixations of their broadcasts, or the communication to the public of their TV broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The above is supplemented by Article 2 of the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms 1971.

Article 15 of the Rome Convention is a permissive provision on exceptions to protection, which may be provided for as follows:

- private use;
- use of short excerpts in connection with reporting current events
- ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- use solely for the purposes of teaching or scientific research.

Further, a Contracting State may provide for the same kind of limitations as it provides for literary and artistic works.

Discussions are currently underway at WIPO's Standing Committee on Copyright and Related Rights (SCCR) concerning possible revisions to the Rome Convention. The committee, which held its 6th meeting in Geneva in November 2001, discussed proposals

to update protection for broadcasters. It is generally felt that existing international broadcasters' rights under the Rome Convention afford little protection against cable retransmission and webcasting.

III. TRIPS (1994)

The TRIPS standards for copyright and related rights start with compliance with the Berne Convention apart from Article 6bis (i.e. moral rights). TRIPS makes explicit, as Berne does not, that copyright extends only to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such [Article 9(2)]. Computer programs, whether in source or object code, are to be protected as literary works under Berne, while compilations of data, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations,¹¹² are also to be protected. Article 13 adopts rather more restrictive language than Berne on limitations and exceptions to copyright: members are to 'confine' such limitations and exceptions, albeit within the established 'three-step test' provide by Berne, i.e. certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. The text provides no further detail.

¹¹² The formula of Berne art 2(5).

IV. THE WIPO TREATY 1996

The WIPO Treaty of 1996 contains a number of provisions designed to address the copyright problems of the Internet. The Treaty is significant for its silence on certain subjects, reflecting a failure of the parties at the time to agree upon the appropriate way forward. So there was a proposal for an Article stating explicitly that the right of reproduction included temporary or transient reproduction, as is already the position in the UK, but this was dropped after much controversy, although it was agreed that the present Berne Convention provision (Article 9(1)) does not cover such reproduction.¹¹³

Article 8 provides for a new 'right of communication to the public' by wire or wireless means. This right includes (and so is not confined to) making work available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them; i.e. by way of transmission on the Internet. This will certainly be the most immediately important aspect of the public communication right. The real significance of the right is that it removes the need for a physical copy to exist before the rightholder can control the distribution of a work. Further, Article 10 of the 1996 Treaty follows TRIPS in setting a more restrictive approach to user rights or limitations on the scope of copyright. Article 10 of the WIPO Treaty repeats the 'three-step' formula of Berne Article 9(2)¹¹⁴ no less than twice, but, significantly, where Berne talks of 'permitting' such acts, the Article, like TRIPS (above), speaks of 'confining' them. Other Articles require Contracting Parties to provide a legal framework to protect technological means of control over use such as copy protection and encryption against circumvention by third parties (Articles 11 and 12), and do not allow any reservations to the Treaty (Article 22).

¹¹³ See Vinje, 'The new WIPO Copyright Treaty', 230-4.

¹¹⁴ See above, appendix I.

V. THE INFOSOC DIRECTIVE 2001

The Infosoc Directive can be broadly summed up as seeking to enhance the position of copyright owners on the Internet and to narrow down the rights of the user. Its underlying policies emerge clearly enough from the recitals, which, while paying lip service to the importance of user rights in the pursuit of ideals of freedom of expression and dissemination of information, ideas and culture (recitals 12, 14), emphasise still more strongly the need for a high level of intellectual property protection to 'foster substantial investment in creativity and innovation, including network infrastructure' (recital 4) and to ensure the availability of reward and satisfactory returns on investment in creative work and the products by which that work is brought to its public (recitals 9-11). The protection therefore has more of an entrepreneurial than a moral right justification, although there are references to the maintenance and development of creativity and the independence and dignity of artistic creators and performers (recitals 9, 10). The Directive is to be a basis for making the Internet commercial.

The specific provisions by which this goal is to be achieved are:

- (i) harmonisation of the reproduction right (i.e. copying as an infringement of copyright) to include temporary reproduction by any means and in any form (Article 2);
- (ii) establishment of a public communication right for authors, that is, communication 'including the making available to the public of .. works in such a way that members of the public may access them from a place and at a time individually chosen by them' (Article 3); and
- (iii) the restriction of user rights, at least so far as these may apply in a digital context (Articles 5 and 6).

The public communication right will, from the copyright owner's point of view, eliminate the gaps in protection left in the electronic and digital world of the Internet by

the present rules on distribution (i.e. the limitation to first sale, rental and commercial lending of hard copies), public performance (i.e. the need for the infringing activity to be in public and a performance for an audience, which is really inapplicable to the essentially private activities of individuals on the Internet), and broad- and cable-casting (i.e. too technology-specific).

The real controversy during the passage of the Directive, however, was over whether these extended rights for owners were sufficiently balanced by the provisions for users - the exceptions to the restricted acts of reproduction and public communication - set out in Article 5; and whether these in turn were set at naught by the rules in Article 6 supporting the use of technological measures of copyright protection in digital products, and enabling the rightholder to deny access until paid by the would-be user, whether or not the proposed use fell within the scope of copyright or the exceptions. The importance of the debate is that, at least with regard to reproduction and public communication rights in the digital context, the exceptions will entirely replace existing national rules on the subject, while the rules on technological measures seem capable of eliminating the exceptions themselves.

The generally restrictive approach to the exceptions is visible in the recitals: 'the provision of .. exceptions [to copyright] .. should .. duly reflect the increased economic impact that such exceptions .. may have in the context of the new electronic environment. Therefore, the scope of certain exceptions may have to be even more limited when it comes to certain new uses of copyright works ...' (44). All but one of the exceptions listed in Article 5 is permissive - that is, the Member States may (and therefore need not) introduce them. The only mandatory exception is to reproduction right, and is in respect of temporary acts of reproduction necessary to let the Internet work: it is therefore easy to see why it must be compulsory for all.

The obvious example falling within this exception is the reproduction occurring on computers and servers as material makes its way across the Internet from the supplier site to the recipient who has called it up. Recital 33 comments that 'this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently'. It is a moot point whether this legitimises what is known as 'proxy server caching', where by deploying appropriate software technology Internet ISPs, librarians, archivists and others make and store on their own servers temporary and regularly updated copies of materials contained on other servers with the purpose of making the information more readily available to their own clients by avoiding congestion at the 'live' site. The European Parliament sought to prevent the exception extending to proxy server caching, but this was rejected by the Commission on the ground that if right-owners' authorisation was required for cache copies, the effective operation of the Internet would be seriously hindered. Such caching may also be saved by the exception for temporary reproductions enabling 'lawful use' under Article 5(1)(b): such lawful uses under Article 5(2) and (3) include public library/educational/museum/archival copying not for economic or commercial advantage [2c], and reproduction for purposes of non-commercial research and illustration for teaching [3a].

Incidentally, the favouring (within limits) of caching also emerges in the E-Commerce Directive 2000, Article 13 of which is headed 'Caching' and which exempts ISPs from liability,

for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.

The ISP must comply with a number of conditions, notably obligations not to modify the information and to comply with any requirements about access or updating of the material.

Nor must it interfere with lawful uses of accepted technology to obtain data on the use of information at its site. Further, if the ISP obtains actual knowledge that either the information at the original source has been removed from the network, or access to it has been barred, or a competent authority has ordered such removal or barring, it must act expeditiously to remove or bar access itself, or else the exemption will be lost. Finally, national courts and administrative authorities are enabled to require the ISP to terminate or prevent infringements taking place. Overall, this is broadly the approach already adopted in the USA under the Digital Millennium Copyright Act. ISPs remain profoundly concerned that it places an unrealistic burden upon them to respond to complaints of infringement from all and sundry. This can now be illustrated by the experience of Napster, which has been forced under the DMCA provisions to disable the material on its sites enabling users of its services to infringe copyright.

Returning to the scope of Article 5(1)(a), it is also not clear, finally, whether the temporary reproduction exception of Article 5(1) covers the copy made in the RAM of the recipient's computer in order for that person to see the page on the screen unless that is a 'lawful use' under Article 5(1)(b) as a result of an express or implied licence or other user right. It would seem extraordinary if the act of browsing the Internet were itself an infringement of copyright, but unless that is covered in the way suggested, that seems to be the result of Articles 2 and 5(1).

Non-mandatory exceptions are provided for at some length in the remainder of Article 5. The key Internet issue was the making of private copies and compensation of the right-holder.

An initial proposal was to allow natural persons to make private copies of audio, visual and audio-visual material. The supporting argument was that, in general, prevention of private copying was not possible; the relevance to the Internet was the fact that so much user activity was at least arguably of a private nature. But complex amendments were made

in the European Parliament at the urgent and clamorous behest of the film, music and recording industries, already deeply concerned by piratical activities generally, and further alarmed by the Internet possibilities of MP3 software, illustrated in particular by the activities of Napster. In all cases, conditions were added that the rightholders receive fair compensation and that the copy be for 'strictly personal use'. In addition, a distinction was drawn between analogue and digital material: with the latter, the exception was to be 'without prejudice to operational, reliable and effective technical means capable of protecting the interests of rightholders'. The special concern with digital material was the ease and speed of perfect and multiple reproductions, especially by way of the Internet, as illustrated by Napster, which could make far deeper inroads upon the structures of the recording industries than was ever possible in the past with analogue copying. On the other hand, digital technology itself may eventually provide the means to bar private copying, and the draft thus left open this route to the rightholder's protection, reinforced by provisions in Article 6 making illegal the circumvention of such technological measures of protection (see further below).

However, Article 5 was further amended in the Council of Ministers, which restored the generality of the exception favouring private use by a natural person for non-commercial ends, extended it to all copyright works, and dropped any distinction between the analogue and the digital. The potential impact for users of the Internet seems large, although it does not mean that the activities of those who make private copying possible for others, such as Napster, are now legal in Europe. Further, true to the Continental pattern, rightholders must receive 'fair compensation' in respect of private copying; moreover, this must take into account 'the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned' (see further below).

The exception is thus dependent upon 'fair compensation' of the rightholders to be effective. So, directly or indirectly, these uses will not be free to the user. In other words, so far as the UK is concerned, and despite its long-sustained opposition to such a move, there will almost certainly have to be a falling into line with those other Member States which provide for levies upon the equipment, material and (perhaps) institutions which enable private copying of copyright works to take place, along with a machinery to ensure the collection of licence fees and the fair distribution of the proceeds amongst rightholders; functions in which the collecting societies and the Copyright Tribunal will probably have the major roles. From a British perspective there seems to be limited room for manoeuvre here, with Member States such as France, Italy and Spain having indicated their intention to be particularly vigilant in ensuring that, in all cases where this is provided for in the Directive, use of works is accompanied by fair compensation. Perhaps, however, where the rightholder does not seek to control access to its site, there will be a case for saying that a fair compensation is in fact a zero return.

Turning now to the issue of technological measures of protection, the initial draft of Article 6 made unlawful any circumvention 'without authority' of effective technological measures designed to protect copyrights or related rights. Technological measures were defined as 'any technology, device or component that, in the normal course of its operation, is designed to prevent or inhibit' infringement of copyright or related rights; these were to be deemed effective 'where the access to or use of a protected work or other subject matter is controlled through application of an access code or any other type of protection process which achieves the protection objective in an operational and reliable manner with the authority of the rightholders'. Examples included 'decryption, descrambling or other transformation of the work'.

Under the initial draft of Article 6, it seemed that, should such technology evolve to the point of complete effectiveness in blocking unauthorised access, the Internet user's

right to make a private copy from a website, even for strictly personal use, would be nullified; unless the private use exception itself could be treated as an 'authority' justifying circumvention. This last proposition was fiercely debated, and further amendments were made subsequently to clarify the relationship between Articles 5 and 6. They may be summarised as follows:

(1) Member States are now to provide 'adequate legal protection' against circumvention of any effective technological measures. Technological measures are 'any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder'; these are deemed effective 'where the use of a protected work or other subject matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective'.

(2) However, with regard to the private use exception, Member States are to take appropriate measures 'to ensure that rightholders make available to the beneficiary ... the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or other subject matter concerned', unless such reproduction has already been made possible by the rightholder to the extent necessary to benefit from the exception. But rightholders may adopt measures regarding the number of reproductions made under the exception: for example, devices to ensure that no more than one reproduction is made by any user. Such technology is to enjoy anti-circumvention protection.

(3) None of the foregoing applies, however, to works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

The basic position intended by these extremely complex and opaque provisions seems at first blush to be that Member States of the EU are to ensure that rightholders make available to the public the means of benefiting from the reprography and private use exceptions. But closer scrutiny suggests that at best this is so only to a very limited degree, in particular in the digital context. In general, the actions of rightholders are to be awaited before Member States can take steps to ensure that users can benefit from the exceptions; what actions by rightholders will suffice to prevent such steps? Do these actions have to go as far as the exceptions would do? How long must a Member State wait for such voluntary actions by rightholders? What steps can a Member State take if appropriate actions are not forthcoming? Since it is likely that the practice of rightholders will vary, it may only be possible to take action in individual cases rather than through generally applicable legislation. It is apparent that the existence and enforcement of copyright is the paramount consideration; the exceptions are not over-riding user rights, but merely defences against claims of infringement, apt to be set aside in the face of countervailing interests.

Even more importantly, what is the scope of the provision giving pre-eminence to contractual terms over the exceptions where works are made available in such a way that they may be accessed from places and at times individually chosen by users? Since this condition applies to everything found on the Internet, the provision seems to have the potential to eliminate the exceptions to copyright altogether in that context. Such apocalyptic conclusions need to be modified, however, because such elimination should only occur if a contract to that effect is previously in place between rightholder and user. On the other hand, this reinforces the position of the rightholder barring access in order to

create an opportunity to establish a contractual nexus under which the user pays for his use; and it is really only against the rightholder who wishes to deny access in order to be paid for the privilege that user rights giving access regardless of the rightholder's wishes are of any significance.

Contract, in other words, ultimately prevails over exceptions, at any rate in the digital environment. This is probably the chief effect of the Directive, strengthening the legal position of rightholders on the Internet and considerably reducing the rights of users to access freely the material published on that medium. It remains to be seen whether legal strength translates into economic strength, given the technological ingenuity and capacity which will continue to facilitate use of material and breaking of technological measures of protection as much as, if not more than, their origination.

Are there any means by which the exceptions to copyright under the Directive might themselves be subject to regulation under other rules of law? All the exemptions in Article 5 are to be subject expressly to the 'three-step test' of Berne Article 9(2),¹¹⁵ but there is no forum in which their consistency with that Article can be tested,¹¹⁶ nor is it easy to see how they might be deployed in the interpretation of either the Directive or subsequent implementing national legislation. But it may be a point of more than academic interest whether some of the potential limitations upon exceptions to copyright in the digital environment infringe the European Convention on Human Rights, notably Articles 8 (protection of privacy) and 10 (freedom of expression).

Following the Magill decision of the European Court of Justice in 1995,¹¹⁷ the use of competition law to control abuse of copyright should also be kept in mind as a factor giving some protection to user interests.

¹¹⁵ Art 5(4). See above, appendix I, for Berne Art 9(2).

¹¹⁶ Except perhaps the European Court of Justice, the authority of which to provide a definitive ruling on Berne may be doubted.

¹¹⁷ Joined Cases C-241-2/91, *Raidio Telefis Eireann v Commission* [1995] I-ECR 808.

The Infosoc Directive by no means brings to an end controversy and debate over its subject. Indeed, it is rather striking how the matters addressed by the Directive are not the ones which have come up in the courts around the world. It tells us nothing about how we characterise the Internet and multi-media works for copyright purposes. Are they computer programs, films, databases or cable programmes? Or does digitisation spell the end of the long-established categories of copyright works? The Directive also does not address such issues as whether hyper-linking and framing are forms of reproduction and so require a licence to be lawful— a matter on which courts around the world have reached varying conclusions. It does not deal directly with the question of whether an Internet intermediary such as Napster may be liable for authorising the infringement of others, and leaves it to the E-Commerce Directive to provide the ‘safe harbour’ escape should such liability be found to exist under the present national laws.

VI. THE UNITED KINGDOM

The governing copyright statute in the UK is the Copyright Designs and Patents Act 1988, now several times amended, mostly as a result of the European copyright directives promulgated since 1991. Under its provisions, the following subject-matter is protected:¹¹⁸

- original literary, dramatic, musical and artistic works (literary work including computer programs and compilations other than databases),
- films
- databases
- the typographical arrangement of published editions of literary, dramatic or musical works
- sound recordings
- broadcasts
- cable programmes

For convenience, literary, dramatic, musical and artistic works and films may be collectively referred to as ‘author works’, and the other categories (apart from databases, which for reasons discussed below form a sub-category on their own) can be grouped as ‘media works’. The distinction rests on a number of points, of which the most important conceptually is the idea that the second group relies essentially on the operation of machinery and technology where the first depends upon an individual as creator. As a consequence, there are differences in the rules applying to the two groups. The first owner of the copyright in an author work is generally the author,¹¹⁹ whereas in the media work it is the person by whose investment the work was produced. Only author works need be

¹¹⁸ CDPA 1988, ss 1-8.

¹¹⁹ In the case of films in the UK, joint authorship is attributed to the principal director and the producer (CDPA, s 9(2)(ab)). For a recent case on joint authorship, see *Robin Ray v Classic FM* [1998] FSR 622. Note also (1) the British concept of a computer-generated work where there is no human author (CDPA 1988, ss 9(3), 178); and (2) that copyright in a work produced in the course of employment falls to the employer

original to be protected,¹²⁰ meaning that they must be independent forms of expression achieved through their author's judgement, skill and labour.¹²¹ Author works alone attract the moral rights of paternity and integrity.¹²² Copyright in an author work lasts for the lifetime of the author plus 70 years, while for sound recordings, the period is fifty years from the end of the year of manufacture or release, and for broadcasts and cable programmes it is fifty years from the end of the year of transmission.

Several of the categories are clearly applicable to all or part of website contents in so far as they consist of text (literary), images still (artistic) and moving (film), and sounds (audio recordings). In general, websites and webpages will be covered by several different copyrights: protection will be cumulative. The difficulty is the multi-media nature of the site or page viewed as a whole; is there a category appropriate to protect the totality from misappropriation by another?¹²³ The likeliest avenue for copyright protection of a whole website may now be through categorising it as a database. A database is defined as a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. Further, to attract copyright, the database must be the author's own intellectual creation by reason of the selection or arrangement of its contents.¹²⁴ From this, it follows that the protection is offered to the selection and arrangement of the database, rather than to its contents as such, although the latter may attract copyright - or several copyrights - in their own right. The use of the phrase 'intellectual creation' also indicates that the selection and

unless otherwise agreed (CDPA 1988, s 11(2)). Employment should be distinguished from a commission, where the copyright would remain with the author unless otherwise agreed.

¹²⁰ There is no express requirement that a film be original (see CDPA s 1(1)(b)).

¹²¹ The Laws of Scotland: Stair Memorial Encyclopaedia, vol 18, paras 941-948; H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs*, 2nd edn (1995), 46-79, 210-244; K Garnett, J R James and G Davies (eds), *Copinger & Skone James on Copyright*, 14th edn (1999), 105-119.

¹²² Apart from computer programs (CDPA, s 79(2)(a)).

¹²³ This issue also arises with multi-media CD-Roms. See further Cornish, *Intellectual Property*, paras 13.60-13.67. A very full analysis of the issues is provided in I Stamatoudi, *Copyright and Multi-Media* (2001).

¹²⁴ CDPA 1988, s 3A. See also for use of this formulation Council Directive on the legal protection of computer programs 91/250/EEC, art 1(3); but in the implementation of this the UK did not see fit to use the phrase.

arrangement must show more than the traditional skill and labour which make compilations original. The definition of a database as a systematically arranged collection of independent works none the less seems very apt to include websites. Individual pages as well as material embodied therein could easily be seen as independent works in their own right, because each element is intended to be and is indeed used on its own; there is no necessary interaction between them.¹²⁵ These works are individually accessible to the user through the electronic means provided by her computer link to the Internet. The website's author has undoubtedly 'selected and arranged' its contents, unless it is simply a random storehouse of materials over which no control or personal selection has been exerted (as, perhaps with the entire Internet itself¹²⁶), or where the method of control used has been a standard or common one. The author of such a collection could however seek protection from the additional, sui generis database right also introduced under the Database Directive. While the database must still be organised in a systematic or methodical way, the system or method need not be a personal intellectual creation;¹²⁷ the principal substantive ground for protection is a substantial investment in obtaining, verifying or preserving the contents of the database, and it is immaterial whether or not the database is also a copyright work, i.e. is an intellectual creation of the compiler in its selection or arrangement.¹²⁸ Database right prohibits unauthorised extraction¹²⁹ from or re-utilisation¹³⁰ of all or a substantial part of the database, lasting for fifteen years from its making.

¹²⁵ Contrast films, which are not databases because there is interaction between script, music, sound recordings and the moving images: see J Holyoak and P Torremans, *Intellectual Property Law*, 2nd edn (1998), 173-4, 506.

¹²⁶ Holyoak and Torremans, *Intellectual Property Law*, 507.

¹²⁷ So e.g. an arrangement of surnames in alphabetical order would attract database right.

¹²⁸ Copyright and Rights in Databases Regulations 1997, reg 13.

¹²⁹ This means 'in relation to any contents of a database, ... the permanent or temporary transfer of those contents to another medium by any means or in any form' (Copyright and Rights in Databases Regulations 1997, reg 12(1)).

¹³⁰ This means 'in relation to any contents of a database, ... making those contents available to the public by any means' (Copyright and Rights in Databases Regulations 1997, reg 12(1)).

Another avenue of approach to the problem of protecting websites was suggested in *Shetland Times v Wills*,¹³¹ which focused on the applicability of the concept of a cable programme, in which the copyright is owned by the ISP.¹³² The essence of this case was whether copyright was infringed when one website provided without authorisation a link to another website. An interim interdict was granted to the pursuer owner of the second website on the basis, inter alia, that the owner of the first website had infringed by inclusion within a cable programme service of another cable programme service. The case was settled before it went any further, but on the basis that linking of the two sites would be allowed under certain conditions.

There are now six major exclusive rights arising from ownership of the copyright in any protected work. The restricted acts for which a licence must be sought if they are to be lawfully carried out by a person other than the copyright owner may be listed as follows:¹³³

- copying
- issuing copies of the work to the public
- renting or lending the work to the public
- performing, showing or playing the work in public
- broadcasting the work or including it in a cable programme service
- making an adaptation of the work

In addition, a person who without right to do so authorises another to do any of the above acts is himself an infringer as well.¹³⁴ Acts of infringement may be in relation to the whole of the work or to any substantial part of it; and measuring the substance of what has been

¹³¹ 1997 SC 316; 1997 SLT 669; 1997 SCLR 160; [1997] FSR 604; [1997] EMLR 277.

¹³² CDPA 1988, ss 7 and 9(2)(c). Cable is to be distinguished from broadcasting, defined in the copyright legislation as 'transmission by wireless telegraphy'.

¹³³ CDPA 1988 s 16(1).

¹³⁴ CDPA 1988 s 16(2).

taken 'depends much more on the quality than on the quantity of what he has taken'.¹³⁵ It follows that if the act can be shown to have been in relation to an insubstantial part of a work there is no infringement, and the act was one which the actor had a perfect right to do.

Of these rights the most obviously relevant to the Internet is the reproduction right. As expressed in the 1988 Act, issuing copies to the public, and rental and lending rights apply only to hard copies, while public performance rights are not easily applicable to the essentially private transmission of Internet material to a user. While the concepts of broadcasting and cablecasting might be extended to cover Internet transmissions, this is a considerable stretching of the technologies involved.

Copying in relation to literary, dramatic, musical and artistic works means reproduction of the work in any material form, and includes storage of the work in any medium by electronic means.¹³⁶ It is also provided that copying in relation to any category of work (i.e. this time extending to the media copyright works) includes the making of copies that are transient or incidental to some other use of the work.¹³⁷ This is generally accepted as covering the loading of software into a computer's RAM and can therefore be readily extended to the browser on the Internet who calls up a webpage on her computer screen. Theoretically it also covers the reproduction which occurs on the various computers and servers through which the webpage travels as it threads its way across the networks to the user's machine, although if this is infringement it has the remarkable result that the technical basis of the operation of the Internet itself is illegal.

The concept of transient reproduction also embraces activities such as proxy server caching, where by deploying appropriate software technology Internet ISPs, librarians, archivists and others make and store on their own servers temporary and regularly updated

¹³⁵ CDPA 1988 s 16(3)(a); *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276, HL, per Lord Reid.

¹³⁶ CDPA 1988 s 17(2).

copies of materials contained on other servers with the purpose of making the information more readily available to their own clients by avoiding congestion at the 'live' site.¹³⁸ Such operations may also amount to the infringing act of storage by electronic means. There seems to be no doubt, therefore, that under the present UK law browsing and caching are infringements of copyright unless either there is some form of licence for that act, or they can be brought under one of the statutory permitted acts.¹³⁹

Certain things may be done with copyright material without the licence of the copyright owner which would otherwise fall within the scope of the restricted acts – for example, make a copy for private study and research, perform the work in private, record a film on TV to watch it at a more convenient time, or quote a work for purposes such as criticising it or reporting the news.¹⁴⁰ Such acts therefore do not require any licence from the copyright owner and may be freely performed by others. The contents of the list reflect a legislative perception that certain interests in certain circumstances outweigh the interest in conferring and enforcing copyright. Some of the items on the list of permitted acts are grouped together as 'fair dealing', but there is no general principle that 'fair dealing' beyond the listed acts or for other than the listed purposes is allowed.

No fair dealing with a literary, dramatic, musical or artistic work will constitute infringement of the copyright in the work if it is carried out for one of the permitted purposes. Fair dealing for any other purpose, or dealing which is only fair in general, is not permitted as such and if there is not to be liability for infringement of copyright the activity will have to be shown to fall within some other category of permitted act. But dealing for one

¹³⁷ CDPA 1988 s 17(6).

¹³⁸ For a useful note on caching by the Global Internet Project, see <http://www.gip.org/caching.htm>. See also C Barlas, P B Hugenholtz and A E Burke, *The Digital Intellectual Property Practice Economics Report (The Dipper Report)* (Esprit Project No 29238, 2000).

¹³⁹ A licence may of course be readily implied in the case of the browser, given that material placed on the Internet is presumably there to be accessed; *sed quare* caching and mirroring.

¹⁴⁰ CDPA 1988, ss 28-76.

of the statutory purposes and also for some other purpose may still be fair dealing.¹⁴¹ The permitted statutory purposes for all literary, dramatic, musical and artistic works are:

- research or private study;¹⁴²
- criticism or review, whether of the work whose copyright is said to be infringed or of some other work or of a performance of a work, which is accompanied by a sufficient acknowledgement;¹⁴³
- reporting current events.¹⁴⁴

In addition, fair dealing for purposes of criticism and review and reporting current events can extend to sound recordings, films, broadcasts and cable programmes. But in these cases, where current events are being reported, there is no need for a sufficient acknowledgement.¹⁴⁵

Research and private study is probably the most obviously significant permitted act for users of websites. The meaning of the word 'research' appears never to have been judicially considered, but it has been held that 'private study' is the private study of the person dealing with the work.¹⁴⁶ The fact that some third party may use the secondary work for purposes of private study does not protect the copier from a claim of infringement of copyright. The exemption would appear clearly applicable to the user of a website making a hard or electronic copy of the material she finds there; but if she prints out a copy of text or an image found on the Internet to replace a previous copy which she made but have lost or destroyed, is she within the exception? Again, how much of the material can be taken? For example, if I call up a webpage while surfing the Internet, a

¹⁴¹ *Sillitoe v McGraw-Hill Book Co Ltd* [1983] FSR 545.

¹⁴² CDPA s 29(1).

¹⁴³ CDPA s 30(1).

¹⁴⁴ CDPA s 30(2) and (3).

¹⁴⁵ See *BBC v BSB Ltd*, [1991] 3 WLR 174; 3 All ER 833.

¹⁴⁶ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

copy of the whole is made in the RAM of my computer, and it would be impossible to do less. Can the operator of a website use the research and private study exemption to justify putting up on her site the copyright works of others as a convenient library akin to the books on the shelves in her study?

UK law has no general saving for private use, and it seems likely that a court would follow the decisions that the private study exemption applies only to one's own study and not to making private study possible for third parties. Admittedly, in the British cases the copier was supplying the copied material in the course of business, while a website producer might well not be earning any financial return from her activities; but the court would likely be concerned about the probable damage to the earnings of the copyright owner and so deem the activity unfair. The general rule that the exemption does not apply to one whose copying makes private study and research possible for others would seem to eliminate any possibility that this exception could be used by those who provide materials on the Internet by way of proxy server caches. The 1988 Act does contain very detailed provisions which, speaking very broadly, enable libraries and archives prescribed by the Secretary of State to supply readers with a single copy of published literary, dramatic or musical material for the purposes of private study or research, provided that the reader pays a sum not less than the cost attributable to producing the copy.¹⁴⁷ The exemption is undoubtedly geared to a world of hard rather than electronic copies, and also does not seem readily applicable to making Internet material available, or storing it in advance of a specific demand, via a proxy cache on the computers or servers in the library or archive.¹⁴⁸ British courts would also probably hold that it was not fair use for a company to copy CDs into MP3 format to enable them to

¹⁴⁷ CDPAs ss 37-44; Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989, SI 1989/1212.

¹⁴⁸ See H Brett and B Goodger, 'Libraries in the Internet and the electronic age', [1997] 13 EIPR 38-41; T Hoeren and U Decker, 'Electronic archives and the press: copyright problems of mass media in the digital age', [1998] EIPR 256-266.

be accessed on the Internet for private use by customers who were already lawful users of the CDs in question,¹⁴⁹ or, in Napster fashion, to provide lists enabling individuals to locate and copy files of copyright music held on other people's computers.

Fair dealing with any work other than a photograph for the purpose of reporting current events does not infringe copyright, provided that it is accompanied by a sufficient acknowledgement.¹⁵⁰ A brief reference in a newspaper story to the fact that quoted words had been given in answer to another newspaper's questions did not constitute sufficient acknowledgement of its authorship as distinct from its copyright.¹⁵¹ No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme, however, while photographs are exempted altogether from the fair dealing provisions on news reporting.¹⁵² Since a major use of photographs is in news reporting, the availability of a fair dealing exception in respect of these works was felt to undermine the position of the photographer too much. The Court of Appeal in *Pro Sieben Media AG v Carlton UK Television*¹⁵³ has indicated that, like 'criticism or review', reporting of current events is of wide scope and is to be interpreted liberally. In this area the human right to freedom of expression is likely to be of particular importance.¹⁵⁴

*Hyde Park Residence Ltd v Yelland*¹⁵⁵ was concerned with the unauthorised publication by The Sun in September 1998 of CCTV photographs of Princess Diana and Dodi al-Fayed, taken on the day of their deaths on 31 August 1997 at the former mansion of the Duchess of Windsor. Jacob J held that the one-year gap in time did not prevent these

¹⁴⁹ *UMG Recordings Inc and others v MP3.com Inc*, US District Court, SDNY (Rakoff J), 4 May 2000, <http://www.nysd.uscourts.gov/courtweb/pdf/00-04756.pdf>.

¹⁵⁰ CDPA s 30(2).

¹⁵¹ *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359.

¹⁵² CDPA s 30(3)

¹⁵³ [1999] FSR 610 (CA).

¹⁵⁴ *Ashdown v Telegraph Group Ltd* [2001] 3 WLR 1368; 4 All ER 666.

¹⁵⁵ [1999] RPC 655 (Jacob J); [2000] TLR 104 (CA). A full transcript of the judgments can be found on the Smith Bernal Casetrack website: see in particular paras 32, 40 (Aldous LJ, with whom Stuart-Smith LJ agreed), and 77-78 (Mance LJ).

events continuing to be 'current', given the continuing publicity about the visit arising from statements made two days before the publication in question by Mohammed al-Fayed, tenant of the mansion and, through a security company which he controlled, owner of the copyright in the photographs. This 'liberal' approach to the definition of current events was accepted by the Court of Appeal, even although The Sun's actual use of the photographs was held not to be fair dealing because the falsity of Mr al-Fayed's statements was already public knowledge and the spread given to material itself dishonestly obtained and hitherto unpublished was excessive. The 'liberal' approach to the currency of events was again applied by the Court of Appeal in *Ashdown v Telegraph Group Ltd*,¹⁵⁶ where the copying in question occurred in December 1999 but related to events over two years earlier. These were nonetheless arguably current events: "[i]n a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest. It might impinge upon the way in which the public would vote at the next general election" (para 64). But in the end the Telegraph Group's dealings were unfair: the publication destroyed part of the commercial value of Ashdown's diary, which he intended to publish himself;¹⁵⁷ much of the material covered was already in the public domain at the time of publication although the diary was previously unpublished, and the material had been obtained in breach of confidence; and a substantial portion was copied, adding significant commercial value for the newspaper. The political interest of the matters discussed and freedom of expression under Article 10 of the European Convention on Human Rights did not justify deliberate filleting of and selection of the most colourful passages from the Ashdown diary.

In another case having some significance for those who gather and store information from the Internet, such as librarians and archivists, it was held that a company

¹⁵⁶ [2001] 3 WLR 1368; 4 All ER 666.

which ran a daily programme of circulating and distributing amongst its executives copies of newspaper cuttings provided by a licensed cuttings agency could maintain that this was fair dealing for the purpose of reporting current events.¹⁵⁸

The Copyright Designs and Patents Act 1988 supports the use of technological protective measures by making it equivalent to infringement of copyright for a person to manufacture or deal in a device 'specifically designed or adapted to circumvent' copy-protection, provided that he knows or has reason to believe that the device will be used to make infringing copies;¹⁵⁹ but it does not appear to be infringement in itself to make use of anti-circumvention devices.

There has been little British discussion of whether fair dealing provisions prevail over contrary contractual provision, contained for example in a copyright licence. The unargued assumption has been that they do, although under at least one provision of the Copyright, Designs and Patents Act 1988, an exception to copyright enabling educational establishments to make a limited quantity of copies of works for purposes of instruction, does not apply if a licence for such activity is available.¹⁶⁰

Nothing in the Act affects any rule preventing or restricting the enforcement of copyright on grounds of public interest or otherwise.¹⁶¹ The public policy concept is that certain types of work - pornography or material published in breach of a lifelong obligation of secrecy, for example - are undeserving of the protection of copyright.¹⁶² This could obviously cover much material on the Internet. A second limitation is one which allows

¹⁵⁷ And in fact did, in 2000: see *The Ashdown Diaries* (PUBLISHER, 2000).

¹⁵⁸ *Newspaper Licensing Agency v Marks and Spencer plc* [2001] Ch 257, rev'g [1999] RPC 536 (Lightman J). The Court of Appeal held that in any event there had been no infringement by the defendants, since what was copied was not a substantial part of the original copyright work (the typographical arrangement of the whole newspaper, as distinct from the articles copied). On appeal the House of Lords upheld this view and therefore did not think it discuss fair dealing defences ([2001] 3 All ER 977).

¹⁵⁹ CDPA 1988, s 296.

¹⁶⁰ CDPA s 36(3); and see further below, 0.000.

¹⁶¹ CDPA s 171(3).

¹⁶² See e.g. *Glyn v Weston Feature Film Co* [1916] 1 Ch 261; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

otherwise infringing acts on the grounds that they are in the public interest.¹⁶³ The scope of this defence remains uncertain.¹⁶⁴

In *Ashdown v Telegraph Newspapers*,¹⁶⁵ the Court of Appeal held that exceptions to copyright must be read in the light of the European Convention on Human Rights. The *Sunday Telegraph* newspaper had published unlicensed extracts from the diaries of Paddy Ashdown, the former Liberal Democrat leader. The issue concerned the impact of the Article 10 right to freedom of expression upon the fair dealing defences to claims of infringement under the Copyright, Designs and Patents Act 1988. At first instance Sir Andrew Morritt VC held that the fair dealing provisions of the statute in themselves satisfied the requirements of Article 10 and that there was no need to bring s 3 of the Human Rights Act into play: 'the balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself in the legislation it has enacted. There is no room for any further defences outside the code which establishes the particular species of intellectual property in question' (para 20). The Court of Appeal concluded, however, that 'rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression' (para 45). This view must be correct under s 3 of the Human Rights Act 1998, which requires statutes to be interpreted as far as possible in consistency with Convention rights. The court went on to observe that, at least in this case, the approach required could be fulfilled, not so much through examination of the statutory language as such, as by way of the remedies granted to enforce the legislation:

¹⁶³ *Beloff v Pressdram* [1973] RPC 765.

¹⁶⁴ See *Hyde Park Residence Ltd v Yelland* [2000] TLR 104 (CA); *Ashdown v Telegraph Newspapers Ltd* [2001] 3 WLR 1368.

in the particular case, by withholding the discretionary relief of an injunction and leaving the copyright owner to a damages claim or an account of profits (see paras 46 and 59). Further, while the statutory defences and the judicial precedents elaborating upon their application fell to be reconsidered in the light of Article 10, that did not require the defendant to be able to profit from the use of another's copyright material without paying compensation.

¹⁶⁵ [2001] 2 WLR 967; 2 All ER 370 (Morritt VC); rev'd [2001] 3 WLR 1368; 4 All ER 666 (CA).

VII. UNITED STATES OF AMERICA

US copyright law is characterised by its express basis in the American Constitution, which empowers Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.¹⁶⁶ The actual law is found in the Copyright Act 1976 with various additions and amendments thereto, most notably the Digital Millennium Copyright Act 1998 with which the USA responded to the WIPO Treaty of 1996. The constitutional basis and the general American legal tradition encourage the courts to take a much more overtly policy-oriented approach to copyright questions than would be possible for a British or (even more so) another European court.

The subject matter of copyright is original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Copyright explicitly does not protect ideas, processes, concepts, principles or discoveries. Original works of authorship include literary works, motion pictures and other audiovisual works, and sound recordings. Compilations may have copyright but only to the extent of the contribution of the author of that work; no right is implied in the material used for the compilation. Two cases to come before the courts in the US have considered what protection, if any, was to be accorded to the contents of a database, where those contents were not in themselves sufficiently original to warrant copyright protection. The first was *Feist Publications v Rural Telephone Service*.¹⁶⁷ In this case the US court found that a list of names and addresses in a telephone directory was factual information (ie. not original), and therefore in the public domain¹⁶⁸. Thus these listings could be freely appropriated by

¹⁶⁶ US Constitution, Article I, section 8.

¹⁶⁷ 499 US 340 (1991).

¹⁶⁸ The selection and arrangement of this information could qualify for copyright protection if it was in some way original. However, in this case the court found that the listings were presented in such a way that 'utterly lacks originality' at p 1297.

others. However, in the second case, *Pro CD v Zeidenberg*¹⁶⁹ the court found that the compiler of a database could use a licence to limit the use to which the unoriginal contents of a database could be put. Pro CD had spent millions of dollars in creating a national directory of residential and business listings, consisting of over 95 million entries, which included full names, addresses telephone numbers, zip codes and industry codes. Pro CD sold these on CD Rom's, subject to a licence which allowed home use of the contents of the database only. Zeidenberg purchased a copy. Using his own retrieval software, he placed a copy on his web site and allowed users to extract up to 1000 entries free of charge. When challenged by Pro CD, the Court of Appeals found that Zeidenberg was bound by the terms of the licence limiting the use of the contents of the CD to personal purposes. The Court said that while no copyright subsisted in the data itself, the terms of the licence were enforceable. Thus, Zeidenberg infringed these terms.

Partly as a result of these cases, and partly because the EU had already introduced protection for the contents of databases,¹⁷⁰ it has been proposed that a regime similar to that found in the EU should be introduced in the USA. There were two competing draft Bills under consideration, one of which was akin to the EU Database Directive, while the other would have introduced a significantly relaxed regime based on misappropriation of information from the database rather than on granting a property right in the contents.

At one time it was thought that one or other may have come to fruition in the 106th Congress.¹⁷¹ But this did not, and has not yet, happened.

¹⁶⁹ 86 F 3d 1447 (7th cir 1996).

¹⁷⁰ See 00

¹⁷¹ J Reichman and ? Uhler, Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology (1999) 14 Berkeley Technology Law Journal 793. http://www.law.berkeley.edu/journals/btlj/articles/14_2/Reichman/html/text.html. discussing EU and US approach and criticising over extensive rights. In W R Cornish The International Relations of Intellectual Property (1993) 52 Cambridge LJ 46 the author discusses the international problems that are wrought over emulation rather than accretion in the protection of creative works. In particular he argues that the choice between the two generally relates to the issue of whether protection is sought over international boundaries (p 55). The example is given of computer programs, accretion, and semi-conductor chip protection, emulation. His conclusion is don't emulate, accrete. However, just this argument is resurfacing over the legal protection of databases, which the EU has done partly by accretion (the structure) and partly by

However, in the absence of a formal regime for the legal protection of the contents of databases, a State Act, the Uniform Computer Information Transactions Act 1999 (UCITA) which supports licensing of information that is not protected by copyright, may serve to provide even stronger protection for the contents of databases. UCITA¹⁷² which individual States may choose to adopt,¹⁷³ provides a framework for the operation of licences in the market place.¹⁷⁴ Despite the findings of the court in *Pro CD v Zeidenberg*¹⁷⁵ commentators had doubts whether the contractual terms contained in a shrink wrap licence (those used around a physical product), or click wrap licence (those used on the web), were enforceable against the licensee.¹⁷⁶ UCITA, which provides that access contracts¹⁷⁷ can be used to license computer information,¹⁷⁸ information, and informational products, would appear to bridge this gap, although the issue remains controversial.

But contract law is not the only way in which information on websites has been protected in the USA. A scenario arose in *e-Bay v Bidder's Edge Inc*¹⁷⁹ where Bidders Edge, which collects information about online auctions and directs users to the best deal, was

emulation (the contents). This has led to some unfavourable comments by US commentators, and a rush by the US to secure protection although this has not yet happened. Samuelson *Challenges for the World Intellectual Property Organisation* [1999] *EIPR* 578 at 585.

¹⁷² Formerly known as Article 2B. For a general overview of the process of gestation see Samuelson and Opsahl, *The Tensions Between Intellectual Property & Contracts in the Information Age: An American Perspective* in F W Grosheide and K Boele-Woelki (eds), *Molengrafica: Europees Privaatrecht* 1998.

¹⁷³ Virginia has enacted UCITA <http://www.ucitaonline.com/whathap.html>. There is a hint of a 'regulatory race' in the endorsement of UCITA. '...if the United States, through the States, does not act, the EU ('EU') will. As a unified market for the first time in history, the EU is happily legislating in each of the areas Article 2B covers, while the Article 2B supporters and critics wrangle. If one is comfortable with the EU as a de facto state legislator, or with legal chaos, then there is no need to continue wrangling'. Towle, *The Politics of Licensing Law* 1999, *Houston Law Review* 36:121 p128.

¹⁷⁴ For a view that these are justifiable on utilitarian grounds see Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing* 1999, *13 Berkeley Technology Law Journal* 891.

¹⁷⁵ 86 F 3d 1447 (7th Cir 1996).

¹⁷⁶ See P Samuelson and K Opsahl, 'The tensions between intellectual property and contracts in the information age: an American perspective', in F W Grosheide and K Boele-Woelki (eds), *Molengrafica: Europees Privaatrecht* 1998 (1999).

¹⁷⁷ Access contract means a 'contract to obtain by electronic means access to, or information from, an information processing system of another person, or the equivalent of such access'.

¹⁷⁸ Computer information means 'information in electronic form which is obtained from or through the use of a computer'.

¹⁷⁹ 100 F. Supp. 2d 1058 (N.D. Cal. 2000)

interdicted from accessing eBay's web site to collect data about items for sale on it. The Court ruled that the use of automated search programmes (known as 'bots') to collect information from web sites amounted to trespassing. In so doing the Court rejected the argument that the trespass claim was pre-empted by the Copyright Act – an argument akin to the question that concerning the relationship between contract and copyright. The finding of the court was in contradistinction to an earlier case, *Ticketmaster Corp v Tickets.com, Inc*,¹⁸⁰ where the Californian court found that a trespass claim by a website operator was found to be pre-empted by the Copyright Act.

On the question of temporary copies, in a controversial ruling, *MAI Systems Corp. v. Peak Computer, Inc*,¹⁸¹ the Ninth Circuit concluded that the image of a software program in RAM is a potentially infringing copy.

The exclusive rights of the copyright owner and their application to digital dissemination have been considered in a large number of cases. The best-known is the Napster case, which has already been discussed in the main text of this paper.¹⁸² Another case, paralleling *Shetland Times v Wills*, and which was also eventually settled, involved an organisation called Total News, from whose website a reader could link on to the web pages of other news organisations such as *The Washington Post*. Again the real issue appears to have been advertising on the respective sites, inasmuch as even after a link had been made to another site from the Total News one, the display was still 'framed' with Total News advertisements. The settlement allowed linking but not framing.¹⁸³ Other decided American cases have in general held linking not to be infringement of copyright.¹⁸⁴

¹⁸⁰ 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000)

¹⁸¹ 991 F.2d 511 (9th Cir. 1993).

¹⁸² See above, §

¹⁸³ For details of the settlement dated 6 June 1997, see <http://www.bna.com/e-law/cases/totalset.html>. Note also the *Ticket Master v Microsoft* settlement, in which it seems to have been accepted that linking to within another's site, as opposed to its home page, was wrong. For another interesting case involving the Ticketmaster website, see *Ticketmaster Corp v Tickets.Com, Inc*, S. District Court, Central District of California, 27 Mar 2000.

¹⁸⁴ See *Bernstein v J C Penney Inc*, Central District of California, 22 Sept 1999, <http://eon.law.harvard.edu/property/metatags/linking1.html>.

Another type of case involves the creator of a website who puts other persons' copyright material on to his pages. A well-known American case of this type is *Religious Technology Center v Netcom On-Line Communication Serv.*¹⁸⁵ in which Denis Ehrlich, acting without authority, posted to an electronic bulletin board both published and unpublished works by L Ron Hubbard, founder of the Church of Scientology. The case raised the additional issue of whether the bulletin board operator and the ISP with which the board was based could be liable for infringement of copyright along with the person who made the initial copy.¹⁸⁶

More recent American litigation has concerned the liability of those who provide, not hyperlinks, but information about, and the technological means of accessing and exploiting, copyright material found on the Internet, in particular music. The arrival of MP3 software, which enabled the conversion of material recorded on CD (in particular music) into highly compressed computer files postable on and downloadable from the Internet, has been particularly important here.¹⁸⁷ Thus there was an unsuccessful challenge in 1999 to the lawfulness of the portable device known as the Rio MPMan player, to which people could copy an MP3 file of music downloaded initially from the Internet to a personal computer, thus enabling the file to be playable wherever the user wished.¹⁸⁸ However, in April 2000 Judge Rakoff of the District Court for the Southern District of New York found infringement of copyright in the service offered by a company called MP3.com. The company had purchased thousands of music CDs and made them available in MP3 format on the Internet to users who, after inserting their own copies of

¹⁸⁵ 907 F Supp 1361 (ND Cal, 1995). See also *Religious Technology Center v Lerma*, US District Court for the Eastern District of Virginia, 4 Oct 1996 (<http://www.bna.com/e-law/cases/lerma.html>).

¹⁸⁶ See for another example *Playboy Enterprises Inc v Webbworld Inc*, US District Court, North District of Texas, 11 Dec 1997, [1998] EIPR N-100 (infringement by providing others' pictures to subscribers).

¹⁸⁷ On MP3 software (named from layer three of the Motion Pictures Experts Group's compression standard), see, e.g., *The Guardian*, 20 Nov 1998, 22 Apr 1999; *The Times*, Interface supplement 4 Aug 1999. *The Scotsman*, 2 Dec 1999, reported that 'MP3' had overtaken 'sex' as the most popular search term on the Internet. See further *Digital Dilemma*, ch 2, for the impact of MP3 on the music industry.

¹⁸⁸ *Recording Industry Association of America Inc v Diamond Multimedia Systems Inc*, 180 F.3rd 10772 (9th Circuit Court of Appeals, 15 June 1999), <http://laws.findlaw.com/9th/9856727.html>.

the CD in question into their personal computers while linked to MP3.com's 'My.MP3.com' website, could then, and again thereafter as often as wished, request a copy of the relative MP3 file held on the MP3.com servers to be transmitted to them.¹⁸⁹ The court rejected an argument that, since the company's activities allowed users to listen to the music, not only at the time but also in the place most convenient to them ('space- or place-shifting'), a fair use defence was available.¹⁹⁰ Since the decision, MP3.com has entered a number of licensing agreements with recording companies such as Time Warner, Bertelsmann and EMI.¹⁹¹

Then there are the cases about those who access and download material from the Internet. Assuming that the material has copyright - as a literary, artistic or musical work, or as a computer program, sound recording or film - is such accession or downloading an infringement of copyright? An issue of this kind arose in *Sega Enterprises Inc v Maphia*,¹⁹² where however the ultimate question was again the liability of the bulletin board operator who provided the service through which not only downloading, but also initial unauthorised uploading of copyright material (computer games), took place.

On the question of ISP liability for infringing acts, the US provisions are to be found in the Online Copyright Infringement Liability Limitation Act.¹⁹³ This Act limits the remedies a copyright owner may seek from an ISP for copyright infringement under certain circumstances. Four acts are covered: (1) transmitting, routing, and providing connections to infringing material (the 'mere conduit' limitation); (2) system caching; (3) storing infringing material at the direction of a user (the 'hosting' limitation); or (4) linking or referring users to infringing material (the 'linking' limitation).

¹⁸⁹ *UMG Recordings Inc and others v MP3.com Inc*, US District Court, SDNY (Rakoff J), 4 May 2000, <http://www.nysd.uscourts.gov/courtweb/pdf/00-04756.pdf>.

¹⁹⁰ *UMG Recordings Inc and others v MP3.com Inc*, US District Court, SDNY (Rakoff J), 4 May 2000, <http://www.nysd.uscourts.gov/courtweb/pdf/00-04756.pdf>.

¹⁹¹ See *The Times* 29 July 2000 for details of the EMI settlement.

¹⁹² 857 F Supp 679 (ND Cal, 1994); US District Court for the Northern District of California, 16 Dec 1996 (<http://www.bna.com/e-law/cases/sega2.html>).

¹⁹³ Copyright Act 1976, ss 201 - 203.

In relation to the 'hosting' limitation, the Act contains a specific procedure to be followed by both the copyright owner and the ISP. This is known as the 'notice and takedown procedure'. If followed correctly, the ISP will not be liable for hosting infringing material. The copyright owner must notify the ISP in a prescribed form that it is hosting infringing material. The ISP must remove this, notify the person who placed the material there (the content provider) that it has been removed: allow the content provider ten days to state why the information should not be removed, and replace the information if the content provider so states. The copyright owner must then go to court to obtain the material's permanent removal. It appears that it has been very successful in enabling copyright owners to have potentially infringing material removed from their servers.¹⁹⁴ It does however beg the question as to how many of the works removed do actually infringe copyright.

It has also meant that the courts have not yet had many opportunities to interpret the legislation. The issue did arise in *A&M Records, Inc., et al. v. Napster, Inc.*¹⁹⁵ Napster applied for, but was refused, the refuge provided by these measures. The court held that Napster's role in the transmission of MP3 files by and among the various users of its system meant that it was not entitled to protection¹⁹⁶ because such transmission did not occur through Napster's system. Rather, all files were transferred directly from the computer of one Napster user through the Internet to the computer of the requesting user.

US law provides a general 'fair use' defence covering purposes 'such as' criticism, comment, teaching, scholarship and research, and indicating that factors to be taken into account in assessing fairness 'include' such matters as whether the use is of a commercial nature or for non-profit educational purposes, the amount and substantiality of the portion

¹⁹⁴ REF TO MAIN TEXT

¹⁹⁵ No. C 99-05183 MHP (N.D. Cal. 2000)

¹⁹⁶ Under Section 512(a)

used in relation to the whole work, and the effect of the use upon the market or value of the copyright work.¹⁹⁷

The Corley case, already referred to in the main text of this paper,¹⁹⁸ is a claim of infringement of the anti-circumvention measures in the Digital Millennium Copyright Act and is also of some relevance to the question of fair use. Corley ran a website, <http://www.2600.com>, geared towards computer 'hackers', on which in November 1999 he posted a copy of 'DeCSS', a computer program created in September 1999 by a Norwegian teenager called Jon Johansen and designed to circumvent CSS, the system protecting DVDs. A challenge was offered to the anti-circumvention measures of the Digital Millennium Copyright Act under the US Constitution, in particular on the grounds that they violated the copyright clause of the Constitution and the First Amendment protection of free speech. The copyright clause of the Constitution grants Congress the power to protect authors 'for a limited time'; the argument was that the anti-circumvention measures created a kind of perpetual protection. The Court in New York rejected this argument as premature and speculative, because there was no evidence of the technology being used to protect public domain works. However, this can hardly be regarded as a categorical rejection of the basic argument. On freedom of speech, the court accepted that computer code was constitutionally protected speech, but held that copyright owners were entitled to protect their property and that the balance of interests struck in the DMCA was not an undue restraint on speech. The court also considered whether the anti-circumvention provisions improperly restricted fair use of the protected material, but noted that Corley had not claimed to be making fair use of copyright material and nothing in its injunction prohibited him from making such fair use. 'Fair use,' it remarked, 'has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.' (Opinion, p. 71)

¹⁹⁷ Copyright Act 1976, s 107.

VIII. AUSTRALIA

In Australia the governing statute is the Copyright Act 1968 as several times amended. The law is broadly similar to that of the UK. The most recent amendments result from the Copyright Amendment (Digital Agenda) Act 2000 (which came into force on 4 March 2001). This gave effect to the 1996 WIPO Treaty, and introduced into Australian law a technology-neutral public communication right replacing the existing structure of broadcasting and cable rights. The Act protects the usual range of works, including databases. In *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*¹⁹⁹ the Full Court of the Federal Court of Australia upheld an earlier ruling that information in databases such as telephone directories can be the subject of copyright protection. Desktop had copied data from the Telstra telephone directories without permission and using headings similar to those compiled by Telstra developed a CD-ROM product enabling users to conduct different searches through the data.. Saying that ‘to deny copyright protection would permit Desktop to appropriate the benefit of Telstra’s substantial labour and expense in performing those activities’ (at para 170), the court confirmed the low threshold of originality required for the protection of databases under Australian law.

Computer programs are also protected by the Act. In *Data Access Corporation v Powerflex Services Pty*²⁰⁰ the High Court of Australia held that the commands (including macros) in a computer language were not computer programs, and hence not entitled to copyright protection. More generally the court held that deciding whether something is a computer program must be answered separately for each language in which the item in question is said to be a computer program. In addition, a computer program is something which is intended to express, directly or indirectly, an algorithmic or logical

¹⁹⁸ See above, §

¹⁹⁹ [2002] FCAFC 112

²⁰⁰ Ltd [1999] HCA 49

relationship between the function desired to be performed and the physical capabilities of the device having digital information processing capabilities. On infringement the court stated that in determining whether something is a reproduction of a substantial part of a computer program and so infringes copyright, the essential or material features of the program should be ascertained by considering the originality of the part allegedly taken.

The 2000 reforms also extended certain exceptions to copyright, enabling educational institutions and libraries to make copies of literary, dramatic and musical works for certain purposes, to the digitisation of printed material for reproduction and communication for the same purposes. Where a work is available for purchase, only a reasonable portion may be so copied: a reasonable portion is stated to be 10% of the words contained in the work or, in the case of a literary work divided into chapters, one chapter. Libraries may also make available on their premises material acquired by them in digital form. However, because copyright owners feared that libraries would turn into 'digital publishing houses' there are a number of restrictions on the digitisation activities of libraries. For instance, a library can only furnish a copy of a work to a user if that work is already held in the collection of the library.²⁰¹ This means that the library will not be able to search for related material on the Internet, or to download and copy it in response to a user request. Further, the library can make available to users within the library premises items acquired in digital form, but only on 'dumb' terminals. A user can make a hard copy of the material only if it complies with fair dealing principles. This would appear to mean that if a library acquires a work that is only in digital form, then, unless a user can plead fair dealing, the work would have to be read that within the library.

²⁰¹ s49(7A)(d)

There are no remuneration schemes for private copying in the Australian Copyright Act. A blank tape scheme was introduced in 1989, but was held invalid by the High Court on the basis that the blank tape levy was a tax, and the legislation did not comply with the requirements in the Australian Constitution relating to taxation legislation.²⁰²

The Copyright Act includes civil remedies and criminal sanctions against the manufacture, importation and supply of circumvention devices and services.²⁰³ Non-commercial use is not subject to sanctions. The sanctions do not apply to supply for certain permitted purposes including decompilation, error correction and security testing of computer programs, library supply to a library client for research or study and educational copying for a student, but not to supply direct to the person doing the research or study; and government use.²⁰⁴ It is notable that the Australian Act is designed to target exclusively preparatory activities (trafficking in circumventing technology). Only individuals and businesses engaged in breaches of the provisions for profit will be at risk. However, the infringing preparatory activities are defined very broadly and include the act of making the circumvention device available online to an extent that will affect prejudicially the owner of the copyright.

Exceptions to the prohibition on trafficking circumventing technologies are granted where the circumvention device or service is used for a permitted purpose.²⁰⁵ This has the effect of allowing some legitimate manufacture, dealing, advertising, supply, etc., of such devices and services in relation to specific exceptions to copyright owners' exclusive rights. These exceptions are defined by reference to specific exceptions in the Copyright Act. The recipient of the device or service may by making a written

²⁰² Australian Tape Manufacturers Assoc v Commonwealth (1993) 25 IPR 1; (1993) 176 CLR 480. The decision is available online on <http://www.scaleplus.gov.au> and on <http://www.austlii.edu.au>.

²⁰³ Copyright Act 1968 Part VAA

²⁰⁴ Copyright Act 1968 s 116A(3)

²⁰⁵ *ibid*

declaration that it is to be used only for certain permitted purposes prevent liability arising which must include a note of the relevant provision in the Copyright Act and that the work is not available elsewhere in a form not protected by a technological protection measure.²⁰⁶ Sanctions against tampering with rights management information are also provided by the Act.

Australian law also distinguishes between copyright management information pertaining to works still under copyright and those in the public domain. The latter are not protected against circumvention.²⁰⁷

The first case to consider these amendments was *Kabushiki Kaisha Sony Computer Entertainment v Stevens*,²⁰⁸ where the court had to consider the definition of 'technological protection measure'²⁰⁹ as used in the Copyright Act. At issue was the question of whether the encryption program used by Sony in its PlayStation consoles and associated computer games was a technological protection measure, and whether 'mod chips' (capable of decrypting the encryption program) were a circumvention device.

After a careful analysis of how the decryption program mechanism actually worked and how that related to the wording of the Act, the court came to a number of conclusions. First it decided that the encryption used by Sony did not prevent copyright infringement. Rather, the infringement (a reproduction of the computer game) came before the operation of the technical protection measure (para 117). Second, the court decided that the temporary storage of part of a computer program in the RAM of a computer (in this case the PlayStation console) did not constitute a reproduction of a

²⁰⁶ Copyright Act 1968 s 116A(3)(b).

²⁰⁷ *ibid.*

²⁰⁸ [2002] FCA 906.

²⁰⁹ Technological protection measure is defined in section 10(1) of the Copyright Act (as amended) as: 'a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means: (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or licensee of the copyright; (b) through a copy control mechanism.'

substantial part of the computer program in a material form as defined in the Copyright Act.²¹⁰

This last point followed the earlier case of Australian Video Retailers Association Ltd. (AVRA) v Warner Home Video Pty Ltd,²¹¹ where the issue arose as to whether the playing of a DVD containing a film involved making a copy of that film in the RAM of a DVD player – was the copy in ‘material form’? That court cited an earlier case, Microsoft v Business Boost,²¹² for the proposition that the definition of ‘material form’ in the Copyright Act was intended to be far reaching and to cover not only ROM and RAM but other types of storage to be developed in the future. Nonetheless the court in AVRA found that there had been no substantial reproduction of the film contained on the DVD in the RAM of the DVD player or PC. All that was copied were insubstantial parts which were then erased before the next parts were copied. This was so where there was no mechanism in the computer that would allow it to reproduce the contents of the RAM. The same conclusion was attained in Sony in relation to the playing of the computer games. No substantial part was copied onto the console and it was not possible to reproduce the data that was temporarily stored in the console’s RAM. Therefore the definition of ‘material form’ was not satisfied, and no copy had been made that would satisfy the terms of the Act. Therefore, the mod chips could not be a device intended to prevent or inhibit the infringement of copyright in a work or other subject-matter.

The court in Sony also considered whether, if the computer game was defined as a film, that would have any bearing on the matter. In the event, and because only tiny parts of a film are sequentially stored in the RAM of the console, it was held that this did not mean that the film is embodied in that device. As a result, the consumer who plays

²¹⁰ ss31(1)(a)(I), 36(1).

²¹¹ [2001] FCA 1719

²¹² CITATION?

the game does not, for the purposes of the Act, make a copy of the whole or a substantial part of the film. This followed the earlier case of AVRA discussed above.

The Sony case is particularly interesting for a number of reasons. It is the first interpretation of the anti-circumvention provisions in the Australian legislation. It can provide little comfort to the makers of consoles and computer games who had presumably been relying on these measures to control the unauthorised dissemination of their products. However, for users of these products it does mean that, at least for the time being, in Australia they can play computer games that might be zoned for the American or Japanese market so long as they have the mod chip installed in the console.

A second noteworthy point is that the case comes after the earlier UK case of *Sony Computer Entertainment v Owen*.²¹³ On facts that were almost identical, but this time concerning a mod chip called 'Messiah', an opposite conclusion was attained based on section 296(2) CDPA. Jacob J had found that the encryption codes included in the games and the consoles were intended to prevent or restrict copying of a work. In Jacob J's analysis the copying that was prevented was the loading of the game into the computer. Thus the courts differed in their view as to what constituted copying for the purpose of their respective legislation. A second point of note to emerge from this case was that notwithstanding the decryption devices had uses other than assisting copyright infringement, it was enough that the program in fact facilitated circumvention of the form of copy-protection employed by Sony. This was approved in the Australian case.

A final question arising as a result of the Australian Sony case is about the correct classification of a computer game. The Australian judge considered two alternatives – computer program or cinematographic work. The point, however, was not finally decided, as the outcome would have been the same. Ultimately the classification does

²¹³ [2002] EWHC 45 (Ch D)

matter as there is a right in Australian legislation to make a back-up of a computer program. There is no such right in respect of a film.

Returning to the Copyright Act, it contains important provisions about authorisation of infringement with a view to protecting the position of ISPs. As with other countries, Australia has introduced provisions whereby ISPs will not be held liable for copyright infringement merely because they have provided the facilities on which the infringement took place. Web site owners will typically be held responsible for infringing material on their sites. However, ISPs must still comply with industry codes of practice to avoid being found to have authorised infringement of copyright and take reasonable steps such as advising web site owners of their copyright responsibilities.

Two further points to note. Firstly, unlike many other countries, Australia protects author's works for a period of only fifty years after the death of the author. Second, Australia has recently recognised the moral rights of paternity (including as in the UK a right to prevent false attribution) and integrity.

Even although the recent reforms in the law have gone a long way to readying Australia for the digital era, a further package of amendments is being proposed for the near future. One of the most interesting concerns parallel importing. The Australian Government adopted an 'Arts for All' policy in 2001. As part of this initiative it is intended to introduce legislation that would enable third parties to parallel import books and software without the permission of the owner of the Australian copyright. Parallel importation of music CD's has been permitted since 1998. However, following the passage of these amendments, the Government discovered that recording companies often included some multimedia content on music CDs. This had the effect of preventing importation of those copies because of the risk of copyright infringement in that content. If the proposals for widening parallel importing are passed, then this apparent loophole should be closed. The intention behind the reforms is that such

relaxation would over time improve prices and conditions for the supply of books, written music and all types of software for Australian consumers.

IX. FRANCE

French copyright law is contained in the Intellectual Property Code of July 1, 1992. This legislation applies to the Internet and to other new technologies as much as it does to the analogue world. Copyright protects works of the mind by virtue of their creation²¹⁴ whatever their kind, form of expression, merit or purpose.²¹⁵ Whereas the medium in which the work is expressed is irrelevant, a creation remains necessary. Thus, and in common with other jurisdictions, ideas are not protected. There is a list in the Code (which draws heavily upon that contained in Article 2 of the Berne Convention) of what are considered ‘works of the mind’,²¹⁶ but it is not exhaustive and thus does not restrict copyright protection extending beyond the categories stated. This contrasts with other jurisdictions, for example, the UK. Software was added pursuant to a law dated July 3, 1985, which anticipated the Computer Software Directive 1991.

Whether a work is included in the list or not, it must be original to be accorded protection. Case law has determined that originality is the mark of the author’s personality. So for example, simple sound recordings are not protected as they lack originality.²¹⁷ Collections of data enjoy copyright protection only in so far as, by reason of the selection or arrangement of their contents, they are original creations.²¹⁸ The test for originality was changed for software. Here, originality means the mark of the author’s intellectual contribution.²¹⁹ In addition, and in common with other EU

²¹⁴ Article L. 111-1 of the Intellectual Property Code.

²¹⁵ Article L. 112-2 of the Intellectual Property Code.

²¹⁶ Article L. 112-2 of the Intellectual Property Code.

²¹⁷ Paris Court of Appeal, October 6, 1979 (for birds’ songs).

²¹⁸ Court of Cassation, First civil chamber, May 2, 1989.

²¹⁹ Court of Cassation, Plenary Assembly, March 7, 1986 (Society Babolat v. Pachot).

Member States, France has implemented the Database Directive,²²⁰ thus introducing a new ‘sui generis’ right for the contents of a database.²²¹ Recently, the Versailles Court of Appeal set out rules concerning online database protection. The Court considered that a database maker could not prevent the extraction or the reutilisation by another party of a part of his database if this content was freely available to the public and the extractions were merely insubstantial: only a qualitatively or quantitatively substantial extraction could be enjoined.²²²

Linking and its relationship with the database right has also come in for scrutiny by the French courts. The French Civil Court of Paris ruled that the website Keljob, with its search engine, infringed the French Intellectual Property Code by displaying hypertext links taking the surfer deep into the ‘Cadremploi’ website. Keljob was using a qualitatively substantial part of the contents of ‘Cadremploi’ database without its consent, and was consequently violating the sui generis right.²²³

French law divides the rights of the author of a work into the moral and the economic. Economic rights are themselves divided into two broad categories: the right of performance and the right of reproduction. Performance is the communication of the work to the public by any process whatsoever, including public recitation, lyrical performance, dramatic performance, public presentation, public projection, transmission in a public place of a telediffused work, and telediffusion (meaning distribution by any telecommunications process of sounds, images,

²²⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

²²¹ Law of July 1, 1998 (new articles L. 341-1 to L. 343-4 of the Intellectual Property Code).

²²² Versailles Court of Appeal, April 11, 2002 (Society PR Line v. Society News Invest).

²²³ Paris High Court, September 5, 2001 (Society Cadremploi v. Society Keljob). The case is currently under appeal.

documents, data and messages of any kind).²²⁴ On the question of broadcasting or communicating works over the Internet, the French courts have considered how this impacts on both music and films. For music, the Paris High Court ordered the domain name registrar GANDI to prevent the broadcasting of music files from the website midtext.com, which was being done without the authorisation of the owners of the copyright in those files. The judge ordered GANDI to re-direct any visitor attempting to reach the midtext.com website to the website of the Programme Protection Agency. This website contains publicly accessible information concerning the temporary suspension of the counterfeiting website and also reproduces the text of the summary decision. In addition, the Judge forbade GANDI from transferring the domain name 'midtext.com' to another registrar.²²⁵

On the question of films, French law requires that each right transferred has to be specifically listed in a broadcasting contract. However historically such contracts have not included clauses which would permit films to be 'broadcast' over the Internet. The Strategic Information Technology Council (CSTI) considers this absence as a major legal obstacle to the exploitation of films over the Internet and is seeking clarification of the legal aspects of online movie broadcasting and online pay-per-view to facilitate this type of webcasting.²²⁶

The other economic right is the reproduction right. Reproduction is the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.²²⁷ The notion of fixation raises some questions, for instance

²²⁴ Article L. 122-2 of Intellectual Property Code.

²²⁵ Paris High Court, May 31, 2002 (Syndicate chamber of the music's editors v. Society Gandi).

²²⁶ The CSTI's report can be found on this website (<http://scti.gouv.fr>).

²²⁷ Article L. 122-3 of the Intellectual Property Code.

in relation to computer programs because reproduction of a program may be permanent or temporary; in ROM or in RAM. It is not clear whether these and other types of temporary or transient reproduction such as those that occur when a web page is called up on a computer screen are within the general concept of reproduction. This is because of the need in French law for a physical fixation to meet the definition of reproduction. On the other hand, it is clear that communication of works over the Internet amounts to a reproduction. In a number of cases dealing with journalists and newspaper publishing French courts have confirmed that publishing on the Internet is a reproduction distinct from a reproduction in a hard-copy newspaper. For instance, the Court of Appeal of Paris has held that the journalists' right of reproduction assigned to the newspaper *Le Figaro* does not include the right to publish the article on-line. Authorisation from the author is needed for any such reproduction and accordingly must be negotiated.²²⁸ The same outcome arises in respect of broadcasting of television news on-line,²²⁹ and for reproduction of photographs on-line where such reproduction is carried out without the consent of the author.²³⁰

Exceptions to the economic rights arise once a work has been disclosed.²³¹ Private and gratuitous performances carried out exclusively within the family circle are not caught by the exclusive right, nor are the making of copies or reproductions reserved strictly for the private use of the copier and not intended for collective use. But the making of copies of works of art, where the reproduction is for purposes identical to those for which the original work was created, the making of copies of software unless for purposes of back-up, and the making of copies or reproductions of

²²⁸ Paris Court of Appeal, May 10, 2002 (*Le Figaro v. National Syndicat of journalists and others*).

²²⁹ Strasbourg High Court (emergency), April 16, 1999 (*Studio Vézelay v. Society Beyne*).

²³⁰ Nanterre High Court (emergency), May 3, 2002 (*Agence France Presse v. Front National*).

²³¹ Article L. 122-5 of the Intellectual Property Code.

electronic databases are excluded from this private use exception. In two cases concerning the same author, Raymond Queneau, questions arose concerning the reproduction of 'Cent Mille Millions de Poèmes' on two different websites, which had been effected without the authorisation of the owners of the copyright in the work. In the first case, the judge held that a website unprotected by security devices and open to any visitor was in the public domain and that the copying involved in its creation could not be justified by the general exemption for private reproduction even if the program allowed the surfer to see only a single poem.²³² But in the second case, the owner of the copyright failed in the attempt to establish infringement because the program which allowed the user to create combinations of the works of Queneau had been made available on an Intranet rather than on the Internet and thus had a private nature.²³³

There are also exceptions to permit reproduction in specified circumstances provided that the name of the author and the source are clearly stated. These are:

- analyses and short quotations justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated;
- press reviews;
- dissemination as current news, even in their entirety, through the press or by telediffusion speeches intended for the public made in political, administrative, judicial or academic gatherings, in public meetings of a political nature and at official ceremonies;

²³² Paris High Court (emergency), May 5, 1997 (Queneau v. Leroy). Raymond Queneau (1903-1976) was a surrealist and experimental author. The poem in question is a collection of words which the reader is invited to assemble in any order to form his or her own version.

²³³ Paris High Court (emergency), June 10, 1997 (Queneau v. Jérôme B.)

- parody, pastiche and caricature, observing the rules of the genre.²³⁴

The second major category within French law is that of moral rights. The rights to be found in the Code are those of paternity, integrity, divulgation (disclosure) and repentance. Apart from the right of repentance, which dies with the author, these rights are perpetual.²³⁵ The rights are also inalienable. The right of paternity gives to the author the right to claim authorship of a work. This right extends to the right to claim authorship of a web site. The first instance judge at the Court of Lyon held that a web site designer employed by a company may, on the grounds of French law author's rights, assert the right of paternity in respect of the design of web sites developed in the course of an employment agreement. French case law constantly asserts that an employment contract does not make any exceptions to the right of enjoyment of author's rights even though work is done under the instruction of an employer.²³⁶ The judge also recalled that, under French law, an author possesses inalienable moral rights: any agreement to give up such rights can only be of a temporary and limited nature.²³⁷

Performers of works have neighbouring rights, both moral and economic.²³⁸ A performer has a right of paternity and right of integrity in respect of the interpretation of a performance. However, a performer does not have either of the divulgation or repentance rights. Phonogram and videogram producers and audiovisual communication enterprises also have an exclusive right of reproduction as

²³⁴ Article L. 122-5, 3^e of the Intellectual Property Code.

²³⁵ Article L. 121-1 of the Intellectual Property Code.

²³⁶ Lyon High Court (emergency), October 22, 2001 (Society Avant-Première Design Graphique v. Society Adgensite).

²³⁷ Court of Cassation, First civil chamber, April 4, 1991.

²³⁸ Article L. 212-2 of the Intellectual Property Code.

well as the right to make the work available to the public by way of sale, exchange or rental.²³⁹ This changes in the case of phonograms where one is played in a public place which is not used in an entertainment. In return for playing the phonogram an entitlement to remuneration exists.²⁴⁰ In addition, French law provides that authors, performers and producers of works fixed on phonograms or videograms are entitled to remuneration in respect of private reproductions of works which are permitted under the provisions of the Code. This leads to the system of levies on the equipment used to make such private reproductions. This then produces funds that are in turn allocated amongst the interested parties by a committee established under statutory powers.

For the neighbouring rights, the exceptions to the exclusive rights are almost identical to those for authors. The beneficiaries of neighbouring rights may not prohibit:

- private and gratuitous performances carried out exclusively within the family circle;
- reproductions strictly reserved for private use by the person who has made them and not intended for any collective use;
- subject to adequate identification of the source, analyses and brief quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated ;
- press reviews ;

²³⁹ Article L. 231-1 of the Intellectual Property Code.

²⁴⁰ Article L. 214-1 of the Intellectual Property Code.

- dissemination, even in full, for the purposes of current affairs, speeches intended for the public in political, administrative, judicial or academic assemblies and in public meetings of a political nature and in official ceremonies;
- parody, pastiche and caricature, observing the rules of the genre.²⁴¹

On this subject, the Paris High Court ruled that a radio station should not broadcast music extracts on their websites without the producers' express authorisation whatever the length of the those extracts.²⁴² Thus it would appear that the short quotation exception does not apply to broadcasts made available over the Internet.

Given both the technical and legal expansion of the reproduction rights, the right for authors and editors to claim remuneration for private copying of works fixated on any type of medium has recently been extended by an Act dated July 17, 2001: authors and editors may now also claim remuneration for private copying of works fixated on any digital medium.²⁴³ Further, in its decision of July 1, 2002 the French Commission 'Brun-Buisson' has determined that private copies of hard discs embedded into electronic devices are subject to levy payments (including walkmans, stereo, numeric video-tape recorders).²⁴⁴ Computers and consoles are currently excepted, but it is understood that they will be soon covered.

²⁴¹ Article L. 211-3 of the Intellectual Property Code.

²⁴² Paris High Court, May 15, 2002 (Society of Phonogramme producers in France and Union of French independent phonographic producers en France v. Chérie FM et NRJ).

²⁴³ Article L. 311-1, new al. 2, of the Intellectual Property Code.

²⁴⁴ Article L. 311-5 of the Intellectual Property Code.

Finally, French law contains provisions, consistent with its general abuse of rights doctrine, against manifest abuse of copyright.²⁴⁵

²⁴⁵ Article L. 122-9 of the Intellectual Property Code.

X. GERMANY

German copyright law rests on the Law on Copyright and Neighbouring Rights of September 9, 1965, last amended by the Act on Strengthening the Contractual Protection of Authors and Performing Artists on 22 March 2002.²⁴⁶ Authors of literary, scientific and artistic works which are personal intellectual creations enjoy protection under the German legislation. Computer programs and films are included amongst such works, while collections of data which by reason of their selection or arrangement constitute personal intellectual creations enjoy protection as independent works.

In common with other Member States of the EU, Germany has enacted the Database Directive. The Regional Court of Dresden has held that data collections in print form fall under the protected category of databases.²⁴⁷ That court also held that the exceptions to copyright protection of databases, (copying for private, scientific or educational use²⁴⁸) also apply to official governmental databases, in this case an official call for tenders publication. By contrast, statutes and other official works of public interest carry no copyright protection, under the Copyright Act.²⁴⁹ On this last point, the Higher Regional Administrative Court of Münster²⁵⁰ held that although statutes and other official works are not protected by copyright, an Internet-based legal publisher has no absolute right of access to all Acts, Regulations and Administrative provisions held by the Federal Justice Ministry for the purposes of creating an online legal database for profit, where it would be published without any change in content or form.²⁵¹

²⁴⁶ BGBl. 2002 I, 1155

²⁴⁷ Section 87(a) German Copyright Act (UrhG).

²⁴⁸ Section 87(c) UrhG and Article 9 of the EC Database Directive

²⁴⁹ Section 5 UrhG.

²⁵⁰ September/October 2001.

²⁵¹ The court also held that the constitutionally guaranteed freedom of the press (Article 5 of the Grundgesetz) was held not to extend to Internet services

There have been a number of other decisions from German courts as to what constitutes a database. The German Federal Supreme Court has held that Deutsche Telekom's telephone directories are databases protected in accordance with the Database Directive. The decision prohibits the copying of Deutsche Telekom's directories by competitors.²⁵² A court in Berlin²⁵³ has held that the use of employment advertisements taken from a daily newspaper cannot be prevented because the advertisements do not constitute a database in the sense of the German Copyright Act,²⁵⁴ while a court in Rostock²⁵⁵ has held that a collection of hyperlinks made available on the Internet to constitute a database even though its creation did not entail a major investment in terms of money, time or effort.

The German courts have also handed down a number of decisions on the interaction between linking, copyright law and database right. On linking, the District Court of Hamburg has ruled that a hyperlink between two web sites, where the linked content appears within a frame and under the URL of the linking web site (a so-called inline-link), violates copyright law if the content of the linked web site qualifies as a database under copyright law. The court held that the fact that the web site is copied into the working memory of the user's computer constitutes a copyright infringement, and that inline-links are outside the scope of the general implied consent of content providers that their web site may be accessed through links from other websites.²⁵⁶

On linking and the database right, the Regional Court of Cologne has ruled that a systematically arranged collection of job advertisements on the Internet is a database

²⁵² Federal Supreme Court, GRUR 1999, 923 - "Tele info CD".

²⁵³ KG Berlin, decision of May 26, 2000, GRUR-RR 2001, 102-103.

²⁵⁴ Section 87a UrhG. The action can however be regarded as being contrary to public policy pursuant to the German Unfair Competition law.

²⁵⁵ Local Court of Rostock, Judgment of February 20, 2001, CR 2001, 786-787

within the meaning of the German Copyright Act, if parts of the collection are individually accessible by electronic means and the construction of the database requires a substantial investment. Thus, the exclusive rights of reproducing, distributing and communicating the job advertisements contained in the database to the public are infringed if a competing company adopts the collection by means of deep links to the relevant advertisements. It was held that such a display of deep links prejudices the database owner's legitimate interests by causing significant damage to his investment, as his business activity is at least partly financed by means of advertising banners on other pages of his web sites not accessed by the deep link.²⁵⁷ The Higher Regional Court of Hamburg has ruled that displaying a link to an online lexicon by incorporating the lexicon in the sites of the person setting the link (so-called 'framing') represents a reproduction of parts of a database under the German Copyright Act. This applies regardless of the fact that the owner of the database has given his consent to a direct link to his online lexicon.²⁵⁸

Returning to copyright, German law protects the author with respect to his intellectual and personal relationship with the work (moral rights) and also with respect to utilisation of his work (exploitation rights). The moral rights are the right to decide whether and how a work is to be published, the right to be recognised as author of the work, and the right to prevent distortion of the work. The exploitation rights, which are not transferable as such, but the exercise of which can be contractually transferred to third parties,²⁵⁹ are the rights of reproduction, distribution, exhibition, and

²⁵⁶ District Court of Hamburg, judgment of July 12, 2000, CR 2000, 776-778.

²⁵⁷ District Court of Cologne, Decision of February 28, 2001

²⁵⁸ District Court of Hamburg, Decision of February 22, 2001, GRUR 2001, 831-832.

²⁵⁹ The new Sec. 29 UrhG reads:

'Sec. 29 - Dispositions over Copyright: Copyright cannot be transferred unless in order to fulfil an obligation post mortem or between several heirs in the course of disposing of the heritage. It is permissible to permit the exercise of rights of use (sec. 31), to make contractual stipulations and agreements over rights of use as well those dispositions mentioned in sec. 39 regarding moral rights'. But note that an author may revoke a transfer of exploitation rights where the holder does not

communication to the public in non-material form - i.e. live recitations and performances, and presentations of certain works (e.g. films, photographs and works of fine art) perceivable to the public by means of technical devices;²⁶⁰ broadcasting and communication of broadcasts; and communication by means of video or audio recordings. A communication of a work is deemed public when intended for a plurality of persons, unless such persons form a clearly defined group and are connected by personal relationship with each other or with the organiser (e.g. family).

The implementation of the Computer Program Directive showed that the concept of reproduction in German law did not extend to temporary or transient reproductions, and accordingly special provision is required in the German legislation.

There have been a number of cases in Germany that have considered 're-publication' of photographs and articles on the Internet where those have been first published in a hard copy newspaper. The Higher Regional Court of Berlin held that, if a freelance photographer hands over photographs to a daily newspaper for printout, this does not, in principle, imply that the newspaper has obtained the right to use these photographs on its website or in an Internet archive. Such use infringes the photographer's copyright under the German Copyright Act.²⁶¹ Similarly, the Higher Regional Court of Hamburg has ruled that the use of articles in the context of an Internet newspaper qualifies as an independent form of reproduction and publication. Publication therefore requires new consent of the news agency delivering such articles. The Court reasoned that the use of the articles in an Internet-newspaper has on its own, considerable potential for exploitation as a result of the world-wide scope of the Internet,

exercise it or exercises it insufficiently, so that serious injury is thereby caused to the author's legitimate interests

²⁶⁰ There is also a distinct right of exhibition in relation to works of fine art and unpublished photographs.

and is different from the use of the articles for a paper edition of the newspaper.²⁶² This reasoning has been developed from a theory dating back to 1923; that of ‘transfer limited by purpose’ (‘Zweckübertragungslehre’): The use of copyright by third parties was granted by the author only to the extent necessary for such use by the third party. In other words: the third party would only be granted the exercise of copyright to the extent necessary for the contractually agreed purpose.²⁶³ The principle became a generally accepted doctrine of interpretation for copyright contracts. It is now expressly mentioned in Sec. 31(5) UrhG that since 2002 reads thus:

Unless the forms of use are individually mentioned/listed when the right of use is granted, the forms of permissible use are determined by the purpose of the contract as intended by both parties. The same applies for the question, if a right of use has been granted, if it should be interpreted as an exclusive or non-exclusive right, what the scope of right of use and right of exclusivity should be and which limits apply to the right of use.

According to Sec. 31(4), permitting the use for ways of use hitherto unknown is not permissible.

German law contains an extensive list of limitations on copyright. These relate to reproductions for purposes of justice and public safety, religious and educational uses (subject to equitable remuneration of the author in some cases), public speeches and current affairs, quotations to the extent justified by the purpose, and public communication if the communication serves no gainful purpose of the organiser, spectators are admitted free of charge and none of the performers receive special remuneration. Most important for present purposes is the exception allowing reproduction for private and other personal uses. It is permissible to make a single copy of a work for private use. It is also permissible to make a single copy of a work for

²⁶¹ Higher Regional Court of Berlin, Decision of July 24, 2001, ZUM-RD 2001, 485-496.

²⁶² District Court of Hanseatisches, Decision of May 11, 2000, EWIR 2000, 1141-1142.

²⁶³ Goldbaum, Urheber- und Urhebervertragsrecht, 2nd ed. 1927, 75.

personal scientific use, if and to the extent that such reproduction is necessary for the purpose; or to include the copy in personal files, if and to the extent necessary and if a personal copy of the work is used as the model for reproduction; for personal information concerning current events, in the case of a broadcast work; and for other personal uses, in particular in the case of a work that has been out of print for at least two years. Copies of small parts of printed works or of individual contributions published in newspapers or periodicals may also be made for personal use in teaching in the quantities required for one class, if and to the extent that such reproduction is necessary for this purpose. Reproduction of sheet music and of essentially complete copies of a book or periodical by way of non-manual copying²⁶⁴ is only permissible with the consent of the copyright owner, or if for inclusion in personal files and using a personal copy for the reproduction, or for personal use where the work has been out of print for at least two years. Copies made under the private use exceptions may neither be disseminated nor used for public communication. Going beyond the exceptions and looking to the general public interest, in the ‘Schoolbook’ case in 1971 the Federal Constitutional Court in Germany concluded that the public interest in access to cultural objects could override a copyright requirement of the author’s consent.²⁶⁵

Authors of works the nature of which makes it probable that they will be reproduced by photocopying or similar processes, or by the recording of broadcasts on video or audio recording mediums, or by the transfer from one recording medium to another, are entitled to equitable remuneration from the manufacturers of appliances and of video or audio recording mediums obviously intended for the making of such reproductions. Where photocopiers are operated by educational institutions or libraries or for payment by other types of institutions, the author is again entitled to equitable

²⁶⁴ i.e. photocopying or scanning.

remuneration from such operators. Claims for this remuneration, however, have to be exercised through a collecting society.

Negotiations have been underway for some time between the German IT industry association Bitkom and the copyright collecting societies with a view to implementing a general copyright levy for digital equipment. Commentators believe that the final agreement will probably consist of the obligation to pay a general duty on CD-burners and printers for a transitional period of three years. Thereafter of an individual payment method could apply, depending on the function of the digital equipment in question. Meanwhile, the Regional Court of Stuttgart has held that Hewlett Packard is obliged to pay a copyright levy of DM 12,- per Compact Disc Recorder sold.²⁶⁶

Neighbouring rights apply *inter alia* to producers of audio recordings and to broadcasting organisations. The producer of an audio recording has the exclusive right to reproduce and distribute it, subject to the same exceptions that apply to a copyright owner. Broadcasters have the exclusive rights to rebroadcast, to record broadcasts, and to make its broadcasts perceivable to the public in places only accessible to the public on payment of an entrance fee. In general, the copyright exceptions apply here also.

On the question of ISP liability, Germany has already enacted legislation in this area in the German Teleservices Act, which in Section 5 provides the following limits to responsibility:

- (1) Under the general rules of civil law, service providers are responsible for their own content made available for use.
- (2) Service providers that make available material of third parties are responsible only to the extent that they have knowledge of the content of such material, the blocking of which is both technically feasible and can be reasonably expected.

²⁶⁵ Federal Constitutional Court, 7 July 1971, BverfGE 31, 229 - "Kirchen- und Schulgebrauch".

²⁶⁶ Computerwoche Online November 23, 2000.

- (3) Service providers have no responsibility for the contents of material of third parties to which they merely provide access. This includes the automatic or temporary storage of material made available by third parties due to the access of users.
- (4) Should the service provider obtain knowledge of the contents of materials provided by third parties, the provider will have an obligation to lock the use material considered unlawful to the extent that this is technically feasible and can be reasonably expected.

The principles from this legislation appear clear. No provider of services in general or a provider of an individual link will have a duty to monitor third party material for any possibly infringing contents. On the other hand, once alerted to such infringing contents, the access provider should be faced with civil liability unless blocking access is not technically feasible.

On the question of ISP responsibility for copyright infringement on the Internet, in 2001 the Regional Court of Hamburg ruled that ISPs were responsible for copyright violations committed by single Internet users, such as for sound recordings made available on the Internet. This was on the grounds that they provided the necessary software and created directories with search engine functions. In a different decision, the Higher Regional Court of Cologne ruled that an operator of a search engine for online newspaper articles which supplies the user with a list of all press reports and via a 'deep link', leads him directly to the full text version of the document (i.e. without passing through the respective press firm's homepage), neither violates copyright nor constitutes anti-competitive behaviour.²⁶⁷

Finally, at the time of writing (August 2002) Germany is, in common with other EU Member States, drafting amendments to be made to domestic legislation so as to conform to the requirements of the InfoSoc directive. In the absence of any specific provisions relating to anti-circumvention measures, the German Unfair Competition

²⁶⁷ Appeal Court of Cologne, Decision of 27 October 2000, GRUR-RR 2001, 97.

Prevention Act has been applied by the courts to enjoin third parties from the unauthorised offer or distribution of means for the circumvention of measures designed to prevent the infringement of copyright and neighbouring rights,²⁶⁸ as well as for the circumvention of access control measures.²⁶⁹ The principles applied by the courts were directed towards free-riding. For these provisions to apply, there needs to be a competitive relationship between the parties. Thus the measures may not apply to circumvention by private individuals.

XI. THE NETHERLANDS²⁷⁰

The Dutch Copyright Act was adopted in 1912, and has since been revised many times, most notably to bring the law into line with the EU harmonisation programme. The courts have also been active in interpreting and applying the law. A number of recent decisions have done much to indicate the direction the law is taking in response to technological developments.

The Dutch Act protects ‘works of literature science or art’.²⁷¹ This in turn encompasses ‘every production in the domain of literature, science or art, whatever be the mode or form of its expression’.²⁷² There is no express requirement in the Act for a work to be original, this facet of the law rather having been developed through judicial activity. Thus, to qualify for copyright protection, a work is required ‘to have an original

²⁶⁸ District Court of Stuttgart, Decision of 10 February 1989, CR 1989, 685-688 [Feilhalten von Hardlock Entfernen]; District Court of Munich, Decision of 3 November 1994, CR 1995, 663-665 ‘UNPROTECT’. For an in-depth discussion on the removal or circumvention of anti-copying devices under German law, see Peter Wand, *Technische Schutzmaßnahmen und Urheberrecht* (Technical Protection Measures and Copyright Law), München 2001.

²⁶⁹ District Court of Frankfurt am Main, Decision of 13 June 1995, NJW 1996, 264-265 [Pirate Card].

²⁷⁰ The compilation of this part of the report has been greatly facilitated by two articles by Professor B Hugenholtz. *Chronide of the Netherlands, Dutch copyright law, 1990-1995* and *Chronide of the Netherlands, Dutch copyright law, 1995-2000* both available from

²⁷¹ Article 10(1)

²⁷² Article 10(2)

and individual character bearing the personal imprint of its maker'.²⁷³ The Act also protects non-original writings, defined as 'all other writings'.²⁷⁴ This has led to protection for 'even the most banal or trivial writings ... provided they have been published or are intended for publication',²⁷⁵ described by some as a proto or quasi-copyright for those works falling under this head. When the Computer Programs Directive was implemented in the Netherlands in July 1994, it added a new definition of protected subject matter - 'computer programs and preparatory materials' - but at the same time excluded computer programs from the category of 'all other writings'. Thus the possibility of obtaining *sui generis* protection for computer programs which do not meet the Dutch requirement of originality is avoided. Also concerning computer programs, the Dutch Supreme Court allowed access to the source code of bespoke software where the underlying contract contained no provision regarding such access. In the absence of a specific term dealing with this issue the court interpreted the contract in favour of the licensee.²⁷⁶

Dutch law also provides for the protection of neighbouring rights as a result of a law that came into force on 1 July 1993. Rights are granted under this amendment to performers and producers of phonograms. The term of protection for copyright is 70 years post mortem auctoris for a natural person, or 70 years after publication for legal persons. For neighbouring rights it is set at 50 years after the end of the year in which the performance took place, the phonogram manufactured or the programme broadcast. In addition, Dutch law provides for moral rights for authors of copyright and for performing artists.

²⁷³ Van Dale v Romme Hoge Raad 4 January 1991, NJ 1991, 608.

²⁷⁴ Article 10(1)

²⁷⁵ *Televizier*, HR 25 June 1965, NJ 1966. See also *EPC/GEC*, HR 8 February 2002, IER 2002/3, pp 128-139.

²⁷⁶ *Van Genk/De Wild*, HR 21 June 1996, RvdW 1996, 145.

In implementing the Database Directive into Dutch law, amendments have been made to the Copyright Act. First, an amendment to Article 10, adding provisions which refer to databases as a particular form of compilation, and second the addition of a special Databankenwet to address the sui generis protection.

Some concerns have been raised over the interaction between database protection and that for non-original writings in the Act. It will be recalled that the Database Directive itself provides for a term of protection for non-original contents of a database of 15 years from the date of release of the database (which can increase if the database is updated). Protection is, however, subject to the requirement that the producer of the database must have expended substantial investment in the compilation of the contents of the database. This compares firstly with the term of protection in the Dutch Act for non-original writings of 70 years pma, and secondly with the fact that there is no requirement for investment to be shown in the compilation of 'all other writings' for protection to attach under this head. This appears to lead to the rather curious result of permitting a database maker who does not qualify for the sui generis database right in the contents of a database because insufficient investment has been expended in the compilation, being able to claim the longer period of copyright protection because the contents would fall under the definition of 'all other writings'.²⁷⁷

That point on databases apart, the Dutch courts have been busy interpreting other aspects of the database law. Three questions have been laid before the courts. First, what is a database? Second (as mentioned above), if a compilation does not fall

²⁷⁷ The Database Directive provides that if copyright protection is to be relevant to protect the structure of the database, then it must be the authors own original creation'. It must be questionable as to whether this test is met.

under the definition of a database, perhaps because it lacks substantial investment, is it still protected by the 'all other writing' clause? Third, if a database is compiled as a secondary result of another primary activity of the producer, can that still constitute a substantial investment (the spin-off argument)? Only the first two points have, to date, been dealt with by the (lower) courts. On the question of what is a database, the District Court of Amsterdam²⁷⁸ ruled, in a case about an electronic collection of newspaper cuttings, that a newspaper does not qualify as a database since it is not a work of reference and its information cannot be separately accessed. By scanning hundreds of newspaper articles and sending custom-made selections of these to its customers by e-mail, the compiler (Euroclip) did not thereby infringe the database rights of the newspapers. They did, however, infringe the copyright in the articles.

The Supreme Court has ruled on the spin-off argument. In *El Cheapo*²⁷⁹ Dutch real estate brokers, NVM compiled a website containing details of their properties for sale in the Netherlands. De Telegraaf set up a search engine on the Internet at www.elcheapo.nl which allowed the visitor to search for properties. The search engine then searched through various existing real estate databases including that of NVM. The results were displayed in a list presented in *El Cheapo*'s look and feel. The Court of Appeal had ruled that, given NVM's database had been compiled merely by converting existing data, it did not meet the test of substantial investment and therefore did not attract database protection (the spin-off argument). This was overruled by the Supreme Court, which said that the substantial investment criterion is not limited to investment in the obtaining, verification and/or presentation of the database on the Internet, but also extends to investment in the collection and arrangement of the data as such. Thus, in the

²⁷⁸ FD and other newspapers/Euroclip District Court of Amsterdam 4 September 2002, published on www.rechtspraak.nl

²⁷⁹ NVM/De Telegraaf HR 22 March 2002, IER 2002/3, pp154-180.

instant case, even if the primary function of the database was for internal use as between brokers, that does not mean that the same database cannot qualify for database protection when made available to the public on the Internet. The case has now been referred to the Court of Appeal in Amsterdam, which will have to decide whether El Cheapo infringes the database rights of NVM, in particular whether the acts of extraction and re-utilisation amount to those activities in respect of a substantial part of the database. Despite the findings of the Supreme Court in this case, it may be that the spin-off argument has relevance to other scenarios. On this, the Court of Appeals of the Hague²⁸⁰ has held that the mere making of lists of television and radio programmes to be broadcast on a specific day was to be considered a spin-off activity without sufficient investment to qualify for separate database protection. The substantial investment was in the planning of the programmes to be broadcast, and not in the listing of them. By contrast, the District Court of Almelo²⁸¹ has ruled in a case concerning the compilation of 8008 numbers by KPN that although KPN had merely put its existing list of numbers on the Internet, it had made a substantial investment in the compilation of the paper database without which the online listing of numbers would not exist. Therefore its online 8008 numbers had to be considered a database.

Two recent cases are interesting as, taken together, the facts are reminiscent of those in the *Shetland Times* case in Scotland. In the first, the District Court of the Hague found that the operator of a dedicated search engine infringed a telephone company's (KPN) database rights by providing data extracted from KPN's online telephone directory without referring users of the service to KPN's site. The result of this digital

²⁸⁰ NOS/Telegraaf Court of Appeals of the Hague 30 January 2001. Mediaforum 2001/2, p. 90; AMI 2001/3, p.73. Note: this decision has been appealed.

²⁸¹ KPN/Dena District Court of Almelo 6 December 2000, AMI 2001/3, p. 69.

set-up was that KPN were denied advertising revenue.²⁸² However, the District Court of Rotterdam did not find infringement of the database right where a web site provided automatic links to newspaper articles posted on-line at another site using the headlines without permission. The court ruled that the headlines were a mere by-product of newspaper publishing and that compilation of these headlines did not pass the 'substantial investment' test. Interestingly the court added that there was no evidence to show that linking to the underlying web pages had resulted in lost advertising revenue.²⁸³

Returning to copyright, the owner of copyright has the exclusive rights of reproduction and communication to the public. The reproduction right covers reproduction, translation and adaptation.²⁸⁴ The public communication right²⁸⁵ covers all acts of making a work available for the public, including acts of rental, lending, retransmission,²⁸⁶ broadcasting by satellite, terrestrial transmitter or cable system.²⁸⁷ The right to communicate broadcast programmes in public places however only applies if and where admission fees are charged. Apparently this amendment was introduced in response to the fear that broadcasting organisations would demand remuneration from owners of cafes and bars for allowing customers to watch television programmes.

The scope of this public communication right in Dutch legislation has led commentators to argue that the law is sufficiently flexible, and indeed eminently suited, to meet the demands of the digital era.²⁸⁸ A number of cases heard over recent years

²⁸² President of the District Court of the Hague, 14 January 2000, Mediaforum 2000, p64.

²⁸³ President of the District Court of Rotterdam, 22 August 2000, Mediaforum 2000, p344.

²⁸⁴ Articles 10, 13 and 14.

²⁸⁵ Article 12.

²⁸⁶ The broad nature of the lending right is limited by a statutory license in respect of the public lending of a work which has been put into circulation with the authorisation of the rightholder. Lending institutions must pay equitable remuneration to the rightholder although certain institutions including educational and research institutions and some libraries are exempted. Articles 15 c-g.

²⁸⁷ Article 12(1)(v): Amendments were made in 1996 to incorporate the Satellite and Cable Directive.

²⁸⁸ Hugenholtz supra n 1.

would tend to support that hypothesis. One of the many questions to come before courts in different jurisdictions concerns the number of people gathered in any one place at any one time who receive the same communication. In the Dutch cases the question has been: what amounts to 'communication to the public'? In other jurisdictions the question often asked is what does 'in public' mean?

In interpreting the broad public communication right, one Dutch court decided that the collective reception of television programmes by means of small communal antenna systems constitutes a communication to the public.²⁸⁹ On this point, the Commissie Autersrecht has recently issued advice on the meaning of 'communication to the public' and 'in public' in relation to access of television programmes by the use of common antennas. The Committee has suggested the introduction of statutory qualitative or quantitative requirements for the delimitation of the notion of 'public'²⁹⁰. Another court has held that the showing of movies in a private cabin (in a sex shop) also constituted an act of communication to the public.²⁹¹ In the latter case the court observed that the essence of the right is making the work available to the public, and that it does not matter whether or not the work is actually communicated to an audience simultaneously. However, it should be noted that the Dutch Copyright Act contains particular reference to certain forms of communication to the public, including those in a closed circle.²⁹² These communications are exempted from this communication right (i.e. no prior permission from the rightholder is required). The rationale for these exemptions appears to be that such communications are not made 'in public'. These points aside, and despite preceding the finalisation of both the WIPO Copyright Treaty and the Infosoc Directive, the results of these cases would seem to fit well with the

²⁸⁹ Hoge Raad, 24 December 1993, NJ 1994, 641; RIDA 162 (1994), 405.

²⁹⁰ Den Haag June 2002.

²⁹¹ Court of Appeal of Den Bosch, 1 February 1994, AMI 1995, 51 (GUFA/Havermans).

obligations to be found in those instruments and would tend to suggest that there is indeed sufficient flexibility in the Dutch law to cope with digitisation, in this area at least.

Another amendment was introduced in 1990 to provide for a home taping levy. The rationale, in common with other jurisdictions that have a levy system, is that it compensates right owners for the losses and damages incurred through private copying of musical works and films. There is however an exemption for personal use for literary, scientific and artistic works.²⁹³ The levy is paid by the manufacturers and importers of recording media defined as an 'object which is intended to show the images or play the sounds recorded upon it'. The definition is broad enough to cover analogue and digital recording objects, although it applies only to recording materials and not to recording equipment.

In common with other jurisdictions, the Dutch Act provides for a number of exceptions to the exclusive rights of the copyright owner. These are enumerated in the legislation, and it was thought by many that the categories were exhaustive and provided for no general 'fair use' provision. However, in *Dior v Evora*²⁹⁴ the Dutch Supreme Court could not find an exemption that would clearly permit the reseller of perfume bottles to display pictures of those bottles in advertising material without infringing copyright. The court however found that, by interpreting an existing exemption broadly, such permission for the use of copyright material in the resale of the perfumes could be found. The court ruled that its interpretation was in harmony with the existing exemptions, but nonetheless the effect was that the closed catalogue was opened on the basis of a creative interpretation of the Act. On this point the decision could be seen as

²⁹² Article 12.

²⁹³ Article 16b (4)

²⁹⁴ *Evora Hoge Raad*, 20 October 1995, AMI 1996, 51.

being in line with a case concerning the unpublished pages of Anne Frank's diary which were reproduced by a Dutch newspaper without permission. The Amsterdam Court of Appeal held that Article 10 of the European Convention on Human Rights did not override the copyright claims of the right holder, the Anne Frank Foundation. The newspaper had argued that publication was in the public interest: the Foundation sought to protect the reputation of the Frank family members. In balancing those interests, the Court found for the Foundation, but at the same time ruled that a clear appeal on the grounds of freedom of expression (and thus outside the scope of statutory exceptions) might be possible.²⁹⁵

The controversy caused by the inflexible nature of the exceptions/limitations to be found in the Infosoc Directive has led commentators to argue for the introduction into Dutch law of broad open-ended exceptions tailored to the digital era. However, it is unlikely that such an approach would be in line with the obligations to be found under that instrument.

Two other recent cases are relevant to current technological developments. The first concerned a question of international private law. A pressing question for copyright owners has been as to which courts have jurisdiction and which law applies to an infringement that occurs on the Internet. In the instant case, a Belgian company (Kapitol) had published telephone subscriber data on a web site which was physically located on a Belgian server. The data were allegedly copied from a database owned by KPN situated in the Netherlands. KPN wanted to sue in the Netherlands. The Court, relying on Article 5(3) of the Brussels Convention (see now the Brussels Regulation), decided that it could. The plaintiff had suffered damage in the Netherlands. Further, as

²⁹⁵ Pres. District Court Amsterdam 12 November 1998, AMI 1999/1. p.5; Court of Appeal of Amsterdam

protection was sought for the Netherlands, the court applied Dutch copyright law to the damage arising in the Netherlands.

The second case concerned the liability of ISP's for hosting material that infringes copyright belonging to a third party. The Court of the Hague found that an ISP would only be liable for such material if it knows, or has reason to know, of the actual reproduction taking place over its facilities. It has been pointed out that, by the inclusion of the 'reason to know' test, the standard is stricter than the provisions of Articles 12 to 15 of the Directive on e-commerce.²⁹⁶ It also begs the question as to when an ISP has reason to know that a reproduction takes place: does it impose a monitoring requirement on those same ISP's?

8 July 1999. AMI 1999/7, p. 116.

²⁹⁶ Directive 2000/31/EC.

XII. JAPAN

Japanese copyright law is found in the Law No. 48 of May 6, 1970. This law has been amended many times since.²⁹⁷ The majority of these amendments have been made not only to ensure that Japanese law complies with international obligations, but also to keep the law in line with technological developments. Some of the most recent amendments were designed to enable Japan to ratify both the WCT and the WPPT.²⁹⁸ But it is not only the Japanese Copyright Act that is of relevance to digital dissemination. The Japanese Unfair Competition Law also has provisions which affect this area. These will be discussed below.

The Japanese Copyright Law was revamped during the 1950's and 1960's due to increased technological changes and international pressure. The current law follows a dualist approach, permitting economic rights to be assigned, but stating that moral rights are non-transferable.²⁹⁹ This stands in contrast to other countries, such as Germany where copyright is seen as an indivisible body of rights that belong to the author and are not transferable. In addition, the Copyright Act in 1970 for the first time differentiated between copyright and neighbouring rights.

One interesting aspect of the Japanese law is that it provides for a system of registration.³⁰⁰ This appears designed to give notice by registration of the date when a work was first made public. The penalties for failure to register are limited to making ineffective, as against third parties, a transfer or restriction on the disposal of copyright, or the establishment, transfer, alteration or expiry of the right of pledge established on a

²⁹⁷ Laws No. 49/1978, No. 45/1981, No. 78/1983, No. 23/1984, No. 46/1984, No. 62/1985, No. 64/1986, No. 65/1986, No. 87/1988, No. 43/1989, No. 63/1991, No. 106/1992, No. 89/1993, No. 112/1994, No. 91/1995, No. 117/1996, No. 86/1997, No. 101/1998, No. 56/2000 and No. 131/2000.

²⁹⁸ Law No. 77/1999, Law No. 56/2000.

²⁹⁹ Article 59.

work protected by copyright. The provisions do not, however, apply to foreigners. Despite the fact that the procedure may have been introduced either to produce legal certainty, or to exercise control over the system, the fact of its existence might prove valuable in the digital era. One issue taxing exploiters of works protected by copyright, particularly makers of multimedia products is the difficulty in tracking owners of copyright. Some suggestions have been made that where a system of registration is in place, that information could prove invaluable in tracking owners.

The definition of 'work' in the Japanese Copyright Act is broad in that it encapsulates 'a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain'.³⁰¹ Examples of works are found in Article 10. These include novels, dramas, articles, lectures and other literary works; musical works; choreographic works and pantomimes; paintings, engravings, sculptures and other artistic works; architectural works; maps as well as figurative works of a scientific nature such as plans, charts, and models; cinematographic works (defined to include a work expressed by a process producing visual or audio-visual effects analogous to those of cinematography and fixed in some material form); photographic works and program works. In a recent case, a Japanese court ruled that anonymous Internet postings are literary property. In so doing it ordered a Tokyo publisher and web site operator to stop publication of a book that reprints comments posted by eleven people on a site without their consent. The court also ordered 1.2 million yen in royalties be paid for copies already sold.³⁰²

³⁰⁰ Article 76

³⁰¹ Article 2(i)

³⁰² <http://www.asiamedia.ucla.edu/Weekly2002/04.16.2002/Japan2.htm>

A number of items are excluded from the definition of works and thus do not receive copyright protection. These include news of the day and miscellaneous facts having the character of mere items of information;³⁰³ the Constitution and other laws and regulations; notifications, instructions, circular notices and the like issued by organs of the state or local public entities; and judgments, decisions, orders and decrees of law courts, as well as rulings and decisions made by administrative organs in proceedings similar to judicial ones.³⁰⁴

In 1985 the law was amended to cover computer programs adding a definition to make it clear that computer programs were protected by copyright.³⁰⁵ At the same time certain 'user' rights were introduced, notably to allow reproductions necessary to allow for corrections, additions, and deletions³⁰⁶ and to permit the making of back-up copies.³⁰⁷ In addition, a voluntary system of registration specifically for computer programs was instituted, based on the date of creation³⁰⁸ rather than the date of publication.

The law concerning databases and new media was updated in 1986. A definition of a database was introduced as a new kind of work, close to but not identical with the compilation work already found in the Japanese Copyright Law and which has to possess originality in compilation and arrangement of the data contained therein. The Japanese Copyright Law now protects databases only to the extent they are creative.³⁰⁹ At the time at which amendments to the law were being made it was anticipated that particular treatment should be accorded to electronic databases, as they constituted a work

³⁰³ Article 10(2)

³⁰⁴ Article 13

³⁰⁵ Article 2 (10bis).

³⁰⁶ Article 20 (2) (iii).

³⁰⁷ Article 47bis.

³⁰⁸ Article 76bis.

³⁰⁹ Tokyo District Court, 25 May 2001, 15 Law & Technology 61.

available on demand. Therefore the definition of publication was extended to the publication by making available the work on individual demand with respect to database works.³¹⁰

To cope with technological changes in the transmission of works by wire and wireless means, a number of amendments have been made over the years by adding definitions to cover this means of communication, as well as one-to-many and one-to-one reception. ‘Broadcasting’³¹¹ is defined as meaning ‘the public transmission of radio communication intended for simultaneous reception by the public of the transmission having the same contents’, and ‘wire diffusion’³¹² as ‘the public transmission of wire-telecommunication intended for simultaneous reception by the public of the transmission having the same contents’. These two definitions thus cover traditional forms of communication by way of broadcasting and wireless networking (one-to-many communication).

Other definitions have been introduced which cover one-to-one activities. ‘Public transmission’³¹³ (relevant to both one-to-many and one-to-one communication) means ‘the transmission of radio communication or wire-telecommunication intended for direct reception by the public’.³¹⁴ Furthermore, ‘interactive transmission’³¹⁵ has been defined ‘the public transmission made automatically in response to a request from the public, excluding the public transmission falling within the term “broadcasting” or “wire diffusion”’. This definition would cover transmission over the Internet where the request was made by an individual.

³¹⁰ Article 4 (4).

³¹¹ Article 2 (1) (viii).

³¹² Article 2 (1) (ixbis).

³¹³ Article 2 (1) (viibis).

³¹⁴ This definition excludes transmission within the same premises but includes computer programs.

³¹⁵ Article 2 (1) (ixquater).

Again, ‘making transmittable’³¹⁶ means ‘the putting in such a state that the interactive transmission can be made by either of the following acts:

- (a) to record information on a public transmission memory of an interactive transmission server already connected with telecommunication networks for the use by the public;³¹⁷
- (b) to connect with telecommunication networks for the use by the public an interactive transmission server which records information on its public transmission memory or which inputs information to itself.

The intention appears to be to make the right of public transmission applicable to the preparatory stages leading up to transmission itself.³¹⁸ To make this point, the law goes on to provide that the author has the exclusive right ‘to transmit his work publicly (including the making transmittable of his work in the case of the interactive transmission) and that the author shall have the exclusive right to communicate publicly, by means of a receiving apparatus, his work which has been transmitted publicly.’³¹⁹

Amongst the exclusive rights granted to the author is the right of reproduction.³²⁰

This does not cover a temporary right of reproduction. In a decision of the Tokyo District Court³²¹ it was found that the temporary reproduction of music into RAM does not fall within the definition of reproduction in the Act. Only data stored and capable of being repeatedly used constitutes a reproduction. The omission of a general temporary reproduction right concerns owners of copyright in computer programs. Circumstances

³¹⁶ Article 2 (1) (ixquinquies).

³¹⁷ The definition goes on to provide: ‘Interactive transmission server’ means a device which, when connected with telecommunication networks for the use by the public, has a function of making the interactive transmission of information which is either recorded on such a part of its memory as used for the interactive transmission (hereinafter in this item referred to as ‘public transmission memory’) or inputted to such device; the same shall apply hereinafter), to add a memory recording information as a public transmission memory of such an interactive transmission server, to convert such a memory recording information into a public transmission memory of such an interactive transmission server, or to input information to such an interactive transmission server’.

³¹⁸ See also Article 92bis for performers, Article 96bis for phonogram producers.

³¹⁹ Article 23.

³²⁰ Article 21.

³²¹ Tokyo District Court, 16 May 2000, 1751 Hanrei Jihô 128 (2001) – ‘Star Digio’

in which the cable transmission of a work takes place within the same premises have generally been treated as outside the scope of transmission rights, and thought to involve performance rights or presentation rights. However, the increasing use of the storage of programs on a server within a LAN and only temporarily copied from them on to a computer has increased calls for the introduction of a temporary reproduction right into domestic law. As a consequence, the law was revised to extend the right of public transmission to 'cable transmission to the public within the same premises',³²² but this was limited to computer programs. However, caching does fall within the definition of reproduction.³²³ There is concern about the implications for ISP liability, and the Japanese Government is considering introducing measures that would exempt them from liability for caching.

Other exclusive rights include the right to perform the work publicly³²⁴ where 'publicly' means for the purpose of making a work seen or heard directly by the public;³²⁵ the right of presentation,³²⁶ the right to recite a work publicly,³²⁷ the right of exhibition of an artistic work or unpublished photographic work,³²⁸ the right of distribution of a cinematographic work;³²⁹ the right of transfer of ownership (excluding a cinematographic work);³³⁰ the right of lending (excluding a cinematographic work);³³¹ and the rights of translation and adaptation.³³²

³²² Section 2 (1) Item 7-2

³²³ Article 2 (1) (15).

³²⁴ Article 22.

³²⁵ Article 2 (7). 'Performance and recitation include the performance or recitation of a work by means of sound or visual recordings, not falling within the term "public transmission" or "presentation" and the communication by means of telecommunication installations of performances or recitations of works, not falling within the term "public transmission".

³²⁶ Article 22bis. This is a right for the author to present his work publicly.

³²⁷ Article 24.

³²⁸ Article 25

³²⁹ Article 26. – (1).

³³⁰ Article 26bis – (1).

With few exceptions, the exclusive rights apply to ‘works’ as defined above. By way of exception the performance and recitation rights include the performance or recitation of a work by means of sound or visual recordings where those activities do not fall within the definitions of public transmission or presentation. The intention appears to be to lift these definitions from one-to-one transmissions on the Internet which should instead fall under the right of transmission.

The right of rental and lending, introduced in 1984, was intended at least in part to deal with the expansion of the record rental business. During the early 1980’s the number of shops lending records proliferated in Japan. The first appeared in Tokyo around 1980. By 1984 there were over 1,900 such shops, and 4,500 in 1995. To meet the concerns of copyright owners whose sales were declining as a result of the numbers of copies being made of the borrowed works, a new Article 26bis was added to the Japanese law. This gave to the author a lending right for all works except for movies which were protected by the right of distribution. The lending right extended to sheet music and to performers and phonogram producers,³³³ but not to books and magazines.³³⁴

Historically Japan allowed the copying of all forms of works including audio and video works for purely private use.³³⁵ However, there are now a number of exceptions to this right. In 1992, in response to the increasing numbers of copies of audio and visual works being made for private use, a home copy compensation payment system for

³³¹ Article 26ter. For the moment, this right is suspended for books and magazines: Sec. 4bis Supplementary Provisions.

³³² Article 27.

³³³ Article 95bis - (1), Article 97bis - (1) respectively. But note that Cabinet Order can fix a time after which rental becomes permissible against payment of a levy: Sec. 95bis (2).

³³⁴ Article 4bis of the supplementary provisions.

private digital audio and video recording was introduced.³³⁶ With further amendments in 1998 and 1999 a number of different types of media now fall under this provision: digital audio tapes (DAT), digital compact cassettes (DCC), and mini-discs (MD) compact disc recordable (CD-Rs), compact disc re-writable (CD-RWs) digital video cassette recorders (DVCR) and data video home systems (D-VHS). Analogue dubbing on video and cassette tapes remains free of charge. Where a digital reproduction is made by means of automatic reproducing machines in which all or main parts of reproducing devices are automatic then private copying is not permitted.³³⁷ Other limitations, including reproduction in school textbooks³³⁸ and broadcasting in school education programmes,³³⁹ also require payment.

On the question of limitations, the Japanese Copyright Law contains a large number of measures, to be found in Articles 30-50. These are present mainly for the purposes of education, informatory purposes, criticism and review, judicial and administrative proceedings and non-profit making purposes. Specific provisions include limitations for the use of works for purposes such as reporting of current events;³⁴⁰ the use of quotations;³⁴¹ the use of factual information prepared by public bodies;³⁴² the reproduction of articles on current topics;³⁴³ exploitation of political speeches;³⁴⁴ reproduction in schools and other educational institutions;³⁴⁵ and reproduction in

³³⁵ Article 30. (1) 'It shall be permissible for a user to reproduce by himself a work forming the subject matter of copyright (hereinafter in this Subsection referred to as a "work") for the purpose of his personal use, family use or other similar uses within a limited circle (hereinafter referred to as "private use"), except in the following cases....'.

³³⁶ Article 30. (2).

³³⁷ Article 30. (1)(i).

³³⁸ Article 33.(1).

³³⁹ Article 34.(1).

³⁴⁰ Article 41.

³⁴¹ Article 32.(1).

³⁴² Article 32 (2).

³⁴³ Article 39.(1).

³⁴⁴ Article 40.(1).

³⁴⁵ Article 35.

libraries.³⁴⁶ As with the UK, some of these are subject to compulsory licensing and payment, for example reproduction in school textbooks. Others require no payment, for example reproduction of works in braille.

In recent amendments to the Japanese Copyright Law, attempts have been made to incorporate the anti-circumvention provisions to be found in the WCT and the WPPT. Amendments have also been made to the Japanese Unfair Competition Law.³⁴⁷ In both, only trafficking in anti-circumvention controls is prohibited: the act of circumvention itself is not affected. The measures of the Unfair Competition Law relate to both access and copy controls in so far as they harm the interests of the content owner. On exemptions, the Unfair Competition Law only limits the provisions in so far as they are for the purpose of testing and researching encryption systems.³⁴⁸ There are no further exemptions relating to the other limitations to be found in the Copyright Law, including those which do not require compensation when they are exercised. The answer apparently lies in the fact that the Japanese Copyright Law would apply to determine whether liability attached to the person carrying out the act of circumvention for one of these purposes. It is also notable that the prohibition in the Japanese Copyright Law attracts criminal sanctions, whereas liability under the Unfair Competition Law is only civil.

Finally, a couple of general points on the Japanese Copyright Law. First, the moral rights included in the Japanese legislation are the right of making the work public,³⁴⁹ the right to be identified,³⁵⁰ and the right of integrity.³⁵¹ Second, the term of

³⁴⁶ Article 31.

³⁴⁷ See generally Article 2

³⁴⁸ Article 11(1)(7)

³⁴⁹ Article 18(1).

³⁵⁰ Article. 19 (1).

protection is 50 years after the death of the author, except where the author is a legal person, in which case protection expires 50 years from the date when the work was made public.³⁵²

³⁵¹ Article 20.(1).

³⁵² Article 51 et seq.

XIII. SOUTH AFRICA

South African copyright law is found in the Copyright Act 98 of 1978 as several times amended (in 1980, 1983, 1984, 1986, 1988, 1992 and 1997). Speaking very broadly, the Act is modelled upon UK copyright law. The quantity of case law on copyright is small, probably reflecting the relatively small size of the market in comparison with the total population. Many of the statutory amendments since 1978, however, have been responses to technological developments, in particular with regard to computer software and databases. Computer programs receive copyright protection in their own right rather than as literary works; but literary works do embrace tables and compilations stored or embodied in a computer or a medium used in conjunction with a computer. Computer games have been held protected as films.³⁵³ 'Programme-carrying signals' as well as broadcasts are amongst the works eligible for copyright; the phrase is not defined, but the word 'programme' in relation to a programme-carrying signal is said to mean 'a body of live or recorded material consisting of images or sounds or both, embodied in a signal'. The legislative intent appears to be to ensure that cablecasts are protected by copyright, and the provision does not appear quite to capture the nature of an Internet transmission. In any event the protection accorded 'programme-carrying signals' extends only to an exclusive right to undertake, or to authorise, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic of South Africa or to do so from South Africa. This does not appear to be apt to cover activity on the Internet. Transmission of a literary,³⁵⁴ musical or artistic work or a computer program or a film, sound recording or broadcast in a diffusion service is an infringement of copyright, with a diffusion service being 'a telecommunications service of transmissions consisting of sounds, images, signs or signals which takes place over

³⁵³ *Golden China TV Game Centre v Nintendo Co Ltd* 1997 (1) SA 405 (A).

³⁵⁴ Dramatic works are included amongst literary works in South African copyright law: 1978 Act s 1, 'literary works', (b).

wires or other paths provided by material substance and intended for reception by specific members of the public' (1978 Act s 1). The reference to 'specific members of the public' again appears to place Internet transmissions outside this form of infringement.

Copyright in South Africa also gives its owner the exclusive right to reproduction in any manner or form, to perform the work in public, and to broadcast it. The legislation says nothing on whether temporary or transient reproductions are caught under the reproduction right. It has been held that playing music to customers in a butcher's shop constitutes a public performance; i.e. that the nature of the place where the music is played to the public is not important in the determination of whether a performance is in public.³⁵⁵

The protection lasts for the minimum Berne and Rome Conventions periods. Provisions for copyright exceptions exist for each of the major categories of copyright work. With regard to literary and musical works, and broadcasts, a person using such a work may make reproductions by way of fair dealing for his/her own research and private study, or for his/her personal or private use;³⁵⁶ but this does not apply to films, sound recordings or computer programs.³⁵⁷ The 1978 Act also provides for the creation of further exceptions by regulation, but expressly confines this power within the 'three-step' test of the Berne Convention.³⁵⁸

Finally, South African copyright law provides for the moral rights of paternity and integrity with regard to films, literary, musical and artistic works. These are limited for an author who authorises the use of a work in a film or TV broadcast, and for the author of a computer program or work associated with such a program, in that he/she

³⁵⁵ South African Music Rights Organisation Ltd v Trust Butchers (Pty) Ltd 1978 (1) SA 1052 (A).

³⁵⁶ 1978 Act ss 12(1)(a), 18.

³⁵⁷ Ibid, ss 16, 17, 19B.

³⁵⁸ Ibid, s 13.

'may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work'.³⁵⁹

³⁵⁹ *Ibid*, s 20.