

An Overview of The Copyright And Related Rights Regulations 2003
SI 2003/2598

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1 **Overview of Key Changes**

- **‘New’ right of communication to the public by electronic transmission including broadcasting and interactive services**
- **Replaces the old right to broadcast the work or include it in a cable programme service.**
- **New performers’ right of making available.**
- **Redefinition (narrowing) of various exceptions - including research and private study and criticism, review and news reporting.**
- **Protection against circumvention of effective technological measures (eg. copy control/scrambling).**
- **Protection against removal of electronic rights management information (eg. digital watermarks).**
- **Injunctions against service providers.**
- **Change to calculation of 50 yr duration of copyright in sound recordings.**
- **Came into force on 31st October 2003. Applies to existing works. But has no effect on pre-22 December 2002 agreements.**

The Regulations implement the European Copyright in the Information Society Directive by amending the Copyright Designs and Patents Act 1988. The Regulations came into force in the UK on 31st October 2003.

2 **Communication to the Public**

Section 16 of the CDPA 1988 now gives the copyright owner the exclusive right:

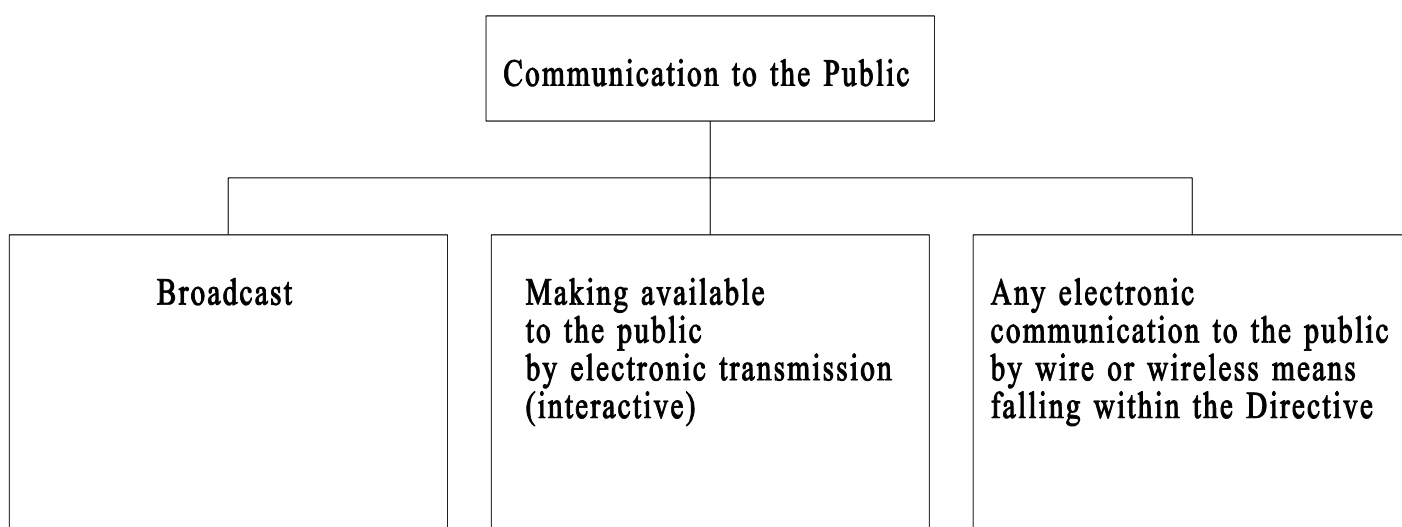
- (a) to copy the work;
- (b) to issue copies of the work to the public;
- (ba) to rent or lend the work to the public;
- (c) to perform, show or play the work in public;
- (d) to communicate the work to the public;**
- (e) to make an adaptation of the work or do any of the above in relation to an adaptation.

The right to communicate the work to the public replaces the old right to broadcast the work or include it in a cable programme service.

Practical observations:

Right of communication to the public needs to be addressed in licence agreements. Licensees will seek grant of right. Licensors will want to restrict grant probably by breaking down the right into discrete areas of use.

3 **Extent of the Right of Communication to the Public**



3.1 The meaning of communication to the public is elaborated in s.20(1) of the 1988 Act as amended:

‘References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work **include**—

- (a) the broadcasting of the work;
- (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.’

3.2 The right to communicate the work to the public is an act restricted in respect of

- (a) a literary, dramatic, musical or artistic work;
- (b) a sound recording or film; or
- (c) a broadcast.¹

¹ s.20, CDPA 1988 replacing the old s.20 which stated that the broadcasting of the work or its inclusion in a cable programme service was an act restricted by the copyright in a literary, dramatic, musical or artistic work, a sound recording or film, or a broadcast or cable programme.

- 3.3 It is a very broadly worded right and the intention of the Directive is clear from Recital 23 which reads:

Recital 23

This Directive should harmonize further the author's right of communication to the public. ***This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates.*** This right should cover any such transmission or retransmission of a work to the public by wire or wireless means including broadcasting. This right should not cover any other acts.²

- 3.4 It is important to note the right of communication to the public is not exclusively defined and is only stated to 'include' broadcasting and making available by electronic transmission at a place and time individually chosen by the viewer. Given that the Regulations are implementing the Directive, the meaning of 'communication to the public' needs to be interpreted by reference to the Directive. It is submitted that it is likely that the court will interpret the non-exclusive definition (in accordance with Recital 23 and Article 3(1)) to include any form of communication to the public where the public are not present at the place where the communication originates by wire or wireless means.
- 3.5 The 'making available' right inherently raises many questions including the issue of where making available occurs. This is particularly problematic as regards the internet as it is not a single point transmission.

Practical Observations:

² See also Art 3(1) *Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*

The right to communicate a work to the public will include not just linear broadcasting (one to many), but also iTV (interactive television), internet use, and ‘pull’ mobile telephone services like WAP³ and 3G⁴ allowing download on request.

It is less clear whether ‘near-on-demand services’ like SkyBoxOffice are included within the second limb - the making available right. This is of particular significance in connection with the grant of this right to performers discussed below. The European Commission considered that such services were not intended to be included as it observed in its comments on Art 3(2)

The element of individual choice hints at the interactive on-demand nature of access. The protection offered by the provision [Art 3(3)] thus does not comprise broadcasting, including new forms of it, such as pay-TV or pay-per-view as the requirement of individual choice does not cover works offered in the framework of a pre-defined programme. Similarly it does not cover so-called near-video-on-demand, where the offer of a non-interactive programme is broadcast several times in parallel at short intervals.⁵

‘Near on demand’ services are probably not included within making available and probably class as broadcasts. But if the time delay between transmissions is so frequent that ordering a service may be regarded in practice as being accessed at a time individually chosen by the viewer, it is arguable it falls within making available.

4 **Definition of Broadcast**

³ Wireless Application Protocol

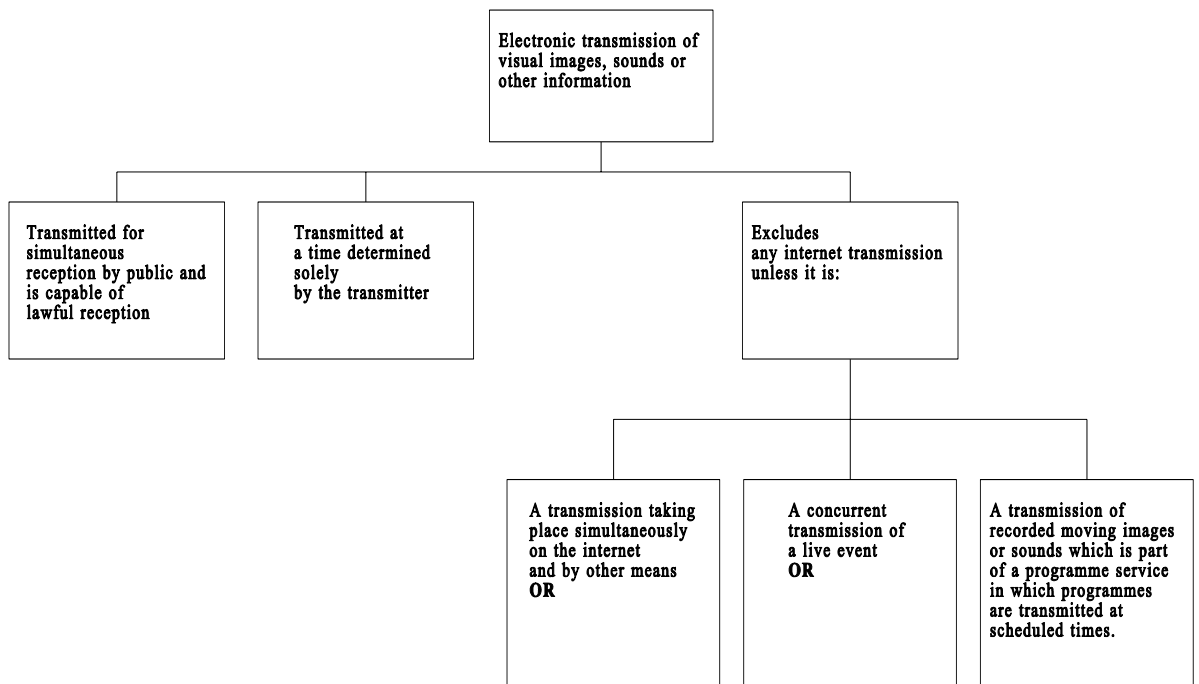
⁴ Third Generation mobile phones

⁵ European Commission proposal for directive on the harmonization of copyright and related rights in the Information Society 97/0359(COD) 10th December 1997 at p.33. Available online at http://europa.eu.int/comm/internal_market/en/intprop/news/copyen.pdf

4.1 A broadcast is a separate category of work in which copyright subsists.⁶ A broadcast is also one of the specified categories of work in respect of which communication to the public is a restricted act.⁷

Overview of Meaning of Broadcast

4.2 Broadly, broadcasting does not include any kind of interactive services. A broadcast is defined as meaning ‘an electronic transmission of visual images, sounds or other information which—



- (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
- (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,

⁶ s.1(1)(b) CDPA 1988 as amended by Reg 5(2).

⁷ s.20 CDPA 1988 as amended by Reg. 6.

and which is not a specifically excluded transmission.⁸

Excluded from the definition of ‘broadcast’ is any internet transmission unless it is—

- (a) a transmission taking place simultaneously on the internet and by other means,
- (b) a concurrent transmission of a live event, or
- (c) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.

Practical Observations:

A licence granting ‘all broadcast rights’ will permit transmission by terrestrial or satellite television, by cable, by internet simulcasts or transmission of a live event via the internet. Excluded from being a broadcast are: most forms of internet downloading, any on-demand services where transmission time is determined by the user.

5 Performer’s Making Available Right

5.1 There is a direct grant to performers of the ‘making available right’ which is now included as one of the property rights conferred on performers together with the existing rights of reproduction, distribution and the rental and lending rights⁹

In addition, the performers consent is now required to make available a recordings of a performance by electronic transmission in such a way that members of the public may access the recording from a place and at a time individually chosen by them.

182CA Consent required for making available to the public(1) A performer's rights are infringed by a person who, without his consent, makes available to the public a recording of the whole or any substantial part of a qualifying performance by electronic transmission in such a way that members of the public may access the recording from a

⁸ s.6 CPDA 1988 as amended by Reg 4.

⁹ s.191A(1) CDPA 1988 as amended by Reg 7(3)

place and at a time individually chosen by them.

- (2) The right of a performer under this section to authorise or prohibit the making available to the public of a recording is referred to in this Part as "making available right."

5.2 The performer's right to equitable remuneration for exploitation of a commercially published sound recording does not apply to exploitation by 'making available'.¹⁰ The right to such equitable remuneration only applies where the recording is played in public¹¹ or where it is communicated to the public in any way other than by being 'made available' for individual on-demand access.¹² It continues therefore to apply to broadcast use. Any assignment to a collecting society of the right to equitable remuneration made before 31st October 2002 insofar as it relates to the new making available to the public right is invalid from 31st October 2002.¹³

Practical Observations:

New license agreements will need to deal with this right. Right only applies to on demand services. Performers can thus prevent the transmission of their recordings in MP3 format over the internet via on demand downloading services. *Quaere* whether 'near on demand' included.

Difficulties may arise in respect of historical licence agreements as the Regulations are stated to apply to performances given before or after 31st October 2003.¹⁴ However

- (1) no act done before 31st October 2003 is to be regarded as an infringement of any new or extended right.¹⁵
- (2) nothing in the regulations affects any agreement made before 22nd December

¹⁰ s.182D(1)(b) as amended by Reg 7(2). See also Reg 34(1).

¹¹ s.182D(1)(a).

¹² s.182D(1)(b) as amended by Reg 7(2).

¹³ Reg 34(2).

¹⁴ Reg.31.

¹⁵ Reg 31(2).

2002.¹⁶

and most importantly:

- (3) No act done after 31st October 2003 **in pursuance of an agreement** made before 22nd December 2002 shall be regarded as an infringement of any new or extended right arising by virtue of these regulations.

The Directive states, in slightly different wording, that it shall apply ‘without prejudice to any acts concluded and rights acquired before 22nd December 2002.’¹⁷

Regarding historical agreements, the position will turn on the language used and the construction of the agreement.

Eg. Are ‘all rights’ expressly included? For example ‘all media whether now known or hereafter to be devised’ or ‘all media whether now existing or to be developed in the future’ may cover publication via electronic transmission. Does the agreement provide for statutory definitions ‘as amended from time to time’ (and thus incorporate the amended definition of broadcast)? Does the agreement expressly deal with on-demand services and web access?

6 **New Permitted Act of Making of ‘Transient or Incidental’ Temporary Copies**

6.1 **Outline of How the Internet Works and The Need for the Temporary Copies Exception**

The Internet is an international network of interconnected computers. Every computer connected to the internet has a unique identity established by its unique Internet Protocol address (‘IP Address’). An IP address consists of a series of numbers for example the IP address of the computer on which the 5 Raymond Buildings website is hosted is 217.28.130.42. A series of numbers is difficult for users to remember so the

¹⁶ Reg 32(1).

¹⁷ Art. 10(2).

Domain Name System ('DNS') was developed which allows users to identify a computer by an alphanumeric 'domain name' such as www.5rb.co.uk. A domain name corresponds to a particular series of numbers that serve as routing addresses on the Internet to a particular computer. Domain names are used generally as a convenient way of locating information and reaching others on the Internet.

An individual computer will be connected to the internet via an ISP (Internet Service Provider) which typically occurs when the computer dials via a modem and connects to the ISP's network which may be connected to other networks. Ultimately, a series of larger networks connect together at a higher level called Network Access Points ('NAP's). In this way it is possible for a user of an individual computer to access the interconnected computers which constitute the internet.

Protocols essentially govern the way in which one computer communicates with another. The basic internet communication protocol is called TCP/IP (Transmission Control Protocol/Internet Protocol). The TCP/IP allows computers to receive information in a common language. The TCP breaks down the information being sent into packets and the IP ensures that each 'packet' of data is sent to the receiving computer where they are reassembled into the original whole.

A hyper text link is the HTML (Hyper Text Mark Up Language) command which directs a web browser to another webpage. It enables internet users to move from viewing one website page to another by clicking on the relevant link. HTML links can be in various forms:

- | | |
|------------------------|---|
| Surface linking | links to the homepage of another site |
| Deep linking | links to an internal page of another site avoiding the homepage. |
| Framing | results in the display of pages of an external site within a frame/window of the original linking site. |
| Inline/Dynamic linking | links to an image on an external site resulting in the display of that image imbedded on the web page of the original linking site. This gives the illusion that the image is part of the linking site. The image is not copied by the linking site and is simply retrieved directly from the |

linked sites server.

When a computer accesses website via the internet it will frequently copy that information into its cache. The cache is a sub-set of the computer's memory which allows it to operate faster. Storing information in the cache allows the computer to access the copy more quickly than if it did so via its main memory. Copies of website pages will be from time to time stored into the cache of a computer used for internet access. A cache is simply a temporary storing area for content (pages, images, and files) that can be accessed immediately and does not have to be retrieved from the web server and its related infrastructure. Caching doesn't just take place in the computer of the end user but in computers all along the chain of ISP networks. This is also dealt with by the Electronic Commerce Directive which provides that intermediaries such as ISPs would not be liable for acting as a mere conduit or caching.¹⁸

Many electronic services require temporary copies of a copyright work to be made as part of the transmission. If a video on-demand is being transmitted from a database in Germany to a home computer in England, a copy of the video will be on the database and thereafter at least a hundred often ephemeral acts of storage in the course of the transmission.

- 6.2 All member states are mandatorily required to implement an exception from the reproduction right in respect of temporary acts of reproduction that are transient or incidental.¹⁹ The Directive makes clear that this is intended to cover acts of internet browsing as well as caching insofar as they are transient and an integral part of a technological process.²⁰

This has been implemented by the introduction of a new s.28A which provides:

28A Making of temporary copies

Copyright in a literary work, other than a computer program or a database, or in a

¹⁸ Implemented in the UK on 21 August 2002 by the Electronic Commerce (EC Directive) Regulations 2992

¹⁹ Art 5(1),

²⁰ Recital 33.

dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of **a temporary copy** which is **transient or incidental**, which is **an integral and essential part of a technological process** and **the sole purpose** of which is to enable—

- (a) **a transmission of the work in a network between third parties by an intermediary**; or
- (b) **a lawful use of the work**;

and which has **no independent economic significance**.
(emphasis added)

Practical Observations:

Note that this exception does not apply to computer programmes or databases. Simple caching on a home computer as part of the process of browsing the web would be included. Some commercial caching for example by search engines that make their services substantially faster may not be included if it can be said it has independent economic significance. Interpretative difficulties with the various elements of s.28A. Generally surface linking does not involve the reproduction of any copyright works. All that is reproduced is a linked web address.²¹ Framing and inline linking are more problematic as they may not be a ‘lawful use of the work’ and such use may be outside the terms on which the original site owner allows access to his website material. Eg. visual search engines that use inline linking or framing to reproduce copies of the images are unlikely to fall within s.28A as the images may have independent economic significance.²²

7 Amendment of Exceptions

²¹ Eg. USA: *Ticketmaster Corp v. Tickets.com, Inc* 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000) Aff'd, 2 Fed App 741 (9th Cir. 2001) (deep linking); *Ford Motor Co. v. 2600 Enterprises*, 177 F Supp2d 661 (ED Mich, 2001) ('fuckgeneralmotors.com' automatically linked to plaintiff's site located at 'ford.com'. Claim for preliminary injunction alleging trademark infringement, dilution and unfair competition by use of the Ford trade mark in the programming code establishing the link was dismissed). Cf *Shetland Times Ltd v Wills* (Scotland, Outer House) [1997] FSR 604; [1997] EMLR 277 where the link itself actually reproduced (arguably) copyright material (newspaper headlines).

²² Cf: *Kelly v Arriba Soft Corporation* 336 F.3d 811 (9th Cir, 2003) withdrawing its earlier opinion of February 2002 280 F. 3d 934 (9th Cir, 2002)

The only mandatory exception in the Directive which member states are required to introduce is that for temporary copying. The Directive provides a long list of other categories in respect of which member states are free to choose whether to provide exemptions if they wish to do so.²³ Generally, the amendments introduced by the United Kingdom serve to narrow the existing exceptions.

7.1 **Criticism, Review and News Reporting**

Section 30 which provides this exemption has been amended. In respect of criticism and review, it only applies to works made lawfully available to the public and therefore cannot be claimed in respect of unpublished works. The new s.30 reads as follows with amendments show by bold italics and strikeout.

30 Criticism, review and news reporting

(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement ***and provided that the work has been made available to the public.***

(1A) ***For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including—***

- (a) ***the issue of copies to the public;***
- (b) ***making the work available by means of an electronic retrieval system;***
- (c) ***the rental or lending of copies of the work to the public;***
- (d) ***the performance, exhibition, playing or showing of the work in public;***
- (e) ***the communication to the public of the work,***

but in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act.

²³ Art.5(3). eg. use for purposes of caricature, parody or pastiche; for public security etc.

- (2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.
- (3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, ~~broadcast or cable programme~~ **or broadcast where this would be impossible for reasons of practicality or otherwise.**

Note that the wording of s30(3) differs from the Directive which merely states ‘as long as the source, including the author’s name, is indicated, unless this turns out to be impossible.’²⁴

7.2 Research and Private Study

This has been amended to exclude research for commercial purposes.

29 Research and private study

- (1) *Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.*²⁵
- (1B) *No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.*
- (1C) *Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.*
- (2) Fair dealing with the typographical arrangement of a published edition for the purposes [~~mentioned in subsection (1)~~] **of research or private study** does not infringe any copyright in the arrangement.
- (3) Copying by a person other than the researcher or student himself is not fair dealing if—

²⁴ Art 5(3)(c).

²⁵ The previous wording of s.29(1) was ‘Fair dealing with a literary, work, other than a database, or a dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.’

- (a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or
 - (b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.
- (4) It is not fair dealing—
- (a) to convert a computer program expressed in a low level language into a version expressed in a higher level language, or
 - (b) incidentally in the course of so converting the program, to copy it, (these acts being permitted if done in accordance with section 50B (decompilation)).]
- (4A) *It is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with section 50BA (observing, studying and testing)).***

~~[(5) The doing of anything in relation to a database for the purposes of research for a commercial purpose is not fair dealing with the database.]~~

7.3 **Other Changes to Existing Permitted Acts**

- 7.3.1 Things done for the purposes of instruction or examination: s.32. Exception amended to only apply to instruction for non-commercial purposes.²⁶
- 7.3.2 Recordings by educational establishments of broadcasts :s. 35. Amended to only apply to education that is non-commercial and where the use is accompanied by a sufficient acknowledgment.²⁷ Exception applies to communication to the public of such a recording where it cannot be received by anyone situated outside the premises of the educational establishment.
- 7.3.3 Reprographic copying by educational establishments : s.36. Exception amended to only permit copying where it is accompanied by sufficient acknowledgment and where the instruction is for non-commercial purposes.²⁸

²⁶ Amended by Reg 11.

²⁷ Amended by Reg 12.

²⁸ Amended by Reg 13.

- 7.3.4 Copying by librarians : s. 38 and 39. Exception amended to only permit supply by librarian to persons who require copies for research for non-commercial purposes or private study and for no other purpose.²⁹ Observing, studying and testing of computer programs: new s.50BA.³⁰ Allows a lawful user of computer program to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program whilst performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.
- 7.3.5 Recordings of folksongs: s. 61. Amended to only permit supply by archivist to persons who require copies for research for non-commercial purposes or private study and for no other purpose.³¹
- 7.3.6 Playing of sound recordings by non-profit clubs or societies: s.67. Amended to further restrict scope of exemption by adding further conditions in particular that the use is for the benefit of the organisation by a person not acting with a view to gain and proceeds applied solely for the purposes of the organisation.³² Any other use will require a licence.
- 7.3.7 Recording for the purposes of time-shifting: s. 70. Amended to only apply to making for private and domestic use *in domestic premises*.³³ Any further dealing in a commercial way of a domestic copy is treated as infringing.³⁴ Free public showing or playing of broadcasts: s.72. Exemption for free public showing of broadcasts to audience who have not paid for admission no longer includes

²⁹ Amended by Reg 14.

³⁰ Inserted by Reg 15.

³¹ Amended by Reg 16.

³² Amended by Reg 18.

³³ Amended by Reg 19.

³⁴ *Sony Music Entertainment (UK) Ltd v Easyinternetcafe Ltd* [2003] EWHC 62 (internet café in return for a fee recorded sound recordings downloaded by its customers on to compact discs. Argument that copying was for private and domestic use within s.70 rejected as café conducting a business operation for profit. Observed that the transmission of material via the Internet was a cable programme service for the purposes of s.70).

musical sound recordings contained within the broadcast.³⁵ Any venue that provides broadcasting on the premises which is not non-profit will now need a licence in respect of sound recordings contained within the broadcast (eg. MTV playing in a bar) as such use will now be infringing unless the user has permission. Any proposed licensing scheme in respect of such excepted sound recordings must be notified to the Secretary of State before it comes into operation.³⁶

8 **Technical Measures and Rights Management Information**

8.1 New rights of action are granted in respect of circumvention of technological measures and removal or alteration of rights management information. Technological measures (TM) are distinguished from electronic rights management information (RMI).

8.2 Broadly, technological measures are those which protect (rather than merely identify) a copyright work by controlling access to the work.³⁷

Eg. Content Scrambling System (CSS)

Region Code Protected (RCP) DVD

Access Codes - Sony Playstation consoles contain a code reader and each authorised computer games contains an embedded access code. If the computer game inserted into the console does not have a valid access code, the computer game cannot be played on the console.³⁸

³⁵ Amended by Reg. 21.

³⁶ s.128A(2) CDPA 1988 inserted by Reg 21(3).

³⁷ ‘Technological measures’ are defined as ‘any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program’ s.296ZF(1) CDPA 1988 as inserted by SI 2003/2498 Reg 24.

³⁸ Copy protected electronic works were already protected against devices designed to circumvent the copy control by s.296 CDPA 1988. And see *Sony Computer*

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Serial Copy Management System (SCMS), used on digital audio recordings to control the number of generations of copies that may be made from a digital recording

- 8.3 Rights management information is ‘any information provided by a copyright owner which identifies the work, the author, the copyright owner or the holder of any intellectual property rights or information about the terms and conditions of the use of the work and any numbers or codes that represent such information’.³⁹

Eg. Digital watermarks - invisible watermarks embed a unique digital code into an image that is invisible to the naked eye permanently ‘tagging’ the image. Various commercial programmes are available including PictureMarc (which is licenced to and bundled with Adobe Photoshop) and Digimarc (Digimarc Corporation);⁴⁰ SysCopP (MediaSec Technologies);⁴¹ and SureSign (Signum Technologies).⁴²

9 **Circumvention of Technical Devices Applied to Computer Programs**

- 9.1 A technical device is any device applied to a computer program that is intended to prevent or restrict acts that are not authorised by the copyright owner of that computer program and are restricted by copyright.⁴³

- 9.2 The copyright owner or his exclusive licensee AND any person issuing copies of the computer programme to the public or communicating it to the public AND the owner or exclusive licensee of any intellectual property in the device⁴⁴ ALL have the same rights of action as a copyright owner does for copyright infringement against:

Entertainment v Owen [2002] EWHC 45; [2002] E.M.L.R. 34.

³⁹ s.296ZG(7)(b) CDPA 1988 as inserted by SI 2003/2498 Reg 25.

⁴⁰ <http://www.digimarc.com>

⁴¹ SysCopP = System for Copyright Protection. <http://www.mediasec.com/>

⁴² Sure Sign. <http://www.signumtech.com/>

⁴³ s.296(6) CDPA 1988 as amended by Reg 24.

⁴⁴ s.296(2) CPDA 1988 as amended by Reg 24.

any person (knowing or having reason to believe it will be used to make infringing copies) who manufactures for sale or hire, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire or has in his possession for commercial purposes any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of the technical device⁴⁵

OR

publishes information intended to enable or assist persons to remove or circumvent the technical device.⁴⁶

10 **Circumvention of Technological Measures**

10.1 These rights of action concern effective technological measures (ETM) which have been applied to a copyright work other than a computer program.⁴⁷

10.2 Any person issuing copies of the work to which the ETM have been applied to the public or communicating it to the public AND the copyright owner or his exclusive licensee (if not the person issuing to the public)⁴⁸ ALL have the same rights of action as a copyright owner does for copyright infringement against:

any person who does anything which circumvents those ETM knowing, or with reasonable grounds to know, that he is pursuing that objective.⁴⁹

10.3 Circumvention for the purposes of research into cryptography that does not prejudice the

⁴⁵ s.296(b)(i) CDPA 1988

⁴⁶ s.296(b)(ii) CDPA 1988

⁴⁷ s.296ZA CDPA 1988 inserted by Reg 24.

⁴⁸ s.296ZA(3) CPDA 1988 as inserted by Reg 24.

⁴⁹ s.296ZA(1) CPDA 1988 as inserted by Reg 24.

rights of the copyright owner is permitted.⁵⁰

10.4 The copyright owner or his exclusive licensee (if different from the person issuing/communicating) AND any person issuing copies of the work to which the ETM have been applied or communicating it to the public AND the owner or exclusive licensee of any intellectual property in the ETM applied to the work⁵¹ ALL have the same rights of action as a copyright owner does for copyright infringement against:

any person who manufactures, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or has in his possession for commercial purposes any device, product or component, or provides services which

- (i) are promoted, advertised or marketed for the purpose of the circumvention of those measures or
- (ii) have only a limited commercially significant purpose or use other than to circumvent those measures, or
- (iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of

Eg: CloneCD (allows creation of copies of copy protected CDs that will play in any machine) and AnyDVD (software which allows circumvention of CSS or RPC DVDs)

10.5 Criminal offences are created in respect of commercial manufacture, importing, sale, hire etc of devices and services designed to circumvent technological measures.⁵²

10.6 Where ETM prevent permitted acts, there is provision to obtain a remedy by issuing a notice of complaint to the Secretary of State who has power to give directions to the owner of the copyright work or the exclusive licensee requiring him to make available

⁵⁰ s.296ZA(2) CPDA 1988 as inserted by Reg 24.

⁵¹ s.296ZD CPDA 1988 as inserted by Reg 24.

⁵² s.296ZB CPDA 1988 as inserted by Reg 24.

means to carry out the permitted act.⁵³

11 **Removal or Alteration of RMI**

- 11.1 Any person issuing copies of a work or communicating copies of a work to the public has the same rights as a copyright owner does for copyright infringement against anyone who knowingly and without authority either removes or alters rights management information where that person knows or has reason to believe by removal or alteration he is inducing, enabling, facilitating or concealing copyright infringement.⁵⁴
- 11.2 Any electronic rights management information which is either ‘associated with a copy of the copyright work or appears in connection with the communication to the public of the copyright work’⁵⁵ is protected.
- 11.3 The same rights as a copyright owner has for copyright infringement are granted to a person issuing or communicating copies of the work to the public against any person who distributes or imports for distribution or communicates copies to the public of a copyright work from which electronic rights management has been removed or altered.⁵⁶ Again, it is a requirement that the importer/distributor knows or has reason to believe that by doing so he is inducing, enabling, facilitating or concealing an infringement of copyright.
- 11.4 The same rights of action (against (1) those altering/removing RMI and (2) those importing/distributing such altered works) are granted concurrently to the copyright owner or his exclusive licensee where he is not the person issuing or communicating

⁵³ s. 296ZE CDPA 1988 as inserted by Reg 24.

⁵⁴ s.296ZG(1) and(3) CDPA 1988 as inserted by SI 2003/2498 Reg 25.

⁵⁵ s.296ZG(1)(a) and (b) CDPA 1988 as inserted by SI 2003/2498 Reg 25.

⁵⁶ s.296ZG (2) and (3) CDPA 1998 as inserted by SI 2003/2498 Reg 25.

copies of the work to the public.⁵⁷

12 **Duration of Copyright In Sound Recordings**

12.1 The term of copyright remains as 50 years but is now stated to run from:

- the end of the calendar year in which the recording is made, or
- the end of the calendar year in which it is first published, or
- if the recording is not published but is made available to the public by being played in public or communicated to the public, from the end of the calendar year in which it is first so made available⁵⁸

but in determining whether a sound recording has been published, played in public or communicated to the public, no account shall be taken of any unauthorised act.

13 **Injunctions Against Service Providers**

13.1 There is a new power granted to the High Court to grant injunctions against service providers who have actual knowledge of a third party using their service to infringe copyright.⁵⁹ This is important as it enables injunctions to be obtained against an ISP even where that ISP is not liable for infringement - for example where a file swapping service is being run via an ISP.

Eg. Napster and MP3 were easier to target as although the actual file swapping was still carried out peer-to-peer, the websites provided a central point through which people could make contact. All search traffic went via Napster. An injunction could be obtained under the new provisions against the ISP used by Napster.

⁵⁷ s.296ZG (4) and (5) CDPA 1998 as inserted by SI 2003/2498 Reg 25.

⁵⁸ s.13A(2) CDPA 1988 as amended by Reg 29.

⁵⁹ s.97A CPDA 1988 as inserted by Reg 27.

Quaere efficacy re: services like Gnutella, Grokster, LimeWire and Bearshare which allow file swapping without any centralisation by linking computers using the software.⁶⁰ Software such as Gnutella, enables users to act as ‘supernodes’ who can act both as clients and servers thus both supplying and receiving files. Supernodes can accept searches from other nodes if the requested files are not available on a particular node. When a user starts the software, his computer finds a supernode and accesses the network. This creates a two tier structure with groups of computer nodes clustered round a supernode. Users using Gnutella/Grokster etc can search without any information being transmitted via computers owned or controlled by Gnutella or Grokster.

- 13.2 Implements Art 8(3) of the Directive which states ‘Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right’.

14 **Transitional Provisions**

The Regulations are stated to apply to copyright works made, performances given, databases made and works first published either before or after 31st October 2003.⁶¹

However:

- (1) no act done before 31st October 2003 is to be regarded as an infringement of any new or extended right.⁶²
- (2) nothing in the regulations affects any agreement made before 22nd December

⁶⁰ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 259 F.Supp.2d 1029 (2003, Dist Ct CD California) (holding on a motion for summary judgment distributors of Grokster and Streamcast (Morpheus) software were not liable for contributory infringement as use was outside their control).

⁶¹ Reg.31.

⁶² Reg 31(2).

2002.⁶³

- (3) No act done after 31st October 2003 **in pursuance of an agreement** made before 22nd December 2002 shall be regarded as an infringement of any new or extended right arising by virtue of these regulations.

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⁶³ Reg 32(1).