

Control over end-use of digitised works

The Copyright and Related Rights Regulations 2003 SI 2003/2498 and the protection given to technological measures of control and electronic rights management information

"For two hundred years our copyright laws have encouraged and enabled storytellers, songwriters, recording artists, and filmmakers to create and disseminate a diverse body of expressive works that has no equal in the world. These works enrich our lives and entertain us. Their creation and distribution employs hundreds of thousands of people, and is supported by hundreds of billions of dollars invested in reliance on the protection afforded by copyright. All of that is at risk in this lawsuit."

"The Defendants have, in essence, unlocked the door to every video and record store in the country and invited every person to come in and copy as much as they want, in flat violation of the Plaintiff's copyrights."

Opening brief for MGM's appeal to the US Court of Appeals for the 9th Circuit from the decision of US District Court for the Central District of California giving summary judgment for Defendants in MGM & others v Grokster & others, 18 August 2003.

The problem – file sharing

1. Once a copyright work is in a digital form multiple anonymous copies can be made in a very short space of time with no loss of quality. Files containing the digital copy can then be "shared" (i.e. copied) over the internet throughout the world without any control by the rightsholder. How can this be combated?
2. File sharing involves a series of infringing acts, including infringement of the new communication to the public right. But proceedings against the individual file sharers are impractical as anything other than scare tactics. Proceedings against the

distributors of the file sharing software are having little current success because of the decentralised nature of their services.

3. PR campaigns seem to be having little effect. Some jurisdictions have introduced a blank tape-type levy on MP3 players.
4. Providing an easy cheap and lawful way to access copyright material on the internet may damp the enthusiasm for file sharing but without further protection a work downloaded lawfully is as easy to share as a work digitised unlawfully.

The answer – effective technological measures and electronic rights management information.

5. Technological measures which aim at controlling or prohibiting file sharing or which make it possible to track down the original infringer are likely to be the most promising weapon of the rights holder. Regulation 24 of the CRRR 2003, inserts new CDPA 1988 ss296ZA – 296ZG, implementing Articles 6 & 7 of the Directive requiring member states to provide adequate legal protection against the knowing circumvention of any effective technological measure or removal of electronic rights management information:

S.296ZF defines "effective technological measure".

A "technological measure" is any technology, device or component which is designed, in the normal course of its operation to protect a copyright work (other than a computer programme¹) from use not authorised by the copyright owner and restricted by copyright. Such measures are "effective" if the use of the work is controlled by the copyright owner through (a) an access control or protection process such as encryption, scrambling or other transformation of the work or (b) a copy control mechanism, which in either case achieves the intended protection.

S.296ZA prohibits circumvention of such measures.

¹ Technical devices applied to computer programme are protected by a revised s.296 CDPA 1988.

A copyright owner and the person who issues or communicates to the public a copyright work to which an effective technological measure has been applied has the same rights against a person who does anything which circumvents those measures, knowing or with reasonable grounds to know that he is pursuing that objective, as the copyright owner has in respect of an infringement.²

SS.296ZB, 296ZC and 296ZD are aimed at combating devices and services designed to circumvent effective technological measures.

A person commits an offence, and the copyright holder has a claim against a person who deals (either in the course of business or to an extent so as to affect prejudicially the copyright owner) with any device primarily designed to circumvent technological measures. A person who provides, promotes, advertises or markets a service the purpose of which is to enable circumvention is at similar risk of proceedings or prosecution. In both cases innocence of the purpose of the device or service is a defence.

S.296ZG protects electronic rights management information.

The rightsholder has a claim against any person who, with guilty knowledge, removes such information or who distributes copies of the work from which the electronic rights management information has been removed.

S.296ZE is aimed at preventing technological control over acts permitted without the authorisation of the copyright owner.

An end user can complain to the Secretary of State if a technological measure prohibits any of a limited subset of permitted acts in relation to works to which the user has lawful access, given in a new Schedule 5A CDPA, which include time-shifting (s.70), ephemeral recordings by broadcasters (s.68) and educational (ss.32, 35 and 36) and other uses, including research and private study (s.29). The permitted acts do not include fair dealing for the purposes of criticism, review or news reporting.

Technological measures and electronic rights management in practice

6. The first stage in protecting unlawful file sharing is the use of technological measures to prevent the initial digitisation of the physical copy of the work into shareable form. Eg Sony Key2Audio.
7. However the rightsholder may wish to provide digital copies of the work to paying customers (see iTunes). In order to restrict dissemination to lawful users such copies could be accessible only on internet sites behind password protected access gateways. The gateway is likely to amount to an effective technological measure the circumvention of which is prohibited by the new provisions.
8. But a file downloaded lawfully is as vulnerable to onward sharing as an infringing copy. Such files may therefore contain effective technological measures which restrict or control aspects of their use.
9. In order to deter further the circumvention of such measures the rightsholder may insert unique data into the lawful copy of the work which enables the identification of the source of the original infringement. Such data would be protected as electronic rights management information.
10. The statutory restrictions on the reach of effective technological measures are in practice fairly limited. The complainant must already have lawful access to the work. The permitted use requirement does not apply to works lawfully made available for downloading from the internet.

Jacob Dean. Andrew Monson. April 2004.

² There is an exemption for research into cryptography where the researcher does not affect prejudicially the rights of the copyright owner.