

Amendments to the Copyright Act: 1988

Implications for the public's use of information

By Paul Mobbs, <mobbsy@gn.apc.org>, October 2002.
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The law on copyright in the UK is shortly to be revised, and these revisions could introduce wide-ranging changes to the way we have traditionally accessed and used information and media/multimedia recordings.

The main points of the proposed scheme of amendment, proposed by the Patent Office, are:

- # Amendments to the rules on 'fair dealing' could damage the personal use of material, and potentially restrict investigative reports from accessing and using unpublished reports as part of their work, and also prevents local organisations for raising money at events where they play recorded music.
- # The regulation of 'digital rights management' poses a serious risk to privacy and personal information due to the poor interaction of controls over the automated collection of sensitive personal data.
- # The proposals to make copyright infringement a criminal offence require a means for people to take action against unfounded threats of action in order to prevent the threat of legal action being used as a method of intimidation.
- # The proposals to allow action for infringement against intermediaries, like Internet Service Providers, provide a means for rights holders to threaten or take action against a 'soft target' to remove material online rather than against the person allegedly committing the infringement.

This briefing looks at the implications of these changes. It also explains the process for objections to these changes – which must be made by October 31st 2002.

The process

The global rules on intellectual property – copyrights, trade marks and patents – are set by the World Intellectual Property Organisation (WIPO). In 1996 they developed new treaties covering the protection of copyright in the 'Information Age'. Around the same time the European Commission were revising the European framework for the protection of digital information, and used the content of the new WIPO treaties to devise their new legal framework. The new Directive – *Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society* – came into law in June 2001.

Countries and trading blocks – such as the European Union – are required to implement the WIPO treaties. Once a certain number of countries have done this it becomes part of international law. The European Commission have set a deadline of December 22nd 2002 for member states to implement the Directive. In the UK, the Patent Office, in association with the Department of Trade and Industry (DTI), manages intellectual property legislation. They issued a consultation report containing proposals for modifying the law in the UK – the *Copyright, Design and Patents Act 1988* – on 7th August 2002. Comments on the proposals have to arrive at the Patent Office by October 31st 2002.

To enable implementation by December 22nd, the Patent Office will work with the DTI to produce a draft

Statutory Instrument (SI) before early December. When the UK joined the European Community it decided to enact European laws via secondary legislation – *Statutory Instruments* – rather than primary legislation – *Acts of Parliament*. However, there are traditionally many legislative instruments that need rushing through before the Christmas recess – so these new proposals may get waived through with less attention than usual.

The consultation on this process gives us two opportunities to lobby on these issues:

- Firstly, by responding to the Patent Office’s consultation (this briefing contains background information to assist you if you wish to respond);
- Secondly, by lobbying MPs on the approval of the statutory instrument when it comes up before Parliament (details of this will be announced at a future date when there are more details available).

For those of you who wish to respond to the proposals you should first read the consultation paper. This is online at:

<http://www.patent.gov.uk/about/consultations/eccopyright/index.htm>

Paper copies are also available from the Patent Office’s Copyright Directorate – contact:

Address: The Patent Office, Harmsworth House, 13–15 Bouverie Street, London EC4Y 8DP.
E-mail: copyright@patent.gov.uk
Tel: 020 7596 6513
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Changes to the fair dealing rules

For most people, one of the most significant changes resulting from the Patent Office’s proposals will be the changes to the rules on ‘fair dealing’. Fair dealing is a principle contained in Chapter 3, Part 1 of the Copyright, Designs and Patents Act (a detailed description is provided in section 28 of the Act). This recognises copyright, but describes certain actions as ‘fair’ by those those using copyright works. The purpose of the fair dealing rules in copyright law is to prevent the monopoly of copyright being used to prevent private, educational and certain public uses of information. For example, the rules give rights to journalists to quote works as part of their work – which otherwise would not be allowed under the strict definitions of copyright.

Annex A, part 4, of the Patent Office’s proposals lists a number of changes to the rules on fair dealing. Some are arguably beneficial within the context of how copyright has been applied. But there are also some problems created by these amendments.

It’s important to note that Article 5 of the EC Copyright Directive, which introduces rules on fair dealing, is not compulsory – member states may interpret Article in accordance with their own traditions on fair dealing. However, when implementing the Directive, the UK must choose an ‘all or nothing’ approach to Article 5. They may implement it, or make up their own rules on fair dealing without specifically referring to Article 5. Therefore, in relation to fair dealing, we’ve everything to play for when interpreting the scope of fair dealing under the other, compulsory parts of the Directive.

A. Private use and research

In relation to private use and research (Annex A, part 4.1), the old requirements for ‘acknowledging the source’ of information is removed, and instead ‘sufficient acknowledgement’ must be given. This is not well defined. The term ‘sufficient acknowledgement’ is defined in section 178 of the Act, and there is no specific

revision to the term proposed by the Patent Office. But the old usage of the term doesn't work well with the proposed revisions.

The issue is that who decides what 'sufficient acknowledgement' is? – the owner of the work, the person using it, or a court? The term 'sufficient acknowledgement' is not specifically part of the Copyright Directive, and so there is no argument to support its use as part of the revisions to the Act.

The current wording of section 29, on the fair dealing rights for research and private study, is far better – it does not provide any restriction on acknowledgement. If recognition is needed, then the current section 29(1A) of the Act (to be deleted) would be a good guide. It states that private study does not infringe the use of a database where the 'source is indicated'. Therefore, if recognition is required, then a requirement to 'report the source' of a quotation or extract would be far better. It is clearer for the person deciding the extent of the reference – although there would have to be one.

A grey area within copyright law is the copying for personal use of a non-literary work. This is important within the context of the current changeover of media standards – from vinyl records/cassette tapes to CDs and digital recording (such as MP3). When you buy a recording you've licensed the material recorded on that media, not the recording media itself. So what do people who have invested in the licenses of record or cassette collections do as these formats become redundant? There is no expressed 'fair dealing' clause for copying to update format.

So far the recording industries have lobbied hard to ensure that people have to pay again to purchase copies of these licensed recordings on new media – because it is in their financial interest to make the public 'pay again' for copies of recording that they have already licensed. But the government must take account of the potential economic and social impacts if people can no longer play their old recordings. In the same way it's difficult to get a 78 rpm record player, in a few years a turntable or cassette deck could be equally difficult to obtain. Unlike books, paintings or sheet music, technologically encoded works can be made obsolete, and so denied use by their licensed owners.

It is possible to argue, from the point of view of Article 5(2)(b) of the Directive, that people are allowed a fair dealing right to copy their old music collections so long as that is for personal use and they already own a licensed copy. In terms of the 'fair compensation' that this paragraph provides, the individual has already paid their license fee – the originator of the work has been paid. Provided that they retain the original copy of the recording, to show they had already licensed the recording for private use, the law should not bar the copying of recorded copyright works where the format they are recorded onto is becoming redundant. Such a fair dealing right would allow people to copy their records or cassettes, onto CD or encode them to MP3, to retain the use of the license they had originally purchased.

It also worth noting, if replying to the consultation proposal, that the regulatory impact assessment (RIA) totally missed the costs to the public of having to re-license their existing recordings. Instead the RIA concentrated solely on the issue of music piracy – which in this context is not relevant because people have already paid to buy a license for their recording.

B. Quotation or use for reporting and critical review

A significant change has been made to section 30 of the Act (Annex A, part 4.2). This section creates fair dealing in relation to 'criticism, review and news reporting'. Currently this right extends to all works. But the new amendment restricts this right to works that have 'been made available to the public'. This term of 'available to the public' is outlined in a new section 30(1A). This says that a work is made available to the public if the works owner makes it available to any member of the public – but contains a caveat that if the supply of the work is unauthorised then it has not been made available.

The impact of the revised section 30 will be that any investigative journalist or member of a campaign group who quotes or uses a private, internal report or other document produced by an organisation could

be sued for copyright infringement. This amendment has serious implications for the democratic process as copyright could be used as a threat to prevent disclosure of information by the media or campaign groups.

It is possible to argue that the revisions of section 30 does not accord with the Directive. The amendments proposed by the Patent Office implement Article 5(3)(d) – the critical review of works, but they misrepresent the Article 5(3)(c) which relates to the use of material for news and current affairs. Article 5(3)(c) contains no limitation on material that has already 'been made available to the public'.

To correct this problem we need to de-couple the interpretation of paragraph (c) from (d). We should argue that where the use involves an issue of public interest the 'public availability' clause should not bar the use of the copyrighted work.

C. Use of sound recordings by non-profit organisations for social events

Under section 67 of the Act, non-profit organisations, clubs or societies can play sound recordings at their events. The condition on such use is that any charge for access to the event only benefits the work of the organisation itself, and that the purposes of the organisation are to advance religion, education or social welfare.

The Patent Office propose to amend this section requiring that any admission charge only covers the cost of mounting the event. No proceeds would be allowed to fund other work outside of that event. Although a minor revision – it should not, theoretically, affect voluntary collections or contributions by those attending events – it may affect the well-being of local organisations who hold dances or discos to raise money for a local campaign (as many local campaign groups do). Therefore this amendment could have a serious impact on the use of social events to raise money to support local charitable causes or campaign groups.

It should also be noted that the regulatory impact assessment – a study produced with all new legislation to gauge the impact of new legislation of the costs to society as a whole – completely failed to note the impact of the amendments section 67 on local community organisations. In general, the main aim of the RIA is to consider the effects upon business, not on the general public.

Digital rights management and the risks to personal information

One of the more significant parts of the amendments is the introductions of rules in relation to 'digital rights management' (DRM) – the use of technology to enforce intellectual property rights. This is implemented under Article 7 of the Directive, and is covered in Annex A, part 6 of the Patent Office's proposals. The main concern of the amendments is to make the removal of any data from digital information that identifies the rights owner an offence.

In practice, things are a little more complicated. Digital watermarking – where data is encoded invisibly within the digital information – is simple to enforce as a 'passive' process. If you have a file where the data is missing or corrupted then you could be liable for legal action. Problems also arise where rights are 'actively' enforced – such as the collection of data and its forwarding via and Internet connection. This is especially important because the data created by people using copyrighted information has the potential for misuse or abuse because of the information it discloses about the individual.

For example, any data that your computer collects and forwards to the rights owner could be used to identify your personal preferences, hours of work, geographical movements, and other information that could assist a highly invasive profile of your personal habits. The main control over such movements is the Data Protection Act (DPA). But the restrictions of the DPA only affect the collection, sale or transfer of data at the most general level. Providing the rights holder notifies the intended use of any information gathered from the users of works controlled via DRM those uses are permitted. Problem is, the sale and transfer of

personal information has always been difficult to control by those identified in the data that is traded.

Paragraph 57 of the Directive's recital (the introductory section) states that there should be measures to protect people's privacy as part of any system of DRM. It is not clear whether the Data Protection Act provides an adequate framework for this since under DRM the user has very little control over the data collected. The interpretation or 'processing' of the data collected via DRM is also an important aspect of compliance with the DPA. In particular, if a person's selection of files, or database queries, or other use of information identifies their personal circumstances or preferences, there is an argument that the information could constitute 'sensitive personal data' – for which the controls are far more rigid.

For those who wish to control the disclosure of information via active DRM there is a simple solution – a 'two way' firewall on their network connection. However, a two-way firewall is not standard under the most widely used operating systems such as Microsoft Windows. Window's firewall only filters data on the way in – if you want two-way protection this must be installed by the user. By filtering the outgoing traffic the firewall can intercept and block DRM communications from their system to the system of the rights owner.

The problem with using a firewall to restrict DRM traffic is that the applications reading copyright works may not allow you to block such transmissions. If you do they will fail to operate (for example, Microsoft's new proposals for the 'Palladium' rights management system). Also, if you block DRM transmission you could be accused of seeking to evade or alter rights management information under the new section 296ZE that the Patent Office propose to insert into the Copyright Act 1988. However, to secure a legal action the rights owner would have to prove you were consciously seeking to infringe copyright by doing so.

There are two significant changes required to the Patent Office's proposals:

Firstly, there should be a specific reference to distinguish passive (encoded data) and active (collected and/or transmitted data) DRM systems. Altering data passively encoded within digital information has few computing applications – other than evading copyright! But there are good reasons to block data that is actively stored and transmitted from your system to another. For example, improving the security of network connected computers, and consciously preventing the disclosure of personal information by your computer. There should be a clause, perhaps some sort of 'fair dealing' provision, that permits users to block the transmission of DRM data where they believe this would compromise the security of the computer system or their personal privacy.

Secondly, whilst passive DRM has few privacy implications, active DRM over the Internet represents a potential invasion and abuse of personal information. More than that, if data is not encrypted or depersonalised as part of DRM transactions online, then sensitive personal data could be disclosed via interception or monitoring of DRM data communications over networks. This issue is not considered within the amendments to the Copyright Act, or directly under the Data Protection Act. There must therefore be a specific clause in the amendments to the Copyright Act or the Data Protection Act that governs the use and protection of data gathered via DRM. This should seek to protect privacy, both from misuse by those collecting DRM information, and by addressing the potential for the interception DRM data when in transit across networks.

Criminal acts and groundless infringement claims

Under the current Act, only the large scale counterfeiting or pirating of copyright works is a criminal offence. Criminal actions can be brought under current legislation by local trading standards offices (part of local authorities in the UK). All other infringements of copyright are civil offences – requiring legal action by the holder of the rights against the individual making or using infringing copies – and rarely result in legal action because they are difficult to detect and prosecute.

Under the Patent Office proposals the infringement of copyright for any 'business' use, or the infringement

of copyright by an individual to the extent that it would 'affect prejudicially' the rights owner, will be prosecuted as a criminal offence. To obtain a prosecution, it would have to be shown that the person knew or had reason to believe that the copy they possessed or communicated infringed copyright. A successful prosecution could result in a fine, or prison, or both.

Generally there is no problem with this amendment, providing that an innocent person is able to prove they were unaware of any infringement of rights (but even then they could be subject to a civil action for damages). A problem will occur when organisations use the threat of action to intimidate or coerce the users of information.

Under other intellectual property legislation there are clauses that allow persons continually threatened with legal action by a rights holder to obtain a court order preventing future threats (e.g., see section 21 of the *Trademark Act 1994*, 'remedy for groundless threats of infringement proceedings'). If an organisation continually threatens legal action for infringement (which has serious implications for businesses and registered charities) without any action being brought in a reasonable time those threatened can get an order to prevent such future threats. The court assesses the claim, rules on its validity, and may issue an order to prevent future threats being made. No such clause exists for copyright – which is a serious deficiency in the Copyright Act.

The argument relating to the issue of 'should copyright infringement be a criminal offence' is essentially one of balance. There is nothing wrong in principle where a clear and serious infringement takes place. What is more serious is the way organisations could use the threat of criminal action to intimidate organisations or individuals. Therefore, to ensure balance, if infringement is to become a criminal offence then there should be a comparable right for the public to seek an order preventing groundless or frivolous threats of legal action from rights owners. To obtain such an order all a person would have to do is provide evidence that the contested work is not owned by those making a claim of infringement, or that the use they are putting it to is clearly a fair dealing right for which the rights owner has no claim.

There is a clause within the Directive – Article 6(4) – which requires that technological protect measures for copyright works do not inhibit fair dealing rights. Currently there is no scheme to implement this objective. The government is looking at a voluntary scheme with the trade associations of copyright holders. But because the trade associations regard Article 6(4) as a 'hackers charter' it is likely that any scheme finally agreed with the copyright lobby will be difficult for the public to use.

The current proposal to implement Article 6(4) is that those who believe their fair dealing rights are being obstructed can complain to the government – who will "investigate". But in practice, providing legal rights to enforce fair dealing would be a more effective means of persuading rights owners that they should not obstruct fair dealing.

It may therefore be more effective to wrap up both the means to counter restrictions on fair dealing, with another right to restrict groundless infringement claims, and pack them up within the same section of the amended Act. The power to take action under this section should also, like copyright infringement, be transferred to local trading standards offices. These are far more accessible to the public than a government department.

Such an amendment would strengthen the rights of those routinely using information as part of their work, or who use information online. The fact that such an order could be granted via your local trading standards – which would not reflect well on those making false claims or obstructing fair dealing – may restrict the use of the new copyright law as a means of limiting the use of information fairly, or berating opponents or those running information services, such as web sites, who are lawfully providing information to others.

Controlling infringement online – 'the ISP as unpaid policeman'

For some time, those running information services on behalf of others have been 'piggy in the middle' on issues like intellectual property infringement and defamation. They have in the past been prosecuted for the actions of their users. Recent EC directives, such as the E-Commerce Directive, have sought to redefine the role of the service provider as an 'innocent communicator' of information. Likewise, Article 5(1) of the Copyright Directive exempts service providers from the 'reproduction right' in instances where information is copied via their systems. However, whilst it may appear that the Directive may help ISPs on copyright matters, it does the opposite.

Article 8(3), along with paragraph 59 of the Directive's recital (the introduction), creates a system whereby 'intermediaries' can be enjoined to take action against one of their users – even though they themselves are not liable for any infringement themselves. What Article 8(3) states is:

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.

The position of the Patent Office is that no changes to the law are required to implement this Article because rights holders can already apply for 'injunctive relief'. But it actually goes further than previous infringement cases because no fault is required to be demonstrated on the part of the intermediary. The intermediary must then take action themselves against the user by whatever means specified in the injunction. Also, if the user is not clearly identified within the injunction, the rights of the user to respond to such an action are limited – and could only amount to suing the ISP, rather than the rights holder who launched the action.

In any case, even without specific legislation, the Directive still has power. Under the principle of 'direct effect', if the government do not legislate on Article 8(3) it will come into force in its own right and be usable in court by rights holders. Therefore inaction in this case by the Patent Office actually has a negative effect, because it leaves the field open to rights holders to use the Directive untranslated into the traditions of UK law. Law would effectively be made the first time a rights holder brings a test case. Therefore this clause does require articulation by the Patent Office in order to provide a legal framework for both ISPs and rights holders to follow.

What this clause actually implements is a system of 'notice to takedown' (NTD) similar to that under the infamous US *Digital Millennium Copyright Act* (DMCA) – albeit by another and less obvious name. However, whilst the NTD procedures under the DMCA can be appealed and reversed by those involved, there is no such procedure under the Directive. According to representatives of the Patent Office, a formal NTD procedure was considered unachievable by the intellectual property staff of the European Commission – so they implemented this more stealthy option instead.

The procedure is also far more subtle than it appears. Rights holders are far more likely to take action against an ISP, rather than their users, because the ISP has assets and a business to lose. The user posting that information may not have any significant assets to lose, making it difficult to enforce action against them. Therefore this procedure, or more likely just the threat of it because if the costs imposed on the ISP, is more likely to achieve a result than if the rights holder had to pursue an individual for infringement.

In response to this, some ISPs advocate a formal NTD system like that of the DMCA. In fact a copyright-industry supported group – *Rightswatch* [see <http://www.rightswatch.com/>] – has been lobbying for precisely this in the UK. However, the pressures behind the work of Rightswatch are the same as those that in the USA have resulted in draconian changes in the law on intellectual property, against the public interest.

The DMCA does have a procedure for users to get their information reinstated if they can prove the rights owner had no case – but it is complex to use. The benefit for the user of using injunctions is that, if applied

directly to them, they can be contested directly rather than retroactive (as under the DMCA). In obtaining an interlocutory injunction the rights owner must also agree to make good any losses on the part of the defendant if the injunction is subsequently shown to be groundless (the DMCA has something similar, but the action brought is for perjury by those bringing the NTD rather than compensating those subject to the NTD order).

The ability to injunct ISPs rather than users is likely to be a recipe for informal legislative censorship – but a censorship by threat and bluff rather than by formal legal action because the ISP will have more to lose, and perhaps less conviction to fight, than their users. Therefore we must oppose these procedures. Instead, where a user is identifiable, all the liability of the intermediary should be to offer-up the name and address of the user. The rights owner should then pursue the user, who is alleged to be guilty of an offence, rather than the ISP who in law has committed no infringement.

The only time an intermediary should in any way be liable for infringement is where they refuse to disclose the identity of the user, or if the responsibility for infringement cannot be determined by the intermediary (i.e., it is not one of their users) and they subsequently refuse to take down the infringing material. The disclosure of a user's identity should also only take place where the ISP can identify a breach of intellectual property rights – that is the material is on their system, and not someone else's (e.g., linked to the ISP's site by a hyperlink or some other process). Such an exemption to injunctive relief could be granted via a clause in the amended Act, and it would not be in breach of Article 8 since the intermediary would still be involved as an 'expedient' part of the process – providing the contact address of the user.

Responding to the consultation, and after

Those who wish to make representations to the Patent Office on the amendments to the Copyright Act must deliver their comments to the Patent Office by **Thursday October 31st**.

The matters raised in this report are wide ranging. It is up to those responding to the Patent Office to decide which issues they may like to make representations upon, if any. Referring to the issues raised in this report –without quoting word for word – would be helpful as it raises the 'noise' on the implications of tightening copyright controls. It's also important for the subsequent stage, when the draft order goes before Parliament for approval. The more members of the public become involved in the process, the more 'politicised' it will become.

The options for lobbying MPs will be considered at a later date when we have more information about the responses of the Patent Office to the consultation process. At some point the Patent Office/DTI will bring a draft statutory instrument to Parliament. At this point we can see how far the Patent Office have moved in balancing public interests with the interests of rights holders.

If you have any feedback or comments upon the information in this report please contact Paul Mobbs – mobbsey@gn.apc.org

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