



LEGAL ISSUES FOR INFORMATION PROFESSIONALS VIII¹: UNDERSTANDING THE RECENT CHANGES TO COPYRIGHT LAW²

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Abstract

This article considers the recent changes in UK copyright law and the implications of them for information professionals. It sets the background to why these changes have come about. The most important changes are those on database rights and those resulting from the EU Directive on copyright in the information society. The latter has imposed new rules regarding so-called Technical Protection Systems, Rights Management Information and copyright for commercial research purposes. Suggestions are made for what will qualify as commercial copying or what will not. The article concludes with some thoughts on the management of risk in the current environment.

Introduction

Copyright always has been, and will continue to be, a tension between rights-holders and users. Rights-holders (in the case of serials, this usually means publishers) have always been concerned that they receive reasonable recompense for any copying of their works that occur, and wish to retain the right to decide who may, or may not, copy their works. They are further

¹ Part VII, Oppenheim, C., Legal issues for information professionals VII: How UK Copyright Law has changed with the EU Directive, *Freepint*, 2004, <http://www.freepint.com/issues/190204.htm#feature>

² Based on a talk given to a UK Serials Group one-day meeting, London, 7 June 2005. It must be stressed that I am not a lawyer and can accept no responsibility for any action (or lack of action) readers might take as a result of reading this article. If you are in any doubt about the legality of some copyright-related action you propose to take, check with a lawyer! In addition, the views expressed here do not, of course, necessarily reflect those of my employer.

concerned about piracy, and about unauthorised but erroneous copies circulating that damage their reputation as reputable publishers. On the other hand, users want easy and unfettered access to serials publications, ideally with the ability to annotate, forward, store and paste into other documents extracts from such serials, preferably with minimum regulation. Serials librarians, needless to say, are caught in the middle of this tension, trying on the one hand to satisfy their patrons and to be helpful to them, and on the other hand, anxious to respect copyright and have the patrons abide by the rules that the law (and licences) dictate.

Up until the 1990s, this tension, though present, was in practice reduced by the limitations of technology. There was (and is) only so much photocopying a patron can undertake. Furthermore, the copies made are not as good quality as the originals, they are costly to produce, it takes a lot of time to make the copies and anyone undertaking large-scale photocopying is likely to be noticed by library staff. With the advent of networked electronic information, all this changed. It is now trivially easy for an individual to rapidly make a perfect copy of a serials publication, to forward that copy to many people (or indeed to place it on a Web site), and to do this at little or no cost and in a manner that makes it difficult to police. It is therefore not surprising that publishers are concerned about loss of control.

How have the rights-holders responded?

The software, music and film industries have responded to the challenge posed by the networked environment in a negative fashion; in other words, rather than taking the view that this is a new business environment that requires innovative solutions and that it is an opportunity rather than a threat, they have worked towards restricting the ability of users to make copies of digital materials. This is typified by infringement actions against those who file share music or provide software that allows file-sharing, and by the misleading statement made by the Federation Against Copyright Theft that is currently appearing in UK cinemas that making a copy of a film in a cinema is “a criminal offence”. (It is only a criminal offence if the intent is piracy or similar; in other circumstances, it is a civil offence).

In addition to this assertive use of the law, the rights-holders have adopted a three-pronged approach to the perceived threat; they are developing so-called Technical Protection Systems (TPS) to ensure only those with suitable ID can access digital materials (the familiar ATHENS ID and password system is a good example of such a TPS); they are increasingly locking clients into contracts and licences which restrict what the client can or cannot do with the digital materials and makes it a breach of contract if the client does something

unauthorised with the materials; and they have successfully lobbied for a strengthening of copyright law in their favour. Serials and other publishers have not been in the vanguard of the development of TPS or lobbying for changes to the law, but they in general support these moves.

Changes to the law

The focus of this article is the situation in the UK, but it is worth noting that the pressure to change the law of copyright more in favour of copyright owners has been world-wide. On a global scale, the lobbying has been through the World Trade Organisation (WTO) to get it to amend its TRIPS (Trade-Related aspects of Intellectual Property) Agreement; and the World Intellectual Property Organisation (WIPO), the UN Special Agency responsible for the maintenance of international intellectual property agreements, of which copyright is one key area of interest³. At a regional level, the major lobbying effort has been carried at through the European Union, and indeed, most of the changes to UK copyright law in the last 15 years have come about from EU Directives rather than through the initiative of the British Government. Once passed by the Council of Ministers, an EU Directive has to be implemented into member states' national laws within a specified period of time (typically, but not invariably, two years). Failure to do so means the Commission can prosecute the member state in question and the European Court has the right to then impose the Directive on the recalcitrant member state's legislation, though I do not think such a drastic step has ever occurred in the copyright arena.

At a national level, the most important developments have been in the USA, which has significantly strengthened its copyright law in favour of owners in the last 20 years. US Congress continues to be the subject of much lobbying and draft Bills for further changes to the law.

The changes to UK law

There have been a number of major changes to UK copyright law since the passage of the CDPA in 1988. Other than an addition to the exceptions to copyright for Visually Impaired People, all have been the result of EU Directives. They include the extension of the standard lifetime of copyright from 50 years *post mortem* to 70 years; the introduction of database right; changes to the way the law protects software; and the recent EU Directive on

³ As an aside, it is worth noting that much of the role of WIPO has been usurped by the WTO in recent years.

copyright and related rights in the information society which resulted in significant changes to much of UK copyright law at the end of 2003.

Database right and *British Horseracing Bureau versus William Hill*

Database right has been embedded in UK law since 1997. The UK law of databases is particularly complex; a brief explanation can be found in⁴. Briefly, a database enjoys database right if there has been a minimum amount of resources expended (in terms of time, money or both) in creating the database. To achieve copyright, however, in addition, the database must show some degree of creativity in terms of the selection or arrangement of the contents. Many commentators have stated that a database can either enjoy copyright or enjoy database right. This is incorrect; a database can either have no protection (because there has been no or minimal effort expended in its creation), have database right alone because there has been effort, or database right plus copyright (there has been effort expended AND there is creativity in the selection or arrangement of items). I cannot conceive of any database which would enjoy copyright and would not enjoy database right as well.

Because of the broad definitions in the Directive, and the resulting UK legislation, many materials encountered by readers of *Serials* in their professional lives could be a database, ranging from what information professionals would recognise as a database (such as *Chemical Abstracts*), through issues of journals, newspapers, to Web sites and even to entire libraries.

In the recent case *British Horseracing Bureau versus William Hill*, the Bureau (BHB) sued William Hill, the well-known firm of bookmakers, for database right infringement because William Hill had copied and displayed BHB's database of previous form in UK horse races without payment or licence. The case was taken all the way to the European Court of Justice, which surprised most experts by deciding there was no database right in the BHB database, and therefore William Hill was entitled to copy the material. The reason given was that because there was no effort or money spent as such in creating the database (it just fell out "naturally" from BHB's task of regulating the UK horseracing industry), there could be no database right. The same logic would presumably also apply to databases such as British Telecom's White Pages telephone directories, which are created for the purpose of

⁴ Giavarra, E. and C. Oppenheim, EU Database directive: some clarifications, *SCONUL Newsletter*, 1997 (12), 6-7.

managing BT's client base and only incidentally does a database with market value fall out of it. Similar logic might be also applied to a library OPAC.

This surprising result has caused alarm amongst some database producers, and I suspect sooner or later some major players, such as BT, will lobby to have the law amended so that databases like a White Pages Telephone Directory continue to receive database right protection.

The changes caused by the EU Directives on copyright and related rights in the information society

The changes to UK law have received wide publicity, so this part of the article merely summarises the most important of them. The most important changes in my view are as follows:

1. A reduction in the fair dealing and library privilege exceptions so that they now only apply to research or private study carried out for a non-commercial purpose
2. New civil (and in a few cases criminal) offences for by-passing or tapering with TPS or with rights management information for the purpose of infringement, to encourage infringement, or to conceal infringement.
3. A new restricted act (i.e., something that cannot be done without the permission of the rights owner) of communicating information – in practice, putting copyright material on the Web, e mailing it, or placing it on an intranet without the permission of the copyright owner. This latter new right for owners was already implicit in UK copyright law, but has been made explicit.
4. A new exception to copyright for material that is automatically copied by one's computer into a cache as a result of simply viewing it on screen. Strangely enough, until the passage of the Statutory Instrument implementing the Directive, this was infringement and therefore virtually everyone who was viewing things on screen was, without realising it, infringing copyright. However, no copyright owner ever bothered to protest, let alone sue.

The Directive gave the UK Government the option of significantly expanding the numbers of exceptions to copyright (i.e., acts of copying that, despite copyright law, were permitted without having to pay fees or ask permission), but the UK Government chose not to do so, other than for Visually Impaired Persons as noted earlier. Equally, it chose not to reduce the number of exceptions, which it also might have done.

I believe the most contentious part of the new law is that concerning TPS. (Not all commentators agree with my view; for example, Burrell and Coleman⁵ believe the furore over TPS is over-done.) A TPS may well prevent a library patron from doing on screen what he or she is used to doing with printed materials, namely simply browsing without copying. The Directive anticipated this problem and required member states to set up methods whereby if someone wanted to (say) browse, or perhaps make a fair dealing copy or a copy for preservation purposes, and the TPS stopped them, then the TPS must be lowered to allow the person to do the *bona fide* act. The UK Government has interpreted this requirement in a clumsy manner, which favours the rights holder. If a patron or librarian encounters such a problem, he or she has to make a formal written complaint to the Secretary of State for Trade and Industry, who is responsible for administering the CDPA. The Secretary of State, after considering the matter, may (not “must”) then issue an instruction to the copyright owner instructing the owner to lower the barrier in this case; if the owner refuses to co-operate, the aggrieved library patron or librarian must then sue the copyright owner in the Courts. Such a complex, slow and expensive process will clearly deter most individuals from pursuing the matter, and indeed, to my knowledge, no one has made such a request. At the very least, in my view, it should be a criminal offence if the rights owner fails to comply with such a request from the Secretary of State, and ideally there should be a much simpler mechanism for requesting a lowering of the barrier. To make matters worse, if one CAN access the material by signing a licence, no matter how expensive and even if it is non-negotiable, then one cannot make any complaint at all.

The law will therefore not help an individual who wishes to browse something in electronic form but is prevented from doing so by a TPS, which can be avoided only by paying for an excessively expensive⁶ licence.

Protection for Rights Management Information is much less contentious; this ensures that no one can without permission, for the purpose of infringement, or concealing infringement, change or delete statements such as “© Charles Oppenheim 2006; all rights reserved” or metadata identifying the owner, when it was created and terms and conditions for use. Of course, if a library cataloguer came across erroneous rights management information, he or she is entitled to correct it, as the object would not be infringement.

Commercial copying

⁵ Burrell, R. and A. Coleman, *Copyright exceptions: the digital impact*, 2005, Cambridge, Cambridge University Press.

⁶ In terms of value for money to the user.

There has been a lot written about what constitutes commercial copying in the new environment, and it must be stressed that what follows is my opinion. The new law states that copying (either fair dealing by the person him or herself or library privilege copying by the librarian based on a signed copyright declaration form from a patron) for research or private study is no longer permitted if the research or the private study is for a commercial purpose. There is no official guidance or case law on what is, or is not, commercial copying. However, certain basic principles are clear:

- It has to do with making any amount of money – either for someone personally or for his or her employer; note that it is NOT about making a profit.
- It makes no difference who the employer is – commercial companies may need copies for non-commercial purposes, and non-commercial organisations may need copies for commercial purposes
- There is no need for the person copying or requesting a copy to apply foresight; the key question is what was the reason that the person wanted the copy at the time he or she asked for it or made it?
- There is an onus is on the requestor or the person making the copy to make an honest declaration

I have developed a set of scenarios together with my opinion whether each one would constitute commercial copying or not, and these are reproduced below. However, it must be stressed that others have disagreed with some of my opinions, and it is up to readers to make their own judgements. “C” means I think it is commercial, and “NC” means I think it is not commercial.

- Work relevant to company’s R&D – C
- Work relevant to market research or competitive intelligence – C
- Necessary for satisfying regulatory requirements – C (but note the discussion on judicial proceedings below)
- Done by students on day release from employer as part of their course – NC (unless promotion or continued employment is guaranteed as a result of successfully completing the course)
- Preparation of a book or book chapters where royalties are expected – C
- Preparation of an article for a scholarly journal - NC unless the author knows he or she will get paid for it (it makes no difference who the publisher is and whether it makes profits or not)
- University research sponsored by a commercial company - C? (It depends on the nature of the contract. If the results are to be kept confidential and/or any Intellectual Property Rights are passed to the sponsor, then it is almost certainly commercial. In other cases, it is non-commercial.)

- Preparation for a conference paper - NC, unless speaker gets a fee
- Work done to assist NHS – NC
- But work done to assist private medicine - C
- Work done as part of someone’s professional development – NC (but some have argued it is commercial, as a clear potential benefit is promotion, i.e., earning more money. I am sceptical about this, as one can rarely be CERTAIN that promotion will result from such activity.)

This list is, of course, not comprehensive, and, as I have indicated, some people disagree with parts of it. If you are uncertain, seek guidance from a copyright lawyer.

As a result of the restrictions on copying imposed by the new laws, a number of organisations have taken a keen interest in a previously rarely used exception to copyright within the CDPA, that for judicial proceedings. Clause 45(1) of the CDPA states it is never infringement to make copies for such purposes, and the new Directive has not changed this right. The CDPA defines “judicial proceedings” as any “proceedings before any Court, tribunal or person having authority to decide any matter deciding a person’s legal rights or liabilities”. Whilst some experts, such as Coleman [2] believe this exception should be narrowly interpreted as applying to current or pending Court actions, others have taken the broad view that it could apply to, say, patent applications, preparation for a submission to a regulatory body, or disciplinary hearings by a professional body. I am inclined to take the broad view, but once again, it is for readers to check with a lawyer if they feel they wish to take advantage of this exception.

Some thoughts on the management of risk

I believe that copyright is less to do with the law than it is to do with the management of risk. I do not take a purist view that one must always avoid the slightest risk of infringement. I do not encourage infringement of copyright, but the fact remains that copyright is a grey area, with the law unspecific and the facts often open to different interpretations. Under these circumstances, I offer an equation that I have found useful in the past:

$$\mathbf{R = A \times B \times C \times D}$$

R is the financial risk that one is taking by doing a certain copying action; **A** is the probability, in that person’s judgement, that what is being done is infringement; **B** is the chances that the copyright owner will find out; **C** is the probability that the copyright owner, having found out, chooses to take legal action (for indeed, some copyright owners ignore minor infringements, or

just have a quiet word with the infringer. This is especially true if the infringer is a major client of the owner.) **D** is the likely damages plus costs that might be awarded against the infringer if the case were to come to Court.

It's not a particularly original formula, and it is not a cynical way to encourage people to infringe. It also takes no account of the financial cost of the loss of reputation if one is found to have infringed. It has been criticised by some for encouraging infringement, but I believe, if used sensibly, it can be genuinely helpful. I offer it as a way of assessing the risk involved in undertaking certain actions. It is then entirely up to the person planning to copy to decide whether to go ahead or not.