

CHAPTER I

Introduction

This book explores the copyright issues that arise in an era of information sharing and collaborative working. The internet has made it possible for everyone to be a publisher, without the content necessarily being subjected to the rigorous editorial checks that would routinely be undertaken by a professional publisher.

There are inherent legal risks in opening up the ability to publish to everyone. In the case of microblogging sites, for example, it is so tempting and so easy to quickly type a brief posting and press the ENTER key before thinking about the implications of what you have written – such as whether it is libellous, a contempt of court or an infringement of copyright.

Issues around jurisdiction arise in an era of global communications. The internet is no respecter of geographic boundaries. In *Football Dataco Ltd v. Sportradar* [2010] EWHC 2911 (Ch) the court ruled that a company is responsible for ‘making available’ internet-hosted material in the country where its host server is based, not in the country where the material is read or used. In the CJEU case (C-173/11), Advocate General Cruz Villalon said that where a party uploads data from a database protected by sui generis right under Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases onto that party’s web server located in Member State A and, in response to requests from a user in another Member State B, the web server sends such data to the user’s computer so that the data is stored in the memory of that computer and displayed on its screen, the act of sending the information constitutes an act of ‘re-utilisation’ by that party. He further concluded that the act of re-utilisation performed by that party takes place both in Member State A and in Member State B.

The book is intended to complement the other Facet Publishing titles for which I have been either the author or the editor – *Digital Copyright* (2nd edn, 2007), *Copyright Compliance: practical steps to stay within the law* (2008), *Managing Digital Rights: a practitioner’s guide* (2005), and the copyright and licensing sections of *Essential Law for Information Professionals* (3rd edn, 2012).

The era of digital content, whether that be born digital material or content which has been digitized from hard copy, has brought about major changes to the way in which creative content is produced, distributed and consumed.

Cory Doctorow at a 2011 conference¹ said ‘Here in the digital age we copy like we breathe, and so the stakes for getting the rules right on copyright have never been higher’.

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In order to aid navigation the book uses symbols to identify four types of content. These are :

- Tip
- Useful resource
- Sample wording
- Case summary




(Tip) denotes short pieces of advice which, if followed, should help the reader to reduce the level of exposure to legal risks.



(Useful resource) denotes material which it is felt should be drawn to the attention of the reader as being of real practical value and as therefore being especially useful.



(Case summaries) denotes summaries of legal cases.

There are also a number of examples of  **Sample wording** such as the wording for a warranty or indemnity clause, a copyright notice for an RSS feed, or a clause to prevent licences from being able to override the copyright exceptions or permitted acts.

The intention is to make the contents of the book as practical, helpful and accessible as possible. Throughout the book there are also a number of checklists covering topics such as deep linking, licence agreements, RSS feeds, blogging, measures to protect your content, or compliance with the Digital Economy Act 2010. The aim of the checklists is to suggest best practice and to minimize the legal risks associated with particular activities.

1.1 Background

The United Kingdom isn't able to set the legislative regime for copyright in isolation, but has to take into account the international treaties and conventions to which it is a signatory, as well as the *acquis communautaire* (the body of EU law that the UK is required to implement as a member state of the EU).

The main statute on copyright is the Copyright, Designs and Patents Act 1988, as amended by the many statutory instruments that have been published since the Act came into force.

Table 1.1 International, European and UK copyright legislation

International treaties and conventions

Berne Convention for the protection of literary and artistic works	1886
Universal Copyright Convention	1952
Trade Related Aspects of Intellectual Property Rights (the TRIPS agreement)	1994

WIPO Copyright Treaty 1996

Anti-Counterfeiting Trade Agreement 2011

European Directives

On the legal protection of computer programs

2009/24/EC (replaced 91/250/EEC)

On the rental and lending right and certain related rights

2006/115/EC (replaced 92/100/EEC)

On the coordination of certain rules concerning copyright and rights

related to copyright applicable to satellite broadcasting and cable

retransmission 93/83/EEC

Harmonizing the term of protection of copyright and certain related

rights 2006/116/EC (replaced 93/98/EEC)

On the legal protection of databases 96/9/EC

On the harmonization of certain aspects of copyright and related rights

in the information society 2001/29/EC

On the resale right for the benefit of the author of an original work of art

2001/84/EC

On the enforcement of intellectual property rights 2004/48/EC

Amending Directive 2006/116/EC on the term of protection of

copyright and certain related rights 2011/77/EC

UK Statutes

Copyright, Designs and Patents Act (CDPA) 1988

Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002

Copyright (Visually Impaired Persons) Act 2002

Legal Deposit Libraries Act 2003

Digital Economy Act 2010

1.2 Possible treaty on copyright exceptions for libraries and archives

The WIPO Copyright Treaty of 1996 has a provision for countries to extend exceptions and limitations in national law into the digital environment in the form of an agreed statement concerning Article 10 of the Treaty (see below), and to devise new exceptions and limitations appropriate for the digital environment. However, without an international mandate, this laudable gesture has had limited effect. The result is a copyright system that is not fit for purpose for libraries and archives today.

The agreed statement concerning Article 10 of the WIPO Copyright Treaty² says:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations

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and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

A scientific study on exceptions and limitations for libraries and archives³ by Kenneth Crews was published by WIPO in 2008. It identifies a number of major issues that need to be addressed at an international level. These include:

- 1 Exceptions to copyright which enabled libraries and archives to preserve and make available works in the print era have not been updated to the digital age, particularly with respect to digital archiving and virtual learning environments.
- 2 Imposed licences for the provision of digital information are often used to undermine exceptions and limitations to copyright designed to support education, learning and creativity.
- 3 Prohibitions to circumvent technological protection measures (TPM) to preserve, archive and enable permitted use of lawfully acquired digital content are hampering research, leading to an incomplete cultural, scientific and historical record.
- 4 The cross-border, multi-jurisdictional nature of the internet is not reflected in current copyright law. Restrictions on the legitimate flow of information and cultural content provided by libraries across international borders will constrain innovation and growth in under-developed and developing countries.

Library and archive users everywhere want digital access to information: for example, photocopying from printed books and journals and from other documents is being supplanted by scanning or downloading and libraries are switching their subscriptions from print to e-journals.

IFLA, EIFL, Innovarte (<http://sitio.innovarte.cl>) and the ICA have proposed a treaty on copyright exceptions and limitations for libraries and archives which is known by the abbreviation TLIB (see www.ifla.org/files/clm/publications/tlib.pdf). They believe that a treaty is needed because libraries and archives currently work under a patchwork of provisions that differ in scope and effect from country to country; and the existing framework increasingly fails to address the legal and policy challenges of the global digital environment. All the proposed exceptions and limitations in the draft treaty apply to non-commercial uses only. The treaty protects a number of activities including:

- 1 The preservation of materials for posterity, with the flexibility to access cultural works in copy-protected formats.
- 2 The circumvention of TPM for the purpose of permitting a non-infringing use of a work.
- 3 The limiting of the risk of liability to libraries and archives with respect to orphan works, in order to facilitate mass digitization projects.

TLIB also provides for:

- 1 An obligation to respect exceptions to copyright and related rights – voiding terms in contracts and licences for information goods that impede or remove statutory exceptions and limitations in national laws (Article 14).
- 2 Obligations concerning technological protection measures – permitting workarounds for libraries and archives to circumvent TPMs in specified circumstances (Article 15).
- 3 Limitation on liability for libraries and archives for actions performed in good faith (Article 16).

1.3 Is digital content treated differently?

A number of people and organizations argue that the CDPA 1988 should not treat digital content any differently than hard-copy content. In 2008, for example, the British Library published a set of five principles on copyright law.⁴ These included:

Digital is not Different – Copyright law should enshrine the principles of creativity, access, recognition and remuneration as it always has done. Exceptions should apply to all formats including digital formats.

Technology Neutral – Copyright law must be informed by technological advances, but specific technologies should not be enshrined in law.

There are a number of provisions within the UK's copyright legislation which relate only to electronic content. The Copyright and Related Rights Regulations 2003 – which implemented the Copyright Directive 2001/29/EC – contain three such provisions, set out in Figure 1.1.

- 1) the right of communication to the public (see 1.3.1),
- 2) making circumvention of technical protection measures illegal (see 1.3.2), and
- 3) protecting electronic rights management information (see 1.3.3).

Figure 1.1 Three things which only apply to digital content

1.3.1 Communication to the public

The right of communication to the public relates only to communication by electronic means. It was implemented as Section 20 of the CDPA 1988, which specifies that communication to the public by electronic means is a restricted act. The author has the exclusive right to authorize or prohibit any communication to the public. It includes the electronic transmission of:

- literary, dramatic, musical or artistic works
- sound recordings or films
- broadcasts.

CDPA 1988 Section 20: Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in

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

(2) 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.

As a result, any electronic act of transmission which results in communication to the public requires authorization. This includes display on a computer screen and it also specifically includes interactive on-demand acts of transmission, digital broadcasting and ‘on-demand’ services.

The concept of communication to the public was explored in the European Court of Justice case *Sociedad General de Autores y Editores de Espana v. Rafael Hoteles* CJEU C-306/05. In answering questions referred to it by a Spanish court, the European Court of Justice confirmed that the transmission by hotel owners of broadcasts through television sets in hotel rooms is a ‘communication to the public’, and could therefore constitute an infringement of copyright under Article 3(1) of the Copyright Directive (2001/29 EC). The court held that the private nature of hotel rooms did not preclude the communication of works in these rooms from being a ‘communication to the public’, since the test was whether a communication had been made to ‘the public’, not whether a communication occurred in a public or private place.

In another European Court of Justice case, however, *SCF v. Marco del Corso*, the

court found that the playing of phonograms in dental surgeries does not trigger the remuneration right because it doesn't constitute a communication to the public.

⊕ **SCF v. Marco del Corso (CJEU C-135/10)**

The Societa Consortile Fonografici (SCF), an Italian collecting society, had pursued a Turin dentist, Marco del Corso, seeking a declaration by the court that the playing of background music in his surgery constituted a 'communication to the public' which would trigger the need for a licence to cover that use of the music. However, the European Court of Justice ruled that dental surgeries were not communicating the copyrighted works to the public.

The other two copyright provisions which only relate to electronic content cover the two components which together form a digital rights management system. So, before examining them in detail it is worth clarifying what is meant by a digital rights management system. This can be expressed using the sum:

$$\text{DRM} = \text{TPM} + \text{RMI}$$

In other words, a digital rights management system consists of both a technical protection measure as well as rights management information. To distinguish between the two, rights management information expresses the owner's intent whereas the technical protection measure ensures that this is honoured.

1.3.2 Technical protection measures

Technological protection measures are now backed up by the law, so that it is an offence to circumvent or break through them. In order to qualify for legal protection the copy-protection measure must be designed to protect the work and must be effective at doing so.

CDPA 1988 s. 296ZF Interpretation of ss 296ZA to 296ZE

- (1) In sections 296ZA to 296ZE, "technological measures" are 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.
- (2) 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 achieves the intended protection.

Most TPMs make copyright in effect perpetual, since they don't expire when the duration of copyright in the content they protect expires. So, even where the

content is no longer protected by copyright, it could still be out of reach if it were behind a technical protection measure. If the manufacturer goes out of business it is quite plausible that in some instances the owner of the rights may be impossible to trace even after only a few years, thereby rendering the product orphaned. In such circumstances it is probable that no key would exist to unlock the DRM.

Section 296 of the Copyright, Designs and Patents Act 1988 deals with devices which are designed to circumvent copy-protection. Where someone applies a technical device to a computer program for the sole purpose of circumventing the copy-protection this is an offence. It is also an offence to publish details of how to circumvent the copy protection. In order to be convicted of such an offence, the person who does anything to circumvent the copy protection must have done so knowingly, or have reasonable grounds to know that he is pursuing that objective.

A number of people have gone to prison for offences relating to the circumvention of technical protection measures. They include:

- 1 Carl Morgan Davison and Mark Taylor, who were given 10-month and 5-month sentences respectively in 2008 for telling people how to bypass the security settings on set-top boxes (s296ZB).
- 2 Online trader Christopher Gilham was given a 12-month custodial sentence suspended for two years in January 2010 and ordered to carry out 300 hours of unpaid work after selling electronic ‘chips’ that enabled computer consoles to play counterfeit games. Worcestershire County Council Trading Standards, working with ELSPA (the Entertainment and Leisure Software Publishers Association), brought a prosecution against Mr Gilham. Evidence seized following test purchases established that the ‘modchips’, intended for most popular games consoles, would override the inbuilt security measures which would normally only permit the playing of genuine games. Following a seven-day trial Gilham was convicted on 15 counts under s. 296ZB of the CDPA 1988 at Worcester Crown Court in September 2008. Gilham lost his appeal against the decision when the case was heard at the Court of Appeal in October 2009 (R v. Gilham [2009] EWCA Crim 2293 www.bailii.org/ew/cases/EWCA/Crim/2009/2293.html).
- 3 Yuncan Meng was sentenced to a total of two years’ imprisonment for trading in circumvention devices. On 15 January 2009 he pleaded guilty at Hull Crown Court to the possession and sale of circumvention devices under s. 296ZB of the Copyright, Designs and Patents Act 1988. These circumvention devices included R4, edge and DST as well as other game copier cards for the Nintendo DS Lite console. He was subsequently taken back to court under the Proceeds of Crime Act 2002 and warned that he faced a further four years in prison unless he paid back the £700,000 proceeds of the computer game scam.

- 4 Nintendo Company Ltd & Anor v. Playables Ltd & Anor [2010] EWHC 1932 (Ch) (28 July 2010) www.bailii.org/ew/cases/EWHC/Ch/2010/1932.html – This High Court civil case, taken by Nintendo, established the illegality of circumvention device game copier cards for the Nintendo DS lite handheld games console. The evidence for this case was established when UKIE (the Association for UK Interactive Entertainment), HMRC (the UK tax and customs authorities) and trading standards officers from the London Borough of Camden co-ordinated an investigation into the sale and distribution of such devices from a number of websites operated by Mr Wai Dat Chan. Over 165,000 devices were seized in the operation, highlighting the scale of the illegal activity. The defendants were found guilty of copyright infringement under ss 296ZD and 296 of the CDPA 1988. The court ruled in this case that the CDPA can be used to tackle pirated games as well as actual acts of piracy and circumvention.
- 5 On 9 December 2011 there was an article by Sonia Elks in Metro newspaper (www.metro.co.uk/news/884320-virgin-tv-con-worth-40m-run-from-a-back-bedroom-in-derby) entitled ‘Virgin Media TV con run from a back bedroom in Derby’ which reported that four men were facing jail after selling around 44,000 set-top boxes which enable their owners to access Virgin’s cable channels free of charge, thus depriving Virgin of around £1000 per box. A story in ‘[Thisisderbyshire.co.uk](http://thisisderbyshire.co.uk)’ dated 23rd February 2012 (www.thisisderbyshire.co.uk/Derby-gang-jailed-massive-TV-box-swindle/story-15294742-detail/story.html) put the amount that Virgin would be defrauded of at £32 million. Anthony Ginnivan, 48, and Paul Hartrick, 51, pleaded guilty at Derby crown court to conspiring to defraud between February 2010 and February 2011. Melvyn Howard, 62, and Amber Ahmed, 34, had already pleaded guilty. In February 2012 they received the following sentences:
- Hartrick was jailed for 5 years
 - Howard was jailed for 2 years and 10 months
 - Ginnivan was jailed for 2 years and 1 month
 - Ahmed was sent to prison for a year.

Some commentators and lobbyists argue that librarians and archivists should be given special status as ‘trusted intermediaries’ and that they should have a new exception in order to allow them to:

- circumvent TPMs and/or
- require producers or publishers from the outset to give libraries and archives clean copies without a TPM controlling access to the content or else be given the key(s) to unlock access to the content, so that:

- they can make copies which are permitted under statutory exceptions and limitations to copyright or database right, including providing accessible copies to print disabled people;
- they can migrate content to different platforms and formats in order to continue to make it accessible and to preserve it in digital form and thereby avoid the problem of technological obsolescence.

The Gowers Review (a review of the UK's intellectual property laws led by Andrew Gowers, which looked at whether our IP laws were fit for the digital age) made two recommendations relating to DRM systems:

- 1 Recommendation 15 – Make it easier for users to file notice of complaints procedures relating to digital rights management tools by providing an accessible interface on the Patent Office website by 2008.
- 2 Recommendation 16 – DTI should investigate the possibility of providing consumer guidance on DRM systems through a labelling convention without imposing unnecessary regulatory burdens.

Neither of these recommendations has been implemented.

Consumers should be aware of the precise terms of the package of rights they are buying before they pay for digital goods and should be in a position to make an informed choice through the use of clear labelling.

In order to illustrate the difficulty of creating clear labels, the All Party Internet Group (now APComms, the All Party Communications Group) in its 2006 report on digital rights management systems cited the example of an e-book of *Alice in Wonderland*, a children's classic which has long been out of copyright, but which came in a protected form. The label on the product said 'this book may not be read aloud' because access to the e-book by speech synthesis devices had been blocked. Text-to-speech facilities are often used by visually impaired people. But by the use of clumsy and misleading labelling and saying 'this book may not be read aloud' they were risking the disappointment of parents looking for bedtime stories; whereas what they actually meant was that they had disabled the text-to-speech function.

In 2011 a new Consumer Rights Directive⁵ was published which updates and consolidates parts of the European consumer law *acquis*, especially in the light of technological changes and the increasing importance of digital markets. Recital 19 to the Directive states explicitly that contracts for the supply of digital content such as the download of digital music, or the streaming of video, or the provision of online games, do fall within the scope of the Directive:

Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts,

irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of this Directive.

Article 5 of the Directive sets out the information which must be provided before a consumer would be considered to be bound by any contract. The information should include details of any technical protection measure used as well as any relevant details regarding the interoperability of the digital content. It would also cover other restrictive or potentially invasive technologies such as regional coding or tracking and monitoring tools. The precise wording is:

Before the consumer is bound by a contract other than a distance or an off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner, if that information is not already apparent from the context: . . .

1(g) where applicable, the functionality, including applicable technical protection measures, of digital content.

1(h) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

The Consumer Rights Directive also includes a right to withdraw from purchases of digital content before it is actually downloaded (as opposed to when it is made available for download, e.g. via a link in an e-mail).

1.3.3 Electronic rights management information

Electronic rights management information is any information provided by the copyright owner which identifies the work, the author or any other rightsholder, or information about the terms and conditions.

It is an offence to tamper with or to remove electronic rights management information associated with a copyright work. Indeed, it is an offence to knowingly and without authority distribute, import for distribution or communicate to the public copies of a copyright work from which electronic rights management information has been removed or altered without authority and where the offending party knows, or has reason to believe, that by so doing he is inducing, enabling, facilitating or concealing an infringement of copyright.

Notes and references

- 1 Doctorow, Cory (2011) *We Copy Like We Breathe*, SIGGraph 2011 Keynote Speaker, *NewsGrist*, 16 August,

- <http://newsgrist.typepad.com/underbelly/2011/08/art-revolution-and-ownership-cory-doctorow-siggraph.html>.
- 2 www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.
 - 3 Crews, Kenneth (2008) *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO.
 - 4 British Library (2008) *Digital is not Different – Maintaining Balance in Copyright*, <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=634>.
 - 5 Directive 2011/83/EC of the European Parliament and of the Council on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.