
Legal and Regulatory Update

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The legal issues relating to the Copyright Directive and the practical implications for marketers

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Abstract

This paper discusses the changes that the Copyright Directive will make to the existing law of copyright following the publication of implementing regulations on 31 October 2003, and how these changes are likely to impact on the marketing industry and the work of marketers generally.

Keywords: Directive, copyright,
internet, TPMs, RMI databases

Introduction

Properly entitled Directive 2001/29/EC 'on the harmonisation of certain aspects of copyright and related rights in the information society', the Directive was due to have been implemented by all EU member states by 22 December 2002. In fact, nine member states have still not passed legislation to give effect to the Directive.

The Directive was brought about by the two global 1996 World Intellectual Property Organization (WIPO) treaties, which provided for certain basic rights associated with intellectual property including the right of distribution, the right of communication to the public and the protection of technological measures and rights management information, which are used to protect the rights of the copyright owner. The WIPO treaties and Directive are both aimed at bolstering the value of intellectual property in the face of an increasing threat from technology, such as seen in the proliferation of peer-to-peer music-sharing software and the ease of copying digital files, whether they be documents, music or images. As such, the majority of the measures they contain are aimed at protecting specific industries, such as the music industry, and will not necessarily affect marketers directly. This paper seeks to outline the changes that will be brought about, and allay any fears associated with the regulations coming into force.

In the UK, the Patent Office conducted a wide-ranging consultation before finalising the implementing Regulations,¹ which appeared ten months late. These Regulations contain a number of amendments of the existing Copyright, Designs and Patents Act 1988.

A progress report published after the consultation admitted that 'a few controversial aspects are continuing to generate debate',² which explains the delay in implementation.

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This paper outlines the main provisions of the Directive/Regulations, and identifies areas that caused the biggest difficulties for the legislators. It also seeks to highlight some of the practical consequences of the implementation.

Contents of the Directive

Communication right

Exclusive right

Under Article 3 of the Directive, authors must be granted an exclusive right to control electronic communication of a copyrighted work to the public. The changes in this area reflect the development of new technologies, which make the old rights covering ‘broadcasting’ and ‘inclusion in a cable programme service’ out of date. The Regulations contain a reworked definition of what constitutes a ‘broadcast’, and the communication right includes ‘the making available to the public . . . 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 The changes are designed to prevent unauthorised exploitation of copyrighted works using, for instance, internet services, and to provide industries with the opportunity to exploit the possibilities of legitimate distribution made available by the internet.

Exceptions — The internet exception

Protection for internet service providers

Under Article 5(1) of the Directive, member states must bring about a limited exception to the restriction on reproducing a copyrighted work to allow works to be transmitted over the internet (where a document is reproduced to allow it to be transmitted). The Regulations provide that certain sorts of copyright will not be:

‘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’.⁴

The test of ‘independent economic significance’ leaves some room for argument. The exception is designed to protect internet service providers, which would otherwise fall foul of the restriction on reproducing copies of documents every time they transmitted them on behalf of their users (even though the reproduction was of no ‘economic significance’, and purely for the purposes of the transmission).

It should be noted that the ‘internet exception’ has already been provided for in the UK under the E-Commerce Regulations.⁵ These allow for copying where the ISP is acting as a mere conduit, and where the ISP is merely caching or hosting.

Exceptions — Research

Previously, the defence of fair dealing for the purpose of research and private study was available to anyone otherwise in breach of the copyright, for instance by taking copies of a copyrighted work. Under the Regulations, this is restricted to research carried out for ‘a non-commercial purpose’⁶ provided that it is accompanied by a sufficient acknowledgment. This suggests that marketers and lawyers alike who are conducting research and who previously relied upon this exception will have to be aware that making copies for the purposes of commercial research is no longer legitimate. In addition, the Directive states that ‘rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter’.⁷ It is likely that this fair compensation will be collected through organisations such as the Copyright Licensing Agency.

Technological protection measures (TPMs)

The Government admitted that TPMs ‘prompted more comment than any other aspect of the Directive’.⁸ The Directive says that member states are to provide adequate legal protection against the circumvention of any effective technological measures. TPMs include those designed ‘to prevent or restrict acts . . . which are not authorised by the rightholder’;⁹ the Regulations state that technological measures include ‘any device, design or component which is designed . . . to protect a copyright work’.¹⁰ One example of a TPM is the use of encryption; another is the production of CDs that cannot be copied (or even played) on PCs.

Responses to the consultation on TPMs came from both rightholders concerned that the Regulations did not go far enough and individuals concerned that the protection of TPMs could lead to anti-competitive practices and affect data privacy.

The new provisions give an incentive to rightholders to employ and design new methods for protecting their rights against copying and other uses, in the knowledge that there are statutory penalties for those attempting to circumvent them. Rightholders will be able to sue individuals bypassing TPMs and, importantly, those making and distributing equipment used to circumvent TPMs. Additionally, the latter category of infringer may be criminally liable.

Rights management information (RMI)

In addition to the development of technological measures of protecting copyright (such as encryption), rightholders have started labelling their products with unique codes that identify, track and assist with the use of works, such that anyone copying the product can be traced. For instance, a piece of software may be sold to a customer. If that customer subsequently makes the software available over a peer-to-peer file-sharing network, the rightholder can identify the customer potentially as in breach of copyright. Under the Directive and the Regulations, a rightholder is given a civil remedy against anyone who ‘knowingly and without authority, removes or alters electronic rights management information’,¹¹ and against anyone inducing or enabling such removal. Remedies are also

Measures for protecting copyright

made available against anyone distributing copyrighted works knowing that the RMI has been removed.

Rights in a database

The Directive does not affect the existing copyright in databases. This right was created in 1996, and applies to collections of independent works, data or other materials that are arranged in a systematic or methodical way, and which are individually accessible by electronic or other means.¹² A author who can show that such a database is his 'own intellectual creation' will receive the usual protections granted to a copyrighted works, such as restrictions on the right to copy the work, and the possibility of pursuing anyone breaching this right for damages, an injunction or other civil remedies. There is also an additional 'database right' that applies to a database where there has been a 'substantial investment in obtaining, verifying or presenting the contents of the database'.

List compilers seeking to use information published in published directories should be wary of reproducing the arrangement of a database (because the copyright in a database is really in the particular formation of those data), and also beware copying a database in which there has been substantial investment by the compiler. But a list compiler taking only limited information from a published directory, and reproducing it in a different arrangement, will not be breaching the copyright of the database owner. The danger would be in reproducing the whole (or segments) of a published directory in the same format or arrangement as the original.

Conclusion

The effect of the implementation of the Directive will be wide-ranging. It is impossible to predict its full extent. The government has said that 'the changes to UK law will potentially affect *any* owner of rights . . . Business *of all sizes* . . . could therefore be affected'.¹³ The government states further that:

'changes to the law of copyright and related rights tend to alter the balance between different players in the market rather than imposing additional costs overall . . . Nevertheless, the clarification, and in some cases strengthening of basic rights . . . should assist all rightholders in their development of new business models . . . The changes will also provide the legal framework for more effective action against piracy and other unauthorised use of works on the internet.'¹⁴

The new Regulations are designed to assist rightholders, and their core focus is on developing the legal support for the practical measures that industries have had to find to protect their copyrighted assets.

The Regulations and Directive should not overly concern marketers. The majority of the provisions are aimed at giving protection to embattled copyright holders who strive to find new ways of protecting their assets, whether through encryption or RMI. Marketers with copyrighted works will receive some further protection, and should be reassured that the

Assistance for rightholders

changes are unlikely to affect the rights they have gained in databases, or restrict any further those seeking to use published directories to compile their own lists.

References

1. Copyright and Related Rights Regulations 2003, SI 2003, No. 2498.
2. Progress report at www.patent.gov.uk/copy/notices/2003/copy_direct2.htm.
3. See ref. 1 above, s. 6(2)(b).
4. *Ibid.*, s. 8(1).
5. Electronic Commerce (EC Directive) Regulations 2002.
6. *Ibid.*, s. 9.
7. EC Directive 2001/29/EC Recital 35.
8. Consultation on UK Implementation of Directive 2001/29/EC on Copyright and Related Right in the Information Society: Analysis of Responses and Government Conclusions, www.patent.gov.uk/about/consultations/responses/copydirect/copydirect.pdf, p. 10.
9. EC Directive 2001/29/EC Article 6(3).
10. See ref. 1 above, s. 24.
11. *Ibid.*, s. 25.
12. Copyright and Rights in Databases Regulations 1997, SI 1997/3032.
13. Regulatory Impact Assessment, www.patent.gov.uk/copy/notices/2003/copyria.pdf, p. 6.
14. *Ibid.*, p. 18.