

Consultation on UK Implementation of Directive 2001/29/EC on Copyright and Related Rights in the Information Society: Analysis of Responses and Government Conclusions

1 Introduction

1.1 In August last year, the Patent Office issued a consultation paper on the implementation of Directive 2001/29/EC, which set out draft amendments to UK copyright law in those areas where changes appear necessary to meet the terms of the Directive. The paper was circulated in hard copy form to some 250 organisations (as listed in its Annex C), mainly national representative bodies, covering a wide spectrum of interests in the copyright field. At the same time the paper was made more generally available by being posted on the Patent Office website. The formal consultation period ran until the end of October last year, but the Patent Office has continued to receive representations since that time which have also been considered.

1.2 The Directive concerns areas of copyright law relevant to many aspects of life and this, coupled with its focus on the impact of modern technology on copyright in which there is a high degree of interest, generated a considerable response, far greater than has been received in any other recent copyright consultation. In all, over 300 responses were received from organisations and individuals, including many from members of the public at large concerned about the possible implications of the Directive for consumer interests. A list of the organisations which responded, over 125, is annexed to the present document. The Patent Office is extremely grateful for all of the responses received, which have greatly informed the implementation process.

1.3 The responses raised a large number of issues, ranging from more general concerns to detailed points on the drafting of the necessary changes to UK copyright law. It is not possible for this summary to cover all of the many points which were made, and it therefore concentrates on the main issues which emerged and the Government's conclusions on these. However, careful consideration has been given to all comments that were received.

1.4 It should be borne in mind that the Directive concerns matters on which there are strongly diverging views and interests, and that it is rarely, if ever, possible to find solutions which will satisfy everyone completely. The Government has sought to achieve fair and appropriate balances between the different interests on matters where the Directive leaves flexibility to member states, but otherwise is legally obliged to comply with the requirements of the Directive.

1.5 The analysis addresses the various issues in the same way as in the consultation paper, that is to say by order of the Articles of the Directive. No reference is made to Articles which do not appear to necessitate changes to UK law, or to implementation proposals which prompted little or no comment.

2 Article 2 (reproduction rights)

2.1 The consultation paper proposed only one change to UK law in this area, which is to supplement s.182A of the Copyright, Designs & Patents Act 1988 (CDPA) by a provision indicating that the reproduction rights of performers extend to transient and incidental copying, as is already explicitly stated to be the case in relation to authors' rights. The Government is proceeding with this proposal, which is purely to avoid any unintended

implication that performers' rights, by contrast with those of authors, do not extend to such copying.

2.2 Some organisations representing authors and performers suggested that, particularly in view of digital technology, the CDPA should be amended to state that rights extend to reproduction 'in part', as in Article 2. However, the Government does not think this necessary or appropriate. The nature of copyright is such that rights could not extend to copying literally any part (such as a single word or letter) and the Government's understanding of Article 2 is that the intention is for rights to extend to any *creative* part of a work or performance. The Government believes that this result is already achieved by virtue of the rights in the CDPA applying to copying of any 'substantial' part, which is interpreted in essentially the same way as intended by the reference to '(creative) part' in the Directive.

2.3 There were also calls from some right owner organisations to add other language from Article 2 to the CDPA, such as stating that rights extend to copying 'by any means and in any form'. However, the CDPA provisions are not limited in the respects concerned, and it is generally not the practice in UK legislation to expand upon wording where this is unqualified and therefore already covers what is required. The Government is not aware of any doubts having arisen as to whether the existing CDPA provisions cover all that is elaborated upon in Article 2.

3 Article 3 (communication and 'making available' to the public)

Rights to be granted

3.1 The consultation paper proposed to replace the present rights granted to authors by s.20 of the CDPA, covering 'broadcasting' and 'inclusion in a cable programme service', by a generalised right of 'communication to the public' by means of 'electronic transmission', further defined as embracing 'broadcasting' and inclusion in an 'on-demand service' or 'other interactive service'. The Government has decided to introduce such a right, especially to ensure that UK law provides the totality of what is required by Article 3.1, and since the present 'cable' right, although extending to 'on request' services, would not seem a particularly clear or transparent way of dealing with this area.

3.2 The proposals gave rise to a considerable number of comments from right owner organisations, in particular as to whether the 'communication' right is of sufficient breadth. In this respect, for example, there were suggestions to the effect that the right would be better expressed as including broadcasting, 'making available' and 'any other' form of communication. Right owner organisations and others also felt that the reference to 'services' in the proposals are inappropriate, in that there may in practice be activities which do not constitute 'services'. Moreover, questions were raised as to the meaning of 'interactive' in the proposals (as opposed to 'on-demand').

3.3 The Government remains of the view that the basic approach indicated in the consultation paper is appropriate, but has concluded that it is preferable to adjust the proposed definition of 'communication to the public' in so far as stating that it will include (a) broadcasting and (b) 'making available' (defined as in Article 3 of the Directive), thereby eliminating the previous references to 'on-demand', 'interactive' and 'inclusion' in 'services' of these kinds. It is not, however, considered necessary to introduce a residual category of 'other' communications into the definition, since the right will be stated simply to 'include' the important examples (a) and (b) above, which does not preclude other acts of such

communication from falling within its scope.

3.4 The obligations in Article 3 as regards performers are different to those for authors, and in this respect the consultation paper proposed to introduce a new exclusive right for performers in relation to ‘on-demand services’. In line with the adjustments to authors’ rights indicated above, the Government has decided to express this right as a right of ‘making available’, defined in the terms of Article 3.2. As envisaged in the consultation paper, the existing remuneration right granted to performers by s.182D of the CDPA will be amended to make clear that it no longer applies in the area covered by the new exclusive right.

3.5 Some right owner organisations suggested that the implementing legislation should seek to identify the point or points at which an act of ‘making available’ (as defined in A.3) is to be regarded as having taken place. However, the Government does not feel that this is necessary, or that it would be appropriate, particularly given that the Directive does not seek to expand upon this aspect.

Broadcasts and broadcasting

3.6 Allied to the establishment of a general ‘communication’ right, subsuming the former ‘cable’ right, the consultation paper proposed to remove s.7 of the CDPA conferring protection on ‘cable programmes’, and amend s.6 to redefine ‘broadcasts’ (and therefore ‘broadcasting’) in a technologically neutral way, such as to embrace both wireless transmissions and cable transmissions of broadcast character. The protection conferred by the existing s.7 on ‘cable programmes’ forming part of ‘on-request’ services would not be maintained, particularly as such ‘programmes’ would in any case seem already to be protected under other headings, ie as literary, dramatic, musical or artistic works, sound recordings or films.

3.7 It is important to define what constitutes a ‘broadcast’ for several reasons, not least in relation to the UK’s obligations under EC and international law to protect broadcasts, and in order that other provisions in the CDPA relating to broadcasts, notably exceptions, are clear in meaning. The consultation paper further proposed to supplement the existing definition in s.6(1)(a) of the CDPA by indicating that a broadcast must be transmitted ‘for simultaneous reception’ by the public, which is clearly a characterising feature of broadcasts. To clarify matters further, it was also proposed to add a new s.6(1A) essentially excepting from broadcast (and broadcasting) any transmission in an ‘interactive service’ enabling members of the public to access transmissions on request and at times selected or determined by them.

3.8 The proposals on broadcasting prompted a considerable response, from interested parties of all kinds. Right owner organisations raised a number of questions as to whether various kinds of activities outside the area of conventional broadcasting would or would not fall to be regarded as broadcasting under the proposals, and generally favoured a relatively narrow definition of broadcasting, especially in relation to the internet. Broadcasters voiced strong concerns that the effect of s.6(1A) might be to remove protection from certain kinds of transmissions (often termed ‘near-on-demand’), which they felt should be regarded as broadcasts transmitted at scheduled times, albeit relatively frequently. User organisations and others felt that the definition of broadcast might be too wide and extend to ordinary internet web pages, with the result that these would not fall within the scope of certain exceptions of importance to them.

3.9 In the light of the various comments received, the Government has concluded that refinement of its original proposals is desirable. The basic definition of a ‘broadcast’ in

s.6(1) will be technologically neutral, and further supplemented by reference to ‘simultaneous reception’ in s.6(1)(a). Some right owner organisations expressed concern as to the implications and appropriateness of s.6(1)(b), which refers to transmissions made for ‘presentation’ to the public. The Government sees no reason to remove this existing provision of the CDPA, which relates to transmissions that are played or shown to an audience rather than simply received by members of the public. Nevertheless, since, without further definition, it would be possible for an ‘on-demand’ type transmission to come within s.6(1)(b), which it would not be appropriate to regard as a broadcast, the Government has concluded that s.6(1)(b) should be further clarified by indicating that the transmission must be one made at a time solely determined by the person making it.

3.10 Otherwise, since a major concern of respondents seemed, understandably, to be the status of transmissions on the internet, and, in particular, that of ordinary or ‘static’ web pages (ie of text or still images), the Government has decided that it is preferable to take a different approach to defining what is not a ‘broadcast’ from that envisaged in the consultation paper. The new s.6(1A) has been reformulated so as to exclude from the definition of ‘broadcast’ (and ‘broadcasting’) any internet transmission otherwise falling within s.6(1) unless it is one of three specific kinds. These are internet transmissions which (i) take place simultaneously on the internet and by other means (eg conventional radio), or (ii) are live transmissions of events as they are taking place, or (iii) are transmissions of recorded moving images or sounds forming part of a service offering programmes at scheduled times determined by the service provider.

3.11 Essentially, the revised s.6(1A) seeks to provide that only internet transmissions of conventional broadcast character will qualify as broadcasts. The Government believes that this is consistent with its existing obligations to protect broadcasts and avoids results that would not seem desirable, notably that ‘static’ web pages might fall to be treated as ‘broadcasts’. (However, the transmission of protected material to the public via such pages will, of course, be subject to the general ‘communication’ right to be granted by s.20.) The revised approach on s.6(1A) also means that so-called ‘near-on-demand’ transmissions may fall to be treated as broadcasts if within the requirements of s.6(1), which the Government feels is reasonable.

Cable re-transmission

3.12 Some right owner organisations expressed concern that the revised formulation of the s.20 right, coupled with the changes to ss.6 & 7, might leave doubt as to whether cable re-transmission of a broadcast constitutes a separate restricted act, as is the case at present. The Government has concluded that clarification is now needed in order to maintain the existing position, by way of a provision in s.6 to the effect that re-transmission is a separate act to the making of the broadcast which is re-transmitted.

Consequential amendments

3.13 The principal changes to the CDPA outlined above necessitate a considerable number of consequential amendments throughout the CDPA and related legislation, to which the Government has given careful consideration. Broadly speaking, as indicated in the consultation paper, these amendments take the following forms. Existing references to broadcasts or cable programmes as species of protected works become references to broadcasts only (in the revised meaning of that term), as, for example, in ss.30(3), 31(1), 35, 70, 71 & 72, and references to the act of broadcasting or inclusion in a cable programme

service become references to communication to the public, as, for example, in s.12(5), 31(2), 58(1) & 62(3).

3.14 However, the full picture is more complex, and not every consequential amendment follows this pattern. For example, s.68 is being limited to the act of broadcasting (as redefined), in particular since the Government understands Article 5.2(d) to apply only to communications of this kind. Moreover, some provisions need rewording to retain their present meaning, notably s.73 which is being redrafted to refer to re-transmission by cable of wireless broadcasts.

Statutory licence in respect of use of sound recordings (ss.135A-H)

3.15 These provisions have to be amended because of the removal of the concept of a ‘cable programme service’, and the Government does not believe that it would be appropriate for them to apply beyond the inclusion of sound recordings in ‘broadcasts’ (as redefined). This in itself means that the statutory licence is no longer potentially relevant to ‘on request’ type services (as was previously the case because of the way in which a ‘cable programme service’ was defined in s.7). Moreover, the Government does not think that it would be appropriate for the statutory licence to apply to internet broadcasts of the kinds referred to at (ii) and (iii) in paragraph 3.10 above, and accordingly it will not do so.

4 Article 5.1 (exception to rights for certain temporary copies)

4.1 The consultation paper envisaged that this exception, which is mandatory, would be implemented essentially verbatim, and this remains the Government’s position. Some concern was expressed that difficulties may arise because the Directive does not apply the exception to computer programs or databases. The Government shares this concern and agrees that the situation will need to be monitored, as, indeed, the Commission is already committed to doing.

4.2 Many right owner organisations called for the exception to be supplemented by the ‘three-step’ test set out in Article 5.5 (which applies to Article 5.1 and also to Articles 5.2-5.4). However, the Government’s understanding is that the Commission consider the test already to have been taken into account in framing Article 5.1. The Government sees no reason to take a different view, and therefore feels it would be inappropriate to add the test. Some interested parties also suggested that the implementing legislation should elaborate on the wording of Article 5.1, notably by the addition of elements from the penultimate sentence of Recital 33, but, again in line with what is understood to be the Commission’s view, the Government does not think this appropriate.

5 Articles 5.2-5.4 (other exceptions to rights)

5.1 The consultation paper indicated that, in general, the Government’s approach to the optional provisions in Articles 5.2-5.4 would be to seek to retain the existing exceptions to rights in UK law (as set out in sections 28-76 of, and Schedule 2, to the CDPA) as far as permitted by the requirements of the Directive, but not to introduce new or wider exceptions in the course of implementing the Directive. A number of bodies representing users of copyright material welcomed the Government’s intention to maintain existing exceptions as far as possible. Several user organisations also expressed wishes to see additional or wider exceptions of various kinds introduced, and these have been noted for further consideration in due course.

5.2 The consultation paper also indicated that it would not be the intention to incorporate the ‘three-step’ test, applied by Article 5.5 to Articles 5.2.-5.4, into UK law. Bodies representing right owners generally felt that the test should be expressly implemented in the CDPA, whereas those representing users generally considered that it should not. The Government continues to consider that the test is a matter to be taken into account with regard to the framing of exceptions in national law, rather than for direct incorporation into law, as is also understood to be the view of the Commission.

Source acknowledgement

5.3 In order to comply with relevant provisions in Article 5.3, the consultation paper envisaged adding requirements for source acknowledgment to the exceptions in sections 29, 30, 32, 35 and 36 relating to research, news reporting and educational uses of material, but generally on the basis that acknowledgment would not be required where impossible ‘for reasons of practicality or otherwise’. The Government is maintaining this approach, which was supported by broadcasters and other users. Many organisations representing authors and other right owners sought stricter obligations on source acknowledgment, but the Government considers that the proposals are consistent with the wording of the relevant provisions in Article 5.3 and that, for practical reasons, there needs to be flexibility in this area.

Exception for research and private study (s.29 of the CDPA)

5.4 The consultation paper proposed to limit the s.29 exception permitting ‘fair dealing’ for research purposes to cases where research is for a non-commercial purpose, and this position is unchanged. Many user organisations expressed strong concerns about the meaning and implications of this limitation, but its addition is necessary in order to comply with Article 5.3(a) of the Directive. A number of right owner organisations suggested that s.29 should also refer to ‘scientific’ research as does Article 5.3(a), but the Government thinks this unnecessary since the breadth of this term is such that it would not appear to add anything meaningful.

5.5 One organisation suggested that the change to s.29 as regards research would mean that the exception in Article 5.3 of Directive 91/250 (concerning determination of the ideas and principles underlying computer programs), hitherto provided for by s.29, is no longer available to commercial users, contrary to the terms of the earlier Directive. The Government has concluded that, in order to avoid any such effect, which was not intended, the exception in the earlier Directive should now be implemented separately, as new section 50BA of the CDPA.

5.6 Many organisations representing right owners questioned the view expressed in the consultation paper that private study is inherently non-commercial in nature, and sought qualification of this aspect of s.29 so as to bring it into line with the terms of Article 5.2(b). On further consideration, the Government has concluded that ‘private study’ should be defined (in s.178) as excluding study which is directly or indirectly for a commercial purpose. Some right owner organisations also called for ‘fair compensation’ to be provided in relation to the private study exception. However, the Government continues to feel that, having regard to Recital 35, this is not necessary or warranted in view of the limited nature of this exception.

Educational exceptions (ss. 32, 35 & 36 and Sch.2)

5.7 In view of the requirements of Article 5.3(a), the consultation paper proposed to restructure the educational exceptions in s.32(1) & (2) such that they would apply generally to instruction in ‘educational establishments’ (as defined in the CDPA), and also to other instruction provided that it is for a ‘non-commercial purpose’. A number of organisations representing right owners questioned whether instruction in educational establishments is inherently non-commercial in nature (as had been the assumption in the consultation proposals). These concerns extended also to the ss.35 & 36 exceptions applying to educational establishments.

5.8 The Government remains of the view that, in practice, it will very largely be the case that copying for educational purposes or instruction in educational establishments under these exceptions is a non-commercial activity, but, on further consideration, has concluded that it cannot be confident that this will invariably be so, for example in relation to some educational activity in some further education establishments. Therefore the Government has decided that, in view of the requirements of Article 5.3(a), the exceptions in ss.32(1) & (2), 35 and 36 (and related Sch. 2 provisions) should be expressly limited to instruction and educational purposes that are non-commercial. However, as envisaged in the consultation paper, a new subsection in s.32, based on Article 5.3(d) and permitting ‘fair dealing’ for the purposes of instruction (whether for a commercial or non-commercial purpose) is being provided, and no change is considered necessary to the consultation proposals on the examination exception in s.32(3).

5.9 Some educational interests pointed out that the deletion of s.7 (see 3.6 above) would seem to mean that cable transmission within an educational establishment of recordings of broadcasts made under the s.35 exception would in future require authorisation, whereas it had previously been exempt by virtue of s.7(2)(d). The Government has concluded that the activity in question should be brought within the scope of s.35, by adding a provision to the effect that the communication of recordings within the premises of an establishment is also permitted.

5.10 However, s.35 already provides that recordings made under its provisions become infringing copies if ‘dealt with’ in certain ways, and the amendments to s.35 will also make clear that communication of a recording outside the premises of an establishment will constitute such a dealing. The Government does not feel it would be justified for such communications to fall within the exception, a matter on which several right owner organisations expressed concern.

‘Dealing with’ provisions in other exceptions

5.11 The Government’s review of the s.35 provisions, coupled with the changes being made to implement Article 3, has led it to conclude that it is also desirable to update other ‘dealing with’ provisions in the CDPA, namely those attaching to the ss.32, 36 & 63 exceptions, by making clear, to the extent appropriate, that communication to the public constitutes a relevant ‘dealing’.

Library and archive exceptions (ss.38-43 & 61)

5.12 In line with the amendment to the research element of s.29, the consultation paper envisaged that ss.38, 39, 43 & 61 (and the related SIs 1989/1212 & 1989/1012) would be amended such that copies made by librarians and archivists under these exceptions must be in respect of research which is for a ‘non-commercial purpose’, and this remains the position.

The definition of ‘private study’ which the Government has concluded should be introduced (see 5.6 above) will, of course, also apply to the ss.38, 39, 43 & 61 provisions.

5.13 It was also proposed to adjust the charging requirements set out in SI 1989/1212, forming part of the ‘prescribed conditions’ applying to ss.41 & 42, so as to refer to a sum ‘equivalent to but not exceeding’ the cost of copy production, in line with the requirements of Article 5.2(c). These changes remain the same, but the Government has concluded that the proposal to make a similar change to s.43 and related provisions was inappropriate, and this will not be pursued.

Exception for playing of sound recordings by charitable and like bodies (s.67 & Sch.2)

5.14 The consultation paper indicated that Article 11(1)(b) of the Directive applies the ‘three-step’ test to the area covered by s.67, and proposed to further limit s.67, in essence such that it would only apply where the proceeds of any admission charge do no more than cover costs. Organisations with interests in licensing public performance of sound recordings argued strongly that s.67 should be repealed in its entirety, as did bodies representing performers. In contrast, those organisations representing user interests which responded saw no need to narrow s.67 and were concerned about the impact of this on local community activities which they did not see as damaging to right owners.

5.15 The Government has concluded that the s.67 exception should be narrowed, but that it is not necessary or appropriate to repeal it completely. On further reflection, however, the Government feels that the approach suggested in the consultation paper is not the most appropriate, and has decided that it would be preferable to limit the s.67 exception in a different way. Firstly, a condition is being added to the effect that recordings must be played by a person acting primarily and directly for the benefit of the organisation and not for gain. Secondly, it is being specified that, not only the proceeds of any admission charge, but also of any charges for goods or services provided when sound recordings are played, must be used solely for the purposes of the organisation. The Government believes that, these changes will, in particular, prevent organisations seeking to benefit from the s.67 exception in relation to activities conducted on a quasi-commercial basis, which was a major concern of those seeking repeal.

‘Time-shifting’ exception (s.70)

5.16 The consultation paper did not propose to amend this exception, but right owner organisations raised a number of concerns, particularly as regards the scope of the expression ‘for private and domestic use’. In the light of this, the Government has concluded that it would be appropriate to define the exception more precisely so as to reflect its intended scope more accurately. To this end, it is being made clear that the exception applies only to the making of recordings in domestic premises for private and domestic use, and also that recordings become infringing copies if ‘dealt with’ such as by way of sale or hire or communication to the public. Particularly in view of these clarifications, the Government does not consider that the provision of ‘fair compensation’, as was also called for by some right owner organisations, would be justified or appropriate. The s.71 exception relating to the taking of photographs of broadcasts is being adjusted in a similar manner to s.70.

Free public showing or playing of broadcasts (s.72 & Sch.2)

5.17 The consultation paper envisaged that the s.72 exception, in so far as it applies to sound recordings contained in broadcasts, would be amended in the light of the application of the

'three-step' test by Article 11(1)(b) of the Directive, but did not make any specific legislative proposals and sought views on what the best approach might be. Organisations with interests in licensing public performance of sound recordings argued strongly that the element of s.72 in question should be repealed, as did bodies representing performers. There was also strong opposition from organisations representing music copyright owners to any extension of the s.72 exception to musical works contained in broadcasts.

5.18 Bodies representing local community interests, licensed premises, cinemas, record retailers and music users more generally were opposed to any change in the s.72 exception as it relates to sound recordings. In particular, such bodies expressed concern about the implications for their members of further licence fees becoming payable in addition to those in respect of music contained in broadcasts, and questioned the justification for payments to owners of rights in sound recordings beyond those they can already obtain from broadcasters for the inclusion of recordings in broadcasts. Some user organisations also felt that the s.72 exception should be extended to music.

5.19 The Government has concluded that the sound recording element of the s.72 exception should be amended, but does not consider that repeal is necessary or appropriate. Rather, the sound recording element of the s.72 exception is being narrowed, in essence by removing from its scope recordings of music (produced other than by broadcasters themselves), except in circumstances where broadcasts are seen or heard in the course of the activities of non-profit organisations or in connection with demonstration or repair of broadcast reception equipment.

5.20 This means that liability to pay royalties to owners of rights in music recordings will arise where broadcasts are heard in commercial environments (other than in the case of demonstration or repair as referred to above, which will remain within s.72). However, the circumstances in which broadcasts are heard in commercial situations will vary considerably, and will not always be the same as with a conscious or deliberate decision to play sound recordings in public by way of CDs, tapes or the like. The Government has therefore concluded it is also desirable to make a change to the mechanism for regulating the licensing of public performance of sound recordings, which will apply to the licensing which will become possible as a result of the narrowing of s.72.

5.21 In essence, those collectively licensing performance of sound recordings via broadcasts containing them will be required to notify proposed licensing arrangements to the Secretary of State, who will consider a number of matters, including the extent to which the licensing body has consulted affected parties and whether its proposals take account of factors such as the degree to which potential licensees will be using broadcasts containing music recordings. The Secretary of State will then decide whether or not to refer the proposals to the Copyright Tribunal for a determination of whether the licensing arrangements are reasonable with regard to all relevant factors. The possibility for referral to the Tribunal by this route will largely be in place of the mechanism for referral of proposed licensing arrangements by users which is provided under the Tribunal's existing jurisdiction.

5.22 The Government has concluded that, for the time being at least, no action should be taken in relation to public performance of musical works via broadcasts (which is outside the scope of s.72 and therefore already licensable), but will continue to monitor this aspect. One organisation representing right owners called for music videos to be excluded from s.72. However, since the Directive does not address public performance rights in films, there is no

basis on which to consider this aspect in the implementation process. Likewise, there is no reason to consider amending s.72 in relation to broadcasts *per se*, as was called for by representatives of race course owners but opposed by bodies representing betting shops. The Directive does not address public performance rights in broadcasts, which remain governed by an earlier Directive requiring rights to be granted only in respect of paying audiences (to which s.72 does not apply).

Exceptions for 'private and domestic use' to rights in ss. 182, 182A & 186

5.23 The consultation paper proposed to remove these present broad exceptions to the rights granted by ss.182, 182A and 186, and replace them with provisions in Schedule 2 of the CDPA corresponding to the narrower exceptions to authors' rights in the area concerned which are contained in ss.70 & 71. This remains the position, with the new Schedule 2 provisions being drafted in line with the changes to ss.70 & 71 referred to at 5.16 above.

6 Article 6 (obligations as to technological protection measures)

6.1 This article, requiring legal remedies against the circumvention of technological protection measures (TPMs) used to prevent or restrict infringements of rights, prompted more comment than any other aspect of the Directive. Many responses, especially from individuals, expressed concern that TPMs will give right owners greater control than copyright itself, and, in particular, will prevent what these respondents see as 'fair use' of legitimately obtained copyright material. The Directive does not require TPMs to be used, but the Government believes that this option must be open to right owners, and the UK is obliged by the Directive to protect TPMs where used. It is also the case that no general 'fair use' exception to copyright is provided in UK law, or in the Directive (this being an aspect of US copyright law). Nevertheless, the Directive recognises that there is a balance to be drawn between the use of TPMs and the continued availability of copyright exceptions, as is further discussed below.

6.2 Organisations and individuals concerned about the implications of Article 6 for society as a whole felt that the protection of TPMs could lead to anti-competitive practices, affect data privacy and inhibit freedom of expression, and called for the implementing legislation to address these issues. The Government has concluded that this would not be appropriate, particularly as Article 6 does not specify that its provisions are to be made subordinate to other laws. Neither, however, does Article 6, or the implementing legislation, make the protection of TPMs supreme above other laws, so that, for example, there will be nothing to prevent competition law operating if TPMs are used in an anti-competitive way, and those using TPMs will need to respect data protection laws. Concerns were also expressed that TPMs could act to prevent material entering the public domain on expiry of rights, but, again, Article 6 does not address this issue, and in any case its provisions do not apply to TPMs used in relation to non-copyright material.

6.3 Implementation of Article 6 is made more complex in that it does not apply to all forms of copyright works. The protection of TPMs applied to computer programs remains governed by Article 7(1)(c) of Directive 91/250, which is drafted differently to Article 6. During the negotiations on the present Directive, the UK expressed concern about difficulties which might arise from the application of two different regimes, especially as it may not always be clear whether or not a work is a computer program, and as computer programs may themselves be used as TPMs on other forms of works. However, neither the Commission nor most other EC states felt it appropriate to seek a unified approach to protection of TPMs at

this stage, although the Commission is committed to an early review of the issue. Several interested parties called for action on implementation to clarify the interface between the two regimes, particularly in relation to the ‘reverse engineering’ exception in Directive 91/250, but the Government considers that, for the present at least, this must basically remain a matter for the courts to resolve.

Protection of TPMs applied to computer programs

6.4 As enacted, s.296 of the CDPA already provided protection for TPMs, whether used on computer programs or other forms of works. The consultation paper proposed to retain s.296, as amended on implementation of Directive 91/250, but in relation to computer programs only, and not other works which are now subject to Article 6 of the present Directive. This remains the intention, but in the light of comments made by parties with particular interests in computer programs, the Government has concluded that it is desirable to make some further adjustments to s.296 in order to bring its wording into closer alignment with that of Article 7(1)(c) of Directive 91/250, which it is now the sole function of s.296 to implement. These changes do not, however, alter the basic approach in s.296, and the Government has concluded that it would not be appropriate to make more substantial changes, such as the introduction of criminal sanctions in s.296 as was called for by some interested parties, particularly since the Directive now being implemented does not revisit existing provisions on computer programs.

Protection of TPMs applied to works other than computer programs

6.5 The consultation paper envisaged the introduction of new provisions to implement the requirements of Article 6 as regards TPMs applied to material other than computer programs, in essence providing civil remedies against the act of circumvention (Article 6.1) and both civil and criminal sanctions against making and dealing in circumvention devices and the provision of circumvention services (Article 6.2). The Government is maintaining this approach.

6.6 Organisations representing academic and research interests drew attention to the statement in Recital 48 that the protection of TPMs ‘should not hinder research into cryptography’, and called for a saving or exemption for research of this kind. The Government has concluded that it is appropriate to introduce such a saving in the provisions setting out civil sanctions against the act of circumvention, but formulated such that it would not apply if anything is done which would be prejudicial to right owners.

6.7 A number of organisations representing right owners suggested that criminal penalties should go further, so as also to apply to the act of circumvention. However, the Government does not consider that this would be appropriate or proportionate. What individuals are able to do without the risk of criminal penalties is in any case significantly circumscribed by the fact that such sanctions will apply to trafficking in circumvention devices or services, whether done for commercial purposes or otherwise to an extent that would prejudice right owners.

6.8 Some organisations representing right owners also suggested that criminal sanctions should apply to all aspects of Article 6.2. However, the Government does not consider that the language of Article 6.2 is in itself satisfactory to be used in formulating criminal offences, which must be clear in scope and meaning. The approach in the consultation paper on criminal offences is therefore maintained. As envisaged in the consultation paper, these

offences will be accompanied by search warrant and forfeiture provisions.

6.9 Concerns were expressed by some right owner organisations that, collectively, the proposed remedies might not cover everything required by Article 6.2. The Government has decided that, to avoid the possibility of any omissions, the provision on civil sanctions in relation to circumvention devices and services should be adjusted to follow the wording of Article 6.2 more closely. Several right owner organisations also feared that the proposed application of the new civil remedies to copies protected by TPMs which are ‘issued or communicated to the public’ might be unduly limiting. The Government has concluded that the provisions should be amended in this respect so as to apply whenever TPMs are applied to works (and that the same approach should also be adopted in s.296).

6.10 Representations were received that owners of rights in TPM technology should be able to take civil action in relation to circumvention devices and services. The Government feels that this would be appropriate, and these parties are being added to those which the consultation paper envisaged as being able to act, as will exclusive licensees whom it also seems logical to include. (Again, a similar approach is being adopted in s.296.)

6.11 A number of right owner organisations suggested that the legislation should define TPMs as measures used to prevent or restrict any unauthorised act, ie not simply those subject to control under copyright or related rights. However, the Government does not believe that this would be appropriate, particularly since the Directive, including Article 6, does not seek to regulate matters outside the scope of copyright or related rights. In response to comments from some other interested parties, the definition of TPMs is, however, being adjusted to refer, as in Article 6.3, to those ‘designed’ to protect copyright material, rather than ‘intended’ to do so as envisaged in the consultation paper.

TPMs and exceptions to copyright and related rights

6.12 The Government fully appreciates that TPMs may act to prevent users of copyright material being able to benefit from exceptions to copyright, and was at the forefront in pressing for the Directive to address this potential problem. The result was Article 6.4 which provides for member states to take action where difficulties arise, and which the consultation paper proposed to implement by means of a scheme for complaint to the Secretary of State who would then investigate the matter and make directions as appropriate to ensure that the benefit of exceptions can be obtained.

6.13 In general terms, organisations representing right owners were concerned that the scheme is too far-reaching and might be premature, while those representing users felt that it does not go far enough and might be impractical. Some right owner organisations suggested that there should be a delay before the scheme comes into force to allow time for the development of voluntary arrangements enabling exceptions to be exercised. However, the Government does not consider that it would be appropriate to implement the protection for TPMs required by Articles 6.1 & 6.2 without at the same time implementing Article 6.4. Some user organisations felt that users should be able to take more direct action, such as through court proceedings against right owners where TPMs interfere with exceptions, or by way of an exception or defence applying where circumvention is carried out in order to benefit from exceptions. However, the Government does not believe that such approaches would be in keeping with the terms of Article 6.4.

6.14 The majority of user groups appeared to consider the scheme the best basis on which to

proceed, although seeking a number of improvements to it. The Government also continues to feel that the scheme is the most appropriate course of action, but has concluded that several adjustments should be made in the light of the many comments received. In particular, the scheme will provide for ‘class actions’, ie complaints to be brought by a representative person or body on behalf of a class of users similarly affected by the impact of TPMs on an exception or exceptions. Other adjustments have been made to bring the scheme provisions into closer alignment with the wording and intentions of Article 6.4, notably that voluntary measures or agreements must have the effect (rather than purpose) of enabling the benefit of an exception to be obtained; and that the situation in which the scheme will not apply is where material is made available (in the meaning of Article 3 of the Directive) ‘on agreed contractual terms’.

6.15 Many user groups were concerned that the consultation proposals are too weak in saying that the Secretary of State ‘may’ give directions, which they felt does not impose any duty to act. This is not so, and if the Secretary of State did not act when action should be taken, the matter could be subject to judicial review. The Government remains of the view that the word ‘may’ is appropriate, particularly as there may be cases where action would not be justified, for example if means to benefit already exist or when an exception does not in fact apply to an area which is the subject of a complaint. There were also calls for greater elaboration of the nature of the directions that the Secretary of State might give and the timescale for action on complaints. The Government feels that this would not be appropriate to set out in the legislation, especially as the area is one in which practical experience has yet to be gained. As provided by the proposals in the consultation paper, the Secretary of State will, however, be able to issue directions about procedures to be followed and this provides more flexibility for tailoring procedures to circumstances as they arise. However, the Government is extremely conscious that thorough and timely consideration will need to be given to complaints, and will seek to ensure that information is readily available on matters such as directions given or the existence of voluntary measures.

7 Article 7 (protection of electronic rights management information (RMI))

7.1 This Article, requiring protection against removal or alteration of electronic RMI in order to induce, enable, facilitate or conceal infringements of rights, prompted much less comment than Article 6. The consultation paper envisaged a provision drafted basically in the same terms as Article 7, and providing for civil remedies against the relevant acts of interference with RMI. The Government has concluded that this should remain the approach.

7.2 Organisations representing rights owners called for criminal as well as civil sanctions to apply. However, the Government does not consider that this would be appropriate, at least at this stage in what is a completely new area of copyright law in which practical experience has yet to be gained. A number of right owner organisations also expressed concern that the reference in the consultation proposals to RMI as being information provided by the ‘copyright owner’ is too narrow, and on this point the Government has concluded that it would be appropriate to refer, in addition, to the ‘right holder’ in order to meet the terms of Article 7.

Article 8 (sanctions and remedies)

8.1 The consultation paper envisaged the introduction of new criminal offences in Parts I and II of the CDPA as regards unauthorised communication of protected material to the public, and this remains the position. As indicated in paragraph 6.1 above, there will also be new

criminal offences in relation to devices and services for circumvention of technological protection measures (TPMs).

8.2 The consultation paper indicated the possibility of addressing concerns about the burden of proof in cases involving the copyright offences. Organisations representing right owners have made some suggestions in this respect. However, the need to ensure that any changes are compliant with human rights law and the desirability of seeking more evidence about the precise nature of the current problems in order to devise the most appropriate solutions means that the Government has decided to take no further action at this time.

8.3 The consultation paper suggested that no specific action might be needed to implement Article 8.3, requiring that right owners be able to apply for injunctions against intermediaries whose services are used by third-parties to infringe rights, on the basis that it is already possible to seek such injunctions under common law in the UK. Right owner organisations generally expressed strong concern that, unless specific provision is made to implement Article 8.3, there would be uncertainty as to whether right owners can apply for injunctions, the more so because the Article 5.1 exception means that intermediaries will not themselves be infringing rights in the circumstances set out in that article. Some representatives of internet service providers, the main ‘intermediaries’ to whom A.8.3 relates, also sought clarity as to the position.

8.4 On further consideration, the Government has concluded that, in order to avoid uncertainty, Article 8.3 should be specifically implemented in UK law, by way of provisions in Parts I & II of the CDPA enabling the High Court (or Court of Session in Scotland) to grant injunctions against service providers, where the latter have actual knowledge of a third party using the service to infringe rights. The term ‘service provider’ will have the same meaning as in Regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013).

8.5 In their responses to the proposals for implementing Article 3, broadcasters expressed some concern that the removal of s.7 (see 3.6 above) would mean what they saw as a loss of protection for ‘services’ of an on-demand nature, with the result that the service provider would be unable to act against infringements stemming from transmissions in such services. They also argued that owners of rights in films or other works might be reluctant to license use of their material in on-demand services if the service provider was unable to take action against such infringements. In fact, s.7 did not confer protection on ‘services’ of the kind concerned, but rather on ‘programmes’ within such services, and, as has been indicated, the Government considers that such programmes will in any case already be protected in other ways.

8.6 The Government does, however, feel that it would be reasonable for service providers to be able to act against infringements connected to their activities in circumstances where they are neither the owner nor exclusive licensee of rights in content they transmit, but the owner of copyright in the content wishes them to be able to act. Accordingly, it has been concluded that provisions to this effect should be introduced, but applying to non-exclusive licensees in general, ie to those licensed on this basis to exercise any of the rights exercisable by the copyright owner under the CDPA, not only the transmission of material in on-demand type services.

ANNEX

LIST OF ORGANISATIONS RESPONDING TO THE CONSULTATION

Action with Communities in Rural England (ACRE)
A4 Internet Limited
Alliance Against Counterfeiting and Piracy
Alliance for Electronic Business
Anglia Polytechnic University (APU)
Art Libraries Society (ARLIS) UK and Ireland
Association of British Bookmakers
Association of the British Pharmaceutical Industry (ABPI)
Association of Consulting Engineers (ACE)
Association for Free Software (AFFS)
Association of Independent Music (AIM)
Association for Information Management (ASLIB IMI)
Association of Learned and Professional Society Publishers (ALPSP)
Authors Licensing and Collecting Society (ALCS)

Bannatyne, Kirkwood, France & Co
Bar Council (Disability Committee)
Bournemouth University
Bristows
British Art Market Federation
British Association of Record Dealers (BARD)
British Beer and Pub Association (BBPA)
British Broadcasting Corporation (BBC)
British Copyright Council
British Equity Collecting Society (BECS)
British Horseracing Board
British Library
British Music Rights
British Phonographic Industry (BPI)
British Sky Broadcasting
British Telecommunications (BT)
British Universities Film and Video Council (BUFVC)
British Video Association (BVA)
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)
Business Software Alliance (BSA)

Cable and Wireless Plc
Campaign for Digital Rights (CDR)
Channel 5 Television
Channel Four Television
Chartered Institute of Librarians and Information Professionals (CILIP)
Cinema Exhibitors Association
Commercial Radio Companies Association (CRCA)
Confederation of British Industry (CBI)
Consortium of University Research Libraries (CURL)
Construction Industry Council
Contender Entertainment Group
Copyright Licensing Agency (CLA)
Crawford Space Communications Limited

Defence Procurement Agency (DPA)
Design and Artists Copyright Society (DACS)
Diboride Conductors Limited
Digital Content Forum
Directors and Producers Rights Society (DPRS)

Domino Systems

Educational Copyright Users Forum (ECUF)
Educational Recording Agency (ERA)

Faculty of Advocates
Federation Against Software Theft (FAST)
Film Council
Film Distributors Association
Forum for InterLending (FIL)
Foundation for Information Policy Research (FIPR)

Glasgow School of Art
GreenNet
Guardian Newspapers Limited

Harbottle and Lewis
Her Majesty's Stationery Office (HMSO)
Hutchinson 3G UK Limited

Independent Television Association
Independent Television News (ITN)
Institute of Chartered Accountants
Institution of Electrical Engineers (IEE)
Intellect
International Association of Music Libraries, Archives and Documentation Centres (IAML) UK and Ireland
Internet Service Providers Association (ISPA)

Johnson Matthey Plc

Ladbroke's Limited
Law Society of Scotland
Libraries and Archives Copyright Alliance (LACA)

Marconi Plc
Macrovision UK Limited
Motion Picture Association (MPA)
Museums Copyright Group
Music Business Forum
Musicians Union
Music Managers Forum (MMF)
Music Users Council
Music Users Council of Europe

National Consumer Council
National Library of Scotland
National Union of Journalists (NUJ)
Newspaper Licensing Agency (NLA)
Newspaper Society

Open University
Orange Plc
Ordnance Survey
Ordnance Survey of Northern Ireland (OSNI)

Phaidon Press Limited
Phonographic Performance Limited (PPL)
Producers Alliance for Cinema and Television (PACT)
Producers Rights Agency
Public Lending Right (PLR) Office

Public Record Office
Publishers Association
Publishers Licensing Society

Raven Sound
Research Councils Libraries and Information Consortium (RESCOLINC)
Royal Commission on the Ancient and Historical Monuments of Wales
Royal National Institute of the Blind (RNIB)
Royal Society

Scottish Consumer Council
Scottish Licensed Trade Association
Share the Vision
Sheffield Hallam University
Sheffield Information Organisation (SINTO)
Society of Archivists
Society of Authors
Society of College, National and University Libraries (SCONUL)
Society of Indexers
Special Structures Lab (SSL) Limited

Thus Plc
Trade Marks Patents and Designs Federation (TMPDF)
Trade Partners UK Information Centre

University of Brighton
University College Northampton
University of Edinburgh
University of Leeds Library
University of Manchester
University of Oxford Library Services Directorate
University of Wales (Department of Law)
Universities UK

Video Performance Limited (VPL)
Voice of the Listener and Viewer (VLV)

Welsh Consumer Council
Wiggin and Company