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Copyright Reform and Legal Education on the Internet

Mark Wing* and Ewan Kirk**

***Senior Lecturer**

****Research Assistant**

Law Faculty, Southampton Institute, UK

Abstract

With the continuing development of the Internet, libraries are looking to take advantage of the capabilities of new technology to find new ways of managing and exploiting their content. This includes the use of Electronic Document Delivery as a way of providing information to library users, whether through Inter-Library Loan or as an alternative to a user having to physically visit the library (which also addresses issues of being able to better serve disabled users).

However, far from being a straightforward possibility, any library proposing to utilise this technology is faced with significant legal issues, especially with regard to new (and rather controversial) copyright legislation currently being brought in by the EU. This new legislation is particularly relevant to libraries because of the way in which it affects libraries' ability to continue their current functions in the electronic environment.

The purpose of this paper is to examine the current legal status in UK law of Electronic Document Delivery, and the effect that the proposed EU Directive on copyright will have on this legal status, including the effect that licensing schemes will have. The analysis will be applied specifically to the context of library document delivery, but the issues raised are relevant to anyone proposing to deliver copyrighted content electronically.

Introduction

With the continuing development of the Internet, the academic and library communities are attempting to exploit the advantages that new digital technology brings. From a research and collection management context, the advantages are numerous, including the use of Electronic Document Delivery as a way of providing information to library users, whether through Inter-Library Loan or remote access via the Internet as an alternative to a user having to physically visit the library (which also addresses issues of being able to better serve disabled users).

However, far from being a straightforward possibility, any library proposing to utilise this technology is faced with significant legal issues, especially with regard to new (and rather

controversial) copyright legislation currently being brought in by the EU. This new legislation is particularly relevant to libraries because of the way in which it affects libraries' ability to continue their current functions in the electronic environment. The purpose of this paper is to examine the current legal status in UK law of libraries utilising the advantages of digital media, and the effect that the proposed EU Directive on copyright will have on this legal status, including the effect that licensing schemes will have. The analysis will be applied specifically to the context of library document delivery and electronic access, but the issues raised are relevant to anyone proposing to deliver copyrighted content electronically on a not-for-profit basis.

UK Law and Library Copying

The digital use of materials results in more of the copyright owner's restricted rights being utilised as a functional consequence. The restricted acts which are relevant to document delivery or remote access are making copies of a work,[1] first issue of copies of the work to the public,[2] and to rent or lend the work or copies to the public.[3] The 1988 Act has been heavily amended in this area to comply with the European Rental Directive.[4] However the new section 36A inserted by the 1996 statutory instrument provides that copyright is not infringed by the lending of works by an educational establishment, whilst the new section 40A provides that "Copyright in a work of any description is not infringed by the lending of a book by a public library if the book is within the public lending right scheme". Where a lender does not come within these exceptions it must be assumed that licence fees will be payable.

Specific Copyright Provisions Relevant to Educational Use

Within he CDPA 1988 there are several exceptions to the copyright owner's rights that apply in the educational context. The most significant of these is the set of library exemptions allowing archiving, lending and inter-library loans to take place. However, the act also provides for a more general educational exemption, relating to `research and private study'. There is a contrast between this and the phrasing of the Draft Copyright Directive,[5]which we shall return to later.

Without more, any dealing in copyright works by libraries or other organisations would be an infringement of copyright were the permission of the individual authors and publishers was not sought. This is obviously not the case, and this is because the 1988 Act makes allowance for lending and delivery schemes such as ILL by way of what are known as permitted acts. These acts provide limited exceptions to acts which would otherwise constitute an infringement. The 1988 Act makes a number of specific exceptions for libraries, and in particular sections 37 to 43 of the 1988 Act. These exceptions are in addition to copying permitted to users under the CLA licence. The CLA licence does not extend to electronic copying of works, so specific permission will need to be sought.

The provisions of section 38 to 43 are as follows:

Section 38 Copying by librarians - Articles in Periodicals

Section 39 Copying by librarians - parts of published works

Section 40 Restrictions on productions of multiple copies

Section 40A Lending of copies by libraries or archives

Section 41 Copying by librarians - supply of copies to other libraries

Section 42 Copying by librarians or archivists: Replacement copies of works

Section 43 Copying by librarians or archivists: Certain unpublished works

Typically, these provisions will only be applicable, however, if the library or archive is a "prescribed library" or archive. The conditions for qualification as a prescribed library or archive are laid down in a statutory instrument,[6] and the effect of these regulations is that non-profit libraries are generally within the definition of a prescribed library. Where a library or archive is run on a commercial basis then in many instances it would need to seek a licence for any copying which was taking place.

In a document delivery scenario therefore, where a document supplier is a library and the document being supplied is a complete work (for example a book) then the supply would be permissible under section 41 of the 1988 Act provided the librarian could not by reasonable enquiry find the person entitled to give permission for copying. Where a photocopy of an article from a periodical is being supplied section 41 also permits that activity. Where an unpublished work is in issue (for example a thesis) then section 43 permits that. Where documents are being supplied the act requires signed declarations to be made as to the eventual uses that the documents will be put to, typically, *inter alia*, that the requester of the loan intends to use the work for the purposes of research or private study only. The 1989 statutory instrument provides a form for these signed declarations.

Where electronic documents are being supplied other issues also come into play. One issue is digitisation. To enable a document to be delivered electronically it must first be placed into a digitised form. This requires the use of either an existing electronic version of a document, or the use of scanners with OCR[7] software. Section 17 of the 1988 Act provides that copying of a work means "Reproducing it in any material form. This includes storing the work in any medium by electronic means".[8] The act also provides that "copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work".[9] The effect of this means that the act of scanning a document, without more is an infringing act, however sections 38 to 43 provide exceptions to infringement by copying for prescribed libraries or archives. There is no reason therefore to assume that these sections provide any less of a defence to the act of electronic copying as they do to normal copying, although copyright owners typically feel much less at ease with the idea of digital copies than analogue copies because of the ease of dissemination and subsequent multiple reproduction of digitised works. It is clear therefore, that where EDD is carried out by library organisations the presence of the permitted acts in the 1988 Act are crucial. Also important to the issue of document supply is section 37(6) of the 1988 Act, which provides references to a librarian or archivist include a "person acting on his behalf", and presumably this would extend to technical support staff working in an EDD programme..

A second issue is authentication. Where supply of documents is to others then the law typically requires that a signed declaration be received before the supply can go ahead. Thus technically, where a request for electronic document delivery is itself made electronically there will be no traditional signed declaration and there is no legal authority as to whether, for example, a typed name at the end of an E-mail will suffice as an electronic signature. It is submitted however that because of the ease with which such a "signature" could be faked the courts will not accept this method as a signature. Various E-mail clients such as Lotus Notes have a much more convincing electronic signature system built into them, but it is unreasonable to expect all correspondents to have a standardised E-mail client. One other solution may be to utilise public key encryption for this purpose. A by-product of public key encryption is that when used in reverse, it can provide authentication of the author of a document. However, several governments, most notably in the UK and US, are rather apprehensive about encouraging use of public key cryptography due to the law enforcement and national security issues its use poses. An example of this is the export ban placed on PGP and subsequent classification as `munitions'. As part of its initiative on the Information Society the EU currently has a draft directive on digital signatures on its books.[10] This draft directive intends to encourage the development of digital signatures by harmonising minimum rules concerning security and liability in order to encourage on-line business. The Directive is hoped to be implemented before 1 January 2001.

The European Approach to Library and Educational Uses

It is inevitable that, given the right legal framework, libraries will be able to take advantage of the new innovations in digital technology. The use of digitised collections and electronic document delivery is part of this. The advantages of the system, not least in terms of speed are great. At the present time however there is some doubt as to whether an appropriate legal framework will be in place in the near future. Quite the opposite in fact -

"Whereas Member States may provide for an exception to the benefit of establishments accessible to the public, such as non-profit libraries and equivalent institutions; whereas, however this should be limited to certain special cases covered by the reproduction right; whereas such an exception *should not cover uses made in the context of on-line delivery of protected works or related subject matter*...."(our emphasis)[11]

Two recent and related developments in copyright are now casting doubt on the future ability of electronic document delivery to survive outside a collective licensing scheme. The two developments are the 1996 WIPO[12] Copyright Treaty (hereafter WCT) and the proposed EU Copyright Directive[13]. Both developments are a direct response by international organisations to the perceived threat to copyright owners interests by the advent of the digital age, and in particular the Internet. This led first, in 1996 to the WCT, and in late 1997 to the European Commission Proposal for a draft Copyright Directive. These two works are closely related, because one of the primary intents behind the EU draft directive is to implement the WCT, though in some respects the draft at present goes beyond the requirement of the WCT as WCT provides for minimum standards only.

It would not be unfair to state that both WCT and especially the draft Directive adopt a very stringent position in relation to digital copyright. In looking at any new intellectual property legislation a key issue for academics and also the end user is how far the legislation achieves the careful balancing of interests between the users and owners of copyright, and in the modern copyright context the public interest in access to information with the commercial interest of publishers in control of that information and therefore in ensuring an adequate return for the publication investment. It appears to be the case that at the present time the balance of legislation is very much in favour of commercial economic interests to the detriment of the public interest. The rationale behind this is chiefly that on line development of commercial services related to copyright works will not take place if current rules from the analogue world are simply transposed into the digital environment -

"Indeed, in a number of cases, traditional exemptions, if applied to the network environment, would have a significant negative impact on the normal on-line exploitation of protected material by right holders and their intermediaries, particularly where these become a primary means of exploitation"[14].

Consequently, the Multimedia Draft establishes a number of rights in relation to copyright works in the digital environment, some of which are new to some member states. The draft also establishes a number of permitted acts, however these acts are much narrower in scope than the permitted acts we have grown accustomed to in the UK. This had led to an outcry in the library community and the strong lobbying by EBLIDA and the creation of new pressure groups such as EFPICC[15].

The Directive contains three main rights restricted to the copyright owner, the right of reproduction, the right of communication to the public, and the right of distribution. However, the distribution right does not apply to dealing with digitised works in an on-line context, as the explanatory memorandum explains, it refers "exclusively to fixed copies that can be put into circulation as tangible objects". We therefore wish to concentrate on the other two rights.

The right of reproduction can be found in copyright laws generally. The right of reproduction is not

explicitly defined in the WCT, instead the pre-existing definition from Article 9(1) of the Berne Convention was deemed to be generally appropriate. Earlier drafts of the WCT had included some definition of reproduction largely at the insistence of the EU, but this proved too controversial to secure agreement between signatories, especially when issues such as transient copies came for consideration. By contrast the commission has provided a comprehensive definition in Article 2. This Article (as amended by the European Parliament) provides:

"Member States shall provide the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

a) for authors, of their works "

Various exceptions to this right are permitted by Article 5, which will be dealt with below. The provisions in Article 2 mark no great change from the provisions in Section 17 of the UK's 1988 Act. However, it should be noted that the phrasing of the right in the Directive does allow the right of reproduction to be construed very widely, and gives a lot of control to the copyright owner with regard to their work. The effect on the academic community by this should not be underestimated.

Article 3 of the Draft Directive provides:

"(1) Member States shall provide authors with an exclusive right to authorise or prohibit any communication to the public of the originals and copies of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

(3) The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public of a work and other subject matter as set out in paragraph 2, including their making available to the public.

(4) The mere provision of physical facilities for enabling or making a communication does not in itself amount to an act of communication to the public within the meaning of this Article."

This is designed primarily to comply with Article 8 of the WCT, and is supplemental to Article 2 in an EDD situation. Thus the making of a copy through, say digitisation of a paper source would be dealt with by Article 2, subsequent dealing with that copy such as sending it to another library or individual would be caught by either Article 3 or 4. Paragraph 3 refers to the fact that the copyright owner continues to enjoy his rights even after distribution (his rights are not "exhausted"). Paragraph 4, added by the Parliament, ensures that it is only the act of communication that falls within the Article, and not the mere provision of facilities that would make such communication possible. However, it is clear from the wording of this provision that this has a great effect on a library's ability to provide services which include the delivery of information on-line, such as remote access, or EDD as a form of inter-library loan solution. The lack of exhaustion only compounds this, because it gives control to a copyright owner even where he may have sold a copy, and therefore already have gained some form of remuneration for his work. Such perpetual control, although allaying fears of copyright owners regarding piracy, does constrict the library's aims regarding the public's educational interest in the work.

These provisions, unless stated otherwise are in addition to, and do not interfere with, the existing EU directives on copyright[16]. It is submitted there are a few concerns which must be voiced regarding the provisions of Article 2 and 3, the main one being in relation to Article 2, the provision

bringing transient copies within the scope of copyright law can effect the entire basis of telematics, which functions on the basis of temporary copies. Although section 17 of the 1988 Act likewise prohibits transient copies, publication on the Internet is probably permitted because the courts could find an implied licence. The draft directive makes no provision for such licences, and one of the reasons why the measure was not included in the WCT was this problem. By its inclusion in Article 2 it makes the drafting of adequate permitted acts in Article 5 doubly important. The scope of Article 3, which prima facie makes any communication of a work to the public an infringement also requires that extensive permitted acts are included in Article 5 to cover public interest copying. In all, these two Articles demonstrate a very broad approach to the rights of the copyright owner *vis-à-vis* the interests of the public.

However, the real fault in the draft directive, and the source of controversy is the limited scope of the permitted acts in Article 5 when compared to present exceptions for analogue copying and supply by libraries. The attitude of the Commission at present displayed in the explanatory memorandum is that the area of electronic distribution of documents by libraries is an area best left to collective licensing schemes, rather than public interest exceptions, otherwise the commercial interests of rights holders will be seriously damaged.

Article 5 - Exemptions to the Copyright Owner's Rights

Article 5 (1) provides a compulsory exemption[17] to "temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmissions systems, whose sole purpose is to enable use to be made of a work or other subject matter" such as using the world wide web, provided such Acts "have no separate economic significance" .

This provides the exemption from Article 2 for temporary copies which are necessary to run the world wide web and other telematics applications. It would also apply to the temporary storage in RAM of computer programmes provided the use of that programme is with licence, as indicated by the phrase "whose sole purpose is to enable use to be made of a work or other subject matter", and is narrower than the previous draft which contained the phrase "otherwise permitted by law". This provision may still also cover situations such as the spread of "thin client" network computers using languages such as Java and TV set top boxes for individuals wishing to use the Internet without a PC, as the wording appears to indicate that this was the intended outcome of this section. It is phrased in such a fashion as to address the issues raised earlier with regard to the broad interpretation of the reproduction right in Article 2, as it appears to allow the copying that occurs as a process of the computer. However, the situation is still unclear, as the exception allows for copying which is "an integral and essential part" of the functioning of the computer. The ambiguity arises from whether caching is included in this. Caching will undoubtedly form part of the process of a user connecting to a library for the purpose of viewing library materials remotely, as well as receiving data in an EDD context. Caching occurs at various levels on the Internet, either by a host server, or by the user's computer itself. The explanatory memorandum for the amended directive refers to "copies which make the transmission feasible"[18], however, the problem with caching is that although it makes a network run more efficiently, allowing downloads to be completed in less time, it is not necessary to the process in that it can still be completed, albeit more slowly. Therefore the question arises as to whether a download is unfeasible merely because it takes more time, or whether the consideration should concern efficient running of the network (which in itself has advantages to the economic development of that network). As it stands, this provision still appears to take too stringent a line with regard to systems set up to allow free access to materials in the same way as a traditional library does at present.

Article 5(2) provides for various other discretionary exemptions to the reproduction right[19] the relevant ones to libraries are in particular Article 5(2)(a) which exempts normal photocopying from

the directive (although national copyright laws may still prohibit this). This has also now been narrowed by the Parliament's amendments, including the exemption form this provision of copyrighted sheet music, and more significantly, providing that there must be some form of compensation system for rights holders, like a levy on blank media or collective licensing scheme. This would cause problems amongst countries that had previously rejected such schemes, as they would have to be set up to take advantage of this provision. A new Article 5(2)(b) *bis* exempts private digital audio-visual copying, but again, there must be compensation for the rightholder. 5(2)(c) would cover most library copying, including digital copying as it relates to reproduction by establishments open to the public on a not for profit basis. This correspondingly, has also been narrowed by Parliament, but only insofar as it makes it clear that the provision only covers not-for-profit libraries. The main concern is that the provision for `fair compensation for the rightholders' in both digital and analogue copying lays an additional cost burden on libraries that does not currently exist, and will point more to a pay-per-view attitude towards library use rather than the current free access that is inherent in educational and library use. It is puzzling that the Directive appears to want to treat private non-commercial uses in such a way, as it seems inappropriate to the authors to do so; the insertion of the phrase "and strictly personal" into 5(2)(b) by the Parliament indicates that the intention is to restrict such copying to the individual user, rather than his distribution to others makes this even more puzzling. It appears to allow for money to be made by rightholders when a work is used, which goes beyond the current limited list of rights restricted to the copyright owner. Again though as this is a discretionary provision national laws could continue as they were prior to the directive coming into force.

Article 5(3) applies to the reproduction right and communication right and is likewise a discretionary provision. It covers use of materials for teaching or instruction or scientific research [20], use of materials by the disabled, provided use is related to the disability (such as, for example, scanning for automatic document readers for the blind[21]), reporting news or current events or criticism or review[22] and finally the use for public security or use in administrative or judicial procedures [23]. Probably the most ambiguous of these provisions is 5(3)(a), which provides for an exception for "teaching and scientific research". Concerns within an educational context relate to the interpretation of this phrase, which can be construed more narrowly than the current UK law, contained in s.29 of the Copyright, Designs and Patents Act 1988, which provides exemption "for the purposes of research or private study". If we take legal education as an example, this clearly does not fall within a literal interpretation of the phrase "scientific research", as legal research and education clearly does not fall within the sciences. This is at best an oversight, which should be corrected to make it clear that such an exemption extends to all branches of education and research, and not merely restricted to the sciences.

These limited provisions are then subject to an overriding proviso in Article 5(4) that they may only be used in certain ways which do not prejudice "the right holders' legitimate interests or conflicts with normal exploitation of their works or other subject matter". They are also subject to varying provisions added by Parliament, such as the right for the rightholder to receive compensation for use of their works in teaching or research, or the right to have the work attributed to oneself when used in reporting news and current events. A corresponding exemption to the Article 4 distribution right is also cited in Article 5(3)*bis* for each of the exemptions in Article 5(3). Once again, Article 5(4) shows an unduly restrictive approach towards the activities of the library and educational communities; library use has always had an effect on the rights of rightholders, as they serve the needs of those who would otherwise have to purchase a copy of the work in order to read/view it. This Article has been criticised previously for being over-restrictive in its approach, and pandering too much to the economic interests of the copyright owners.[24] Such an approach is detrimental to copyright users, due to the inherent emphasis on maximising revenue from every use of a work, even when that had previously been out of the question.

The equivalent provision in the WCT is Article 10[25]. It will be noted that the WIPO exemption in Article 10 WCT is much wider than the proposed exemptions offered by the EU. It cannot be the

case therefore that the EU are merely following international obligations in enacting Article 5, but are deliberately and as a matter of choice offering very limited exceptions to the various rights in the Draft Copyright Directive - this list of exceptions is exhaustive and cannot be added to. The rationale for this narrow approach is clearly stated in the explanatory memorandum[26], however this explanation focuses entirely on the economic interests of owners rather than the educational or other interests of users. In this respect it is submitted the European Commission has gone too far with this proposal in protecting commercial interests at the expense of the public interest -

"...the new draft directive would destroy the balance in copyright law that is kept in the analogue world."[27]

This is something which would particularly affect the library and educational communities, due to the high reliance of these groups on the abilities to make fair dealing uses of works.

Consequences of the Directive

Schleihagen fears that undesirable information monopolies will be the direct result if the draft Directive is introduced in its present form. In rare circumstances community law will control such information monopolies where they result from the use of copyright[28], but surely it would be wiser to back away from a scheme which could assist the creation of such monopolies in the first place?

The potential effects of the draft Copyright Directive as it stands have been identified by the ECUP steering group[29].

Without licence of the copyright owner libraries, archives, universities and documentation centres will be unable to:

1. Display Electronic Copyright material on screen on a site (Breaches Article 3)

2. Enable on site users to view, browse and listen to copyright material for private or educational purposes (Breaches Article 3)

3. Enable on site users to make a digital copy for Private or educational purposes (Article 5(2)(c) relates to library copying and is a discretionary ground, so breaches article 3. It may also be subject to remuneration of the copyright holder.)

4. Provide access to digital copyright material to remote users for private educational purposes (Breaches Article 3)

5. Make a digital copy for preservation or archival purposes (Article 5(2)(c) is discretionary, even if implemented may conflict with Article 5(4) proviso)

6. Send copyright material via FTP or E-mail to another library (Breaches Article 3)

7. Send copyright material via FTP or by E-mail to students or staff within an institution (Breaches Article 3)

Educational Use and Licensing

The Commission and Parliament's attitude is that these types of activity, including electronic document delivery should be permissible only under licensing schemes,[30] and if such activities are to be carried out without the control or permission of the author, then there should be what is termed "adequate remuneration" for such activities.

Such approaches have been heavily condemned by ECUP, EBLIDA and EFPICC, all of whom represent the interests of libraries and library groups. They have identified the threat that the approach that the Commission and the Parliament have taken towards digital uses of copyright works. ECUP identified the need "for affordable access to information"[31] as well as adequate protection for copyright works, and it is widely felt that the latter is being given priority over the former. Again, the emphasis has been upon the economic interests of the copyright owners, which is particularly evident in the fact that the Commission feels that licensing schemes should evolve rather than any specific exemptions in the interests of public access. The problems with such an approach have been identified by the EFPICC, and the authors agree with the contention that an evolution towards a pay-per-view society, although it will address the concerns of the copyright owners, will result in social divide between the `information rich' and the `information poor'. The problem with such situation is that one cannot justify it by comparing it with similar practices currently in place. The only costs involved currently in not-for-profit libraries are those to cover use of materials used in copying for interlibrary loan, for example. There has never been a sense that copyright owners are missing out on valuable revenue by their materials' inclusion in a public library collection.

Reform of Crown Copyright Law

Although matters may become stricter in the general copyright field but there is cause for optimism in the field that he is particularly relevant to lawyers. This is the field of access to public sector information. At both a United Kingdom and European level there are on going processes which will, or are likely to result in greater access to public sector information.

In the United Kingdom much government documentation is currently protected by Crown Copyright. The Crown Copyright Provisions in the Copyright Designs and Patents Act 1988 refer to where a work is created in the course of employment by a "crown servant" then copyright belongs to the Crown i.e. the UK government. Therefore Crown copyright exists in many materials which are of relevance to the study of law. This system may be contrasted with systems in other countries such as the USA and Australia where the position is much more relaxed and as a general statement of principle there is no Copyright in the law which governs one. Until comparatively recently lawyers in the UK could only look on in envy at the contents of certain web sites such as those produced by Cornell University in the USA and the AUSTLII in Australia.

Reasonably free use of extracts of statutory material could be made in analogue publications through HMSO's "Dear publisher" letters which stated that provided material was used in a value added context in for example a cases and materials book there would be no infringement of Crown Copyright. However the position regarding digital copying and inclusion on it non-government websites was considerably more restrictive. Free services provided by HMSO on their own website such as the free provision of statutes and statutory instruments, while undoubtedly useful, were limited because the service only started in 1996 and there are, of course, a large number of statutes and other government material which predate 1996.

The UK government produced in the 1990's both a green paper and a white paper on " The Future Management of Crown Copyright". On the publication of the White Paper in 1999 the government opted for a rationalisation of the rules relating to Crown Copyright. In departments where there is a significant public sector benefit in access to information the rules will generally be relaxed and brought into line with rules regarding analogue copying. In certain other areas, for example Geographic information, discussions are ongoing to the best solution of issues such as funding for organisations such as Ordnance Survey, and to whether that is best achieved by a continuation of the existing system or whether other options such as privatisation made achieve better results.

The consequence of the White Paper is that use of government materials on non-government websites should be significantly easier than had previously been the case. However with the Open government initiative currently in full swing and with extremely wide availability of many

government materials via government websites it begs the question whether institutions such as UK universities really have any need to include many statutes on their websites. In addition the private sector has become involved in this area and there are excellent services such as, for example, Butterworths legislation direct service which provide a full hyper-linked statute book. Many university law students will have access to the services as part of their studies, but some would argue it should be the responsibility of government to provide access to such services free of charge.

If matters do not move quickly enough for those in the UK a solution may come from the European Union in any event. Although, as we have previously stated, Europe appears to be favouring commerce with its general Copyright laws in the field of access to public sector information indications are from the Commission's recent Green Paper that the EU strongly favours general free access to such information. The EU is practising such a system itself with its excellent and comprehensive websites, such as Europa, Echo, Curia and OAMI. Some would argue that perhaps a little more could be done with access to full databases of ECJ decisions and some secondary legislation only being available via subscription services such as CELEX, LOVDATA and EUROLAW.

However there are difficult and complex issues to be resolved if Europe is to legislate in this area. For example in particular fields some restrictions on access to, and copying of, certain classes of information may actually work for the public good. One debatable example is that of Ordnance Survey in the UK, who used monies recouped from licensing Crown Copyright in Geographic information to fund what is widely recognised as one of the world's best Geographic information providers. One only has to compare maps from the United Kingdom and the Republic of Ireland to those produced in many European countries and the USA to see that simple abolition of restrictions in this area may not necessarily be in the public good *unless* the UK government continues to fund Ordnance survey as well as it is currently being funded by be recouping its own costs through Crown Copyright. With so many other areas such as education and health making their demands on the public purse this could in no way be guaranteed.

If Crown Copyright were to be abolished there is also the issue of ensuring quality control of non-government reproductions of Crown Copyright material. Without restricting people's rights in some way how could this be achieved? The simple answer is that directly it could not, though a law web site which contained inaccurate information would be unlikely to be popular for very long. One possibility is that the future role of HMSO could be limited to an integrity protection function, with a provision similar to the moral right of integrity found in many European copyright laws being extended explicitly to cover government information. If this used the same format as the existing moral rights in the Copyright Designs and Patents Act 1988 then an inaccurate or otherwise misleading reproduction of government material could be actionable as a breach of statutory duty, a statutory tort.

Conclusion

The draft Directive, originally proposed by the Commission, has now been discussed fully by the European Parliament.[32] Despite strong representations made by interest groups during this stage, [33] they appear to have fallen on deaf ears, and far from the Parliament taking a more restrained approach to European copyright reform, has in fact behaved in a more radical manner than the Commission had done in proposing the Directive. It appears that the Parliament has been more influenced less by the calls for more specific mandatory permitted acts than by opposing commercial pressures calling for stricter measures concerning the control of copyright works. Because the commercial pressures appear to have won out, and the concept of educational fair use of copyrighted works in Europe, including EDD may have a limited future in the digital environment and collective licensing or pay per view access may become the norm for any delivery of digital copyright works, even if not for profit. It was hoped that the exceptions in Article 5 would be significantly expanded, as they are inadequate if the current uses of copyright works are to be extended into the digital era,

especially by the library and educational communities, and especially with regard to the discretionary provisions if the cultural differences between Member States are to be taken into account. In particular from a member state perspective the commission identifies the UK as the region of the EU where library privileges are "most developed " and it is likely therefore countries such as the UK may have the most to lose if the directive is implemented in its present form. It was envisaged that concessions could be gained if enough pressure was brought against the measure. However, national governments in countries such as the UK should continue to be lobbied to pressure for change. The long and difficult passages of two recent intellectual property directives relating to biotechnology and comparative advertising illustrates the potential efficacy of such tactics even where powerful commercial or political interests, or even the European Commission itself favours certain measures. The concern now is that the proposal as it now stands is far too biased in favour of copyright owners, addressing their concerns, but not those of the copyright users, and that is the best opportunity to redress that balance and avoid distortion of the copyright laws of the EU has passed.

Conversely, for at least a reasonable proportion of legal material, the direction the law of copyright is taking is likely to be one of increasing liberality, with initiatives from both the UK and EU appearing to favour this direction. How this matter will be resolved, particularly at the Pan-European level, will be closely scrutinised by those interested in the area, both economically and academically.

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[1] Section 17

[2] Section 18 (heavily amended by SI 1996 2967)

[3] Section 18A, inserted by SI 1996 2967

[4] Directive 92/100/EEC

[5] Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society COM(1999) 250 final

[6] SI 1989 1212 The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989

[7] Optical Character Recognition

[8] Section 17(2)

[9] Section 17(6)

[10] Draft Directive COM(1998) 297 final

[11] Recital 28 draft Directive on Copyright and Related Rights in the Information Society on COM (1999) 250 final

[12] World Intellectual Property Organisation

[13] Available at http://europa.eu.int/comm/dg15/en/index.htm

[14] Explanatory Memorandum draft Directive on Copyright and Related Rights in the Information Society on COM(97) 628 final

[15] European Fair Practices in Copyright Campaign

[16] Article 1 Draft Directive

[17] signified by the wording "shall" in Article 5(1)

[18] Explanatory memorandum to Directive COM(1999) 250 final, at p.7

[19] signified by the wording "may" in Article 5(2)

[20] Article 5(3)(a)

[21] Article 5(3)(b)

[22] Articles 5(3)(c), (d), similar in effect to s29, 30 of the UK's 1988 Act

[23] Article 5(3)(e)

[24] Heide, T. (1999) EIPR 105

[25] Article 10:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

[26] "The provision aims at striking a balance between, on the one hand, providing the strongest possible incentives to encourage the creation of original works and other protected subject matter and, on the other, facilitating the dissemination of such works to users. It is based on a re-assessment in the light of the new technological developments since their economic impact may be quite different compared to the traditional environment. In such cases, exceptions and limitations must be construed in a more narrow way by the Community legislator as well as by the Member State applying the exceptions, in order to prevent economic damage to the market of protected works and other subject matter." (draft Directive Explanatory Memorandum)

[27] Statement by the Director of EDLIBA, Barbara Schleihagen to European Parliament 16 July 1998.

[28] In, for example the "Magill" litigation - see *Radio Telefis Eirerann v Commission* [1995] 1 All ER (EC) 416

[29] Modified from an E-mail by Emanuella Giavarra, ECUP secretary, on the ECUP Web site mailing list archive - at http://www.kaapeli.fi/hypermail/ecup-list/

[30] "This, of course, does not mean that libraries and equivalent institutions should not engage in on-line deliveries. To the contrary, these activities may well play a major role in the tasks of such institutions in the future. As on-going library projects in a number of Member States show, such uses can and should be managed on a contractual basis, whether individually or on the basis of collective

agreements." (draft Directive Explanatory Memorandum)

[31] In a statement of 19th December 1997, entitled "Towards a balanced information society" http://www.kaapeli.fi/~eblida/ecup/docs/1997/natrecom.htm

[32] For the latest news on the progress of the draft directive visit the EDLIBA website http://www.kaapeli.fi/~EBLIDA/publications/hn-jul98.htm

[33] For instance, note 31 above.