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Observed: the New Digital Legal World?**

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## **Monopoly Defeating Mechanisms: Will they Function in The Digital World?**

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### **1.1 Introduction**

History reveals that 'copyright' was originally perpetual (1403?)<sup>[1]</sup> and remained perpetual till the Statute of Anne (1709).<sup>[2]</sup> Copyright in its early stage used to be treated as a monopoly. The Printing Patent conferred by the Crown and the Stationer's Copyright was treated as a monopoly. The impact of the monopolies in the society was not a desirable one. Soon the Government and the society realized the adverse effect of the monopolies and the first Copyright Act, Statute of Anne (1709) was enacted. The purpose of the Act was threefold:<sup>[3]</sup>

- (1) to destroy the stationer's monopoly over copyright by making it available to anyone,
- (2) to shorten the duration of copyright
- (3) introducing public domain

Since the enactment of the Statute of Anne copyright has striven to maintain a delicate balance between incentive to authors and avoiding monopolistic stagnation. To achieve its goal certain mechanisms had been adopted such as: Fair use, Public Domain, Idea/Expression Dichotomy and the First Sale doctrine.

Recently, however, with the implementation of new laws ( DMCA, EUCD and UK CRRR 2003 amended CDPA 1988) there is a growing concern that the mechanisms which were enacted to defeat the monopoly will not work in the digital medium. With the provision of affixing technological measure to the copyrighted works in the digital world and the non application of first sale doctrine in the digital world has disabled the monopoly defeating mechanisms.

The aim of the paper is to demonstrate the way monopoly defeating mechanisms are becoming non functional in the digital world. A comprehensive discussion has been made on the CRRR (Copyright and Related Rights Regulation) to that effect. The purpose of the paper is to show how the doctrine of fair dealing has been narrowed down and has been rendered obsolete in some circumstance. Furthermore, the study also demonstrates how the CRRR, DMCA and EUCD has transgressed the boundary of exclusive rights set by the two WIPO treaties; WCT and WPPT and copyright law; thereby strengthening the copyright owner's right in a way that has never been intended by WIPO treaties nor by copyright law. The ultimate result will be the problem of monopoly will recur; resulting to a situation where there will be no fair use, no public domain, no idea/expression and no first sale doctrine.

### **1.2 Birth of Copyright**

The actual date of birth of the copyright remains sceptical but according to Blagden it may have been somewhere in 1403<sup>[4]</sup>. According to Patterson however, although the exact date of copyright in

England is not known, but it may have been sometime between 1518 and 1542. According to Patterson the first date corresponds to the printing patent and the second date corresponds to stationers' copyright.[5]

### 1.3 Printing Patent

The basis of printing patent was an exclusive right granted by the sovereign to publish a work. The patent was conferred by the Royal prerogative. It was part of Royal Prerogative which has been defined as "the power of the King to do things which no one else could do, his power to do them in a way in which no one else could do them." [6] The earliest genuine anticipation of copyright awarded by means of printing privilege first appeared in the fifteenth century in Venice. [7] In fact granting the printing patent have been originally an aspect of the patent system in general. The earliest grants were letters of protection given to foreigners for the purpose of introducing new industry. [8] The printing patent was the only letters patent granted by the sovereign and it used to cover both the printing patent and the industrial patent. [9]

Printing patent was a governmental copyright and were of two types- printing patent of general nature and of particular nature. The printing patent of general nature was perpetual and covered a general class of work whereas printing patent of particular nature was awarded for limited period of time to reward the authors for services or to encourage them in useful activities. [10] Printing Patent of general nature used to be awarded to handful few and it is this printing patent which gave rise to monopoly in the society. It was to last forever free from any restrictions. Peter Actors, the first Royal Printer was granted a printing patent of general nature with was remarkably free of any restrictions. [11] Patent of particular nature used to be awarded to individuals for limited period of time to reward the authors for services or to encourage them in useful activities. [12]

In fact, Printing patent created monopoly in two ways:

- (a) The printing patent of general class covered a class of work rather than a single work for example; bibles, prayer books, school books, ABC (elementary books) etc.
- (b) Printing patent covered the works which had no author. Had the works not been covered by printing patent they would have been available to any printer and publisher.

Thus the monopoly gave rise to resentment among the patent and non patent holders. [13] The stationers who had the ability to set up themselves in business were prevented by printing patents from publishing books. Had it not been for the printing patent the non patentees could have secured it otherwise by paying a lump sum money to the author thereby making a profit for themselves. [14]

Resentment grew against the printing patent within the stationers' company. The fight was against the patentees having the general patents. The controversy had three significant effects: [15]

- (a) It gave rise to the Star Chamber Decree of 1586
- (b) Enhanced the power of the Stationers' Company.
- (c) This is the first time the Government realised the adverse effect of monopoly.

The monopoly problem gave rise to piracy and the insurgents started pirating privileged works. The company attempted to deal with the pirates, prosecuted them in Star Chamber and otherwise. Moreover, the company took steps to spread the benefits of the patents particularly among the pirates-once they reformed and made more copies available to the use of the whole of company. The government appointed a Royal Commission to look into the difficulties. [16]

Economic factor was the dominant reason over the dissatisfaction of printing patents. Since the patents were limited to few hand the company had to :

- (a) abolish general patents for individuals;
- (b) to spread the benefits of the patents among a larger number of persons.[17]

Gradually the dominance of printing patent began to fade with the delimitation of Royal prerogative over printing and with the development of literature. The writers increasingly produced enduring works. The Stationer's copyright unlimited in time, surpassed the printing patent in importance. Later on the printing patent had very little significance and by the end of 17<sup>th</sup> century, it was the stationers' copyright which became more important of the two.[18]

## 1.4 Stationers' Copyright

The other type of copyright was the stationers copyright. The name 'stationers copyright' derived from its progenitor, the Stationers' company, and it was a private affair of the company.[19] The stationers' copyright was an integrated concept and was created for the purpose of trade. It was supported by the Government to act as a monopoly.[20]

Stationer's company received the Charter from Philip and Mary on May 4, 1557.[21] According to the preamble of the charter granted in 1557, Philip and Mary incorporated the stationer "to provide a suitable remedy against seditious and heretical material printed by schismatical persons". Such material, they felt, moved the sovereigns subjects not only against the crown, but also against the "faith and sound catholic doctrine of Holy Mother Church." [22] The main theme of the charter was to obtain an effective agency for censorship. On November 5, 1558, a bill for the restraint of the press was introduced in the House of Lords. The title of the bill was "No man shall print any book or Ballad, & C unless he be authorised thereunto by the king and Queen's Majesties License, under the Great Seal of England.[23]

The incident gave rise to a bond between the partnership of the company and the government. The government's interest lied with controlling the press whereas the company's interest lied with protecting property. The partnership lasted over a hundred years. [24]

The impact of the Charter was that prior receiving the charter the company's power was confined only to company but upon receiving the charter the company gained a complete monopoly of printing beyond the company compounded with the support from the Government.. [25]

## 1.5 The Impact of the Charter

- i Stationers company became incorporated;
- ii Censorship acted as a prelude to copyright;
- iii. The charter of Stationers' Company gave it almost complete monopoly of printing, together with powers of national regulation;
- iv. The charter strengthened the monopoly of the stationers' copyright

The company administered a guild system in which right to print a book was established through entry in the company's register.[26] Once the 'copy' was secured, the right to print a particular 'copy' continued for ever. But only members of the guild, that is the book sellers and printers, not authors, might own copies.[27]

## 2.0 Monopoly Defeating Mechanisms

Monopoly defeating mechanisms were first introduced by the Statute of Anne (1709). The Statute has ensured three ways of defeating monopoly:

- (a) The requirement of the creation of a new work in order to obtain copyright;
- (b) The limited term of copyright;

- (c) Limited rights granted to copyright owner: to print, publish and vend (which limits the copyright owner's control of the use of the work after it was purchased by the consumer).[28]

## 2.1 Fair Dealing

The doctrine of fair use did not take its shape at once rather it reached in its existing form gradually. [29] In the century from 1740 to 1839, English judges developed a relatively cohesive set of principles governing the use of a first author's work by a subsequent author without the former's consent.[30] Initially, the English judges allowed fair use in the context of 'fair abridgment' but later recognised that the other uses could be fair, for example for criticism or review. In every case the permitted use was 'productive' rather than 'consumptive' and led to the creation of a new work.[31]

It is important to realise that in the past fair use doctrine then did not apply to an individual's personal use of a copyrighted work; it was promulgated to permit a second author to make a fair use of the copyright of a work, this is to exercise a right otherwise reserved to the copyright owner. The public entered as an secondary beneficiary of the second author's creation of a useful work.[32]

As submitted earlier the source of 'fair dealing' was the first English Copyright Statute, the Statute of Anne. In 1709 when Parliament enacted the Statute of Anne, created a very sophisticated term of copyright, allocating rights to the public as well as to the author and to the copyright holder. The statute states "An act of encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned."

## 2.2 Birth of Fair Use and the Shift from Fair Use to Fair Abridgment

### Some Early English Cases : 1740- 1839

#### Gyles v. Wilcox (1740)[33]

This was a case of fair adridgment. In this case a real and fair abridgment was held to be fair dealing. By real and fair the court meant one that did not merely colourably shorten the copyrighted work to evade infringement rather such abridgment are allowed because they involve 'invention, learning and judgment' by the abridger. The right to make a fair abridgment was judicially created out of fear that the benefit from others otherwise infringing works, which depended upon the use of the original work, would be lost. In order to avoid this loss, the decision in Gyles invented the solution that the abridgment was a new work and as such would promote the progress of success as did the original.

#### Dodsley v. Kinnersley (1761)[34]

This case was a mixture of fair abridgment and review. Plaintiffs as assignees of Samuel Johnson published a two volume work of Johnson's fiction. Defendant printed one tenth of the work in the Grand Magazine of Magazines. Defendant claimed fair abridgment, both because of the nature of the use which was believed to aid rather than interfere with the sale of the work.

The court found for the defendant and rested on the fact that plaintiffs had previously published extracts of the work, which indicated to the court that the market for or value of the work would not be injured. In the decision the amount of the work that is only one tenth of the plaintiff's work has been appropriated was also mentioned.

In this case for the first time market factor was taken into account and the amount of the work was discussed for the first time.

#### Cary v. Kearsley (1803)[35]

The significance of *Cary v. Kearsley* is it moved fair abridgment to Fair use. In this case the Lord emphasised clearly the importance of good faith or *animus furandi*. Plaintiff the author composed an itinerary 'The Book of Roads' by taking and preparing surveys and distances of various roads. The defendant published same kind of work. Plaintiff pointed out two points to support the infringement done by the defendant:

- (a) the names of certain places and their places and their distances generally corresponded;
- (b) several errors contained in his work were also found in defendant's work.

On deciding the issue Lord Ellenborough remarked:

“ [T]hat part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*?”

Although Lord Ellenborough did not use the word “fair use” instead asking where the matter was “use fairly” in this case the origin of the fair use was found as opposed to fair abridgment which only deals with the shortening of a larger work into a smaller version of the same work.[\[36\]](#)

Lord Ellenborough used fair use in the sense that the use by a second author of a first author's work for the promotion of science. The person must be an author, and he must appropriate the material “ with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement.[\[37\]](#)

## 2.3 Position In US

By 1841, U.S Supreme court Justice Joseph Story as a Circuit Judge in *Folshom v. Marsh*[\[38\]](#) formulated Fair use doctrine. In that leading case he stated that the determining factor of whether use of copyrighted material justifiable or not depends upon the nature of the new work, the value and the extent of the copies and the degree in which the original authors may be injured thereby. This formulation of fair use remained the bedrock for future American Decision. In fact, so well the doctrine was synthesized that later English courts looked to his expression on the concept of guidance.[\[39\]](#)

In the U.S. when Congress under took the revision of the 1909 Copyright Act in the 1950's it commissioned a series of studies on copyright. Among the 35 studies directed to deal with copyright one study (study No. 3) dealt with the copyright clause.[\[40\]](#) Study No 3 dealt with the meaning of “Writings” in the copyright clause of the constitution. The analysis of copyright reveals that the basic purpose of copyright is to protect and enlarge the public domain. Congress is constitutionally bound to protect the three policies in the copyright clause: (1) the promotion of learning, (2) protection of the public domain because copyright is available only for original writings, only for limited time; and (3) the right of public access. In the US therefore fair use has strong constitutional underpinnings.

Justice Story's language was codified in amendments to the Copyright Act of 1976.[\[41\]](#) With Justice Story's suggestions expressed in four nonexclusive factors. While enacting section 107 of the Copyright Act of 1976, Congress expressed an intent to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way adding at the same time , however, that it had no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. “[T]he courts must be free to adopt the doctrine to particular situations on a case by case basis”[\[42\]](#)

## 2.4 UK CDPA 1988

In the UK sec 28 of the CDPA deals with fair dealing. Fair dealing is placed under the heading of “Acts Permitted in Relation to Copyright Works”. The introductory provision of the chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright.

Under CDPA 1988 number of activities comes under the umbrella of fair dealing. Sec 29 fair dealing covers research and private study in literary, dramatic, musical and artistic works and published editions. Section 30 deals with fair dealing with a work for the purpose of criticism or review. The exception allows publicly available works to be used for purposes of criticism or review, one pre condition of remaining fair is to acknowledge the source. Section 30 deals with reporting current events and permits all works other than the photographs; section 31 deals with incidental inclusion of copyrighted material; section 32 deals with activities done for purposes of instruction or examination. There are other provisions related to the exceptions such as exceptions designed to encourage collective licensing schemes, exceptions concerning artistic works and Broadcasts and cable casts. Besides these the other exceptions are time shifting, free public showing, retransmission by cable.

Various other defences are provisions covering a compulsory license for the broadcasting of sound recordings; (CDPA, sec 135A) incidental recording in the course of making a licensed broadcast of a work (CDPA, sec 68) recordings by the supervisory bodies for the purpose of controlling broadcasts (CDPA, sec 71) the sub titling of broadcasts to the deaf, hard of hearing and handicapped (CDPA, section 74) provisions for blind (Visually Impaired Persons) Act 2003, sec 75.

## 2.5 Fair use in Computer Program in CDPA

Back Up Copies, Decompilation, Adaptation and screen display

## 2.6 Doctrine of Exhaustion/First Sale

The trace of first sale doctrine is enumerated in the Statute of Anne which limited the rights granted to the copyright owner: to print, publish and vend in order to limit the copyright owner’s control of the use of the work after it was purchased by the consumer.[43] The common law root of the first sale doctrine allows the owner of a particular copy of a work to dispose of that copy.[44] First sale however only applies to the tangible property and does not apply to the digital medium. In the UK first sale is known as ‘exhaustion of right’. For example if X sells a box of books to Y and Y wants to distribute the books among people there is nothing that X could say as X’s right over the books has been exhausted over the first sale of the books.

It is worthy to note that there is a fundamental distinction between copyright and the copyrighted work.[45] A work can exist without copyright but copyright will not survive without a work. Following this a distinction can be drawn between the sue of copyright and the use of copyright work. This distinction become important when the copyright owner is given an “exclusive” right that the user may also wish to exercise the concurrent right. In the nineteenth century, there was only one such right, the right to vend the copyrighted work.[46] When the copyright owner claimed that a person’s resale of a copy that he had purchased was an infringement of the copyright owner’s right to vend, the court held that it was not. The copyright owner’s right to vend was limited to the first sale and did not extend to subsequent sales of the same copy. Thus, the first sale constituted a use of the copyright; subsequent sales did not.[47]

In the US the doctrine appears in section 109 of the copyright Act of 1976. Section 109(a) specified that notwithstanding a copyright owner’s exclusive distribution right under section 106 the owner of a particular copy or phonorecord that was lawfully made under title 17 is entitled to sell or further dispose of the possession of that copy or phonorecord.

## 2.7 Public Domain

The notion of public domain was first initiated by the Statute of Anne. The title of the Act suggests the idea beneath it “An act for the encouragement of Learning, by vesting, the copies of printed Books in the Authors, or Purchasers, of such Copies, during the Times therein mentioned.” The Act shortened the term of copyright and channel the copyrighted works into the public domain. The Act specifically extinguished the concept of common law literary rights, irrespective of the fact that once they were protected or not, must pass into public domain. Statute of Anne for the first time recognised the right of the authors. However, the statute vested the rights on the authors with the right of public interest.

Public domain consists of the works free from copyright. There are several kinds of works that has created public domain. One category of the Public domain consists of works made before the Statute of Anne such as the works of Shakespeare. The other category of public domain consists of the works which copyright has been lapsed, that is the statutory term of the copyright has been over. Works which are not eligible for copyright protection also contributes to public domain. In the U.S the works made by foreign nationals belongs to public domain. Although in the UK the foreign nationals works receives copyright protection. In the U.S in order to receive copyright protection the work has to be complied with statutory requirements. Thus, those which are not complied with the statutory requirements does not receive the copyright protection and fall under the class of public domain. According to Jessica Litman the concept of the public domain is another import from the realm of real property.[48] The term public domain gained widespread use in the late nineteenth century when the Berne Convention adopted the term *domaine public* from the French. The contents of the public domain may be mined by any member of the public.[49]

## 2.8 Idea/expression Dichotomy

It is an axiom of copyright law that it only protects expression and not the ideas in a work. According to Sherman and Bently[50]the discussion of separation of idea from its expression emerged as long back as mid 18th century. The authors suggested even in the mid 1800 expression was regarded as an abstract and isomorphic enough to be copied.[51] At that point of time the expression of the author, inventor, engraver and designer was distinctive enough for the property to be identified.[52]

Although in the UK there is no statutory rule that bars ideas from copyright protection, however, article 1(2) of the Software Directive provides that ‘Ideas and principles which underlie any element of computer program, including those which underlie its interfaces, are not protected by copyright under this Directive’.[53] This proposition has been left un stated in the UK version because of the reason that it is already there as a matter of common law principle applicable to the entire field of copyright.[54] It is also implied from the Copyright, Designs and Patents Act 1988 that ideas alone are not protected.[55] There have been a number of respected judicial statements to the effect that ideas alone are not protected.[56]

Among the International Conventions Idea/Expression dichotomy has been mentioned in the Trips. Art 9(2) of the Trips convention states: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”[57]

The idea/expression dichotomy has been restated in many cases and codified in the U.S Copyright Act of 1976.[58] In the US section 102(b) of Title 17 USC provides ‘in no case does copyright protection ...extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work’.[59]

The idea/expression dichotomy has been characterized as a “hallowed principle of copyright law”<sup>[60]</sup> and Professor Nimmer labelled it an “axiom of copyright law”<sup>[61]</sup> which advanced a First Amendment value of limiting copyright protection in a manner consistent with free expression.<sup>[62]</sup>

### **3.0 Development of Copyright and Its Effect on the Monopoly Defeating Mechanisms:**

The 1709 Copyright Statute vested copyright on the authors and gave them an exclusive right on their books. The duration was limited to 14 years and was limited right granted to the copyright owner: to print, publish and vend. Gradually, however the protection started to increase to cover other forms works. In 1734 copyright gave protection to engraving and the Engraving Copyright Act (1734) was enacted. The other Acts which were enacted to give protection to new forms of works were: The Engraving Copyright Act 1766, The Prints Copyright Act 1777, The Sculpture Copyright Act 1814, The Dramatic Copyright Act 1833, Lecture Copyright Act 1845, the Copyright Act 1842, the International Copyright Act 1852, the fine Arts Copyright Act 1862, Copyright Act 1911, Copyright Act 1956 Act, Copyright Computer Software Act 1985, Copyright Designs and Patents Act 1988, Copyright and Rights in Databases Regulations 1997 and finally Copyright and Related Rights Regulations 2003.

The fact is every changes in the Copyright Act adds bundle of rights that constitute copyright and gave an extended protections both in terms of form and duration. Copyright Act 1842 broadened the definition of book by including pamphlet, sheet of letter press, sheet of music, map and chart. The Act also broadened the protection provided to drama by including every tragedy, comedy, play, opera, or other scenic musical or dramatic entertainment. The term of copyright was extended to lifetime to seven years if it is less than 42 years from the first publication of such work. For the work published after the death of the copyright owner the duration is extended 42 years from its first publication. The 1852 Engraving Copyright included prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied. 1911 Act broadened the copyright protection and spread the protection to literary, dramatic, musical works. Musical works were infringed by making a film, record or other “contrivance” for mechanical performance. 1956 Act introduced infringement by broadcasting by diffusing to subscribers. 1985 Copyright Computer Software Directive extended copyright protection to computer programs, 1988 CDPA created a rental right in respect of sound recordings, films and computer program. Copyright and Rights in Databases Regulations 1997 extended protection to the Database Directive and finally the Copyright and Related Rights Regulations 2003 was implemented to combat with the digital piracy taking place by virtue of rapid technological development.

### **3.1 Information Society Directive (2003)**

On 9<sup>th</sup> April the Directive on the harmonisation of certain aspects of copyright and related right in the Information Society was adopted.<sup>[63]</sup> The Directive had two main goals to satisfy:

(1) To bring greater harmonisation to European copyright law in relation to copyright and exceptions to those rights;

(2) To implement the two 1996 world Intellectual Property Organisation Treaties, The WCT and the WPPT on Copyright and on performances and phonograms. To achieve these aims the Copyright Directive provides the following:

1. the harmonisation of three fundamental exclusive rights, these being- reproduction right, the communication to the public and the distribution right;
2. The introduction of the exhaustive list of copyright exceptions, all optional except Art 5 and ;

3. the introduction of obligation to protect circumvention of technical measures, designed to prevent infringement of copyright and removal of rights management information, Art 6 and 7.

The UK implementation of the Directive “The Copyright and Related Rights Regulation CRRR 2003” took effect on 31<sup>st</sup> October 2003.

**The WCT, Article 11** provides; obligations concerning technological measures. Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by the authors in connection with the exercise with their right under this Treaty on the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.

**The WPPT, Article 18** contains similar provisions for technological measures used by performers or producers of phonograms with respect to their performances or phonograms.

Member countries of WIPO during the Diplomatic Conference could not agree on the detailed set of rules on technological measures that protect copyright.[64] The text of the treaties left it to the states to determine the level of protection to be given to the technological measures and the specific acts that need to be prohibited.[65]

The aim of protection taken by the WIPO treaties suggested “effective technological measures should protect author’s exclusive rights.” The text suggests that only authors exclusive rights to be protected to which no limitations or exception applies.[66]

More over in the preamble of WIPO treaties it has been stated that in the digital age public privileges should not be limited by the protection measures. The WCT provides “[r]ecognising the need to maintain a balance the rights of authors and the larger public interest, particularly education, research and access to information.”[67] The WPPT contains similar language too.

Technological measures may cause material to be protected that would not have been protected by copyright laws. The impact of the technological measures are the exception or limitations of the copyright which traditionally has been regarded as fair dealing/fair use both in the UK and US can no longer be exercised. The technological measures not only have locked up the copyrighted materials but also the unprotected elements such as ideas, facts, scenes a faire etc which has been recognised both in the UK and the US law.

The consequence of these technological measures and the protection given to these right management information has led some commentators comment that it has given rise to Access Right.[68]

The U.S DMCA (Digital Millennium Copyright Act) and the CRRR (Copyright and the Related Rights Regulation) has given the right holder to bring civil and criminal action for circumvention of technological measure on removal of right management information against any person who obtains access without authorisation (although the person may have the legitimate right to access to the information). The consequence of this additional of this additional right has given to right of access to the right holder as an exclusive right.

DMCA section 1201, addresses two kinds of technological measure: access control devices and copy control devices. Section 1201 institutes a ban on circumventing access control device but not prohibition on circumventing copy control device. Furthermore, section 1201 operates with two kinds of prohibited acts: direct acts of circumventing the technological protection measure and acts preparatory to circumvention such as making and selling devices that are used to circumvent either category of technological measure.

In contrast CRRR does not distinguish between access control and copy control devices. Section 1201 of the DMCA institutes a ban on circumventing access control devices and bans on trafficking in technology that defeats access and/or copy control devices. That means one will not be able to circumvent access control or traffic any technology that defeats access or copy control. In contrast, there is however, no prohibition on circumventing copy control devices, under section 1201. This omission was employed to “assure that the public will have the continued ability to make fair use of copyrighted work.”[\[69\]](#)

However, since it is prohibited to traffic the copy control devices it makes very little sense as the person who wants to make fair use must have the technological expertise to make such device himself.[\[70\]](#)

Perhaps it is worthy to look at the Australian legislation pertaining to technological measure. The Australian legislature came up with a possible solution to reconcile a prohibition on devices with the limitations of copyright. The Australian Copyright Amended (Digital Agenda) Bill of 1999 targets only the preparatory activities to circumvention. The Australian Copyright Act grants the copyright owner or a licensee a civil remedy against a person who provides circumvention devices or services. However, the provider may escape liability if the person delivered the device to sign a declaration stating that it will only be used for a ‘permitted purpose’.[\[71\]](#)

296ZA of the CRRA deals with technological measure and applies to work other than a computer program. 296ZB restricts any one to circumvent those measures with knowledge. 296ZB also deals with the devices and services that is designed to circumvent the technological measure. 296B(1) permits to import such measure for private and domestic use but restricts any commercial making, hiring, selling, distribution, possessing of these devices.

296ZB(2) makes it illegal to promote, advertise or market any measure which enables or facilitated the circumvention of effective technological measure.

Therefore the consequence is very much similar to the DMCA. Although 296ZB(1) permits a person to import a technological measure for private or domestic use but 296ZB(2) makes it illegal to traffic the devices. Essentially, the unavailability of the devices will render it impossible to circumvent the technological measure unless the person has his own expertise to do it.

296ZE deals with the technological measure which prevents the permitted acts not restricted by copyright. 296ZE(2) of the CRRR states:

“where the application of any effective technological measure to a copyright work other than a computer program prevents a person from carrying out a permitted act in relation to that work then that person or a person being the representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State.”

It is notable here that the fair dealing been represented as a class of persons rather than a class or work or acts.

Subsection (9) of the 296ZE allows the fair use to be overridden by agreed contractual terms for the works made available to the public and for on demand works. Subsection 10 of 296ZE allows a complaint where a person has a lawful access to the copyrighted work.

To sum up CRRR allows a fair user to make a complaint to the secretary of State for the lawful access to the copyrighted work allowed by the copyright Act but not in cases where the right owner made works available on contractual basis or on demand works. In other words, it means that there is no fair use available for the works ‘made available to the public’ and for ‘on demand works’. Moreover, 296ZD specifically discusses the rights and remedies in respect of devices and services

designed to circumvent technological measure but unfortunately, nowhere in the Act it has mentioned the remedies that a fair user might assert for failing to get access to a work which has not been restricted by copyright.

296F(1) defines a technological measure as any device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program. One may argue saying that computer program is also a literary work. The separation of computer program from the copyright work is a strange one.

296ZF(3) states:

- (a) protection of a work is to the prevention or restriction of acts that are not authorised by the copyright owner of that work and are restricted by copyright; and
- (b) use of a work does not extend to any use of the work that is outside the scope of the acts restricted by copyright.

Essentially 296ZF of CRRR effectively gives the copyright owner very broad right which will override the copyright act. The fair user must abide by any kind of restriction that the copyright owner imposes on his/her work although it may not be restricted by copyright Act. So the fair user has to satisfy two things now in order to get access to a work:

1. to abide by the restriction imposed by the right owner;
2. to abide by the acts restricted by copyright

Although 296ZF(b) specifically permits to use of the works that has not been prohibited by the Copyright Act there might be restrictions imposed by the copyright owner by means of contract or by any other way that the copyright owner wishes to attach to his/her work.

To sum up this broader right given to the right owner by CRRR has in fact created a right of access which is not an exclusive right given by the Copyright Act. The consequence of gaining this exclusive right has cut down the fair use domain. In order to gain access to the work permitted by the copyright Act the fair user should have the right of lawful circumvention or else the fair user should be given the right to access the work. It is worthy to mention here that to gain access to a work is not a restricted act under Copyright Act.

Historically a right of access has been introduced into copyright law through the right to prohibit temporary reproductions granted by Software and Database Directive.<sup>[72]</sup> Under these directives any unlawful user who accesses a database or a computer program may be held liable for copyright infringement, as accessing to a digitised database or a software product temporarily reproduces a copy in the computer's random access memory.

The same is not true for the CRRR as 28A intends to exempt temporary reproductions that are necessary to use to gain access to these copyright works.

### **3.2 Shift from Copyright owner V. Infringer to Copyright owner v. User**

The Conditional Access Directive ('CAD') obliges E.U. member states to target the commercial dealing which enable unauthorised access to services provided on the basis of conditional access. In particular CDPA section 298 implements the 1998 EU Conditional Access Services Directive ("CASD").<sup>[73]</sup>

The CAD is designed to protect "protected services". The Directive requires Member States to prohibit persons in their territory from:

- (a) Making, importing, distributing, selling, renting, or possessing for commercial purposes "illicit devices";

(b) Installing, maintaining or replacing for commercial purposes an “illicit device”;

© Using commercial communications to promote “illicit devices”.

From the above discussion we see that simply possessing other than for commercial purposes<sup>[74]</sup> a circumvention device, or using such a device simply to circumvent copy protection or access a restricted service, are not expressly prohibited. In essence CAD obliges member states only to target the commercial dealing in devices enable unauthorised circumvention, while CRRR aims at mere act of circumvention or possession. As Patterson observed “[I]t is important to appreciate the fact that the fair use doctrine, as originality created, did not apply to the exercise the concurrent rights of the user but to the exercise of concurrent right by a competitor.”<sup>[75]</sup> So far the UK music industry has sued 23 illegal file sharers and was paid £50,000 to settle out of court.<sup>[76]</sup> In the US the RIAA has sued more that 6500 file sharers and each of them opted to settle for \$ 3000 to \$ 5000 outside the court.<sup>[77]</sup> Conversely, recently in France downloading songs and movies for private use was held to be fair use. The French Court of Appeal of Montpellier released a 22 years old internet user free of charges after he was sued for copying nearly 500 movies on the internet, burning them on CDs and sharing them with friends. The court based its decision on the article L-122-5 of the French Intellectual Property Code stating “authors can’t forbid copies or reproductions that are only intended for the private use of the copyist.”<sup>[78]</sup>

### 3.3 Amendment of provision relating to criticism review and news reporting

Section 30 of CDPA now includes a new condition on the current fair dealing exception of criticism, review and new reporting. The new condition of review “acknowledgement” has been added as a requirement. The criticism or review exception in section 30 has been modified to include a requirement that the work has already been made available to the public. Making available to the public includes:

- a. the issue of the copies to the public;
- b. making the work available by means of an electronic retrieval system;
- c. rental or lending of copies of the work to the public;
- d. the performance, exhibition, playing or showing of the work in public;
- e. the communication to the public of the work.

Therefore in the light of the above if a lawful user with to make a review of an article to which technological measure has been attached will not be able to get access to it till he pays for it. But the purpose of copyright is not to restrict to get access to a work. The problem has been created by the encryptions based protection which does not differentiate between the lawful user and the infringer. The result has given rise to a situation where these technological measures not only are prohibiting access to a potential infringer but also to the lawful user who has the legitimate right to get access to the work by virtue of fair use.

### 3.4 Right Management Information

CRRR has added a new right in CDPA 296ZG Electronic Rights Management Information which is entirely a new area for UK copyright law. Civil and criminal remedies are available to the right holders in case of any sort of tampering with these right. Subsection 7(b) of the 296ZG defined rights management information as information provided by the copyright owner, the information being the terms and conditional of use of the work, any numbers or codes that represent such information.

Any person knowing and without authority removing or altering any electronic rights management information or dealing in works from which rights management information has been removed has reasonable grounds to know, that by so doing is inducing, enabling, facilitating or concealing an

infringing act.

The right (RMI) given to the copyright owner is quite broad in scope and also protects the distribution of software with an on screen copyright license. RMI also includes website use terms and classic copyright notices. Exhaustion of right will only occur in respect of tangible copies of work.

### 3.5 Performer's Exclusive Right

Introduction of Performer's Exclusive Right as opposed to the current remuneration right to control on demand transmission of recordings of their performances has added, broadened and extended the performer's right. The amendment has given right to two distinct new rights:

- (a) Communication to the public of the work;
- (b) Making available right for performers.

Section 20 of the CDPA has been changed to grant an exclusive right to the authors of copyright works to grant an exclusive right to control any electronic communication to the public. The communication of the work to the public includes:

Literary, dramatic, musical or artistic works, sound recording or film or broadcast. The making available of the work to the public by electronic transmission means to make the work in such a way that members of the public may access it from a place and at a time individually chosen by them.

Therefore, section 20 has been replaced to provide a restricted Act in relation to the communication to the public of a:

1. literary, dramatic, musical or artistic work;
2. a sound recording or film; or
3. a broadcast.

Communication to the Public right is given to authors of copyright works, performers (for fixations of their performances), phonogram producers (for their phonograms), producers of the first fixation of their films (for the original and copies of their films) and broadcasting organisations (for fixation of their broadcasts, where the broadcasts are transmitted by wire or air, including cable and satellite). [79] This new right will address the issues such as uploading films, broadcasts, music, text/images in the website. Performers as well as phonogram producers will have a clear right to prevent the circulation and transmission of their recordings in Napster style. Moreover the Performers are given the exclusive rights to control "on demand" transmission of recordings of their performances. It is worthy to mention that the "on demand" right are only given to performers, record and film producers, broadcasters and not to the authors.[80]

### 3.6 Time shifting

In the past there was no need for copyright. Through out its history, copyright law has been closely to developments in technology. It was only after the introduction of printing that any serious question as to the copyright in literary works arose. Since then the advancement of other technologies such as photocopy, TV, radio were successfully coped up copyright. With every advancement of technology copyright owners attempted to persuade courts that the equipments of technological advances authorise and incite infringement. In the UK, in CBS v. Amstrad, the House of Lords refused to find infringement in marketing a twin deck tape recorder. In the US in the Sony (Betamax, 1984) case time shifting was allowed to be a fair use. Under 1988 CDPA section 70 time shifting was made as an explicit defence for broadcast. CRRR 2003 has narrowed down the exception by adding the word "domestic premises" only. However, no where in the act the word

“domestic purpose” has been defined. The other concern is time shifting may not be possible in case of digital programmes. Technological measures have been attached to the digital programmes which will bar consumers from freely recording digital programmes. The purpose is to keep consumers from copying and swapping TV shows and movies. The technology started with DVR allowing consumers scheduling shows at their convenience, pausing live television and skipping easily past commercials. Other technologies are Soft wares like Bit Torrent. The software has been created by Bram Cohen in Bellevue, breaks files hundreds or thousands of times bigger than a song file into small pieces. By P2p to copy and post “Desperate Housewives” takes hours to download, on Bit Torrent it arrives in minutes.[81] Recently it has been emerged that Britain is the world’s biggest market for downloading pirated television followed by Australia and United States.[82] Although on August 2004 the court of Appeals for the Ninth Circuit affirmed a lower court’s April 2003 preliminary injunction, which found that the owners of P2P networks, Grokster like networks did not contribute to copyright infringement,[83] the case will be further heard by the Supreme court of US in summer, 2005.

Inter operability has become a major concern with the introduction of RMI (Right Management Information). RMI has caused trouble to a lawful purchaser who has music CD or video and unable to use them both at home and at car or portable lap top; transferring CDs to iPod or watching DVDs on Laptop computers. Recently Apple and Sony have been sued over RMI in France. French consumer association has launched legal action over two companies proprietary music formats, claiming that the respective RMI use by Sony and Apple, which prevents songs bought from their online music shops from being played on other manufacturer’s media player, is limiting consumer’s choice. The companies were criticized for lack of interoperable RMI.[84]

Recently, Australia is reviewing its copyright laws. The federal Attorney General, Philip Ruddock is considering allowing consumers to freely copy films, music, photographs from one medium to another, as long as they have paid for them and the material is solely for private use. [85]

### **3.7 Extended Right**

Software Directive introduced circumvention to computer program, film and sound recordings. CRRR extended the right of circumvention to other forms of works such as rights in performances and database right.

### **3.8 New Criminal Offences**

CDPA section 107 and 198 has been amended to add new criminal offences for infringing copyright in a work by communicating the work to the public and infringing performer’s making available right.

### **3.9 Back up copies**

In the UK Software Directive and the 1988 Act entitle lawful users of a program to make “necessary” back up copies.[86] It is regarded a matter of reasonable practice to make back up copies of programs. A contractual clause seeking to override the entitlement is void.[87]

The section states “it is not an infringement of copyright for a lawful user of a copy of a computer program to make any back up copy of it which it is necessary for him to have for the purposes of lawful use. The same exemption does not seem to be possible to exercise in the CRRR 2003. Section 296(6) states: “In this section references to a technical device in relation to a computer program are to any device intended to prevent or restrict acts that are not authorised by the copyright owner of that computer program and are restricted by copyright.”

In essence CRRR is authorising the copyright owner to override the exception by contractual terms.

Thus, section 50A will not apply to the works where technological measures have been applied.

## 4.0 Decompilation

Article 6 of the Software Directive and section 50 B of the 1988 CDPA it is not an infringement of copyright of a lawful user to decompile a program for a permitted objective, provided a set of limiting conditions are satisfied. A term in an agreement, which seeks to prevent such decompilation is void.[\[88\]](#)

The defense of fair dealing for purposes of research and private has not application to decompilation. [\[89\]](#) Decompilation could be defined as to study the operation of a computer program in order to discover its specifications.[\[90\]](#)

Decompilation of a program is permitted under the following conditions:

1. the sole permitted purpose is only to create an independent interoperable program;
2. the information obtained must not be used for any other purpose
3. it must not be used in a program which infringes the portion decompiled.
4. The information must not be supplied to any one other than for the permitted objective.

Besides these there are two more conditions to be satisfied: [\[91\]](#)

- a. The lawful user must not have the necessary information “readily available to him”; and
- b. B the lawful user must not decompile more than necessary to achieve the permitted objective.

By virtue of CRRR section 50BA has been inserted into CDPA. 50BA permits a lawful user to observe, study or test the functioning of a computer program. 50BA(2) states:

“[W]here an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void)

Having stated so 296(6) states: [I]n this section references to a technical device in relation to a computer program are to any device intended to prevent or restrict acts that are not authorised by the copyright owner of that computer program and are restricted by copyright.

Therefore a lawful decompiler not only has to comply by the restriction imposed by copyright but also abide by the restriction imposed by the copyright owner.

CDPA 50BA(2) mentioned about section 296A but remained silent on the effect of 296(6).

The consequence being that the fair dealing of decompilation of the program is not longer valid to the works to which technological measures have been applied.

In other words technology has locked up the right to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, thereby rendering the idea/expression dichotomy void.

## 4.1 Three Step Test

Art 5.2 and 5.3 of the Information Society Directive provided a list of twenty exceptional exceptions. The list is exhaustive, so any new exception does not fall within the exhaustive list has to be removed or modified and not new exceptions may be introduced unless they fall within the listed exception.

The Art 10 of the WIPO Internet Treaties expressly permit the development of “new copyright exceptions and limitations that are appropriate to the digital environment. “Fair Use” exceptions generally allow certain users activities without the right owner’s consent. The ‘Three step’ test was introduced in the WIPO treaties. UK did not include the Three Step test in its national regulation although will be obliged to follow should the requirement arises. Three step test lays down three condition in order to render any use fair:

- (a) special cases;
- (b) do not conflict with a normal exploitation of the work;
- (c) do not unreasonably prejudice the legitimate interest of the authors.[92]

It is questionable if the three step test will have any relevance to the digital world at all given the fact that the scope of possible exception has become very narrow. With the RMI attached in the works almost every exploitation will require license. Moreover, if a lawful user wants to make a review on the article posted on the internet which is locked will not be able to get access to the material has been technologically locked.

## 4.2 Research and Private Study

Section 29 of the CDPA has been amended and fair dealing with commercial research has been excluded. Now the fair dealing can only be exercised for non commercial research although in practice it will be a difficult task to determine on how to separate a non commercial research from a commercial one. The section requires fair dealing with a literary, dramatic, musical or artistic work for research there must be sufficient acknowledgement unless this would be impossible for reasons of practicality or otherwise. Sec 9(1C) however, does not require any acknowledgement if the fair dealing is exercised for private study. It is difficult to determine circumstances when the study will be amounted to be done for research and when the study will be amounted for private study given the fact that nowhere in the Act the private study has been defined.

## 4.3 Conclusion

In the past copyright was perpetual and the perpetuity nature of copyright created monopoly in the society which in turn gave rise to chaos in the society. To correct the situation Statute of Anne (1709) was enacted to destroy the monopoly and to maintain a balance between the incentive to authors and the promotion of learning. To achieve this balance couple of monopoly defeating mechanisms were enacted. However, with the development of copyright law and the current implementation of new laws has upset this balance and has either narrowed the application of the monopoly defeating mechanisms or made them entirely inoperable. It has also been observed that the new laws have transgressed with the limit of exclusive rights set by copyright law and the two WIPO treaties. The new laws have broadened the copyright owner’s exclusive rights to cover public domain. Thus, the new laws have disabled the monopoly defeating mechanisms by strengthening the copyright owner’s right in a way that has never been intended by copyright law. The question to be asked, are we going to the right direction? Unfortunately, however, the history suggests otherwise!

[1] Blagden, Cyprian, *The Stationers’ Company: A History, 1403-1959*. London: Allen, 1960

2 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville, 1968, p 42

3 *ibid*

4 Blagden, Cyprian, *the Stationers’ Company: A History, 1403-1919*, London: Allen, 1960

5 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville, 1968, p 42

6 *Ibid*, p 81

7 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, Harvard Law Rev, December, 1970

8 Hulme, *The History of the Patent System under the Prerogative and at common law*, XII L.Q.R. 141, 142 (1896)

- 9 Benjamin Kaplan, *An Unhurried View of Copyright*, Columbia University Press, New York and London, 1967, p 62
- 10 Mark Rose, *Authors and Owners, the Invention of Copyright*, Harvard University Press, Cambridge, Massachusetts, London, England, p 42
- 11 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, p 85
- 12 Mark Rose, *Authors and Owners, The Invention of Copyright*, Harvard University Press, Cambridge, Massachusetts, London, England, p 42
- 13 Blagden, *The English Stock of the Stationers' Company*, X *The Library*, 5<sup>th</sup> ser., 163, 166 (1955)
- 14 11 ARBER 16, cf Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville, 1968, p 94
- 15 *ibid* p 91
- 16 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, p 91
- 17 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, p 108
- 18 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, p 113
- 19 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, p 5
- 20 Lyman Ray Pateson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, p 85
- 21 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, P 28
- 22 1 ARBER XXVIII cf Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, P 28
- 23 3 *Parliamentary History* 354 (1751) cf Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, P 28
- 24 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, P 28
- 25 Lyman Ray Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville: 1968, P 32
- 26 John Feather, *Authors, Publishers and Politicians: The History of Copyright And the Trade*, EIPR, 1988
- 27 *ibid*
- 28 L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright, A Law of User's Rights*, The University Georgia Press, Athens & London, p ?
- 29 William F. Patry, *The Fair Use Privilege in Copyright Law*, The Bureau of National Affairs, Inc., Washington, D.C. p 3.
- 30 *ibid*
- 31 Norma Dawson, *Fair Use Privilege In Copyright Law*, EIPR, 1989, 11 (5), 178-179
- 32 L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright, A Law of User's Rights*, The University Georgia Press, Athens & London, p 68
- 33 2 *Atk.* 141, 143 (1740) (No. 130)
- 34 *Amb.* 403 (1761) (No. 212)
- 35 4 *Esp.* 168
- 36 William f. Patry, *The Fair Use Privilege in Copyright Law*, The Bureau of National Affairs, Inc., Washington, D.C. p 10
- 37 *ibid*
- 38 9 *R. Cas.* 342 (C.C.D. Mass. 1841) ( NO. 4,901)
- 39 *Scott v. Stanford*, L.R. 3 Eq. 718, 722
- 40 Kaplan J. *Symposium Beyond Napster: Debating the Future Of Copyright On The Internet: Keynote Address: Resolving Tensions Between Copyright and the Internet*, *The American University Law Review*, December, 2000
- 41 17 U.S.C. section 107 (2001)
- 42 H.R. Rep. No. 94- 1476, 94<sup>th</sup> Cong., 2d sess. 66 (1976)
- 43 L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright, A Law of User's Rights*, The University of Georgia Press, Athens & London, p 67
- 44 Statement of Marybeth Peters, *The Register of Copyrights before the Subcommittee on Courts, The Internet, and Intellectual Property Committee on the Judiciary*, United States House of Representatives 107<sup>th</sup> Congress, 1<sup>st</sup> session, December 12-13, 2001; <http://www.copyright.gov/docs/regstat121201.htm>.
- 45 Eaton s. Drone, *The Law of Property in Intellectual Productions*, Drone on Copyright, Boston, Little, Brown, 1879, p 386
- 46 L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright, A Law of User's Rights*, The University of Georgia Press, Athens & London, p 67
- 47 *ibid*
- 48 Jessica Litman, *The Public Domain*, *Emory Law Journal*, Fall, 1990, p 4
- 49 *ibid*
- 50 Bred Sherman and Lionel Bently, *The making of Modern Intellectual Property Law, The British Experiences, 1760-1911*, Cambridge University Press, 1999
- 51 *ibid*
- 52 W. Spence, *The Public Policy of a Patent Law*, London: Printed for the Author and sold at 8 Quality Court, 1869, 16.
- 53 Directive 91/250/EEC
- 54 Cornish & Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*, Fifth ed, Thomson, Sweet and Maxwell, p 291-292
55. CIPA 1988 Act

- 56 L.B (Plastics) Ltd v. Swish Products Ltd.[1979] RPC 551, Ibcos Computers v. Barclays Mercantile Highland Finance [1994] FSR 275
- 57 TRIPS, Art. 9(2)
58. Norma Bibbon & Trimming, Inc. v. Little, 51 F. 3d 45, 48, 5<sup>th</sup> Cir. 1995
- 59 1976 Copyright Act
60. Atari Games Corp. v. Oman, 693 R. Supp. 1204, 1207 (D.D.C 1988), Rev'd on other grounds, 888 F.2d 878 (K.C. Cir. 1989)
61. M.Nimmer 7 D Nimmer on Copyright sec. 13.03 (E), at 13-51 to 13-52
62. M.Nivver & D Nimmer on Freedom of Speech, section 2.05 (C ) at 2-63
- 63 Directive 2001/29 [2001] O.J. L 167/10
- 64 Workshop on Implementation Issues of the WIPO Copyright Treaty ( 'WCT') and the WIPO Performances and Phonograms Treaty ( 'WPPT'), December 6 and 7, 1999- [http://www.wipo.int/eng/meetings/1999/wct\\_wppt/doc/imp99\\_2.doc](http://www.wipo.int/eng/meetings/1999/wct_wppt/doc/imp99_2.doc) (last visited January 11, 2003)
- 65 ibid
- 66 Terese Foged, US and EU Anti Circumvention Legislation: Preserving the Public Privileges In the Digital Age, EIPR 2002
- 67 The WCT Preamble, Recital 5
- 68 Terese Foged, US and EU Anti Circumvention Legislation: Preserving the Public Privileges In the Digital Age, EIPR 2002
- 69 U.S Copyright Office Summary, The Digital Millennium Copyright Act of December 1998.
- 70 Terese Foged, US and EU Anti Circumvention Legislation: Preserving the Public Privileges In the Digital Age, EIPR 2002
- 71 Art 116A of the Copyright Amendment Bill of 1999. [http://www.copyright.com.au/digital\\_agenda\\_bill.htm](http://www.copyright.com.au/digital_agenda_bill.htm) (last visited January, 2004)
- 72 Bygrave and K.J.Koelman, Institute for Information Law, Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems (1998), pp- 43-46
- 73 Directive 98/84 implemented into UK law by the Conditional Access ( Unauthorised Decoders) Regulations 2000, S 1 2000/1175
- 74 S 297A (1) (b); S 298 (2) (a) (ii)
- 75 L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright, A Law of User's Right, University of Georgia Press, 67
- 76 <http://newsvote.bbc.co.uk> (last visited March, 2005)
- 77 Financial Review, <http://www.afr.com/articles/2005/03/01/> (last visited March, 2005)
- 78 <http://www.audionauts.net/blog/index.php?> 2005/03/11/23-movies-downloading-judg...(last visited March, 2005)
- 79 Simon Stokes, The UK Implementation of the Information Society Copyright Directive Current Issues and Some Guidance for Business, Legislative Comment, Computer and Telecommunications Law Review, 2004, p 3
- 80 Ibid
- 81 The New York Times-Arts-Television- Steal this Show-<http://www.nytimes.com/2005/01/03/arts/television> (last visited February- 2005)
- 82 [Http://news.com.com/2102-1025\\_3-5580735.html?tag=st.util.print](http://news.com.com/2102-1025_3-5580735.html?tag=st.util.print)
- 83 P2P blow for the copyright holders, Sam Mamudi, New York 22 August 2004, <http://www.legalmediagroup.com/news/print.asp?SID=>(last visited August, 2004)
- 84 <http://news.com.com/2102-10273-5575417.html> (last visited Feb 2005)
- 85 <http://www.smh.com.au/news-last-visited-February-15>, 2005.
- 86 Software Directive, Art 5(2); CDPA 1988, sec 50A
- 87 Software Directive, Art 9(1), CDPA 1988, sec 50A (3)
- 88 CDPA 1988, sec 50 B (4), 296A
- 89 CDPA 1988, sec 29 (4)
- 90 Ian J Lloyd, Information Technology Law, fourth edition, Oxford University Press, p 463
- 91 Cornish & Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights, Fifth ed, Thomson, Sweet and Maxwell, p 874
- 92 Art 10 para (1)



