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UK Copyright Law in the Digital Environment

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(Response to Questionnaire III.B)*

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1. Exclusive Rights

1.1. Does your law include, as part of the exclusive reproduction right, the right to authorize temporary reproduction, and if so, through an explicit provision or an interpretation on the basis of a non-specific provision?

United Kingdom (“UK”) copyright law includes temporary reproduction within the exclusive reproduction right and has done so by an explicit statutory provision since 1988 (Copyright, Designs and Patents Act 1988 [“CDPA 1988”], section 17(6)).

1.2. Does your law provide, explicitly or on the basis of interpretation, the right of making available works and subject matter of related rights through digital networks? If it is provided explicitly, by which words has it been described?

Implementing the Copyright in the Information Society Directive 2001 (“InfoSoc Directive”) with effect from 31 October 2003, CDPA 1988 section 20 deals explicitly with the ‘making available’ right in digital networks as follows:

- (1) The *communication to the public* of the work is an act restricted by the copyright in –
 - (a) a literary, dramatic, musical or artistic work,
 - (b) a sound recording or film, or
 - (c) a broadcast.

- (2) References in this Part to communication to the public are to *communication to the public by electronic transmission*, and in relation to a work include –
 - (a) the broadcasting of the work;
 - (b) *the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.*

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The key words of section 20 have been italicised in the above quotation. Following the words of the statute, the right is probably best referred to as the “public communication right”. As the statute also makes clear, the public communication right extends beyond transmission through digital networks to include broadcasting (itself widely defined in CDPA 1988 section 6).

2. Limitations and Exceptions

2.1. In which way have digital technologies been taken into account in the drafting of provisions on limitations and exceptions, or in their interpretation?

CDPA 1988 section 28A, also introduced with effect from 31 October 2003 in implementation of the InfoSoc Directive, provides that copyright is “not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process, and the sole purpose of which is to enable – (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance”. This exception does not apply to the copyright in computer programs or databases; nor does it apply to the copyright which may exist in a broadcast as such.

With regard to *computer programs*, lawful users can (see CDPA 1988 sections 50A-50C):

- make back-up copies.
- decompile the program to obtain the information necessary to create an independent program which will be inter-operable with the decompiled program or another program.
- observe, study and test the functioning of the program to determine its underlying ideas and principles.
- make copies or adaptations of the program necessary for its lawful use (e.g. error correction), so long as this is not prohibited by any agreement regulating what uses are lawful.

With regard to *databases*, a person who has a right (contractual or otherwise) to use a database, may in the exercise of that right, do anything necessary for the purpose of access to and use of the database contents or part thereof (CDPA 1988 section 50D).

Most of the other exceptions and limitations spelled out in CDPA 1988 sections 28-76 either apply generally, or to specific kinds of user (e.g. educational establishments, libraries, archives), or to specific categories of work (literary, dramatic, musical or artistic works, films, sound recordings, broadcasts). The UK’s approach has therefore not been systematic, but rather casuistic, with digital technologies been taken into account only in certain, very specific contexts.

2.2. In particular, what limitations and exceptions have been provided in respect of the rights of electronic reproduction and making available?

Apart from the material already referred to in 2.1, the classic UK exceptions of “fair dealing” for purpose of non-commercial research, private study (see further below), criticism, review and news reporting (CDPA 1988 sections 29 and 30) apply to all the rights enjoyed by the copyright owner, in particular the reproduction right, but also, so far as appropriate, the public communication right (it would seem obvious, for example, that I cannot defend unauthorisedly putting copyright material on an openly accessible website by saying that I am doing so for the purposes of my own private study). No specific exceptions to the public communication right have been developed to take account of digital networks, although there are several exceptions for broadcasts (CDPA sections 68-75), which fall within the public communication right. One such exception for broadcasting allows “time-shifting”, the “making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time” (CDPA 1988 section 70); but there is as yet no exception for “place-shifting”, which would be a more useful exception in the context of digital network transmissions.

It may be worth noting the Legal Deposit Libraries Act 2003, the current provision under which those who publish print material in the UK can be required to deposit a copy of the publication with each of the following libraries: the British Library, the National Libraries of Scotland and Wales, the Bodleian Library Oxford, the Cambridge University Library and the Library of Trinity College Dublin (see also CDPA 1988 section 44A). The deposit rights have existed since the eighteenth century; the purpose of the 2003 Act was to extend the deposit obligation beyond print, and in particular to works published on the Internet. In order to facilitate the capture of Internet material for the deposit libraries, the Act introduced an exception allowing them to make copies of such material for the purpose. This has, however, yet to come into force, as the detailed regulations have not yet been agreed.

2.3. In respect of private reproduction, does your law distinguish between analogue and digital reproduction and if so, in which way?

Does the law explicitly or by interpretation require that the permitted private copy is made from a legally made copy and/or from a copy made available legally?

The CDPA 1988 does not distinguish between private and other forms of reproduction; reproduction anywhere is *prima facie* infringement of copyright (CDPA 1988 section 17), and there is no general exception for private reproduction. Nor is there any distinction between analogue and digital reproduction, save that reproduction “includes storing the work in any medium by electronic means” (CDPA 1988 section 17(2)).

The nearest that UK law comes to an exception for private reproduction is its exception for “fair dealing ... for the purposes of private study” (CDPA 1988 section 29(1C)). This however applies only to literary, dramatic, musical and artistic works, and so not to films, sound recordings and broadcasts. While private study is undefined, and could therefore apply to the person accessing material by digital/electronic means, the word “study” appears to be narrower than the more general “use”.

The concept that to be permitted the use must be “fair dealing” would probably mean that a person making a copy for purposes of private study, but knowing that the copy from which she was making her copy was not itself legally made, would not be able to plead the exception. It should be noted that CDPA s 30(1) provides that fair dealing with a work for the

purpose of criticism or review of that work does not infringe copyright provided that the work has been lawfully made available to the public (considered in *HRH The Prince of Wales v Associated Newspapers Ltd (No 3)* [2006] EWHC 522). The words “provided that the work has been lawfully made available to the public” do not appear in the subsection dealing with “private study” which might argue that an unlawful act (e.g. in breach of confidence or to overcome a technological protection measure) would not invalidate a defence of “private study”. However general case law indicates that fair dealing is limited to the extent that a work is “unpublished”. This might suggest that there is a distinction between “published” and “lawfully made available to the public”. This is yet to be considered by the courts.

Private study does not extend, however, to the observation, study or testing of a computer program (CDPA 1988 s 29(4A)), which activity has its own special provision (see above, 2.1).

3. Relation between Limitations and Contracts

Is it legally possible to extend the protection by contract thereby undermining limitations and exceptions under the law?

The general UK position on this matter is unclear, although there are a number of specific statutory provisions with a bearing on the matter in particular contexts. There has been little discussion as to whether the rules on limitations and exceptions merely provide defences to claims of infringement or are free-standing user or public rights. The difference is important because, if the permitted acts are substantive rights, then the copyright owner should not be able to prevent actions designed to exercise them; but if they are merely defences, then they can be invoked only when the copyright owner sues for infringement. Debate about this point has developed because producers of digital works may be able to deploy technological measures to prevent users gaining access to them to perform permitted acts if they have copyright – and, indeed, even if the works never had or have passed out of copyright. Thus technology has the potential to create protection akin to copyright for works which have never had, or have ceased to have, copyright, as well as to extend protection beyond the scope of copyright where that exists.

CDPA 1988 describes the limitations and exceptions to copyright as “permitted acts”, language hardly redolent of user rights. The Act further says that its provisions on permitted acts “relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts”, (CDPA 1988 section 28(1)), which is also clearly against the notion that the permissions are to be seen as user rights.

There has been little UK discussion of whether the fair dealing provisions to be discussed below prevail over contrary contractual provision, contained for example in a copyright licence. To put it another way, can one contract out of fair dealing? The un-argued assumption was that fair dealing prevailed over contract (see e.g. W R Cornish, *Intellectual Property*, 5th edition: 2003, para 19.77), although under at least one provision of the Copyright, Designs and Patents Act 1988, an exception to copyright enabling educational establishments to make a limited quantity of copies of works for purposes of instruction, does not apply if a licence for such activity is available (CDPA 1988 section 36(3)). There is also the provision quoted in the previous paragraph, which might be read as meaning that beyond the permitted acts may lie, unaffected, other rights or obligations restricting the doing of any of the specified acts, such as might be found in a contract. Another example of contract prevailing over exceptions relates to the permitted act of temporary reproduction or adaptation of a computer program necessary for a lawful user’s lawful use of the program: a term of any contract regulating the circumstances

in which the user's use is lawful, and prohibiting the copying or adaptation in question, will make those acts infringements (CDPA 1988 section 50C, implementing Software Directive 1991, reading article 5(1) in conjunction with article 4(a)).

On the other side of the coin (i.e., suggesting that contract does not prevail over exceptions and limitations) are the following provisions in CDPA 1988. Any term or condition of an agreement purporting to prohibit the permitted act of temporary reproduction of a database necessary for the purpose of access to and normal use of the database contents by a person with a right to use the database is void (CDPA 1988 sections 50D(2) and 296B). A number of other acts in relation to computer programs which are permitted to a lawful user thereof cannot be over-ridden by contract – i.e. making a back-up copy of the program (CDPA 1988 section 50A), decompilation in terms of CDPA 1988 section 50B(2), and observing, studying or testing the functioning of the program in accordance with CDPA 1988 section 50BA. And for the owner of copyright in a computer program to put it on the market without granting a licence, express or implied, to enable the purchaser to load it into a computer's RAM and run it (thereby making the purchaser a lawful user) would seem an absurd scenario.

The Copyright and Rights in Databases Regulations 1997 (implementing Council Directive No. 96/9/EC of 11 March 1996 on the legal protection of databases) make it clear that a lawful user of a database which has been made available to the public in any manner shall be entitled to extract or re-utilise insubstantial part of the contents of the database for any purpose (Reg 19(1)) and that any term in an agreement purporting to limit this entitlement shall be void (Reg 19(2)). While this goes to the substantiality of the amount extracted (the limitation on the extent of the *sui generis* right) it illustrates that contract provisions may not be used to extend the scope of the *sui generis* right in this respect.

In the most recent detailed study of the topic in UK law (Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press: 2005), the authors conclude that it is “generally possible to contract out of the permitted acts. There is, however, a growing list of circumstances in which it is not possible to contract out of the permitted acts, Parliament and the European legislator having recognised that it ought not to be possible to exclude the exceptions in certain circumstances.” (ibid, p 69). They argue that such a piecemeal approach is preferable to the inflexibility which would arise from a blanket prohibition on contractual exclusion of the permitted acts (ibid, p 70). It would be better, in their view, to distinguish types of fair use, those excludable by contract and those not (ibid, pp 269-70, 306-10).

4. Technical Measures and Rights Management Information

4.1. Please describe the protection, if any, against circumvention of, and against “secondary” acts related to, technical protection measures, including legal sanctions.

In its original form, CDPA 1988 section 296 provided that where copies of a copyright work were issued to the public in an electronic copy-protected form - that is, could not be copied or could only be copied with poor quality reproduction - the copyright owner had a secondary infringement claim against a person *dealing in any device specifically designed or adapted to circumvent* the form of copy-protection employed, or *publishing information intended to enable or assist persons to circumvent* that form of copy-protection. The Software Directive 1991 also provided that there should be appropriate remedies in national legislation against a person putting into circulation, or possessing for commercial purposes, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any

technical device applied to protect a computer program (article 7(1)(c)). Making and supplying devices to enable technical protection measures to be evaded was made equivalent to infringement of copyright itself and, in the UK, also invited criminal penalties. As a result of the InfoSoc Directive, however, UK law has been substantially amended and added to, with effect from 31 October 2003.

Specific provisions for *computer programs* continue, since the Software Directive was not superseded on this point by the InfoSoc Directive (CDPA 1988 s 296 as amended by the Copyright and Related Rights Regulations 2003, regulation 24). Any device that is intended to prevent or restrict acts unauthorised by the copyright owner *and* restricted by copyright is protected. *Making, dealing in, or possessing for commercial purposes a circumvention device while knowing or having reason to believe that it will be used to make infringing copies makes the person in question liable as an infringer of copyright in his or her own right.* All the usual civil remedies – injunction/interdict, damages, account of profits, delivery up of infringing items – therefore apply.

The rules are similar in respect of *copyright works that are not computer programs* (e.g. broadcasts, databases, sound recording CDs, film DVDs, websites), but wider in scope (CDPA 1988 s 296ZA). Thus the rules apply to *protect*, not just technical devices, but *effective technological measures applied to the work*. This covers any technology, device or component designed in the normal course of its operation to protect a copyright work, that is, to prevent or restrict acts unauthorised by the copyright owner *and* restricted by copyright (CDPA 1988 s 296ZF(1)). These measures are “effective” if use of the work within the scope of the acts restricted by copyright is controlled by the copyright owner through either (a) an access control or protection process such as encryption, scrambling or other transformation of the work; *or* (b) a copy control mechanism (CDPA 1988 s 296ZF(2)). Thus chips in computer games consoles, designed to prevent use of the consoles in other than designated territories, would be held to be technical protection measures, while supplying chips that bypassed such restrictions have been held to be acts of circumvention (*Sony Computer Entertainment v Owen* [2002] EMLR 34; *Sony v Ball* [2005] FSR (9) 159).

A person who does *anything* (i.e. not just manufacture, dealing or commercial possession) circumventing these measures knowing, or with reasonable grounds to know, that that objective is being pursued, is to be treated as an infringer of copyright (CDPA 1988 s 296ZA(1), (3)).

The people who can sue under any of the anti-circumvention rights are:

- those who have issued copies of the protected work, or communicated it, to the public
- the copyright owner or his/her exclusive licensee (CDPA 1988 ss 296(2), 296ZA(3), 296ZG(3), (4)).

In addition, with regard to devices protecting computer programs, the owner/exclusive licensee of any intellectual property right in the protection device itself may take action (CDPA 1988, s 296(2)(c)).

There are criminal law sanctions against manufacturing, dealing in or with, or installing, maintaining or repairing unauthorised decoders; punishments include imprisonment and/or fines (CDPA 1988 section 297A).

4.2. Please describe the protection, if any, against manipulation of rights management information and related “secondary” acts, including the legal sanctions.

The approach to the protection of rights management systems is to make it akin to infringement of copyright knowingly and without authority to remove or alter digital rights management information associated with a copy of a copyright work or which appears in connection with a communication of the work to the public (CDPA 1988 section 296ZG(1)). Also caught is the person who knowingly and without authority distributes, imports for distribution or communicates to the public copies of a copyright work from which the digital rights management information has been removed or altered. In both cases the person so acting must know, or has reason to believe, that the action induces, enables, facilitates or conceals an infringement of copyright (CDPA 1988 section 296ZG(2)).

4.3. In which way has the conflict between the legal protection in relation to technical protection measures on the one hand and limitations of, or exceptions to rights on the other hand been solved in your law, in particular regarding private reproduction? Have there been any agreements between relevant associations, court cases or factual problems at all in this respect?

CDPA 1988 section 296ZE implements Article 6(4) of the InfoSoc Directive. 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 who is a representative of a class of persons prevented from carrying out a permitted act) may complain to the Secretary of State (i.e. the relevant Government Minister). The Secretary of State may thereupon issue written directions to the copyright holder, with which the latter must comply. Failure to do so gives the complainant a civil right of action. The directions may be to establish whether any voluntary measure or agreement subsists with regard to the copyright work in question, OR to ensure that the copyright owner or exclusive licensee makes available to the complainant the means of carrying out that permitted act, to the extent necessary to benefit from that permitted act. The direction can be subsequently revoked or varied. The complainant must be somebody who has lawful access to the protected copyright work.

It should be noted that this provision only applies to certain (and not all) permitted acts. Schedule 5A Part 1 CDPA lists those permitted acts to which it applies. This includes, for example section 29 (research and private study) and section 31A (making a copy available for a visually impaired person). It is notable that it does not apply to section 30, criticism, review and news reporting.

None of CDPA 1988 section 296ZE is applicable, however, where the copyright work in question has been made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them (CDPA 1988 section 296ZE(10)). Thus it appears that in a digital network environment the exceptions and limitations to copyright may be over-ridden by contract, or at the least that the procedure described above will not be available where contract limits the exceptions. The limits on this may arise from the phrase “agreed contractual terms”: does “agreed” mean that the terms must in some way be negotiated ones, rather than the standard forms normally used in on-line transactions? If the word does not have this meaning, its use alongside “contractual” would appear rather tautologous.

We are unaware of any use so far of these provisions, or of any agreements between relevant associations.

4.4. In which way, if at all, does the law or practice take into account the extent to which technical measures preventing private reproduction are in fact employed in respect of the remuneration for private reproduction?

Not at all. This matter is, however, the subject of some discussion, notably where collections of works in the education environment are made available by publishers under specific subscription regimes (e.g. Lexis and Westlaw) but the educational establishment still subscribes to a photocopying licence. Although not private reproduction as such, the question arises as to the extent to which the educational establishment might be paying twice on behalf of their students for the same works.

5. How are licensing contracts interpreted which were concluded at a time when internet uses were not yet known? Are there statutory rules or is there case law resulting in an interpretation according to which new, then unknown digital uses would not be covered by a non specific licensing agreement?

There are no special rules of interpretation in this area, nor has the issue arisen in reported case law. General principles would apply: what was the intention of the parties, given the words used and the context in which they were used? In contemporary drafting practice there is usually provision for future technological development.

6. Collecting societies

6.1. Which rights in digital uses are administered by collecting societies in your country?

The pre-digital collecting societies have adapted themselves for digital activity in relation to their portfolios: e.g. the *Mechanical-Copyright Protection Society* in relation to recordings of music, the *Copyright Licensing Agency* in relation to the photocopying and scanning of books, journals and magazines, the *Design and Artists Copyright Society* in relation to artistic work, *Phonographic Performance Ltd* in relation to the public communication of music, *Authors Licensing and Collecting Society* in relation to literary works.

6.2. Do they employ digital rights management, and if so, in which cases?

As the collecting societies do not generally make available works themselves, but rather licence others to make copies, so they do not employ digital rights management. However, the terms of the licence to reproduce works in digital form are likely to provide that the licensee may only make licensed works available in connection with suitable digital rights management technology. For example, the scanning licence between the Copyright Licensing Agency and certain Higher Education Institutions provides that access to Digital Copies must be by way of a "process of authentication" (which in the UK would be by Athens authentication) and that the licensed works may only be made available on a secure network. In terms of the licence grant, the Licensee is permitted to retain a digital copy on the secure network. The course users (the students) may access, download and print out a copy from a digital copy but are only permitted to retain an electronic copy for the duration of the course of study. There is no requirement that digital rights management be used to ensure that the terms of the licence are adhered to at the point of the student, but that may be because the

technology is not yet sufficiently advanced in this domain. (For a copy of the trial licence see http://www.cla.co.uk/support/he/HE_TrialPhotocopyingandScanningLicence-Feb06.pdf).

7. Secondary Liability

7.1. Under what conditions, if at all, and in which way are internet service providers and software providers liable under secondary liability rules for non authorized peer to peer file sharing by individual users?

The relevant concept in UK copyright is *authorisation of infringement*. The copyright in a work is infringed by any person who, without the licence of the copyright owner, authorises another person to do any of the restricted acts (CDPA 1988 section 16(2)). There cannot be infringement by authorisation unless there has been an infringement of the primary rights of the copyright owner; or to put it another way, only if authorisation comes from the copyright owner is there no primary infringement. To authorise an infringement is to “sanction, approve, or countenance” it,¹ a formulation capable of a very wide meaning, especially when conjoined with the apparent willingness of the courts to treat indifference as capable of being authorisation.² However, the concept has been applied in a relatively restricted way, by employing a test of the degree of authority, or control, which the defender had over those who actually carried out the infringement.

Liability by authorisation has obvious importance for commercial Internet service providers, universities, and other bodies which enable the access to the Internet for customers, students and others by means of which infringing Internet activity can take place. Can such bodies be liable for authorising such infringing use? The general answer is probably in the negative so far as the UK is concerned. Leading cases have held the providers of certain facilities – in one case, a sound recording lending library; in the other, a double-headed cassette recorder with which reel-to-reel copying was possible - not liable despite the fact that their services and products rendered infringement easy and probable,³ the crucial factors in each case being that lawful activity was possible with the facilities provided, that the defendants had given express warnings to customers against use for infringing copying, and that they lacked the necessary control over what their customers did with the facilities provided.

Where however one or more of these factors is lacking, then liability for authorisation is more likely. In particular, the ability of the defendant to prevent or stop infringing activity – as for example by removing offending material from its facility once brought to its attention – or its knowledge that infringing activity is taking place without steps being taken to prevent or deter it, might well lead a UK court to conclude that authorisation had taken place. No such case has yet arisen, although there have been successful actions against individual file-sharers for infringement of the public communication right.

¹ This definition of ‘authorise’ was first stated in *Monckton v Pathe Freres Pathephone Ltd* [1914] 1 KB 395 and *Evans v Hulton & Co Ltd* [1924] WN 130.

² *PRS v Cyril Theatrical Syndicate* [1924] 1 KB 1; *Moorhouse v University of New South Wales* [1976] RPC 151 (High Ct of Australia); *CBS v Ames Record & Tapes* [1982] Ch 91.

³ *CBS Inc v Ames Records and Tapes Ltd* [1982] Ch 91; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013.

The Directive on electronic commerce in the European Union⁴ also sets out an exemption from liability for intermediaries where they play a wholly passive role as mere conduits of information from third parties.⁵ It limits service providers' liability for other activities such as the storage of information provided by recipients of the service and at their request (hosting), so long as the provider does not know of the illegal activity, is unaware of facts and circumstances from which illegal activity is apparent, and acts expeditiously to remove or disable access upon learning or becoming aware of the activity.⁶ There is explicitly no obligation actively to screen or monitor third party content.⁷

7.2. What legal possibilities do right holders who want to sue individual users of file sharing networks have in order to identify the individual users?

There are different "discovery" procedures in the various jurisdictions of the UK (England & Wales, Scotland, and Northern Ireland). In England, search orders under the Civil Procedure Act 1997, which enable a party to search a defendant's premises for evidence of infringement in cases where there is an extremely strong prima facie case of infringement, also allow the defendant to be asked for information about e.g. sources or destinations of supplies. According to BBC News Online for 30 January 2006, <http://news.bbc.co.uk/1/hi/technology/4663388.stm>, the High Court of England & Wales that day issued an order requiring 10 Internet service providers to hand over information about 150 file-sharers detected using their networks. A similar result could probably be achieved in Scotland using the procedure of commission and diligence under the Administration of Justice (Scotland) Act 1972 sections 1 and 1A as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 section 19, under which a court may compel any person to disclose such information as he has about the identity of any persons who appear to the court to be persons who might be defenders in any civil proceedings which appear to the court to be likely to be brought.

7.3. Please describe the liability of persons who set links from their own website to another one.

There is no specific liability for linking. In *Shetland Times v Wills* 1997 SC 316; 1997 SLT 669; 1997 SCLR 160; [1997] FSR 604; [1997] EMLR 277, an early case in the Internet context, the court granted an interim (i.e. temporary, pending full trial) interdict to stop the defender's website deep-linking to the pursuer's site. The two sites were newspaper ones, and the defender's links took the same textual form as the headlines on the pursuer's site. One, rather doubtful, basis for the judge's decision was therefore unauthorised textual reproduction; the doubt is whether the text of a headline (or hyperlink) is of sufficient substance to be a copyright work. The judge also took the view, on the basis of now repealed wording in the CDPA 1988, that websites were cable programme services, in relation to which there could be infringement by way of "inclusion" of one such service within another. Linking, the judge ruled, could be such infringing "inclusion". Today, however, if the pursuer was to be provided with a remedy at all, it would have to be by a different route. Linking cannot be seen as reproduction, issuing copies of a work to the public (distribution), public rental/lending, public performance, or adaptation, five of the six main forms of copyright

⁴ European Parliament and Council Directive 2000/71/EC on certain legal aspects of Information Society services, especially electronic commerce in the Internal Market (E-Commerce Directive); implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013).

⁵ E-Commerce Directive art 12, implemented by 2002 Regulations, reg 17.

⁶ See art 14 (hosting), implemented 2002 Regulations, reg 19.

⁷ E-Commerce Directive art 15.

infringement. Might it be seen as a form of public communication of a work? – that is, as the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them. Given that linking does not actually incorporate the target work within the linker’s own transmission, but merely gives the user access to another’s transmission, the answer would appear to be No. Two other possibilities are that the provision of a link to another site in such a way as to circumvent restrictions on access might fall foul of the rules against anti-circumvention (above, 4.1), or be held to be authorisation of infringement (above, 7.1). Outside copyright, if the target website is a database, then linking to it may be a form of re-utilisation of the kind restricted by the *sui generis* database right so long as the part re-utilised amounted to a substantial part of the database (see Copyright and Rights in Databases Regulations 1997, SI 1997/3032, reg 16), since “re-utilisation” in relation to any contents of a database, means making those contents available to the public by any means (*ibid*, reg 12(1)).

8. Applicable Law: Under what conditions, under statutory rules or case law, is an act of infringement qualified as domestic?

The basic position applied in the UK’s various jurisdictions under Part III of the Private International Law (Miscellaneous Provisions) Act 1995 is that where an issue between parties before the court has its most significant relationship with an occurrence in another country, then the law of that country (rather than that of the UK jurisdiction concerned) should be applied to it. So in *Pearce v Ove Arup* [1999] FSR 525 the question whether the building of Rotterdam Town Hall infringed copyright in architectural drawings was found by the English Court of Appeal to be governed by Dutch rather than English law. The converse outcome is that, where the most significant relationship between the parties is an event in one of the UK jurisdictions, then the relevant UK law will be applied by a UK court otherwise having jurisdiction.

A court may have jurisdiction over a defendant domiciled within its jurisdictional territory OR, in cases of tort/delict (which could include copyright infringement), if the harmful event occurred in that place. In *IBS Technologies (PVT) Ltd v APM Technologies SA and another* [2003] All ER (Ch.D) 105 (concerning Article 5(3) of the Lugano Convention) the claimant was an Indian corporation and owner (by virtue of a number of assignments) of the copyright in a piece of software known as TopAir. This was used to support planning and control procedures for small and medium airlines operating on a charter basis. The first defendant was a Swiss corporation and the second defendant its chairman who was also domiciled in Switzerland. The original creator of the software was the Swiss chairman, the copyright was subsequently assigned to IBS Technologies. The English court decided that it was possible for IBS to sue the Swiss defendants in the English court based on Article 5(3) of the Lugano Convention, but that the court would be limited to deciding on the damage which had occurred or which was threatened in the United Kingdom: “In my judgement Article 5(3) of the Lugano convention does enable the claimant to sue the defendants in this Court, but only in relation to damage which can properly be said to have been caused, or to be threatened, against the claimant in the United Kingdom. This limitation applies both to the claim for damages for past infringement and to the claim for an injunction to restrain threatened infringement.” The damage was the testing of the software in Manchester. The threatened damage was the potential future marketing by the defendants of the software system in the UK.

In *Bonnier Media v Smith* 2003 SC 36; 2002 SCLR 977; [2002] ETMR 86, a case of significance for its Internet context although not a copyright one, the Scottish Court of Session heard an action against a cybersquatter who was living in Greece and was managing director of a Mauritius company, for use of a Scottish newspaper title (*Business AM*) in twenty-two domain names, which clearly caused harm in Scotland. But the remedies granted could only be in respect of the infringements of rights under Scots law and in Scotland.⁸

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⁸ See further Lilian Edwards, "The Scotsman, the Greek, the Mauritian company and the Internet: where on earth do things happen in cyberspace?" (2004) 8 *Edinburgh LR* 99.