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6th February 2006

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Dear Jeff

**Implementation of the Directive on the Enforcement of Intellectual Property Rights
(2004/48/EC) ("the Enforcement Directive")
Business Software Alliance Comments Re Article 7(5)**

Further to our discussions at a recent EURIM meeting, and to your e-mail communication of January 11, 2006, I am writing to explain why the Business Software Alliance (BSA) disagrees with the conclusions reached by the Patent Office in relation to the implementation of Article 7(5) of the Enforcement Directive.

Article 7(5) Enforcement Directive

The Patent Office transposition note¹ regarding the Enforcement Directive Article 7(5) "permits member states to take measures to protect the identity of witnesses". Article 7 is concerned with "certain measures to be taken for the preservation of relevant evidence in respect of an infringement that is alleged to have taken place". This includes applications for "civil search and seizure orders". It is clear that Article 7(5) is intended to make provision for the protection of witness identity in connection with such measures. This means that Article 7(5) provides a basis for the protection of witness identity, in applications made in England and Wales, for civil search and seizure orders.

¹ <http://www.patent.gov.uk/about/consultations/enforce05/annexb/index.htm>

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The Patent Office implementation review concludes, in relation to Article 7(5):

“No action required

Rule 39.2 provides that the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.”

This conclusion is not correct. Current procedural provisions, insofar as they apply to civil search and seizure orders, do not make provision for the admission of hearsay or anonymous evidence. The current procedural provisions applicable to applications for civil search and seizure orders impose a positive obligation upon an applicant to reveal the identity of a person providing evidence in connection with such an application, such obligation not being overridden by Rule 39.2.

Civil Procedure Rules

CPR 25, together with its corresponding Practice Direction, regulates the basis upon which civil search and seizure orders may be applied for. An application for a search order must be accompanied by an affidavit². In such an affidavit, a deponent might wish to make reference to information provided by a third party, albeit that that third party does not wish his/her identity to be revealed. Typically, this might take the form of a statement to the effect:

“I have been advised and believe that infringing material is located at the defendant’s premises. The person that has so advised me wishes to remain anonymous. The information appears to be credible and the person trustworthy.”

In relation to such a statement, “the source for any matters of information or belief” must be revealed³. Revealing the “source” of the evidence will require that the identity of “the person that has so advised me” be disclosed. There is no provision in CPR 25 or the accompanying Practice Direction that absolves a deponent from this requirement.

These rules therefore oblige an applicant for a civil search and seizure order to disclose the identity of a witness whose evidence is being relied upon in the course of such an application. This information will become known to the defendant when the search order is executed.

The Patent Office has taken the position that a witness giving evidence to support a civil search and seizure order application can have his or her identity protected pursuant to CPR 39.2 (4). However, the wording of the above referenced Civil Procedure Rules effectively require that personal information about the witness (i.e. their name, address and occupation) must be made known to the defendant.

CPR39.2 should therefore be amended to make clear that it also applies to the identity of a witness in interlocutory matters, including orders sought pursuant to CPR 25.

² CPR 25 PD 3.1

³ CPR 32PD 4.2 (2)

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The duty of full and frank disclosure

Similarly, in applications for search orders, "the evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including *all material facts* of which the court should be made aware"⁴. In any application for an interim remedy, an applicant to the court has a duty to act in the utmost good faith and disclose to the court all the information which is material to the application.

The identity of a witness who has provided information is clearly "material information". Rule 39.2 does not qualify this duty. A qualification to the duty to present all material information should be introduced, along the lines of CPR 39.2, if the witness does not wish his identity to be revealed.

Common Law Restrictions

As detailed in BSA's original paper on this subject (a copy of which is enclosed with this letter), significant common law restrictions remain in relation to the introduction of "anonymous" evidence in civil search and seizure applications, notwithstanding the procedural bars detailed above. Without a procedural clarification in this regard, Rule 39.2 will not avail applicants of the opportunity to utilise "anonymous" evidence in civil search and seizure applications given these common law restrictions.

No Prejudice to Intended Defendant

No additional prejudice to an Intended Defendant is created as a result of allowing "anonymous" evidence to be admitted in civil search and seizure applications. The presiding Judge in such applications will retain full discretion as to the making or otherwise of such an order: the above qualification would simply render such evidence admissible, as opposed to being (as it is now) inadmissible. An Intended Defendant would retain the protection afforded to it by an applicant's cross undertaking in damages: in addition, an applicant's solicitor, acting within his role as an officer of the court, operates pursuant to an overriding duty to act as an officer of the court, and as such, will not introduce such evidence without having taken all reasonable steps to satisfy himself as to its veracity. If further statutory procedural comfort was required in this regard, wording along the lines of Section 132 (5) of the Irish Copyright and Related Rights Act 2000 might be implemented.

Conclusion

BSA does not believe that there is any objection per se to the introduction of anonymous evidence in connection with civil search and seizure applications. The interests of justice are clearly met by affording witnesses an opportunity to provide evidence to a Court, without fear of reprisals from an Intended Defendant. The Patent Office believes that provision is already made for such evidence to be admitted, pursuant to Rule 39.2.

The wording of the relevant procedural provisions applicable to civil search and seizure applications, together with common law restrictions, suggest that this view is incorrect. It is apparent, however, that the means to address this issue are relatively straightforward, in that

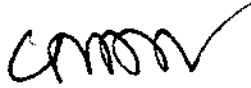
⁴ CPR 25PD 3.3

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clarifying amendments to the relevant Practice Directions can be introduced in order to ensure that the intended position (which is that anonymous evidence may be introduced in civil search and seizure applications) is the actual position.

I look forward to hearing from you as soon as possible in this regard.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graham Arthur', with a stylized flourish at the end.

Graham Arthur

REGULATORY IMPACT ASSESSMENT

1. Title

The Copyright and Related Rights Regulations 2003

2. Purpose and Intended Effect of the Regulations

2.1 The Regulations are to implement in the UK EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the Directive¹). The Directive entered into force on 22 June 2001¹.

2.2 The Directive is an internal market measure. It supplements five Directives² already adopted in this field with common rules on issues which are mainly relevant to the global challenge of digital technology. The Directive harmonises the basic rights relevant to uses of copyright material in the information society and e-commerce, namely the rights of originators of copyright material to control reproduction and communication to the public by electronic transmission of their works, including digital broadcasting and "on-demand"³ services. The Directive also limits the type and scope of exceptions to rights (eg concerning copies made for private purposes and temporary copies in electronic environments), and harmonises the legal protection of technological systems for identification and protection of works, and the right of distribution of physical copies of works. Finally, the Directive requires that effective, proportionate and dissuasive sanctions and remedies be provided for infringements of these rights and obligations.

2.3 A complementary purpose of the Directive is to implement some international obligations resulting from two treaties in the copyright field concluded in December 1996

¹ Official Journal of the European Communities: L 167/10; 22.6.2001.

² 91/250/EEC, 92/100/EEC, 93/83/EEC, 93/98/EEC and 96/9/EC.

³ Services whereby works are accessed by members of the public at a time and place individually chosen by them.

under the auspices of the World Intellectual Property Organisation (WIPO)⁴.

2.4 The Regulations amend an existing regime in this area. Current UK legislation is set out in the Copyright, Designs and Patents Act 1988 as amended by the Broadcasting Acts of 1990 and 1996, Regulations⁵ implementing earlier Directives and two Copyright Acts of 2002⁶. UK law already provides the basic framework of rights relevant to new technology, including specific exceptions to such rights, and the main *adjustments* needed to comply with the Directive are limited to certain key areas. The changes to UK copyright law are generally technical in nature; they are not concerned with wholly new rights or major extensions to existing rights, which was the case with earlier Directives in this field.

2.5 The main effects of implementation are introduction of exclusive rights (as opposed to current remuneration rights) for performers to control ~~non-demand~~ transmissions of recordings of their performances, amendments needed to comply with the regime of compulsory and permitted exceptions to rights, amendments to take account of the comprehensive nature of the legal protection required for technological measures, introduction of new provisions for the legal protection of electronic rights management information and improvements to sanctions and remedies.

Risk Assessment

2.6 The Regulations are necessary to implement an EU Directive, which takes account of certain obligations under two new international treaties. Risk assessment, therefore, should be seen in the context of these adopted international measures. Both treaties and Directive have been generally welcomed by legitimate interests. Digital technology permits perfect copies of works to be made and transmitted almost instantaneously across national boundaries, and it is widely accepted that strengthening and harmonisation of basic rights is necessary in order to ensure that copyright laws can be in a position to cope effectively with

⁴ The WIPO Copyright Treaty; The WIPO Performances and Phonograms Treaty

⁵ SI 1992 No.3233, SI 1995 No.3297, SI 1996 No.2967, SI 1997 No. 3032 and SI 2000 No. 1175.

⁶ Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002; Copyright (Visually Impaired Persons) Act 2002.

the demands of the information society. In particular, the ease of unauthorised use of digital copyright material on the internet requires the introduction of common rules specific to on-line transmission and electronic copying, coupled with stronger sanctions and remedies to deal with wilful illegal activity when on a damaging scale. Effective legal protection is also required for technological measures which right owners are now applying to their works in digital formats and environments in order to protect these works against all infringements and assist in management of rights.

2.7 Independent quantitative assessments of the risks involved are difficult to obtain. The UK recorded music industry⁷ has estimated that sales of singles in 2002 declined by 12% from 2001 to 52.5m units and, although album sales were reasonably steady, downward pressure on prices meant that the value of albums fell by 3% in 2002. Overall, the market value of sales dropped by 3.7% in 2002 to stand at £1,186m. On an international basis⁸, unauthorised file sharing of music on the internet and CD burning has been held by the industry to be mainly responsible for a reported fall in the value of world sales of recorded music CDs of over 7% in 2002. The industry does, however, acknowledge that competition from other entertainment sectors and uncertainty on consumer spending are also relevant factors. The music industry is in the front line in the fight against copyright infringements on-line; the latest industry estimate that 5 million users of recorded music have on-line access to 900 million songs worldwide (via peer-to-peer networks) indicates the scale of the problem being faced.

2.8 The film industry too has potentially much to lose from the abuse of new data compression technologies and the spread of broadband access. The industry⁹ estimates that about 500,000 illegal downloads of films now take place each day. Moreover, there are strong indications that the contagion of on-line copyright infringement is spreading to leisure software and books.

⁷ British Phonographic Industry (BPI)

⁸ International Federation of the Phonographic Industry (IFPI)

⁹ Motion Picture Association (MPA)

2.9 On a different level, the narrowing of certain exceptions to copyright will mean additional royalties being payable in some areas for use of copyright material. For example, photocopying of books and journals by businesses that no longer falls within the scope of the exception to copyright permitting fair dealing without infringing copyright for the purposes of research for a commercial purpose (section 29) may be covered by the existing industry licence for larger scale business photocopying¹⁰. The recorded music industry¹¹ has claimed that the repeal of the exception as it applies to sound recordings permitting broadcasts to be seen or heard in public by non-paying audiences (section 72) would give rise to additional royalties of £10m each year, but it is not as yet clear what the licensing arrangements will be for royalties that can be collected as a result of the narrowing of the scope of this exception and so how much of this amount might actually be collected.

2.10 Even though UK copyright law has proved remarkably “future-proof”, the need for international and regional action on rights and remedies has been clearly demonstrated. Nevertheless, it is also important that the law in this area continues to be properly balanced to take account of the interests of legal users of protected works and also of intermediaries, such as Internet service providers and equipment manufacturers. The concerns of consumers of works must be addressed if public perceptions of copyright are to be influenced in a positive way.

3. Options

3.1 As the subject of this assessment is a Community Directive, choices are necessarily limited – in particular, to do nothing is not a viable option. Non-implementation of the Directive's requirements leaves the Government open to infraction proceedings by the European Commission and actions by those persons who could demonstrate a loss due to failure to deliver the required protection in national law.

3.2 The Directive is, in the main, prescriptive and the Regulations effect the necessary changes to UK copyright law. However, there is a degree of choice within the provision on

¹⁰ The Copyright Licensing Agency

¹¹ Phonographic Performance Limited

exceptions to rights (Article 5) in that the types of exception listed in paragraphs 2 and 3 of the article are optional. It is, therefore, for individual Member States to decide whether to maintain or introduce exceptions in their national legislation in line with any one or more of such categories of exceptions. However, the list in Articles 5.2 and 5.3 is also exhaustive so that exceptions outside the scope of the specified categories are not permitted. Moreover, all exceptions to rights in national law must be framed so as to comply with the three-step test¹² of Article 5.5 of the Directive, although this is not a new requirement for the majority of UK exceptions. Finally, Article 11.1(b) of the Directive imposes the test (for the first time) on exceptions permitted by an earlier Directive (92/100/EEC).

3.3 The approach adopted in the Regulations in the area of exceptions is unchanged from the line pursued during negotiations on the draft Directive. As was made clear in consultations with interest groups both before and after adoption of the Directive, it has always been the Government's intention to maintain as far as possible the existing exceptions regime in UK law, and thereby continue the present balance in the law between the interests of all the key stakeholders. No new exceptions permitted by the Directive have therefore been proposed in the current Regulations¹³; rather, existing exceptions have been analysed and amended as necessary in the light of the detail of the permitted categories in the Directive and any new requirements arising from the "three-step test". In the case of the narrowing of the exception relating to playing of sound recordings in public by permitting a broadcast to be seen or heard in public by non-paying audiences (section 72), the interests of users are protected by additional regulation of the area that can be licensed by licensing bodies for the first time, although this regulation largely replaces existing jurisdiction of the Copyright Tribunal.

3.4 As is normal for Community measures, the Directive also leaves Member States to decide the precise nature of the criminal sanctions and civil remedies to be provided in national law for the infringing activities covered. The Regulations extend and further

¹² According to this test, which derives from international treaties, exceptions to rights can only be applied (1) in certain special cases, (2) which do not conflict with a normal exploitation of the protected material and (3) which do not unreasonably prejudice the legitimate interests of the right owner.

¹³ New exceptions for the benefit of visually impaired people have, however, been introduced into the 1988 Act by the Copyright (Visually Impaired Persons) Act 2002. These are permitted by Article 5.3(b) of the Directive.

strengthen the current position on enforcement in UK law, while continuing to apply criminal penalties only to those who wilfully participate in illegal activities in the course of business or on a similar scale. The changes in this area do not, of course, impose any new burdens on legitimate business and the activities that are legitimate are in most cases the same as at the moment. One exception to this concerns the unauthorised circumvention of technical measures protecting copyright material from infringement. In general, circumvention is likely to be undertaken by those wishing to do something with the protected material that is already illegal, such as making unauthorised copies. However, in order to preserve the existing balance as far as possible, this new illegal activity includes a limited saving for those engaged in cryptographic research and does not attract criminal offences.

4. Benefits

Business sectors affected

4.1 The changes to UK law will potentially affect any owner of rights covered by the Directive, ie authors of all descriptions, performers, record producers, film producers, broadcasting organisations, cable operators, and publishers. Businesses of all sizes involved in such activities could therefore be affected. The Regulations are also relevant to those providing on-line services and networks, to certain suppliers of hardware, software and technological protection systems, and to all users of works involving the rights in question, including (again) businesses of any size or description, private individuals, libraries, educational and scientific research establishments, and disabled groups.

4.2 The economic significance of the main copyright-based industries is shown by their contribution to the UK's GDP. Present estimates¹⁴ are close to 5%, but if industries with *some* dependence on copyright protection are included, the figure would be well over 6% with nearly 1.5 million employees involved. These industries generated revenues of around £128 billion in year 2000 (£10.8 billion in exports). About one third of this revenue is attributed to the software and computer services sector. The recorded music sector alone (business sectors D22140 and D22310) has reported annual revenue of about , 4.6 billion,

¹⁴ Second Creative Industries Mapping Document 2001 (www.culture.gov.uk)

with total overseas earnings of , 1.3 billion. Equivalent figures for electronic publishing (sector D22150) are £18.5 billion revenue (£1.7 billion exports) and for the film and video industries, £3.6 billion (£650 million). UK electronic publishing firms have an estimated 80% of the Community market for on-line services and products.

4.3 The European Commission has estimated the market for copyright goods and services Community-wide to range between 5 and 7% of GDP. This market comprises traditional print products, performances, films, videos and phonograms, as well as software, CD-ROMs, interactive CDs, satellite and cable broadcasts, and new on-demand services. The growth rate of the market for recorded music (CDs) over the last decade (well over 60%) is seen by the Commission as a good indicator of future growth in the copyright market as a whole, with TV broadcasting also growing rapidly. The EU music industry employs (directly and indirectly) about 600,000 people. The software market in general (sector D22330) has been forecast to grow by over 10% a year, while the European computer games sector has experienced considerable year-on growth (eg 50% increase in overall turnover during 1998). The EU leisure software industry employs about 100,000 people and has a current Community value of \$8billion, with EU developed software taking 45% of European sales (30% globally).

Benefits - general

4.4 Although efforts have continued to obtain quantitative information on probable benefits arising from the Directive as a whole for the various parties involved, little data has been received. However, the software industry¹⁵ has suggested that software piracy (estimated at more than \$13 billion worldwide) could be reduced by at least one third as a result of globally harmonised rights, and a cut in the rate of piracy from 25% to 15% would mean 40,000 more jobs in the software sector in the UK with an extra £2.5 billion in tax revenue (an additional £10 billion towards GDP). Also, the narrowing of certain exceptions to rights will clearly provide some financial benefit for certain right owners (see paragraph 2.9).

¹⁵ Business Software Alliance (BSA)

4.5 The limited information offered to date by interested parties on likely benefits (*and costs*) of the Regulations is quite typical as regards changes to legislation in the copyright field. Indeed, it has generally been the case that interested parties have experienced considerable difficulties in attempting to compile such data for proposals in the area of intellectual property as a whole. The nature of intellectual property rights means that changes to them are inherently difficult to quantify. For example, an owner of a right, such as a creator of a copyright work, does not have to exercise that right (and thereby benefit) unless he or she chooses to do so. Also, if rights are exercised, then benefits can vary depending on whether the owner acts independently or collectively.

4.6 Despite the underlying difficulties in quantifying specific economic effects of amendments to copyright law, there are some general conclusions that can be drawn regarding the changes contained in the draft Regulations:

- right owners will benefit generally from enhanced legal security (including more transparent, and in some limited respects strengthened, rights; new protection for electronic rights management information; extended offences; and more comprehensive remedies);
- the development of information society services (such as on-demand services and digital broadcasting) and new business models will be facilitated by the amendments clarifying the scope of rights to control electronic communication - to the advantage of all the key players (right owners, users and intermediaries alike);
- by implementing many of the international obligations of the 1996 WIPO treaties, the Regulations will take the UK (and EU) closer to ratification of these important instruments, which are now in force and providing a boost to intellectual property protection worldwide (the UK depends on international copyright agreements to ensure UK creativity and investment are properly protected abroad); and
- the improved measures against unauthorised circumvention of technological protection systems will benefit right owners (content providers) in a similar and

complementary way to that in which changes in protection of conditional access services¹⁶ have benefited providers of such services (enhanced legal security against infringement). Businesses supplying the technology of protection will also benefit from the right of action given by the Regulations against those dealing in circumvention devices, and indirectly from more use of such protection systems stemming from greater confidence in their integrity.

Issues of equity or fairness

4.7 As noted earlier, the main purpose of the Directive is to benefit right owners at the expense of those wishing to use their copyright material without authority, and issues of equity or fairness do not arise when considering copyright piracy or other infringements of rights. However, one area where such issues are relevant is the relationship between the interests of right owners and those of legitimate users of copyright works, and the Directive does impose certain constraints on the categories and precise nature of exceptions to rights for the benefit of users that Member States may wish to maintain or introduce in national laws. The Government's aim in preparing these Regulations has been to seek to maintain as far as possible the existing balance between the interests of the various stakeholders – in particular, existing exceptions have been limited only to the extent considered necessary to comply with the Directive. Moreover, in one area where licensing will be possible for the first time, additional regulation of licensing by collective licensing bodies has been included to safeguard the interests of users.

4.8 The Directive requires legal protection to be provided in national law against the act of circumvention of technological measures used by right owners to protect their works against unauthorised copying and other infringements. However, since this protection applies generally, the Directive also provides for Governments to act if users in areas such as the education, library and archive fields are prevented by such measures from benefiting from exceptions to copyright in those areas. Regulation 24 comprises a procedure which will allow anyone considering that they are unable to benefit from certain exceptions to make a complaint to the Secretary of State, in order that the matter can be investigated and remedial

¹⁶ The Conditional Access (Unauthorised Decoders) Regulations 2000 (SI 2000 No. 1175).

action taken as appropriate. Moreover, any problems in this area will be addressed in the contact committee established by Article 12 of the Directive, and in the European Commission's review of the operation of the Directive (to be completed in 2004).

4.9 As detailed in the following section, there will be some unavoidable additional costs for certain types of user of copyright works. However, the Government has sought to minimise the impact on legitimate business in general and the effect of the Regulations as a whole is expected to be broadly neutral in this respect.

5. Costs

Costs - general considerations

5.1 Given the scope of the Directive and the comments above on affected sectors, the notion of a "typical" business is not a practicable one to pursue for the Regulations as a whole. The actual cost of complying with the Regulations for a particular business will depend on whether that concern is a net owner or exploiter of protected material, or whether it only uses copyright works in the course of business. Some *general points* to note are:

- since protection by copyright and related rights arises automatically when the works in question are created, there is no legal requirement for registration of the work or performance in order to secure rights;
- there are therefore no costs involved in the acquisition of the rights covered by the Regulations, ie there are no official fees or initial professional costs to quantify;
- the general uncertainty over the economic effect of implementation of any copyright Directive does not end there, since any particular owner or user of rights also stands to be affected by what others (right owners, intermediaries and users) choose to do in respect of their own or others' rights (ie one person's benefit can be another's cost);
- however, if such actions give rise to disputes between parties, then litigation costs

could of course ensue.

5.2 Legal protection for technological systems of copy protection already exists in UK law, but the Regulations enhance this protection and also introduce complementary protection for electronic systems of identification and management of works. Since these provisions should, in general, only impinge on the activities of those with illegal aims, there should be no additional cost to legitimate business in this respect. Concerns that the increasing use of such technological systems and the enhanced legal protection for them could impact on legal users is discussed above in paragraphs 4.7 and 4.8 (Issues of equity and fairness).

Specific identified costs

5.3 While the Regulations taken as a whole should have a broadly neutral impact on legitimate business in general, significant potential costs in some specific areas have been identified for consumers and other net users of copyright works such as libraries (sector O92510) and educational institutions. These additional costs arise from amendments to certain long-established exceptions to rights in UK law which are necessary in order to comply with the regime imposed on such exceptions by Article 5 of the Directive. While we have sought to minimise overall effects on legal users in these Regulations, it is likely that some who at present benefit from particular exceptions will need to negotiate permission for certain uses of works with rights owners and possibly have to pay for such use. However, many businesses and organisations are already using copyright material to such an extent that it would be well outside the scope of existing exceptions, so that they will already be paying for such use. Moreover, right owners have indicated that they are currently working through collective licensing bodies to minimise the impact on libraries, archives and like users of protected material.

5.4 While acknowledging that precise figures are difficult to estimate, the libraries and archives sector in general¹⁷ fear an increased administrative and financial burden as a consequence of the necessary limitation of exceptions for “fair-dealing” research to copying done only for non-commercial purposes. Some of these costs will, of course, be passed on to

¹⁷ eg Libraries & Archives Copyright Alliance (LACA); British Library; Association for Information Management (ASLIB IMI); Society of College, National & University Libraries (SCONUL).

businesses, including SMEs, and also to individual users of library and similar services. Increased costs are also of particular concern for businesses in the information supply field; one such organisation estimates additional costs of at least £25,000 p.a.. Another estimate deriving from a survey of affected users puts the average additional cost each year at around £7,000 if all inter-library document supply copies need to be copyright cleared. Average extra costs for organisations already holding copying licenses have been estimated at £1,300 p.a.¹⁸. However, estimates may not have fully taken into account the very limited copying that could have happened legally under the fair dealing exception and the new business licences for photocopying books and journals¹⁹ that may cover this at no additional cost.

5.5 Businesses in many sectors have expressed concern that the revised rules, and particularly uncertainty over what is “commercial” research, could discourage information sharing and even basic innovation and research²⁰. One estimate for SMEs in the research field without in-house collections of documents suggests that 60% of documents obtained externally would be affected. The cost of complying with this change in the law for the field of further and higher education has been put at £2.5 million p.a. (an increase of 50%). Responses received regarding the likely impact on commercial organisations are at varying levels. One estimate is for an additional £2 million p.a. overall, another is for individual extra costs between £400 and £70,000 p.a., and a third sees the cost of a single photocopy of a scientific article increasing from around £4 to as much as £30. Companies in the IT, telecoms and electronics sector²¹ also fear the extra burden that will flow from this necessary legislative change, including the need to make the difficult choice between accepting the additional expense stemming from blanket licences or cutting back on document acquisition (with likely consequences for innovation from reduced access to information). The cost of maintaining the status quo in this sector alone has been estimated at £15 million p.a..

5.6 Another specific area where economic information has been offered is that covering the performance of sound recordings and broadcasts in public. The Risk Assessment

¹⁸ LACA

¹⁹ Copyright Licensing Agency

²⁰ eg Construction Industry Council

²¹ Intellect

(paragraph 2.9) includes some data provided by the recorded music industry on the monetary effect of one particular exception to rights in existing law (section 72 of the 1988 Act). Some data has also been provided on section 67 which covers playing of CDs in public by, or for the benefit of, charitable and similar organisations. While the consultation on draft proposals for implementation of the Directive indicated that some narrowing of these exceptions would take place, the UK music industry supplied information on the likely costs to businesses of repeal of these provisions. Removal of s.72 is estimated to mean a charge of £80 p.a. for a typical SME currently providing background music only by playing sound recordings via the radio or television, with some users paying proportionately more for the licences that would be required. The industry also estimates a positive impact on 80-90% of music business SMEs arising from such additional licence revenue. Business music users, on the other hand, (including the entertainment retail industry and representatives of brewers and owners of public houses) fear that any narrowing of s.72 would give rise to significant additional administrative and financial burdens for them. Publicans are said to already pay on average £600-700 p.a. for playing background music. Moreover, while the horseracing industry (racecourse owners) estimate that s.72 has meant a loss to them of £3.26 million p.a. in royalties for use of broadcasts in betting shops, the betting industry estimates considerable financial disadvantage if the exception were to be repealed. The betting industry is said to have agreed to pay £4,000 per race to the UK's 59 racecourses (£28 million p.a.) on the basis that free-to-air broadcasts of racing would not attract payment.

5.7 The Government has decided to narrow the exceptions in question. Section 67 is amended by imposing additional conditions on the playing of CDs in public so that, for example, charitable organisations can no longer benefit from this exception where commercial organisations operate a disco for them or where the person (even an amateur) playing the sound recordings is acting for gain. Section 72 is amended so that organisations acting for profit that use a broadcast to play sound recordings in public will in most situations need a licence in the future. However, this new area of licensing is subject to a regulatory regime that provides additional safeguards for users. The businesses that may have to pay a new or increased royalty for use of music in public because of a narrowing of these exceptions will be balanced by others who will be taken within the scope of the exception regarding their use of copyright material currently excluded from its scope.

6. Consultation with small business: the Small Firms Impact Test

6.1 As noted above, there is no single kind of business which could be said to be typical as regards the impact of the Regulations. The Department has sought to identify appropriate individual businesses in areas covered by the Directive willing to try to evaluate the impact of copyright measures on their activities. However, as was also generally the case with earlier Directives in the copyright field, small businesses have not provided figures for compliance costs. The European Commission experienced the same difficulties in their attempts to obtain more specific data for 'typical' businesses. Nevertheless, the Department's consultations with organisations representing small businesses have produced some useful non-specific estimates of possible costs which have been outlined above in paragraphs 5.3 to 5.7.

Guidance for business

6.2 Guidance for business as a whole (large and small) is covered below under 'Consultation' (paragraph 10.2).

7. Competition Assessment

7.1 The main effects of the Regulations are summarised in paragraph 2.5 above. While the changes to the existing UK regime of protection for copyright and related rights are largely technical in nature, they result from a harmonising Directive which seeks to contribute to the EU internal market by removing distortions to competition.

7.2 It is a generally held view that the digital environment, which is particularly addressed by the Regulations (and Directive), offers many opportunities to forward-looking and specialised SMEs. The increased legal certainty that will result from the changes can only encourage investment in creativity and innovation and development of new 'copyright' businesses. Evidence of this growth and increased competitiveness of relevant business can be seen in the development of legitimate online trading of copyright works, which can only

benefit consumers by increasing their choice of legal means of acquiring such works. Ongoing work is specifically directed to ensuring that British businesses, and small and medium enterprises in particular, are aware of the opportunities provided by intellectual property protection to enhance their profitability and competitiveness.

7.3 One specific issue where concerns have been raised is the relationship between the present Directive's protection for technological protection measures and the "reverse engineering" exception to rights in computer programs provided by an earlier Directive (91/250/EEC). As has been explained to users of software, the copyright Directive (and present Regulations) are not intended to affect the existing exception which, in specified circumstances, allows reverse engineering of a program in order to achieve interoperability between programs.

8. Enforcement and sanctions

8.1 International treaties and earlier EU Directives in the copyright field require that existing UK law has appropriate provisions for the enforcement of rights and obligations. A similar obligation in Article 8 of the copyright Directive has led to a thorough consideration of the offences and remedies in the 1988 Act, particularly with on-line piracy in mind. New offences covering illegal communication of works and performances to the public are being introduced (Regulation 26) but only those who act wilfully on a commercial or similar scale will risk criminal prosecution.

8.2 Articles 6 and 7 of the Directive provide legal protection against unauthorised interference with technological measures used to protect works, and with information associated with works which is used to identify and track them in electronic situations. Careful consideration has been given as to what constitutes "adequate protection" and "appropriate sanctions and remedies" (which the Directive stipulates) for each act outlawed by these Articles and the Regulations provide generally for civil remedies. Criminal sanctions in this area are again limited to wilful illegal activity (principally making and dealing in illegal circumvention devices) at least on a commercial scale.

9. Monitoring and review

9.1 Since the formal consultation on draft proposals to amend UK law was concluded in 2002, views have continued to be sought from UK interested parties on the financial and administrative effects of the Directive and the implementing Regulations. The Directive requires the Commission to report on the application of the Directive not later than 22 December 2004, and every three years thereafter. Particular emphasis is to be placed on the area of exceptions to rights and the interplay with technological protection systems.

9.2 The Directive establishes a Contact Committee to facilitate both implementation and information exchange, and to study future developments in the field. The first meeting was held on 10 March 2003 and the plans are for six-monthly sessions.

10. Consultation

10.1 A draft of this Regulatory Impact Assessment accompanied a consultation paper on draft amendments to the 1988 Act to transpose the Directive, which was issued in August 2002. The consultation package was published on the Patent Office website and remains available at <http://www.patent.gov.uk/about/consultations/eccopyright/index.htm>. The consultation paper was distributed widely within Government. It was also sent to organisations representing all main stakeholder groups as well as to others who had registered a particular interest since the Directive was adopted. A list of public consultees is attached as Annex I.

10.2 Although the consultation paper comprises a considerable amount of information on the likely impact of the Regulations, specific guidance for businesses in general was issued at the end of 2002. This additional guidance explains in detail the effects of certain changes to exceptions to copyright that many businesses may need to understand and is reproduced in Annex II²².

10.3 Formal consultation on the draft changes to UK law closed on 31 October 2002. Over

²² The analysis of responses in Annex IV is also relevant.

300 responses were received from interest groups and individuals, and Annex III lists those organisations which provided written comments. Annex IV is an analysis of the substance of the responses and a summary of the Government's main conclusions. The draft proposals in the consultation paper have since been reviewed and developed in the light of the responses to the consultation and continuing discussions arranged by the Department with stakeholders on certain contentious issues.

10.4 Consultation on the Directive and earlier documents^{23 24} was also extensive. The draft Directive was distributed widely to UK interested parties and their views sought on the specific proposals for legislation. A summary of this exercise is given in the Regulatory Impact Assessment accompanying the Explanatory Memorandum on the Commission's amended proposal for the Directive²⁵. The amended proposal was distributed to those originally consulted and others who had made their interest known since the initial consultations. Over 180 organisations were contacted and 30 or so formal written submissions were received. One of the main themes to emerge from this consultation on the amended proposal was that users' concerns had been greatly increased by the further limitations on exceptions introduced by that text. The Department then held an extensive series of meetings with key stakeholders. So-called 'mega-meetings' involving all interests on particular issues (arranged by the Department) proved particularly successful in brokering compromise solutions to complex and controversial problems. The Department also sought to ensure that interest groups were kept fully aware of developments in the EU Council's discussions and of suggested compromises.

10.5 The intensity of consultations with interests increased in the run-up to adoption of the Directive and a fairly general view developed that the text of the Common Position represented a workable compromise. However, while most users and intermediaries were more or less content with the balance of the Common Position and made this known to Government, some interests, especially right owner groups, lobbied the European Parliament

²³COM(95)382 final of 19 July 1995.

²⁴COM(96)568 final of 20 November 1996.

²⁵EM 8723/99 of 27 May 1999; submitted by the DTI on 15 June 1999

strongly for further moves in their direction. With some limited changes to the Common Position adopted by the Parliament, all interests then indicated that they could accept the Common Position as amended.

10.6 Consultation has continued since adoption by the EU Council (9 April 2001). As the Department began its formal analysis of the Directive's impact on UK law, interest groups were informed of the intended legislative route and general approach to be adopted on implementation. Many meetings were held with key interests prior to publication of the consultation on draft amendments and about 30 written submissions were received in this period suggesting how certain aspects of the implementation should be addressed. Officials have also attended meetings with other Member States called by the Commission to try to encourage as much harmonisation as possible on transposition of certain provisions of the Directive, and major interests have been kept up to date on these discussions.

10.7 Other related consultations have also taken place. These have dealt with (1) amendment of the statutory licence provisions for broadcasting of sound recordings (s.135A-G of the 1988 Act), (2) a possible exception to copyright for the benefit of visually-impaired people, and (3) possible changes to criminal provisions in intellectual property law. Details of these consultations, including summaries of responses, can be found on the Patent Office web site (www.patent.gov.uk). Some of the changes proposed in the first of these exercises are delivered by the draft amendments now proposed. The second and third of these exercises have led to Government-supported Private Members' legislation.

11. Summary and Recommendation

11.1 Changes to the law of copyright and related rights tend to alter the balance between different players in the market rather than imposing additional costs overall, so that the net economic effect UK-wide (aside from any administration costs) should be broadly neutral, as the gains to one will offset the costs to another. Nevertheless, the clarification, and in some cases strengthening, of basic rights brought about by the present Regulations should assist right owners in general in their development of new business models. The changes will also provide the legal framework for more effective action against internet piracy and other

unauthorised use of works on the internet. While there will be some unavoidable additional costs for certain users of copyright works, including educational establishments and libraries, the present (essential) balance in copyright law between the interests of right owners and legitimate users of works will be largely maintained.

The recommendation is that Directive 2001/29/EC should be transposed into UK law as soon as possible by approval of the draft Regulations.

12. Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed

Date

**Lord Sainsbury
Parliamentary Under-Secretary of State for Science & Innovation
Department of Trade and Industry**

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ANNEX I

LIST OF THOSE CONSULTED DIRECTLY ON THE DRAFT AMENDMENTS IN ANNEX A OF THE CONSULTATION PAPER OF 7 AUGUST 2002

Action with Communities in Rural England (ACRE)
AEI Music Ltd
Alliance against Counterfeiting & Piracy
Alliance of Independent Retailers (AIR)
American Film Marketing Association (AFMA) Europe
America Online (AoL)
Anti-Counterfeiting Group (ACG)
Arts Council of England
Arts Council of Northern Ireland
Arts Council of Wales
Associated Newspapers
Association of British Concert Promoters
Association of the British Pharmaceutical Industry (ABPI)
Association of Convenience Stores (ACS)
Association of Education & Library Boards (Northern Ireland)
Association of Independent Music (AIM)
Association of Independent Research and Technology Organisations (AIRTO)
Association for Information Management (ASLIB)
Association of Leading Visitor Attractions
Association of Learned and Professional Society Publishers (ALPSP)
Association of Licensed Multiple Retailers (ALMR)
Association of Professional Recording Services (APRS)
Association of United Recording Artists (AURA)
Association of University Teachers
Authors Licensing and Collecting Society (ALCS)

Bangladesh Caterers Association (UK)
Bar Council
Brewers and Licensed Retailers Association of Scotland (BLRAS)
British Academy
British Actors Equity Association (Equity)
British Art Market Federation
British Association of Leisure Parks, Piers and Attractions (BALPPA)
British Association of Picture Libraries & Agencies (BAPLA)
British Beer and Pub Association
British Betting Office Association
British Broadcasting Corporation (BBC)
British Chambers of Commerce
British Computer Society (BCS)
British Copyright Council
British Deaf Association
British Film Institute (BFI)
British Holiday and Home Parks Association
British Horseracing Board
British Hospitality Association
British Institute of Innkeeping
British Interactive Multimedia Association (BIMA)
British Internet Publishers Alliance
British Library
British Literary and Artistic Copyright Association (BLACA)
British Music Rights
British Phonographic Industry (BPI)
British Photographers Liaison Committee

British Retail Consortium
British Sandwich Association
British Screen Advisory Council (BSAC)
British Shops and Stores Association
British Sky Broadcasting
British Telecommunications (BT)
British Video Association (BVA)
British Web Design and Marketing Association (BWDMA)
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)
Buena Vista Home Entertainment
Business in the Community
Business Software Alliance (BSA)

Cable & Wireless
Campaign for Digital Rights
Campden & Chorleywood Food Research Association
Candy Rock Recording Ltd
Central Computer and Telecommunications Agency (CCTA)
Centre for Education Management (CEM)
Channel 5 Broadcasting
Channel Four Television
Chartered Institute of Library and Information Professionals (CILIP)
Chartered Institute of Library and Information Professionals in Scotland (CILIPS)
Chartered Institute of Library and Information Professionals (CILIP) Wales
Chartered Institute of Patent Agents
Chinese Chamber of Commerce (UK)
Chinese Takeaway Association (UK)
Christian Copyright Licensing International (Europe) (CCLI)
Cinema Exhibitors Association
Commercial Radio Companies Association (CRCA)
Community Media Association (CMA)
ComPact Collections Limited
Computing Services and Software Association (CSSA)
Confederation of British Industry (CBI)
Confederation of Information Communication Industries (CICI)
Consortium of University Research Libraries (CURL)
Consortium of Welsh Library and Information Services (CWLIS)
Consumers Association
Convention of Scottish Local Authorities (COSLA)
Copyright Licensing Agency (CLA)
Council for Museums, Archives and Libraries
Council of Museums in Wales

Design & Artists Copyright Society (DACS)
Diamond Cable Communications Ltd
Digital Content Forum
Direct Marketing Association (DMA)
Directors & Producers Rights Society (DPRS)
Directory and Database Publishers Association (DPA)

Educational Copyright Users Forum (ECUF)
Educational Recording Agency (ERA)
Educational Software Publishers Association (ESPA)
English Association of Self-Catering Operators
European Association of Consumer Electronics Manufacturers (EACEM)
European Catering Association (GB)
European Digital Media Association (EDiMA)
European Informatics Market (EURIM)

European Leisure Software Publishers Association (ELSPA)
European Publishers Council

Faculty of Advocates
Federation Against Copyright Theft (FACT)
Federation Against Software Theft (FAST)
Federation of the Electronics Industry (FEI)
Federation of the Licensed Retail Trade in Northern Ireland (FLRT)
Federation of Licensed Victuallers Associations (FLVA)
Federation of Small Businesses
Filmbank Distributors Ltd
Film Council
Film Distributors Association
Fitness Industry Association
Forum of Private Business
Forum of Private Business in Scotland
Foundation for Information Policy Research (FIPR)

Gathering the Jewels
General Consumer Council for Northern Ireland
GMS (Recordings) Ltd
Guild of Hairdressers

Her Majesty's Stationery Office (HMSO)
Hospital Broadcasting Association (HBA)

Incorporated Society of British Advertisers (ISBA)
Incorporated Society of Musicians (ISM)
Independent Schools Council (ISC)
Independent Television Commission (ITC)
Independent Television Network (ITN)
Information and Communications Industry Association (ICIA)
Institute of Directors (IOD)
Institute of Practitioners in Advertising (IPA)
Intellectual Property Institute (IPI)
International Artist Managers Association (IAMA)
International Association of Music Libraries, Archives & Documentation Centres (IAML) UK
International Federation of the Phonographic Industry (IFPI)
International Visual Communication Association (IVCA)
Internet Service Providers Association (ISPA) UK

Law Society of England & Wales.
Law Society of Northern Ireland
Law Society of Scotland
Learning and Teaching Scotland
Library and Archive Copyright Alliance (LACA)
Library & Information Services Council (Northern Ireland)
Library & Information Services Council (Wales)
Local Government Association

Macrovision UK Ltd
Mechanical-Copyright Protection Society (MCPS)
Meteorological Office
Museums Association
Museums Copyright Group
Music Choice Europe
Musicians Union (MU)
Music Managers Forum (MMF)

Music Producers Guild (MPG)
Music Publishers Association
Music Users Council
Music Users Council of Europe

National Archives of Scotland
National Consumer Council
National Council for Voluntary Organisations (NCVO)
National Federation of the Blind
National Federation of Fish Fryers
National Federation of Retail Newsagents
National Hairdressers Federation (NHF)
National Library for the Blind (NLB)
National Library of Wales
National Library of Scotland
National Market Traders Federation
National Museum Directors Conference
National Museums & Galleries of Northern Ireland
National Union of Journalists (NUJ)
National Union of Students (NUS)
Newspaper Licensing Agency (NLA)
Newspaper Publishers Association (NPA)
Newspaper Society
Nickelodeon UK
Northern Ireland Council for Voluntary Action (NICVA)
Northern Ireland Film Commission
Northern Ireland Hotels Federation
Northern Ireland Independent Retail Trade Association (NIIRTA)
Northern Ireland Museums Council
NTL

OFTEL
Open University Worldwide
Ordnance Survey
Ordnance Survey of Northern Ireland

Performers Alliance
Performing Artists Media Rights Association (PAMRA)
Performing Right Society (PRS)
Periodical Publishers Association (PPA)
Personal Managers Association (PMA)
Phonographic Performance Limited (PPL)
Producers Alliance for Cinema & Television (PACT)
Producers Rights Agency
Public Lending Right (PLR) Office
Public Record Office
Public Record Office of Northern Ireland
Publishers Association
Publishers Licensing Society

Radio Authority
Radio, Electrical and Television Retailers Association (RETRA)
Restaurants Association
Royal Academy of Arts
Royal Commission for the Ancient and Historical Monuments of Wales
Royal National Institute for the Blind (RNIB)
Royal National Institute for Deaf People (RNID)
Royal Society

Royal Society for Mentally Handicapped Children and Adults (MENCAP)

Satellite and Cable Broadcasters Group
School Library Association
Scottish Arts Council
Scottish Consumer Council
Scottish Council for Voluntary Organisations (SCVO)
Scottish Library and Information Council (SLIC)
Scottish Licensed Trade Association
Scottish Museums Council
Sianel Pedwar Cymru (S4C)
Society of Archivists
Society of Authors
Society of Chief Librarians (in England & Wales) (SCL)
Society of College, National and University Libraries (SCONUL)
Society of London Theatre (SLT)
Sound Management Services Ltd
Spoken Word Publishing Association (SWPA)
Student Radio Association

Talking Newspaper Association of the UK (TNAUK)
Tape Manufacturers Group
Telecommunications UK Fraud Forum (TUFF)
Telewest Communications plc
Theatrical Management Association (TMA)
Thus plc
Trade Marks Patents & Designs Federation (TMPDF)
Training & Enterprise Councils (TEC) National Council
TSC Music Systems Ltd

UK Chinese Catering Association
UK Hydrographic Office
UK Media Monitoring Association
UK Reprographic Association (UK-Re)
Universities UK

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

Welsh Consumer Council
Welsh Local Government Association
Writers Guild of Great Britain

GUIDANCE FOR BUSINESSES ABOUT CHANGES TO COPYRIGHT LAW

Introduction

Certain changes to copyright law to be made in the next few months will be relevant to many businesses, large and small, and this guidance note explains why. These changes all relate to exceptions to copyright, that is uses of copyright material that do not infringe copyright and so which may generally be undertaken without a licence from the copyright owner(s). The three areas covered in this guidance are:

I – Copying of copyright material for commercial research

II – Use of broadcasts in public by letting them be heard or seen

III – Access to copyright material for visually impaired people

Copyright law is provided by Part I of the Copyright, Designs and Patents Act 1988 as amended ("the 1988 Act"). The changes will be the result of implementation in the UK by a statutory instrument of the EU Directive on copyright and related rights in the information society ("the Copyright Directive"¹) and the bringing into force of the Copyright (Visually Impaired Persons) Act 2002 ("the 2002 Act"²).

I. Copying of copyright material for commercial research

The copying of material protected by copyright is an act restricted by the copyright and so generally cannot be done without permission from the copyright owner(s), ie without a copyright licence. At the moment, a business wishing to make a single copy of a short extract from any book, journal or newspaper for the purposes of research is, however, likely to be able to do so under the exception to copyright in section 29 of the 1988 Act. A business may also ask a librarian in a not-for-profit library to supply it with such a copy under related exceptions in sections 38, 39 and 43 of the 1988 Act, but must sign a declaration confirming the purpose of the copying. Copying that extends beyond this, such as the making of multiple copies and copying more than a short extract, already usually needs a licence from the copyright owner(s). However, much copying is licensed collectively by the Copyright Licensing Agency (books and journals) and the Newspaper Licensing Agency (national and regional papers).

Implementation of the Copyright Directive in the UK requires these four exceptions to exclude copying that is for research for a commercial purpose. Many businesses that currently enjoy these exceptions will therefore need a licence in the future, probably from the organisations indicated above. Businesses will often already have licences from these organisations because they are already copying beyond the scope of the exceptions. They should enquire whether these licences will in the future cover the limited copying that would have been within the scope of the exceptions if they have not already been informed that this is the case by the CLA and/or NLA.

It is important to note that it is the **research** that must be for a **non-commercial purpose** for

any copying to remain within the scope of the exceptions. It is likely that most research being undertaken by a business conducted for profit will be for a commercial purpose and so copying in connection with this research will fall outside the scope of the exceptions in the future. Even limited copying by or for not-for-profit organisations will fall outside the scope of the exceptions as amended where the copying is in connection with research for a commercial purpose. When deciding whether or not research has a non-commercial purpose, businesses will only need to consider what is known at the time of copying.

II. Use of broadcasts in public by letting them be heard or seen

Presenting copyright material to the public is an act restricted by the copyright and so generally cannot be done without permission from the copyright owner(s), ie without a copyright licence. This is true regardless of how the material is presented to the public and so, for example, music is used this way where it is performed live, or a music CD is played, or a radio broadcast of music can be heard in public. A broadcast is made up of a number of different types of material and there can be separately owned copyright in each type, ie the broadcast itself, any films or sound recordings included in the broadcast and any literary, dramatic or musical works included within the films, sound recordings or broadcast. A radio broadcast that is heard in public or a television broadcast that is shown in public may therefore involve presentation to the public of some or all of these types of copyright material.

At the moment, though, a business wishing to use a radio or television in a public place where people have not paid for admission can generally enjoy the exception to copyright in section 72 of the 1988 Act and do not need licences from the owners of copyright in the broadcast or any films and sound recordings included in it. However, where a broadcast of music is used, then a licence will generally be needed from the Performing Right Society (PRS) which licenses this use on behalf of the owners of copyright in the music.

The Copyright Directive amends an earlier Directive³ which means that section 72 will be narrowed so that commercial use of broadcasts to provide a musical ambience or musical entertainment in public will in future require a licence from Phonographic Performance Limited (PPL) as well as one from PRS. PPL licenses this use on behalf of the owners of copyright in sound recordings. This will be true both when the public that enjoy the musical ambience or entertainment are customers and when they are employees such as in the staff canteen or in an open-plan office area.

III. Access to copyright material for visually impaired people

Where an organisation wishes to make accessible copies of copyright material in formats such as Braille, large print, electronic and on audio tape for visually impaired people, they generally need to get a licence from the copyright owner(s). However, the 2002 Act, amongst other things, introduces a new exception to copyright (section 31B of the 1988 Act) that means not-for-profit bodies and educational establishments (so-called "approved bodies") will generally be able to make and supply accessible copies to visually impaired people without a licence. There are a number of conditions and limitations applying to this exception and detailed guidance will be made available to "approved bodies" that wish to help visually impaired people by making accessible formats.

This new exception applies to commercially published literary, dramatic, musical and artistic works and published editions (but not databases). These terms are broad and cover anything from books, journals and newspapers to instruction booklets and manuals, advertisements, maps and knitting patterns. In order to avoid any conflict with the commercial market for alternative formats, the exception will not permit the making of any accessible formats that provide the same or substantially the same degree of accessibility as copies of the copyright material that are commercially available. Making a recording of a performance of a musical work is also not permitted under the exception.

The exception will **not** apply where copyright owners have set up a licensing scheme(s) operated by a licensing body(ies) covering the making of alternative formats, so long as such schemes have been notified to the Secretary of State at the Department of Trade and Industry. To the extent that the exception has not been overridden by licensing scheme(s), then an "approved body" acting under the exception is required to notify the copyright owner(s) of this activity. Where any copyright owners would prefer this notification to go to their representative body rather than themselves, then that representative body must have given notice to the Secretary of State. Businesses therefore need to consider whether they prefer to license the making of alternative formats of any copyright material they produce under a licensing scheme operated by a licensing body and, if not, whether they would like a representative body to receive notifications from "approved bodies" of any activity under the exception.

Businesses might also be interested in another new exception in the 2002 Act that might benefit their visually impaired employees facing problems with access to copyright material in the workplace (as well as elsewhere). This second new exception essentially puts on a statutory basis existing joint industry guidelines, which can be found under "Publishers Issues" at Publishers Licensing Society, and additionally covers unpublished material. Detailed guidance will be made available for visually impaired people before the 2002 Act comes into force but the key features are that the visually impaired person must already have an (inaccessible) copy of the copyright material and can only make (or ask someone to help them make) an accessible copy for their personal use where a copy that is accessible is not commercially available.

Status of this guidance

This guidance provides information about some of the effects of the statutory instrument implementing the Copyright Directive and some of the provisions in the 2002 Act that will be important to many large and small businesses, but does not in any way replace the legislation. This guidance has no legal force, but is intended to help businesses understand the significant changes for them that are covered by this guidance.

Further information

Implementation in the UK of the Copyright Directive will involve a number of other changes to copyright law that are largely technical in nature and essentially do not change the scope of rights granted to copyright owners under copyright law. As at the moment, copyright based industries are advised to get expert advice from lawyers specialising in the area of intellectual property as some of the detailed changes may be of interest to such industries. It will be

possible to find the final text of the statutory instrument at the website of Her Majesty's Stationery Office (HMSO) in due course and information about its progress, including a copy of the consultation document on implementation issued in August 2002, can be found on the Patent Office website.

The text of the 2002 Act can be found at the HMSO website and further detailed guidance for "approved bodies" and visually impaired people will also be available on the Patent Office website in due course.

Information in general about copyright law can also be found on the Patent Office website and this will be updated when the law has been changed. Enquiries about copyright in general can also be directed towards the Patent Office's Copyright Enquiries service at:

Copyright Enquires
The Patent Office
Harmsworth House
13-15 Bouverie Street
London EC4Y 8DP

Tel: +44 (0)20 7596 6566
Fax: +44 (0)20 7596 6526
Email: copyright@patent.gov.uk

It would be helpful if people would check first to see if the answer is given in the detailed Copyright FAQ section on the IP portal website or by using a link from the IP portal to another organisation that might be able to help. Copyright Enquiries' staff are not lawyers and cannot give legal advice or opinion.

Issued 24 December 2002

¹ 2001/29/EC

² 2002 Chapter 33

³ Directive on rental and lending right and on certain rights related to copyright in the field of intellectual property (92/100/EEC)

ANNEX III

ORGANISATIONS FROM WHICH WRITTEN SUBMISSIONS WERE RECEIVED IN RESPONSE TO THE 2002 CONSULTATION

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

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

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

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

Domino Systems

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

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

Glasgow School of Art
GreenNet
Guardian Newspapers Limited

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

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

Johnson Matthey Plc

Ladbrokes Limited
Law Society of Scotland
Libraries and Archives Copyright Alliance (LACA)

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

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

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

Phaidon Press Limited
Phonographic Performance Limited (PPL)
Producers Alliance for Cinema and Television (PACT)
Producers Rights Agency

Public Lending Right (PLR) Office
Public Record Office
Publishers Association
Publishers Licensing Society

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

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

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

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

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

Welsh Consumer Council
Wiggin and Company

**SUMMARY OF RESPONSES TO THE CONSULTATION PAPER ON
IMPLEMENTATION OF DIRECTIVE 2001/29/EC**

A more comprehensive analysis of the responses to the consultation can be found at <http://www.patent.gov.uk/about/consultations/responses/index.htm>. This is only a short summary of the main points raised and conclusions reached. The summary is divided up according to the relevant article of the Directive, but only articles that have led to more than minor changes to the law are referred to.

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

Article 3 (communication and ‘making available’ to the public)

Rights to be granted

The consultation paper proposed to replace the present rights granted to authors by s.20 of the Copyright, Designs and Patents Act 1988 (CDPA), covering ‘broadcasting’ and ‘inclusion in a cable programme service’, by a generalised right of ‘communication to the public’ by means of ‘electronic transmission’, further defined as embracing ‘broadcasting’ and inclusion in an ‘on-demand service’ or ‘other interactive service’. A number of concerns were raised about in particular the definition of the elements of ‘communication to the public’. The Government has therefore concluded that it is preferable to adjust the proposed definition of ‘communication to the public’ so that it includes (a) broadcasting and (b) ‘making available’ (defined as in Article 3 of the Directive). The obligations in Article 3 as regards performers are different to those for authors, and in this respect the consultation paper proposed to introduce a new exclusive right for performers in relation to ‘on-demand services’. In line with the adjustments to authors’ rights indicated above, the Government is providing this right as a right of ‘making available’, defined in the terms of Article 3.2

Broadcasts and broadcasting

The consultation paper proposed to remove s.7 of the CDPA conferring protection on ‘cable programmes’, and amend s.6 to redefine ‘broadcasts’ (and therefore ‘broadcasting’) in a technologically neutral way, but excluding ‘on-request’ services. The proposals on broadcasting prompted a considerable response, from interested parties of all kinds. The Government has therefore concluded that refinement of its original proposals is desirable, in particular to exclude from the definition of ‘broadcast’ (and ‘broadcasting’) any internet transmission otherwise falling within s.6(1) unless it is one of three specific kinds, all of which are of the same character as traditional broadcasts.

Consequential amendments

The principal changes to the CDPA outlined above necessitate a considerable number of consequential amendments throughout the CDPA and related legislation. Many of these changes lead to no significant change in scope of the amended provision. However, the Government believes that it is not appropriate to apply the Statutory Licence in respect of use of sound recordings (ss.135A-H) beyond the inclusion of sound recordings in non-internet 'broadcasts' (as redefined) and such broadcasts that go simultaneously on the internet and by other means.

Article 5 (exceptions to rights)

General

The consultation paper envisaged a new temporary copy exception as required by Article 5.1 and this remains unchanged, although the Government shares the concern raised because it does not apply to computer programs and databases. The consultation paper indicated that, in general, the Government's approach to the optional provisions in Articles 5.2-5.4 would be to seek to retain the existing exceptions to rights in UK law (as set out in sections 28-76 of, and Schedule 2, to the CDPA) as far as permitted by the requirements of the Directive, but not to introduce new or wider exceptions in the course of implementing the Directive. A number of bodies representing users of copyright material welcomed the Government's intention to maintain existing exceptions as far as possible. The consultation paper also indicated that it would not be the intention to incorporate the 'three-step' test, applied by Article 5.5 into UK law. Bodies representing right owners generally felt that the test should be expressly implemented in the CDPA, whereas those representing users generally considered that it should not. The Government continues to consider that the test is a matter to be taken into account with regard to the framing of exceptions in national law, rather than for direct incorporation into law.

Exception for research and private study and library and archive exceptions (s.29, 38, 39 and 43 of the CDPA)

The consultation paper proposed to limit these exceptions permitting 'fair dealing' or copying by librarians on behalf of others for research purposes to cases where research is for a non-commercial purpose, and this remains the intention. Many user organisations expressed strong concerns about the meaning and implications of this limitation and many organisations representing right owners questioned whether further limitations are also needed. The Government has modified the proposals a little as a result of the comments, in particular to clarify the status of fair dealing for 'private study'.

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

The consultation paper proposed to restructure the educational exceptions in s.32(1) & (2) such that they would apply generally to instruction in 'educational establishments' (as defined in the CDPA), and also to other instruction provided that it is for a 'non-commercial purpose'. A number of organisations representing right owners questioned whether instruction in educational establishments is inherently non-commercial in nature. Whilst the Government believes that, in practice, it will very largely be the case that activities in educational establishments are non-commercial, it

has concluded that ss.32(1) & (2), 35 and 36 (and related Sch. 2 provisions) should be expressly limited to activities carried out for a non-commercial purpose. However, 'fair dealing' for purposes of instruction (whether for a commercial or non-commercial purpose), is also being provided in s.32 as indicated in the consultation paper. Moreover, s.35 is being amended by adding that the communication of recordings of broadcasts within the premises of an educational establishment is also permitted.

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

The consultation paper proposed to further limit s.67, in essence such that it would only apply where the proceeds of any admission charge do no more than cover costs. Organisations with interests in licensing public performance of sound recordings argued strongly that s.67 should be repealed in its entirety, as did bodies representing performers. In contrast, those organisations representing user interests which responded saw no need to narrow s.67 and were concerned about the impact of this on local community activities. The Government has concluded that a different approach to narrowing s.67 should be adopted. In future, recordings must be played by a person acting primarily and directly for the benefit of the organization and not for gain, and not only the proceeds of any admission charge, but also of any charges for goods or services provided when sound recordings are played, must be used solely for the purposes of the organisation. The Government believes that, in particular, this will prevent organisations seeking to benefit from the s.67 exception in relation to activities conducted on a quasi-commercial basis.

'Time-shifting' exception (s.70)

The consultation paper did not propose to amend this exception, but right owner organisations raised a number of concerns, particularly as regards the scope of the expression 'for private and domestic use'. In the light of this, the Government has concluded that it would be appropriate to make it clear that the exception applies only to the making of recordings in domestic premises for private and domestic use.

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

The consultation paper envisaged that the s.72 exception, in so far as it applies to sound recordings contained in broadcasts, would be amended but did not make any specific legislative proposals. Organisations with interests in licensing public performance of sound recordings argued strongly that the element of s.72 in question should be repealed, as did bodies representing performers. Bodies representing local community interests, licensed premises, cinemas, record retailers and music users more generally were opposed to any change in the s.72 exception as it relates to sound recordings. The Government has concluded that the sound recording element of the s.72 exception should be amended, but does not consider that repeal is necessary or appropriate. Rather, the sound recording element of the s.72 exception is being narrowed, in essence by removing from its scope recordings of music (produced other than by broadcasters themselves), except in circumstances where broadcasts are seen or heard in the course of the activities of non-profit organisations or in connection with demonstration or repair of broadcast reception equipment. In addition, changes to the mechanism for regulating the licensing of public performance of sound recordings will apply to the licensing which will become possible as a result of the

narrowing of s.72.

Article 6 (obligations as to technological protection measures)

General

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

Protection of TPMs applied to computer programs

In the light of comments made by parties with particular interests in computer programs, the Government has concluded that it is desirable to make some further adjustments to s.296 in order to bring its wording into closer alignment with that of Article 7(1)(c) of Directive 91/250.

Protection of TPMs applied to works other than computer programs

The consultation paper envisaged the introduction of new provisions to implement the requirements of Article 6 as regards TPMs applied to material other than computer programs, in essence providing civil remedies against the act of circumvention (Article 6.1) and both civil and criminal sanctions against making and dealing in circumvention devices and the provision of circumvention services (Article 6.2). The Government has maintained this approach, with some modifications to bring the provisions closer to the Directive and facilitate enforcement, but has rejected calls from right holders to apply criminal sanctions to the act of circumvention. Organisations representing academic and research interests drew attention to the statement in Recital 48 that the protection of TPMs 'should not hinder research into cryptography', and called for a saving or exemption for research of this kind. The Government has concluded that it is appropriate to introduce such a saving in the provisions setting out civil sanctions against the act of circumvention.

TPMs and exceptions to copyright and related rights

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

obtained. In general terms, organisations representing right owners were concerned that the scheme is too far-reaching and might be premature, while some representing users felt that it does not go far enough and might be impractical. The majority of user groups appeared to consider the scheme the best basis on which to proceed, but the Government has accepted the suggestions that the scheme should provide for 'class actions', ie complaints to be brought by a representative person or body on behalf of a class of users.

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

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

Article 8 (sanctions and remedies)

The consultation paper envisaged the introduction of new criminal offences in Parts I and II of the CDPA as regards unauthorised communication of protected material to the public, and this remains the intention. As indicated above, there will also be new criminal offences in relation to devices and services for circumvention of technological protection measures (TPMs). The consultation paper suggested that no specific action might be needed to implement Article 8.3, requiring that right owners be able to apply for injunctions against intermediaries whose services are used by third-parties to infringe rights, on the basis that it is already possible to seek such injunctions under common law in the UK. Right owner organisations generally expressed strong concern about this approach and on further consideration, the Government has concluded that Article 8.3 should be specifically implemented in UK law.