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# March of the Spiders

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Policy Challenges for Copyright in the Digital Publishing Environment



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Foreword by Michael Fabricant (MP)

**Shadow Minister for Industry & Technology**



In an increasingly digital world, a successful regime for the reward and management of creative effort is a vital pillar of the knowledge economy. The United States and European countries have different ways of managing intellectual property and copyright disputes and yet no country appears to have solved the many problems associated with so-called digital rights in a manner that fully satisfies legitimate business and consumer interests.

The research that follows, suggests that we should review a number of our ideas on the protection and management of intellectual property. If the United Kingdom is going to be “The best possible place for eBusiness”, then it needs to offer the best possible environment to support the contribution of our publishing industry, while recognising that where such issues as copyright are concerned, we may have to encourage new thinking and sensible initiatives for adoption by the wider European community.<sup>1</sup>

Without a doubt, the protection of intellectual property has become a fuzzy area of legislation, one that mixes Fair dealing, copyrights and database rights in a manner that confuses many of our successful online publishing companies; several of which were interviewed for this research by Aediles.

If a proportion of online publishers are asking for better direction and for a more rapid and equitable means of managing disputes and violations, then it is only right that any pressing concerns are reviewed and some movement is made towards finding a resolution that is acceptable to as many interests as possible. The United Kingdom needs to lead more and follow less in this new digital age and having provided a foundation for much of the free world’s intellectual property legislation in the 17th century we should perhaps be looking to explore and innovate further in the 21st century.

**Michael Fabricant is President of the Conservative Technology Forum.**

Malcolm Harbour (MEP)

**Chairman of the Conservative Technology Forum**



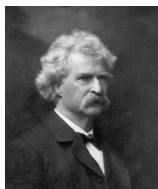
The widespread availability of diverse and innovative content represents a crucial part of the European economic future. As access to the Broadband Internet across Europe continues to expand, Digital services delivered by current and future technologies will generate jobs and prosperity for millions of citizens. Those services will also improve the quality and effectiveness of European business and public-sector agencies.

But it will only be possible to multiply and seek out new market possibilities if potential suppliers, on-line publishers, can expect a fair return on the investment they have made in new materials and services in the digital space. This is why an effective intellectual property regime remains a central pillar of information society policy. It must balance the legitimate expectations and rights of consumers with an easily implemented and enforceable package of measures for content providers. It must equally operate across national boundaries, in recognition of the fact that digital services are a sector of global economic importance.

The European Union has taken a lead in this area but more needs to be done. This valuable paper sets out a number of key concerns for digital publishing and will be an important exhibit in the current EU review of copyright legislation.

**Malcolm Harbour is European Information Society Spokesman for the Conservatives.**

## Preface



The author [Mark Twain](#), once remarked, “*Only one thing is impossible for God, to find any sense in any copyright law on the planet.*” Over one hundred years later, [Lawrence Lessig](#),<sup>2</sup> Professor of Law at Stanford University, author of *The Future of Ideas* and champion of the ‘Creative Commons’,<sup>3</sup> <sup>i</sup> told an audience at University College, London, “*Mix [George Lucas](#) and [Alfred Hitchcock](#) and it’s piracy but mix the works of [Milton](#) and [Shakespeare](#) and it’s called creative writing.*” Both remarks reflect the problematical nature of dealing with copyright. Today, the fundamental problems and uncertainties surrounding the protection of intellectual property appear unresolved. In the 21<sup>st</sup> century, it may be argued, that on the one side, the arrival of new methods and tools that circumvent the protection of online content and on the other, digital rights management (DRM) technologies and supporting copyright legislation, are frustrating citizens and commercial publishers alike.

“The danger”, says TiVo general counsel, Matthew Zinn in a [Wired Magazine Interview](#) “is that DRM can tilt the balance of copyright so that ultimately there’s no concept of ‘Fair use’, because the content owners dictate what the rules are. But I think content owners are beginning to recognize that if you make things too restrictive, then consumers will find non-legal ways to achieve what they want.”

“A patchwork of infringement remedies”

It is this question of infringement, a delicate balance between the protection of valid commercial interests and the limiting factors of the technology that are explored in this document. The purpose of this independent research, is to identify such limitations and “grey areas”, in the current and projected international copyright <sup>ii</sup> legislation within the electronic publishing space, through a series of interviews with leading companies, copyright lawyers and cross-party Parliamentary figures with an interest in intellectual property, its promotion and protection in the digital economy.

### Scope of the Research

This research, which focuses on the online publishing industry asks if present legislation governing electronic publishing and database rights and supporting infringement procedures, such as Notice and Takedown of websites, are both fair and effective in the present environment and whether UK, European law and their associated regulatory agreements and protocols, need refining further to reflect the increasingly defensive position in which the industry finds itself today. Is the protection of intellectual property and copyright, as some observers would ask, a broadly unworkable concept without popular consensus, once content is released on the Internet?

“We need to establish a database of copyrights here in the UK.”

<sup>i</sup> Creative Commons was formed to an alternative mechanism to those who want to protect their works, but share them under certain conditions. The group devised a series of flexible copyright licenses available for anyone, for free.

<sup>ii</sup> United States Digital Millennium Copyright Act (DCMA) & European Union Copyright Directive - EU Directive 2001/29/EC

In an ideal world publishers would like to see present legislation protecting intellectual property reinforced by a common international approach but not at the expense of weakening existing law. Should the UK, through Europe, be encouraging a pragmatic solution to this dilemma and if so, what measures should be taken to adjust or strengthen existing protocols in order to create the best possible environment for online publishing?

While this research examines matters of commercial concern, such as the interpretation of Fair use or Fair dealing, it also touches on wider issues of public access to information and conceptual innovation involving the [Creative Commons](#)<sup>4</sup> a controversial project championed by Professor Lessig and articulated by Richard Stallman in the book, [Free Software, Free Society](#). While in the UK, the BBC are making their creative archive available under a Creative Commons License, in the United States, The National Endowment for the Arts and the Library of Congress are putting [thirty million newspaper pages online](#), dating from 1836 to 1922, starting with the famous armed forces magazine, "The Stars and Stripes."

This report is being prepared by Simon Moores of [Zentelligence](#)<sup>5</sup> on behalf of *Aediles* in conjunction with the [Conservative Technology Forum](#),<sup>6</sup> Aediles are an independent open-market 'think-tank', exploring market-driven solutions in European information society policy.<sup>iii</sup>



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<sup>iii</sup> Although published under the auspices of the Conservative Technology Forum, the contents of this document are contributions to policy debate and do not necessarily represent the official policy or views of the Conservative Party or its Shadow Ministers.

## Acknowledgements

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Eddie Cheng, Bethan Lloyd, Howard Rubenstein and Nigel Ridgeon of Yell Group, Nigel Pocklington of the Financial Times, Alexandra White and Richard Hensley of The Association of Online Publishers, Derek Wyatt (MP) Labour, Richard Allan (MP) Liberal Democrat, Lawrence Lessig, Professor of Law, Stanford University, Michael Fabricant, (MP), Shadow Minister for Industry & Technology, Malcolm Harbour (MEP) Conservative, Philip Virgo, EURIM, Ian Cuddy, eGov monitor, Alastair Crawford, Keith Marsden and Sophia Henri of 192.com, Trevor Fenwick, The Database Publishers Association, Claire Wardle, Royal Mail.

## Independent Opinions on UK Copyright Legislation

For the purposes of this research Zentelligence consulted two leading intellectual property and copyright lawyers, Michele Rennie,<sup>7</sup> Head of Intellectual Property and Internet Law at [Computalaw](#) Ltd, author of *International Computer and Internet Contracts and Law* (1985–2004) and Chairman of the British Computer Society Electronic Commerce Legal Task Group, Margaret Briffa<sup>8</sup>, Intellectual Property specialist and the founding partner of solicitors, [Briffa](#) and Ian Brown, of University College London, the Foundation for Information Policy Research and EDRI (European Digital Rights),



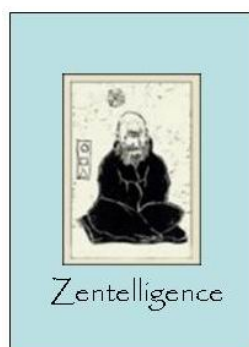
## About the Conservative Technology Forum

Information economy and information society issues now play an increasingly important part in plans for the economic success of the United Kingdom and the future of the European Community. Led by Shadow Industry & Technology Minister [Michael Fabricant](#) MP and chaired by [Malcolm Harbour](#), MEP, (European Information Society spokesman for the Conservatives), the Conservative Technology Forum is actively contributing to Westminster Front Bench thinking, on Information Society matters. In conjunction with the independent policy and research unit, [Aediles](#), its objective is to enlist the creativity of those working with the new computing, communications and content industries in examining how society should be enabling constructive change while handling the consequences of rapid technology evolution. Its home page is [www.conservative-technology.org](http://www.conservative-technology.org) .



## About Zentelligence (Research) Ltd

[Zentelligence](#) (Research) Ltd is an independent research company that advises governments, European and UK parliamentarians, vendors, business and the media on the evolution, development and application of Internet-related technologies and their impact on social change. The company accepts research, analysis and consulting assignments involving electronic government, information society and information security issues. Its homepage is [www.zentelligence.com](http://www.zentelligence.com) .



## A Wider Discussion

This research may be considered controversial. While it does not aim to support or represent any specific position in regard to existing copyright legislation and associated measures for addressing the problem of infringement, it does suggest that members of the publishing industry, businesses, academics and lawyers interviewed for this report, may favour a wider discussion of legislation affecting the intellectual property regime, as well as a more flexible and practical approach to the twin challenges of infringement and protection. Conversely, there are those who would regard the idea of encouraging further debate at a political level as an unwelcome challenge to the existing status quo and the UK publishing industry, with its important contribution to the economy of £12 billion.<sup>9 10</sup>

“What works well for a trade association does not work for everyone else.”

Are publishing businesses adequately protected by present copyright legislation? From a purely technological perspective, intellectual property protection is a square peg being rammed uneasily into the circular space of the Internet. Efforts to protect intellectual property rights are frequently frustrated by the World Wide Web and the methods described in this report. This is an understandable source of concern to businesses requiring greater confidence in dealing with an uncooperative digital medium.

One flagship brand of the UK's online publishing industry<sup>11</sup>, the [FT.com](http://FT.com) prides itself on a “Strong, permissions-based architecture”, which defends its premium, subscription-based content from unauthorised access over the Internet. However, until the report was written, the FT appeared unaware that subscriber passwords to its Website and as many as thirty thousand other companies and premium publications<sup>12</sup> such as [The Economist](http://TheEconomist.com) and [The New York Times](http://TheNewYorkTimes.com), are available in seconds, from an aggregator site, [www.bugmenot.com](http://www.bugmenot.com).

“Does Government have a role in defining what public information is and what should lie in the public domain and does one do this unilaterally, state by state or at a European level?”

A further concern for publishers is that in the digital environment, copying and re-use of data for commercial purposes is much simpler than in the analogue world. There are myriad examples of abuses, where content has been accessed from both free access web sites and subscription based services in breach of the user license, downloaded and re-compiled to create a product designed to commercially disadvantage the original publisher.

Following from this, a second leading brand Yell.com can observe its publicly available directory content “Scraped” from the Internet on a regular basis, forcing it to invest in elaborate monitoring systems to protect its data, and at the far opposite end of the electronic publishing spectrum, a third Website, [www.arabgov.com](http://www.arabgov.com) a non-commercial resource which monitors eGovernment progress in the Arab world, can discover that its entire content has been ‘scraped’, ostensibly for research, by an Internet address that points at a foreign university.

“My concerns are that potential infringers working from more “relaxed” IP regimes outside the UK will continue to scrape and copy with little fear of having their routes to market blocked.”

These are just three of the many examples of copyright infringement regularly faced by on-line publishers who are increasingly frustrated in their ability to protect their digital content from the free-for-all world of the Internet. Some businesses are calling for more streamlined legislation and protection against the kinds of infringements described in more detail later in this report and Britain appears caught between separately evolving United States and European copyright codes, which reportedly lack the agility and unambiguous interpretation that publishers like Yell.com are requesting; particularly when it comes to questions of ownership and assignment of copyrights.<sup>13</sup>

An additional problem is posed by the exceptions and limitations to the relevant European (Copyright) Directives<sup>14</sup>, which allow national governments to maintain their existing national exceptions when implementing the directives into their national law. These exceptions result in country-by-country variations to the directives and so will inhibit the development of pan-European databases<sup>15</sup>, “An area where the UK has a market leading position”, says one leading member of an industry association, “are held back by concerns of the producers over redress in up to twenty-five different legal environments.

From a separate perspective, the publishing business is fighting a constant guerrilla war against the Internet, in its attempts to maintain controls on copyrighted content, once it becomes available on the World Wide Web. While legislation might prove an effective sanction against copyright theft on a domestic basis, the spread of the global village makes enforcement and the protection of rights an expensive and often difficult exercise

“How do we work within the existing framework? The market demands new models.”

Given the relative speed differential between advances in technology and the arrival of supporting legislation, it would appear sensible to widen the debate to consider new measures and solutions capable of closing a widening gap between consumers, businesses and publishers. The European Union is presently engaged in a [consultation process](#) on the fine-tuning of legislation<sup>16</sup> and perhaps, with over half the domestic population now using the Internet, it would be appropriate for the UK to explore whether its own implementation of copyright law is fit for purpose in a changing online environment or whether it has gaps that might damage the delicate balance between rights holders’ interests, and those of users and of consumers?



## Exploring Copyright in a Digital Context

Copyright is a legally enforceable framework designed to reward the creators of original intellectual property for the use of their achievements by others. It is the means through which the entertainment and publishing industries derive profit over a fixed period of time from their commercial activities.<sup>17</sup> Copyright legislation, both in application and interpretation is increasingly a source of confrontation between the citizen in a digital society and the legislative-supported interests of a market-place attempting to protect its intellectual property, distribution and royalty mechanisms in the face of the Internet.<sup>iv</sup>

“Where does copyright start and where does it end?”

Outside of the popular digital entertainment space occupied by music and (DVD) video the on-line publishing industry can be broadly divided into the following categories:

- Electronic Books (e-Books)<sup>18</sup>
- On-line publications (Unrestricted Access) – e.g. The Guardian On-line<sup>v</sup> The IT Portal, and Computer Weekly
- On-line publications (fully or partly subscription-based) – e.g. FT.com and the Economist.com<sup>19</sup>
- On-line databases, directories and aggregators – e.g. Yell.com and 192.com

On the one side, there exists a strong, technology-driven, permissions-based architecture in online publishing; i.e. the FT.Com and the Economist, which only wish to make premium content<sup>20</sup> available to registered subscribers. At the far opposite end of the digital spectrum there are the online directories and auction sites, such as Yell.Com or eBay who have large volumes of database information that they wish to make publicly available and searchable as part of a business model that leverages the commercial efficiencies of the Internet.

“It is not realistic to put media on the Internet and expect to control it”

The value in all such businesses lies in their content, as in the case of databases, where licensed customer data, such as BT's OSIS - (Operator Services Information Systems Database) subscriber telephone number information, is further refined into unique intellectual property, perhaps by combining subscriber and postcode address data with the electoral roll, as with 192.com or through adding original and detailed business information, as in the case of Yell.com. In the case of online publications, such as the FT.com or the Guardian Online, emphasis is placed on the unique value of news features and analysis supported by a globally recognised and respected brand but in all cases such content is protected by copyright legislation which is wholly permissions-based; i.e. all content is automatically protected by default regardless of whether this was the author's original intention or not. As a consequence, to reuse any

<sup>iv</sup> See Lawrence Lessig, The Future of Ideas

<sup>v</sup> The Guardian has also launched a new digital edition in tandem with the Guardian Online which is subscription based <http://digital.guardian.co.uk/>

material, beyond a defence of "Fair <sup>21</sup> Use"<sup>vi</sup>, requires the assent of the original copyright holder.

## Database Rights

Where directories of information are involved, a note should be made of the question of Database Rights.<sup>22</sup> The 1997 Regulations established a "Database Right"<sup>23</sup> to offer protection to those who had made a substantial investment in the assembly of a database. As part of the European Union's harmonisation exercise, "A database which used to have protection under UK copyright law is now protected for fifteen years from the date of completion, by a separate database right,<sup>24</sup> (*providing there has been substantial investment in either the obtaining, verification or presentation of its contents*<sup>25</sup>).

Copyright protection is only available to an author when originality is involved in compilation but an online directory, may be protected by both copyright and the database right and the Fair dealing defense of the kind that are encountered in copyright do not apply. Database protection is available when an author has used his/her own intellectual creativity in selecting and/or arranging the contents of a database irrespective of whether the contents are copyright or not. An online directory may be protected by both copyright (if the content is original) and the database directive does have exceptions to the *Sui Generis*<sup>26</sup> rights of a database author such as extraction or re-utilisation of a substantial part of its contents for private purposes (of a non-electronic database); illustration for teaching or scientific research (as long as the source is indicated and it is for non-commercial purposes); for purposes of public security, administrative or judicial procedure.<sup>vii</sup>

"There is a real need for additional legal protection where a publisher has invested in the creation of a database. However this is new law and the first cases are only now reaching the end of the legal processes."

The exact nature of what is being protected is, as has been seen in November's European Court of Justice Ruling (ECJ) on the case of the British Horseracing Board vs. William Hill is open to interpretation.<sup>27</sup> In this matter, the Court appears to make the distinction between an organisation whose prime economic activity is publishing, creating and maintaining a database and any other organisation, whose prime function is something other than publishing, creating and maintaining a database. The latter appears to be less protected. There are other interpretations of the judgement which differ in their opinion of what is being protected. The confusion created by this case should not deflect attention from the real need for the protection of the original investment and with it the economic interests of the rights-holder and whether that exists in the underlying content and/or the database as a whole.

### Length of Database Rights

Database rights can be continued indefinitely if there continues to be substantial investment made by the database owner. This is the nature of publishing and not as simply a difference between online publishing and paper publishing; a point which arose in relation to railway timetable guides at the beginning of the last century.

<sup>vi</sup> Fair use or Fair practice is understood as the reproduction or sampling of a copyrighted work "as is" for purposes of parody, news reporting, research and education without the permission of the author. See [Electronic Frontier Foundation www.eff.org/IP/eff\\_fair\\_use\\_faq.php](http://www.eff.org/IP/eff_fair_use_faq.php)

<sup>vii</sup> Article 9.

Database rights can raise a new problem of their own in the online environment. In addition to tracking the sources of original material, that may be multiple, with copyright owned by a number of different contributors many directories and databases are being constantly updated, it might be argued where there has been a substantial change to the contents or substantial investment to the extent that the database could be considered a “substantial new investment” (evaluated qualitatively or quantitatively) that an “Everlasting database right”, is created which in theory extends such database protection on an indefinite basis which was not the original intention of the legislation and which now appears to be challenged by the result of the ECJ ruling.<sup>viii</sup>

“Government should fund investigation into copyright and database rights and then take it to Brussels.”

Fundamentally, the database right allows a publisher to prohibit the “extraction” or re-utilization” of a *substantial* part of a database and the repeated and systematic extraction and re-utilization of *insubstantial* parts of a database if this conflicts with normal exploitation of the database or unreasonably prejudices the publisher’s legitimate interests. This is particularly relevant when it comes to questions of “Spidering” and “Scraping”, of data which will be explored shortly.

### Understanding Fair Use

In an article entitled “[Copyright in the Digital Age](#)”, Michael Fraas writes, “The core concept of Fair use is that, in general, any use that does not exploit the commercial value of the original is permissible.<sup>28</sup>” In his report, “[Implementing the EU Copyright Directive](#)”, Ian Brown<sup>29</sup> of The Foundation for Information Policy Research, describes how [Directive 2001/29/EC](#)<sup>30</sup> of the European Parliament on the harmonisation<sup>31</sup> of certain aspects of copyright and related rights in the information society “Has proven more contentious than its drafters foresaw,”<sup>32</sup> in that the Directive does not allow for a “Fair use” principle.

“If Britain is going to be an information society can we live with the current regulations or are we going to have to review the copyright legislation?”

The European Copyright Directive (EUCD), writes Dr. Bernt Hugenholtz, had a dual purpose<sup>33</sup>. “First, to bring the laws on copyright and related rights<sup>34</sup> in the European Union in line with the WIPO<sup>ix</sup> “Internet Treaties”, in order to set the stage for joint ratification of the Treaties by the Member States and the European Community.” The second objective of the Directive was to harmonise certain aspects of substantive copyright law across the board. It was implemented in the United Kingdom at the end of October 2003 using secondary legislation under the European Communities Act. Ian Brown comments that as “The UK already had a fairly restrictive regime, the introduction of the EUCD, changed very little.” Brown adds ““Fair use” is an American concept; the European semi-equivalent is “Fair dealing” or (as the EU calls it) “exceptions” to the copyright and related rights in the EUCD. As Fraas says, Fair use is fairly wide, buttressed as it is by the United States First Amendment to the constitution.”

<sup>viii</sup> It is likely that the court would not protect a database which had not been “substantially” modified. It might be inferred from this ruling, however, that if an update represents a “substantial investment” - qualitatively and quantitatively - then a fresh period of protection might be afforded.

<sup>ix</sup> World Intellectual Property Organisation (WIPO)

“In the absence of effective harmonisation it is better to retain the higher protections offered by UK law. The infringers largely ignore the law whatever jurisdiction.”

“Fair dealing”, continues Brown, “attempts to provide an exhaustive list of exceptions to copyright. Anything not included in the exceptions (section 5 of the EU CD<sup>35</sup>) is not permitted.”<sup>36</sup>

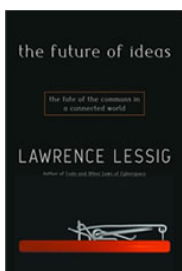
## When Fair Fails

“Fair use” or its European semi-equivalent “Fair dealing”<sup>37</sup>, presents electronic publishers with a series of problems that do not appear to be unambiguously interpreted by recent changes to international copyright legislation.

Leading copyright expert and lawyer, Michele Rennie<sup>\*</sup> has noted, that “While the amendments introduced in May 1999 to the proposed copyright directive have taken into account some of the issues that were the subject of the many objections received to the initial 1997 draft, the implementation of some of those amendments is inconsistent throughout the draft, especially in Article 5.3, where fair compensation is payable for reproduction of copyright materials for the purposes of teaching and scientific research<sup>38</sup> but not for the purposes of reporting current events nor for criticism or review, even though those latter purposes may be commercial.” She concludes that while “Member States retain the option of implementing non-mandatory exceptions and limitations to the various exclusive rights there can be little harmony achieved within the European Union for the copyright industry.”<sup>39</sup>

“We need an industry perspective on Fair use.”

## Creative Commons



One approach to increasing certainty on the re-use of copyright materials (with the owner’s permission) is the Creative Commons project.<sup>40</sup> The project, regarded as contentious by many publishers, has developed a series of licences that allow copyright owners to reserve some rather than all rights related to a work. Other authors and publishers are then able to make use of works released under a Creative Commons licence without needing to negotiate rights clearances, which can be prohibitively expensive to obtain for individuals and small companies. Users of these works are free to share them with their friends and colleagues, which can be a way to build publicity for a work and author. Science fiction novelist [Cory Doctorow](#),<sup>41</sup> for example, has found that releasing books online under a Creative Commons licence has increased the sales of the printed versions.

The main options available to right holders releasing a copyright work under a Creative Commons licence are:

1. Should attribution of the work be required?
2. Should commercial reproduction and reuse of the work be allowed?
3. Should derivative works be allowed?
4. Must derivative works be published under an equivalent licence?

<sup>\*</sup> See footnote 100

More specific licences are also being developed. One that has attracted the interest of many [musicians and music publishers](#) is the sampling licence<sup>42</sup>, which allows significant parts of a work to be sampled and used in a new composition, but which does not allow the reproduction of the original.

“We need to have legal remedies for abusing the conditions of the Creative Commons license”.

Creative Commons originated in the United States, but has partners all around the world creating versions of its licences that are adapted for local legal systems. The [UK partner organisation](#) is based at Oxford University, and has a distinguished advisory board including Lord Justice [Robin Jacob](#)<sup>43</sup> and Reuters Professor of Intellectual Property Law [David Vaver](#).<sup>44</sup> The UK-specific licences should be made available early in 2005.



## Spidering and Scraping: The Open House Dilemma

In the context of the publishing industry, two expressions, “Spidering” and “Scraping” offer two different descriptions of a near identical process. The former is however deemed to be acceptable and “Fair” in most circumstances and the latter is regarded as a theft of intellectual property.<sup>45</sup>

“You can’t steal Intellectual Property, there has to be a tangible offence.”

Capturing the attention of the leading search engines, such as Google, Yahoo and MSN is normally of singular importance to an Internet business. Without a top ranking on any of these information aggregators, a business is, to all intents and purposes, invisible to the Internet’s rapidly growing population. As a consequence most businesses actively encourage search engines to visit and index their Website content on a regular basis and adopt an “Open Door” policy to the activities of the Web “Spiders”, autonomous programs<sup>46</sup> employed by the search engines to seek-out and index the content of Websites, following their links to other websites and recording as many as 100,000 pages from any one visit.<sup>47</sup> The harsh commercial reality of the Internet and its remarkable speed of growth, means that only a relatively small percentage of the global population of Web sites are indexed and ranked against complex algorithms and as a consequence, brand value and identity plays an important part in the weighting process.

### Caching & Mirroring

Most search engines make a statistical record of a Web page<sup>48</sup> when they “Spider” it for meaning or context to related queries. For example, the engine can point to specific information contained on a page that’s related to a search term, but it often doesn’t have the complete picture of the page.

“The Internet has changed the rules and few people understand how.”

Leading search engine Google goes one step beyond, however, by taking a digital image of pages and then making it available to visitors in cached links. Those pictures remain on its site until the next time Google spiders that particular page. This feature is useful for visitors seeking to locate Web pages that may no longer exist on the source Web site - most evident in the Internet’s archive at [Wayback machine.org](http://Wayback machine.org). However, this feature<sup>49</sup> has recently been putting Google at odds with some publishers and such caching raises a legal dilemma involving a central feature of the Internet. When is it considered acceptable to copy the contents of someone else’s Web page, even temporarily and would such an action benefit the website owner, in terms of improving a search engine ranking, i.e. Google, or is it an abuse which might lead to loss of intellectual property or brand dilution?<sup>50</sup>

In a January article for the [LA Times](http://LA Times)<sup>51</sup>, Professor Lessig writes that in December 2004, “Google announced a partnership with major research libraries to scan 20 million books for inclusion in Google’s search database. For those works in the public domain, the full text will be available. For those works still possibly under copyright, only snippets will be seen.” The potential of this project”, writes Lessig “is only beginning to be understood”, because, he continues, “It is not at all clear that Google

and these libraries have the legal right to do what is proposed. For work in the public domain, the right is clear enough. But for work not in the public domain, Google's right to scan — to copy — whole texts to index is uncertain at best, even if it ultimately makes only snippets available. When permission has been given by the copyright holder, again there's no problem. But when permission has not been secured, the law is essentially uncertain.”

Copyright lawyers and industry experts believe that there are legally untested arguments <sup>52</sup> around a commercial caching service and while some lawyers argue that Google's practice would be protected by Fair-use, Fred Lohman, an attorney at the Electronic Frontier Foundation has remarked in an interview, that “From a strict copyright standpoint, - substantiality in UK law - it violates copyright.” <sup>53</sup>

“The search engines are driving the market.”

News.com reported in July 2003, that some Web site operators have objected to the feature and digitally request that Google does not <sup>54</sup> archive their pages by adding a “NOARCHIVE” <sup>55</sup> tab to their sites. Among other arguments, publishers say that cached pages at Google have the potential to intercept traffic from visiting their own site or at worst, constitute trademark or copyright violations. In the case of an out-of-date news page in Google's cache, a Web publisher might face legal action because of false data remaining on the Google cache but corrected at its own site.

For this reason, the issue is expected to join the long list of other technology-generated copyright problems that need to be tested in a court of law in Europe and the United States or explicitly addressed in new copyright legislation.

“We need a common protocol, common enforcement and a level playing field.”

A new problem that has appeared in 2004 surrounds [Mirroring](#). According to a story in the eCommerce Times in November 2004, “Sites that completely copy a content providers” site have appeared. [Mirrordot.com](#) first posted in September copies, summaries, and links of stories that appear on [Slashdot.org](#), a popular tech message board. Then [Mirrordot.com](#) simply caches the stories to which [Slashdot](#) links. [Mirrordot.com](#), which runs its own ads with the stories as well as the original sites' advertisements, tallies the traffic for itself. This, according to experts, appears quite legal under current law.

Similar legal ambiguity used to surround the question of caching by Internet Service Providers. ISPs store copies of popular pages on their own servers in order to provide their customers with faster access to those pages. This could be argued to infringe the copyright in those pages, despite the benefits for the server providing the original copies of those pages (reduced server load and a better user experience). Successful lobbying by the communications industries resulted in a mandatory exception to copyright for this purpose in the Copyright Directive. Member states must allow “Temporary acts of reproduction... which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable either:

- A transmission in a network between third parties by an intermediary.
- A lawful use of a work or other subject-matter to be made, and which have no independent economic significance”.

“What is the definition of Fair Use where Spidering is concerned?”

The opposite dimension of Spidering is Scraping or using a computer program,<sup>56</sup> a “Bot”, to systematically access and harvest data from the websites of others. Scraping is a frequent source of annoyance to the publishing industry and in particular those companies whose directories and “White Pages” are open to the public. Unless, like the FT.com an agreement is reached with every search engine, given access to permissions based content, blocking unauthorised access, a directory publisher or auction site can quite possibly lose all of its data and intellectual property to a third-party Scraper program in a matter of minutes and a law exists to prevent such database extraction and reutilisation.

In his book, [The Future of Ideas](#), Lawrence Lessig examines the problem<sup>x</sup> the “Open architecture of the Internet” introduces in the context of Spidering. “When a search engine Spiders the Web”, writes Lessig, “it uses the resources of others to build its index. When Best Book Buys enters Amazon.com, it collects the price Amazon offers by using Amazon’s servers. In a sense then, we could say that each of these bots *trespasses*<sup>57</sup> on the servers of other sites.”

### The Bidder’s Edge Example

Professor Lessig cites the 1999 case of auction site aggregator, [Bidders Edge vs. eBay](#) and comments that, “In the virtual sense, that one goes to a Website, Bidder’s Edge’s Bot was “entering” a computer without the permission of its owner and entering without permission is the classic definition of trespass.” Auction site, eBay did not want bots that created competitors and had imposed a No-Bot policy on access to its Web site. By continuing to ignore that sign, coded into eBay’s pages [Bidder’s Edge found itself in court](#).

Although information posted on a site is may be available to the public, as it was in this case, the unauthorized collection of that data for commercial purposes is considered equivalent to trespassing.

In more fundamental terms, eBay was arguing that Bidder’s Edge was harvesting proprietary data that belonged to eBay and its members. Correspondingly, Bidder’s Edge was arguing that it was simply providing an aggregation search engine for auction sites and nobody, as Lessig points out, “Was forcing eBay to open itself to the World Wide Web.”

The wider problem however lay with supporting a lawsuit based on trespass to property rather than trespass to land. The court rejected the argument of Bidder’s Edge that it could not commit trespass to eBay’s website because the site was publicly accessible. eBay’s servers, the court said, are private property to which eBay grants conditional access. It held that the “electronic signals sent by Bidder’s Edge to retrieve information from eBay’s computer system were sufficiently tangible to support a trespass cause of action. Finally, it found that a Web Scraper does not need to interfere with the operator’s possession of its system in order to maintain a claim of trespass.

“We are looking for ways of finding controls and protecting our rights. Perhaps something such as sampling and research should be built on top to support a better definition of “Fair use” in the commercial environment.”

<sup>x</sup> Lawrence Lessig - The Future of Ideas P.169 - [www.the-future-of-ideas.com/](http://www.the-future-of-ideas.com/)

The dispute was however settled when as part of a settlement; Bidder's Edge paid eBay an undisclosed sum and agreed to drop its appeal of an injunction that barred it from using an automated search system to harvest eBay's listings.

Lessig imagines a world where every use of data on the Internet may have to be licensed and if each time a machine has to negotiate with another before it can enter an individual site, such as the FT.com, then the overall costs of using the network will increase and its value to society decline.

While this area of cyber law is still evolving and has not been properly tested in the UK,<sup>58</sup> a number of courts in the United States have held that the use of such computer programs violates the rights of website operators under a variety of legal theories. In particular, website operators have sued, and in many cases prevailed against, third parties that used Web "Scrapers" to extract pricing, product and other data from the website operators' websites, claiming that such actions constitute:

- A violation of the federal Computer Fraud and Abuse Act
- A trespass to the website operator's computer systems
- A breach of the operator's website terms and conditions
- A violation of the federal Copyright Act.

Based on these cases and according to an opinion by attorneys [Hale and Dorr](#), it would appear that anyone who, without authorization, uses a Web "Scraper" or similar computer program to access and download data from a third party website risks potential and perhaps serious legal claims from the website operator. However, example cases in the United States, suggest that, for publishers wishing to protect the data available on their website, the failure to observe some basic precautions may compromise or even preclude such claims. Specifically:

- Website operators should ensure that their website terms and conditions specifically prohibit unauthorized access or downloading of data using any computer program; and
- Website operators should either clearly identify the terms and conditions of use on each webpage containing valuable data or provide an obvious link to a webpage with those conditions.

### **Spidering - A Legal Minefield**

In theory, for any search engine to index or harvest Website content without the owner's permission could represent a breach of copyright. After all, once you have created something, original<sup>xi</sup> the law automatically embraces your work, which can include Web pages, objects and software code<sup>59</sup>. The very nature of the Internet and Web browsing demands however that digital content held on one machine is presented and/or downloaded to a second and this represents an area of difficulty when interpreting Fair use or Fair dealing. Is such data<sup>60</sup> being used for the purpose intended by its creator, i.e. a Yellow Pages or eBay search or is it being used as the basis for the creation of new and derivative work without the permission of the original copyright owners. If this represents directory-type services, who are the original copyright owners, the directory company or the company that collected the raw information?

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<sup>xi</sup> See Database Rights

“There are several layers of copyright, even copyright on copyright, which hasn’t been tested in court yet.”

A concern expressed by the directory publishing industry, is that “Scraping lifts large chunks of data from their websites, which is frequently used to compete or to create new products.” A particular problem that follows- on from such activity involves brand infringement and passing-off and the Indian subcontinent is described as a “Constant source of entertainment”, by both Yell.com and FT.com. The former reports that it can observe frequent attempts to scrape its data and given the often international nature of the problems, only a fraction of the more serious infringements can be pursued.

Yell.com has an open interpretation of Fair use. This is described as “A fundamental difference between search-engine Spidering and prohibited Scraping, arbitrarily decided by what data is being harvested, how much has been taken and how that data is being used. “If there is a systematic effort to take data and sell it as a commercial exercise or sell advertising against it”, say’s Yell’s Director of eBusiness, Eddie Cheng, “then we will aim to take appropriate action to defend what we regard as our intellectual property.”<sup>xii</sup> He continues, “We encourage people to use our data but not in bulk; there being little visible difference between a Scraper and a user other than the context and the intention.”

## Deep Linking

A further [area of concern](#)<sup>61</sup> is now surfacing in the electronic publishing environment as personal Weblogs, “[Blogs](#)“, become more popular as an alternative source of news, involves Deep Linking and Framing.

“Deep links” are embedded HTML code that point from one Web site, to specific content or a Web page within a second site, allowing visitors to bypass the latter’s front page. Bookmarks or Internet favourites are typically deep links. So are search engine results.

“Deep linking isn’t a great problem but passing off is.”

Many publishers object to this practise for a number of valid reasons and in particular because it steers a visitor directly to a source of information, bypassing any messages or advertising that the owner of the website might wish the visitor to see on their Home Page. If the site that is Deep Linking also sells advertising, as in the case of some of the more popular Weblogs, publishers may become even more hostile, as they see their content apparently supported by advertising revenues that they are not receiving on some distant Website.

If a simple Internet Framing feature is involved, which embeds the page on one site inside the one that it is called from; the reader might not immediately be aware that the content that he or she is reading is not actually on the Website they first visited. Thus, the work of a respected newspaper columnist might, at first glance, appear to be sitting on the personal Weblog of a news aggregator on the opposite side of the globe. An example of such Framing can be seen by accessing the author’s own Zentelligence Weblog through the [Zentelligence Website](#) where it is clearly framed. In the UK however, the best known example of a legal challenge surrounding the Framing of a website is that of the [Shetland Times vs. Shetland News](#) in 1995.<sup>62</sup>

<sup>xii</sup> Yell.com has now taken technical measures to prevent scraping of its content.

“We need a benchmark for what we allow and what we don’t allow.”

The following piece of code is a Deep Link to a Wired Magazine article that explores the problem in a little more detail. From the example, you will see that a Deep Link is little more than a URL and a short description of that URL and arguably a statement of fact.

```
<a>href="http://www.wired.com/news/politics/0,1283,51887,00.html">: Deep Linking</a>
```

In a 2002 ruling, U.S. District Judge Harry Hupp<sup>63</sup> declared that such “[Hyperlinking does not itself involve a violation of the Copyright Act](#),” in a ruling on a case which had pitted Tickets.com against Ticketmaster. “There is no deception in what is happening. This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”

[In Europe](#), the relationship between Deep Linking and legislation appears inconsistent and this is one area that, at least in theory, should be harmonized by the introduction of the European Copyright Directive among member states.<sup>64</sup>

“I can see copyright infringement and Notice & Takedown growing in the UK”

In Germany, such linking has been tested and Mainpost, a publishing subsidiary of German group Verlagsgruppe Holtzbrinck, sued NewsClub.de, a news headline aggregator, over deep linking, claiming that [NewsClub.de](#) infringed German copyright law by such actions. However, the court declared such linking to be legal and stressed the importance of deep links for the internet. It declared that it is up to the plaintiffs to prevent deep links with technical measures<sup>xiii</sup>, if they object to such activity. This is trivial for website operators to do. The court did not offer any direction as to whether the circumvention of such measures would be illegal but today, under the European Copyright Directive, this circumvention of such an access control mechanism could be illegal.

In Denmark, the opposite occurred in [a similar case](#)<sup>65</sup>. In July 2002, a Danish court ruled that “deep linking” is illegal and where facts are not normally regarded as copyrightable has interpreted the law<sup>xiv</sup> in a way that takes into account both presentation and the “sweat of the brow” principle of database rights.<sup>66</sup>

“Most of my content sits behind a strong permissions based system. Control of content is everything.”

The Bailiff’s Court of Copenhagen ruled<sup>67</sup> in favour of the Danish Newspaper Publishers Association, which claimed that Danish company [Newsbooster](#) violated copyright laws by “deep linking” to newspaper articles on some Danish newspapers’ Internet sites. According to court transcripts, an injunction against Newsbooster forbidding the service to deep link to any association-owned content was granted because Judge Michael Kistrup found that Newsbooster’s service was in direct competition with the newspapers to whose content the service linked, a violation of the

<sup>xiii</sup> Digital Rights Management

<sup>xiv</sup> See University of Tuebingen <http://www.jura.uni-tuebingen.de/bechtold/lcp.html>

Danish Copyright Act and the Danish Marketing Act, which forbids profiting by use of other companies' products and/or services.

## Dealing with Copyright Infringements

### The Argument for Self Regulation

In answer to the growing problem of copyright infringement on both sides of the Atlantic, governments have encouraged a self-regulatory model to deal with Internet violations.<sup>68</sup> The accepted "Modus Operandi" in such cases in the US under the Digital Millennium Copyright Act is the delivery of a "Cease and desist" notice and subsequent takedown of the offending content or Website. As a result, any person or company believing their copyright to be infringed can demand its removal from a Web site without having to prove to the courts that an infringement has occurred. If the person responsible for the content notifies the operator of the website that the content is not infringing, it will be restored to the site. At that point the organisation making the allegation of infringement must rely on the traditional legal mechanisms to take action against the alleged infringer.

"All of our case law goes back to controlling physical media. There is no point in putting content on the web and expecting to control it."

In the European Union, the E-Commerce Directive specifies that the operators of websites hosting allegedly infringing content are only responsible<sup>69</sup> for that content once they are given "actual knowledge" of its existence. Copyright owners can therefore notify such websites of alleged infringement and have content taken down from a site. Unlike the DMCA, there is no automatic procedure by which the person responsible for the content can dispute the allegation and have the content restored.

The argument that lies behind this method of dealing with copyright violations is that in a world acting at Internet speeds, the legal process is unable to respond to online infringements in real-time, given that a pirated electronic book or music album can be downloaded and shared by a million people in a matter of minutes. A second problem is that the Internet easily crosses national jurisdictions and as Yell.com asks, "What happens when our content is Scraped from Russia or India?"

"Europe is a tool and the principle is to make it easier for us to enforce a common set of legislation."

The overall problem however, faced by the accused on both sides of the Atlantic, is that judicial process, as Sandy Starr points out, is replaced by Self Regulation, with the concomitant loss of any presumption of innocence. This is one reason why such "cease and desist" procedures remain controversial in Europe. In the United States, under the Digital Millennium Copyright Act (DMCA), the publisher of disputed content can however demand its reinstatement and if this is refused, there is a well defined judicial procedure to follow.

## The European eCommerce Directive

Under the conditions of the European eCommerce Directive<sup>70</sup>, the general legal framework in Europe for provider liability, Internet Service providers (ISPs) may, in some circumstance,<sup>xv</sup> while unlikely, be liable for illegal content hosted on their sites. These liability limitations apply horizontally to all potential forms of liability, including copyright infringement, trademark infringement, defamation, and infringement of a Member State's pornography and indecency laws. The limitations also apply to both civil and criminal liability.<sup>71</sup>

“Seven copyright Directives have been adopted over ten years. We need to make sure the early Directives are consistent with the more recent ones. This type of nuts and bolts work makes a real difference to how EU law works on the ground and we owe it to rights holders and content users, including consumers, to make this important body of EU law as coherent and as simple as possible.” - Internal Market Commissioner Frits Bolkestein.

Once notified, the Directive stipulates an ISP should take immediate action to block or remove offending content<sup>72</sup> and the Directive excludes the liability of ISPs when they act as on-line intermediaries, by setting forth exceptions for a “mere conduit,”<sup>73</sup> for caching,<sup>74</sup> and hosting.<sup>75</sup>

Presented with a suspected [copyright violation](#), a plaintiff in Europe “may ask the host ISP to provide the identity of the user”, “he may ask the ISP to pass on a complaint to their customer”, or “he may ask the ISP to suspend or terminate their customer’s Internet connection as expressed in [“Combating Internet Copyright Crime”](#)<sup>76</sup> a more detailed analysis of international legislation and infringement from the Publishers Association.

“Thanks to the introduction of so many variations and exceptions, everybody ended-up with exactly what they already had, which is exactly why European copyright legislation is so impotent.”

Sandy Star, writing in Spiked Magazine, [“Copycat, Copyright”](#), arrives at the conclusion that, “None of the above three options is particularly attractive - the first violates privacy, the second is ineffective, and the third is excessive. Not only that, but all three options place too heavy a burden of responsibility upon the ISP.” However, The United States Digital Millennium Copyright Act, (DMCA) and the Ecommerce Directive ostensibly absolve ISPs of such responsibility, by dictating that ISPs are not liable for copyright-infringing content that they host, provided that they remove it “expeditiously”<sup>77</sup> upon notification by the plaintiff.<sup>78</sup>

In what is, after all, the front line of any dispute, the E-Commerce Directive remains unhelpfully ambivalent on the question of enforcement and simply refers to its Articles 17 and 18 to court actions and out-of-court dispute settlement.<sup>79</sup> Presently experiencing a review<sup>80</sup> a [Commission working paper](#)<sup>xvi</sup> suggests that “Current EU copyright legislation<sup>81</sup> is generally effective and consistent, but would benefit from some improvements.<sup>82</sup>

<sup>xv</sup> See Note 61

<sup>xvi</sup> The Review of the “acquis communautaire”



“I believe, therefore, that we should continue to fulfil - step by step - the goal of harmonisation which could, eventually, end up even in a European Copyright Code (Regulation). Of course, we must not cherish illusions about the difficulties and obstacles which may appear pursuing that way.”

## The US Approach to Copyright Infringements

The United States deals with the question of infringement differently to that of Europe. It has a provision for Internet Service Providers confronted with allegations of copyright infringement.

In the USA, notice and takedown is formalised in the 1998 Digital Millennium Copyright Act, which forces Internet Service Providers (ISPs) to take down material whenever they are notified of copyright infringement. The DMCA does, however, grant the content provider (the publisher of the disputed content) an opportunity to demand that removed content is subsequently replaced - in which case the plaintiff's claim must either be dropped or taken to court.

The DMCA<sup>83</sup> section 512 stipulates that all categories of service providers qualify for the provisions involving, access, caching, hosting and service as search engines.

In the United States, such legal provisions comprise five elements or conditions:

1. A complainant must clearly identify himself and the nature of the infringement
2. Both parties (plaintiff and the ISP customer) must act “in good faith”, on penalty of perjury.
3. The Service Provider must act to block the offending material upon receipt of the complaint and inform the customer.
4. Any published materials must be re-instated within fourteen business days of a counter notice being issued.
5. Customer identification data can only be obtained through subpoena.

A fundamental difference between Europe and the United States is that due process still exists for copyright regulation in the latter but only as a last resort for the accused, and not as a reliable default protection against an allegation. Under a policy of self-regulation, it is impossible to tell whether the plaintiffs have copyright concerns at all, let alone legitimate ones. The DMCA allows plaintiffs to intimidate content providers<sup>84</sup> by demanding that content is expeditiously removed, with the implied threat of a court action to follow if that content is reinstated.

“In the United States, you can't copyright directories.”

In contrast with the United States' own provisions, European legislation appears open to looser interpretation and doubt on the part of ISPs. “There are no criteria to validate complaints and counter notices and outside of the Regulation of Investigatory Powers Act (RIPA), there are no arrangements for the hand-over of customer data, More-over there is no obligation in Europe to inform the customer and there are no legal guarantees to protect freedom of speech.”<sup>85 86</sup>

There is a growing view that the current situation - with fragmented data collection and updating, often outsourced and with sharing of information forbidden, except when mandatory under legacy powers – offers the worst of all worlds, duplication, waste, error and confusion, without credible protection against fraud and abuse.

In Europe, Hugenholtz writes “The eCommerce Directive enforces an even worse self-regulatory regime, without preserving due process at all. The Directive forces ISPs to take legal responsibility for copyright-infringing content, as the DMCA does. But the Directive then dictates that governments must “Encourage...the drawing up of codes of conduct...by trade, professional and consumer associations or organisations for copyright regulation.”

“The problem”, writes Sandy Starr <sup>87</sup> “is that mere notification by alleged victims of infringement is not enough for ISPs to remove content on a fair basis. The DMCA is slightly preferable to European legislation, because it at least incorporates mechanisms intended to discourage wrongful takedown. But this does not make the role of ISPs any fairer. Supporters of new copyright legislation often argue that this legislation removes ISP liability, but given the heavy burdens placed upon ISPs to remove all allegedly infringing content, it is equally true to say that new legislation imposes ISP liability.”

“Permissions may need to be expanded to support new uses of electronic business.”

A report from the Publishers’ Association takes a different view. In their report, the association, hailed the US NTD solution as “A resounding success” and described its “Essential Elements” <sup>88</sup> as:

- Limited to copyright
- “Safe harbour” for ISPs
- Good faith declarations underpinning Notices, made under penalty of perjury
- Clear specification of the contents of Notices (including “representative sample” evidence)
- The appointment of designated Copyright Agents, to receive Notices
- “Expeditious” response times

The report points to the fact that of 20,000 NTD notices in the United States, over four years, there have been less than ten counter notices, proof positive, they believe of the system’s success and a good reason why a flexible, technology conscious solution of the same kind, should be adopted in the United Kingdom <sup>89</sup>, where only time consuming and expensive “analogue” remedies, such as applications for injunctions and actions for damages are presently available to the plaintiffs in copyright infringement cases. In the report, the association further comments: <sup>90</sup>

“In Europe, the ISP has to rely on what you say is true and there has to be some corresponding penalty for alleging you have rights when you have not.”

“An EU–sponsored pilot project called [Rightswatch](#)<sup>91</sup> has published a White Paper, examining the [practicalities facing NTD in Europe](#). It concluded that an industry–led

solution was not possible without Government or legislative support.<sup>92</sup> Funding for the Rightswatch project was exhausted in 2002 and there has been no further activity on the subject since then. This has, as The Publishers Association points out, “Left us with something of a vacuum, since the Government’s stated policy is to leave all such matters to industry self-regulation. With the present growth of internet piracy it is becoming increasingly obvious that this laissez-faire approach in such a key area of e-commerce is no longer sufficient.”

The Publishers Association has been attempting to take this work forward by seeking a consensus on appropriate legal changes from copyright holders, ISPs and civil society organizations. They are developing a system that would introduce the best elements of the US approach into UK law, and could potentially be given legal status using a Regulatory Reform Order if parliamentary time is not available for primary legislation.

### Changes in the United Kingdom

2003<sup>xvii</sup> saw a number of significant changes in UK copyright law<sup>xviii</sup>, a consequence of the UK implementing the EU Copyright Directive of 2001 with its attempt to harmonise legislation between the different member states.

The 2003 Regulations introduced a number of important changes, including adding a new copyright, protecting the communication to the public of copyright works, films, sound recordings or broadcasts which is primarily aimed at protecting content made available by "on demand" interactive services such as websites. It also gives performers the right to control the distribution of their recordings where these are to be made available over the Internet and similar on demand services. The Regulations clarified that making temporary copies of copyright works (excluding software and databases) is permitted in limited circumstances such as browsing internet material.

“UK implementation allows substantiality, taking an insubstantial amount without infringement; this is not the case across Europe.”

The Regulations also "firmed up" some of the “exceptions” to copyright described (i.e. Fair dealing and the library privileges) where any copying that is carried out for "commercial research purposes" will now infringe copyright even if the source is acknowledged. It has been pointed-out that such changes may affect individuals and organisations making copies or requesting them from document delivery services, such as the British Library Document Supply services, when requiring the copy for a commercial purpose. Such suppliers of copyright material will need to be properly licensed to do so by, for example, the Copyright Licensing Agency and similar bodies.

Other exceptions which are affected by the 2003 Regulations include the right to show or play radio or TV broadcasts in public (e.g. the use of a TV in a public hotel lobby or bar). Such organisations (unless "not for profit") will now generally require a licence from the Phonographic Performance Ltd (PPL) for the sound recordings within a broadcast in addition to the existing need to ensure that any music included is properly licensed by the Performing Rights Society (PRS).

The Regulations also included stronger protection against copyright pirates including those selling or using devices to hack copy-protection systems as well as against service providers who actually know that their service is being used to infringe copyright. Copyright owners are also able to prevent the removal or alteration of on-

<sup>xvii</sup> October 2003

<sup>xviii</sup> The Copyright, Designs and Patents Act 1988

line notices, license terms, digital watermarks etc used with their work and non-exclusive licensees of software and other copyright material can now themselves take action against infringers in certain cases where their licence grants this right (previously only exclusive licensees could do this).

### **Combating Internet Copyright Crime**

In the Publishers Association report *Combating Internet ©opyright Crime*, the authors concluded that it is clear that the UK has several very real international and legal obligations to provide rights owners with “expeditious” and “effective” remedies for copyright infringements, none of which exclude online infringements. These, the reports comments “May be available in theory, but are they adequate and available in practice?”

Historically, UK copyright law offers a broad range of remedies to copyright owners and exclusive licensees, in both the civil and criminal courts. Such cases however, depend on the availability of time and where civil action is concerned, sufficient and often generous funding to pursue such an action.

In the UK, civil remedies take the form of injunctions against the defendant, issued by a judge and which are of limited use in dealing with Internet-related complaints. Described as “Dangerously complacent”, reliance on the existing injunction system under English law, “fails to provide the “effective” remedy against intermediaries which rights holders require in the digital age.”

“Policy seems a little vague. There needs to be a better way of doing things but it’s not an area which has been explored.”

It has been pointed out,<sup>93</sup> “Such injunctions are unlikely to be granted against an intermediary who claims his behaviour is exempted under [Article 5 of the EU Directive](#)<sup>xix</sup> (although Recital 59 specifically provides that the remedy “should be available even where the acts ... are exempted” under Article 5). UK judges may be unwilling to grant an injunction against a defendant who argues that there is a substantial legal issue which should be tried at full trial (as there may well be in the interpretation of Article 5 generally), and yet the Government is proposing not to provide for such a remedy, on the grounds that injunctions are in theory “available”.

Actions for damages are reflected in the interview with [Eddie Cheng](#), the eBusiness Director of Yell.com, with the comment, “What is the damages model? Whole life cost of each record may be £10 - £15 per listing or it could be the open market price of the data, a few hundred pounds per thousand records. The true figure, we believe, lies between the two.” Cheng further points out that “the current structure allows repetitious infringement”, in that Copyright legislation was originally aimed against persons or companies with assets that could be threatened by an infringement. “Today”, Cheng comments, “Internet publishing businesses can be established at very low cost and in pursuing a ‘fly-by-night’ Internet publisher one can be left with no assets to seize and the real possibility that the individual in question will fold one company and start re-offending with a second one within a very short period of time.” “How”, says Cheng, “Do we manage to reconcile the objectives of copyright legislation with the slippery reality of Internet infringement practises?”

<sup>xix</sup> Exceptions and limitations - Temporary acts of reproduction

## An Industry View of the Problem<sup>94</sup>

In the UK, The Publisher's Association **recommends** the following:- "We believe the UK needs a Notice and Takedown (NTD) system<sup>95</sup> for copyright compatible with the USA's, based on a Code of Practice<sup>96</sup> to be agreed by all sides of the copyright industries, and underpinned via "light-touch" Ministerial order, such as a Regulatory Reform Order. One of the advantages of any such Code would be that it would be flexible enough to evolve in line with technological developments."

A second representative body, the UK Association of Online Publishers (**AOP**) believes that "Changes to the existing practise of Notice and Takedown in the UK may be necessary to ensure that the system is not abused by a complainant who misrepresents his or her legal rights." Such a view may indirectly extend to the question of protecting the interests of smaller publishers from larger companies that might abuse the present system, examined in the next section of this report but stress the AOP, "There is no evidence of which we are aware, of plaintiffs using the system to gain a commercial advantage."

While the AOP believes "The present solution works reasonably well – an injunction can be awarded pretty quickly if records and relevant copyright assignments are in good shape. The present sanctions are effective." The problem as they identify it "can be with people who seek to remove of the material concerned without justification, who may be both large and small, against which behaviour there is no effective sanction."

"The ISP community is spending a great deal of time and money on lawyers."

In the US, the AOP notes "There is a penalty of perjury and in the UK we need some kind of equivalent system to ensure that plaintiffs don't lie about their rights,<sup>xx</sup> using the legislation to conceal a different agenda. We need proper sanctions in place."

### Working the System

The "System" is seen by some lawyers and smaller businesses as working in the favour of larger interests, particularly when a lengthy and successful court action may only lead to the award of two thirds of the defendant's costs.

"The Internet has changed the rules and few people understand this. There is little awareness at a political level of the gates of hell opening up."

Chief Executive of 192.com, Alastair Crawford, referring to the case of [Royal Mail vs. I-CD Publishing](#),<sup>97</sup> stresses that under present legislation, "Litigation – Database Rights or Copyright – is being used as a tool to stifle innovation", and leading Intellectual property expert, solicitor Margaret Briffa, describes the present arrangement in the UK as one "That protects old wealth at the expense of new ideas," and joins Michele Rennie in calling for an equivalent forum of first instance to ICANN<sup>xxi</sup> in Europe able to deal with copyright disputes quickly and cheaply.

<sup>xx</sup> A wrongful injunction without merit.

<sup>xxi</sup> Internet Corporation For Assigned Names and Numbers (ICANN)

Pursuing an action for damages in the High Court is only for the determined and the well-funded with time to spare, months or even years. Given the costs and the risks of litigation in front of a judiciary with a limited familiarity of the technology issues, such an action is quite ineffective in addressing the volume of infringements that an online publisher, such as Yell.com might experience from potential defendants who may be in another jurisdiction.

“For NTD to work effectively you have to have effective sanctions against people who abuse the system.”

In the case of electronic publishing, as broadly defined at the start of this report, criminal remedies are unlikely to be applied. Although provided for criminal remedies may be available under s.107<sup>98</sup> of the [1988 Copyright, Designs and Patents Act](#), against people who make, import, possess or deal with “infringing copies” and under s.107 (2) against people making or possessing articles “designed or adapted” for making (unauthorised)<sup>99</sup> copies. While it may be possible to describe “Scraping” software as designed for such purposes, this opinion has yet to be tested in a UK court.

## Conclusions

From the series of interviews conducted as part of this research, members of the UK publishing industry are clearly encouraging a review of the sanctions and procedures available under present copyright legislation, in both the United Kingdom and Europe and wider recognition that extra-jurisdictional copyright infringement is a steadily increasing burden for electronic publishers.

“As soon as you step outside Europe, you cannot enforce the law with any degree of confidence.”

The interviews suggest that on principal at least, the procedural shape of present, injunction-based legislation, may unfairly favour companies holding a dominant market position at the expense of smaller entrants into the market. These may be unable to properly defend themselves from a challenge which may have no legal merit but which may instead be motivated by a commercial and anti-competitive decision.

### Principle and Practise

While larger publishers can often afford to use the threat of litigation under existing copyright infringement legislation, with an injunction or an action for damages, this is far from satisfactory, as on the one hand, a large organisation, might use its wealth to intimidate a rival and restrict the proper exercise of free speech and on the other, a defendant’s intellectual property might be completely lost or devalued in the time it might take for any action to reach the courts.

A [paper by Oxford University’s Centre for Socio-Legal Studies](#), suggests “That the current framework established by the E-Commerce Directive provides an incentive for Internet Service Providers to take down content without investigating the complaint. This is because it does not set forth a detailed “put back” procedure, as it exists in the United States.”

The authors comment, “The lack of standard Notice and Takedown (NTD) procedure poses several problems<sup>100</sup>. Firstly, ISPs are not able to know whether they are properly informed, whether the information (complaint) received is correct (founded) or not and whether they can face liability claims by web page creators when their pages have been shut down, and it is established ex-post that the content was neither illegal nor harmful. Consequently there is potential shortcoming in the protection of freedom of expression which suggests the current regime may actually promote unfair competition in some situations where companies engage in a form of commercial war on the internet, putting bad faith claims against their competitor’s Web content. The Directive does not specify the essential information that a notification should include, leaving the matter to be settled by agreement between business operators. Instead, it encourages the national marketplace to produce its own standard procedure. “

“Large companies will use legislation as a ploy to keep smaller companies out of the market.”

There appears to be a consensus from the interviews, that a fairer, faster and cheaper system of administering justice is preferable, particularly if Britain wishes to stress its

politically-stated credentials as a suitable environment for a growing knowledge economy.

### Layers of Copyright

When layers of copyright are involved in a piece of work, such as online directories, which aggregate information from a number of different sources and then add further value, a chain of copyright permissions can present a problem when challenging an alleged infringement.<sup>101</sup> An online directory or database can resemble a large layer cake made-up of a series of permissions and supported by an icing composed of copyright law and database rights. Thus, if an online directory is stolen or “scraped” the paper trail of broken rights that may need to be identified in court could be a lengthy one. Alternatively a licensee might, as did I-CD Ltd<sup>xxii</sup>, check the Royal Mail’s Post Code File (PAF) for errors prior to incorporating this into their database service and then find themselves being sued by Royal Mail<sup>102</sup> for modifying and correcting the data and breaching that company’s database rights, which leads to the vexing question of when such database rights should be considered exhausted? This particular case led Alastair Crawford, CEO of i-CD and 192.com, who was interviewed for this research to comment:

“This claim by Royal Mail is rather like the Oxford English Dictionary claiming rights to royalties from the Harry Potter books because J.K. Rowling checked her spelling in the dictionary; the only difference is that Royal Mail, and Royal Mail alone, actually benefits financially for every postally correct address that is published.”

“Copyright legislation presents us with a chain of permissions tied to unworkable procedures”

The Royal Mail case also raises wider issues surrounding the availability of Public Sector Information (PSI),<sup>xxiii</sup> with database publishers calling for calling for fair and unbiased access to all such information on a non-exclusive basis. The PSI directive when implemented is expected to liberalise access to public sector data without weakening the protections of copyright and the database right.

A publishing industry, representative body, the [Association of Online Publishers](#), (AOP) agrees that the present system may “Create greater difficulties for smaller publishers”, (as AOP as a trade association, does not represent them by definition it cannot say) and recommends that in the event of litigation, a business should “Ensure that its rights are tied down and capable of validation in court, - as a matter of basic good commercial practice.”

"Reflecting the independent legal opinions it says, "The people stealing your content may be in China, India or the Cayman islands; whilst UK legislation and online resolution may be effective in the UK, it cannot deal with the source of the infringement, where legal action in the country concerned may be necessary. Government action is essential to make sure that such countries observe their international obligations to enforce intellectual property rights.”

<sup>xxii</sup> See Appendix case study– i-CD vs. Royal Mail

<sup>xxiii</sup> See Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information



“Does Government have a role in defining public information and what should lie in the public domain and does one do this unilaterally, state by state or at a European level?”

### **A Third Way?**

The publishers, while reserving judgement, appear prepared to consider other ways of managing permissions structure in particular, non-commercial circumstances, to make it clearer and more approachable to the general public. This comes in the shape of a [Creative Commons](#)<sup>103</sup> License,<sup>104</sup> a UK version of which will be launched this year<sup>105</sup> and which will be used to licence this research among other works and as a basis for the [license used in the BBC's creative archive](#) project that will make much of their back catalogue available. This will allow people to download BBC programmes (where rights clearances are available) from [bbc.co.uk](#) for non-commercial use, keep them on their computers, and manipulate and share them, so making the BBC's archives more accessible to licence fee-payers.

In support of the Creative Commons project, author Lawrence Lessig argues. “If the essence of copyright law is to allow creators to have control, he argued, then there are ways to maintain ownership of copyrighted works and still make it possible for the average person to license the use of those works.”

“We would like to explore extending our permissions based system to explore other uses of sampling and Fair use.”

The AOP remarks, “Creative Commons licensing is a good thing to look at but it's too early to say whether our members would support it. This will depend on their individual circumstances. Clearly agreement on a common set of definitions would be helpful and we can see its potential application in tomorrow's more sophisticated (DRM) digital rights environment.”

As one of the world's leading financial publications, the [FT.com](#) adds, “We're a little nervous about Creative Commons but perhaps something such as sampling and research should be built on top – of copyright - to support a better definition of “Fair use” in the commercial environment.”

“We are looking for ways of finding controls and protecting our rights”

Collectively, the idea of a Creative Commons as a part-solution to the myriad challenges facing publishers is viewed with trepidation and reflects the broader industry argument that if certain aspects of the procedures surrounding application of the laws are in need of reviews then it should be by strengthening the existing laws rather than by weakening them. Creative Commons might be regarded as the publishing industry equivalent of a Pandora's Box. Open it too far and it may release forces that will be difficult to control within the existing intellectual property framework.

## Summary and Recommendations

- In the opinion of the lawyers consulted, injunction-based legislation can, in principal, favour a dominant position at the expense of smaller publishers. A fairer faster and cheaper Notice and Takedown (NTD) and resolution process is recommended in the framework of UK law to deter the possibility of challenges that lack legal merit.
- In the UK, an independently-funded ombudsman or indeed a re-funded and empowered “Rights watch” with appropriate regulatory guidelines and powers to administer ICANN-type fast, fair and cheap out-of-court resolutions may be required, to judge infringements complaints, effectively, efficiently and quickly, particularly where any dubiety of claim is involved.
  - Intellectual property rights and related disputes often turn on very complex facts, which would make the role of Ombudsman problematical. However, such an Ombudsman might offer a potentially useful mechanism in third party disputes.
- Copyright and database rights frequently overlap. There is however a risk that database rights, although finite, might, in theory, be extended almost indefinitely by the very nature of online publishing, where any kind of directory may never be completed. This is an area in need of further review.<sup>106</sup>
- Database publishers are hopeful that the implementation of the [PSI directive](#)<sup>107</sup> will allow fair and unbiased access to all Public Sector Information<sup>xxiv</sup> and establish a low-cost disputes resolution system. Database publishers have long argued for access to PSI on a fair and non-exclusive basis. At present the only recourse open to complainants is through the Office of Fair Trading (OFT).
- The “Chain of permissions”, the rights system that is present in compilations is frequently confusing, cumbersome and unwieldy in a digital environment.
- The presence of aggregator-based sites such [www.bugmenot.com](http://www.bugmenot.com) comes as a surprise to some publishers and makes a mockery of permissions-based architectures. Password and log-in information for many of the world’s leading permissions-based publications, including [www.ft.com](http://www.ft.com) are freely available.<sup>108</sup>
- UK legislation cannot be “ring fenced” from international legislation and this is true of the fight against computer crime in general. Legislation is only as good as the weakest link or nation prepared to support intellectual property rights. From this perspective, action at the European and international level would be most effective for instance the World Intellectual Property Organisation – WIPO which is an international intergovernmental organisation dedicated to ensuring that the rights of creators and owners of intellectual property is protected worldwide and that inventors and authors are recognised and rewarded from their ingenuity. WIPO already operates the ICANN Domain Name Dispute Resolution service which is fair, fast and cheap and available to all parties without the need for legal representation.
  - United Kingdom legislation has to work as far as possible in line with international agreements such as [TRIPs](#)<sup>109</sup>, and the harmonisation that has existed since the end of the nineteenth century. With very few exceptions

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<sup>xxiv</sup> See Royal Mail vs. I-CD

most countries have reasonable IP laws. However, there are political dimensions to the problem of enforcing IPR on a global basis and as an example, in Europe; different countries had developed different theories on the economic and moral bases for copyright.

- The implementation of the European Copyright Directive has created the opposite of the “Harmonisation” that was intended with twenty-five member states now looking to protect their own national interests, through a series of implementations and “exceptions”.<sup>xxv</sup>
- [A Commission working paper](#) suggests that “Current EU copyright legislation is generally effective and consistent, but would benefit from some improvements.” The working paper assesses, in particular, whether any inconsistencies between the different Directives hamper the operation of EU copyright law or damage the balance between rights holders’ interests, those of users and consumers and those of the European economy as a whole. It concludes that “There is no need for root and branch revision of the existing Directives but that fine-tuning is necessary to ensure that definitions – for example of reproduction right - are consistent.” Similar updating seems necessary with respect to the exceptions and limitations set out in the different Directives.<sup>110</sup>
- Government should recognise that intellectual property theft is a growing problem across the entire electronic-publishing spectrum and not just the software, film and music industries.<sup>xxvi</sup>
- It would be “Sensible for the publishing industry to agree on a series of common license propositions”, the forthcoming UK Creative Commons license is a concept that might offer a new level of simplicity and flexibility, “Legal shorthand”, for the management of permissions and distribution of non-commercial material but it is too early to judge and is viewed with some caution.

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<sup>xxv</sup> See substantiality in Fair dealing between Europe and the UK

<sup>xxvi</sup> As with the example of [www.yellowpages.com](http://www.yellowpages.com) in India

## Appendix

### Summary of Royal Mail v i-CD Publishing (UK) Limited

By Keith Marsden – Managing Director – i-CD Ltd

i-CD Publishing is a publisher of people databases including directory enquiries; electoral roll and business information. It publishes this data on the web site www.192.com and on UK-Info Disk, a CD ROM product.

UK-Info Disk was first published in 1997 and is now in its tenth edition. In common with many other directory providers, i-CD continually works to improve the quality of the data that it publishes including address cleansing i.e. improving the quality of the address information through correction of errors and insertion of missing fields. One of the primary tools used to do this across the directory industry is PAF validation. PAF validation involves the automated comparison of the address records held in each database with the Royal Mail's Postal Address File (PAF). There are a number of commercial software applications on the market from licensees appointed by the Royal Mail. i-CD has always used data bureau licensed by the Royal Mail to carry out PAF validation on its databases. The data bureaus have relied upon the Royal Mail's End User License agreement in carrying out this work.<sup>111</sup>

The result of PAF validation on i-CD's databases is that a small percentage of existing addresses are corrected for errors and omissions. No new records are added through the process of PAF validation. In the case of the Electoral Roll, the database contains almost every residential address in the UK and in that respect is very similar to PAF. The key difference is that the Electoral Roll includes names whereas PAF does not.

In late 2002, some 5 years after the launch of UK-Info Disk, the Royal Mail launched a legal claim against i-CD claiming that the End User License on which i-CD's bureau relied did not allow them to PAF validate i-CD's databases and that an end user license fee of £150 was payable by i-CD for each disc ever produced. The claim therefore amounted to approximately £300 Million. Royal Mail was essentially suggesting that the same license fee was due for distribution of each copy of a PAF validated database as would be due for the distribution of the PAF database itself.<sup>112</sup>

The essence of this dispute centred on the interpretation of a clause within the Royal Mail's End User License which said:

*"The End User shall not at any time reproduce, publish, sell, let, lend or otherwise part with possession of PAF or relay or disseminate PAF but the End User may make one back up copy of each version of PAF for security purposes. The End User shall ensure that its employees, agents and subcontractors comply with the terms of this clause **PROVIDED THAT nothing in this clause shall prevent the End User from using PAF to modify existing mailing list databases.**"*

Ultimately the outcome of this case hinged upon interpretation of this clause something that could have been heard and judged upon early in 2003. Unfortunately, the Royal Mail introduced a number of more sinister allegations against i-CD including that i-CD had unlawfully extracted raw data from PAF. Even though Royal Mail failed to offer of evidence to support the allegations the court required that data audits of millions of records within i-CD's databases be carried out, that expert witnesses be hired and that a six day hearing be conducted. The need for data audits delayed the court hearing until February 2004. On the last day of the trial Royal Mail dropped all of

these subsidiary allegations leaving the judge only to interpret the words in the end user license.

The case turned on the meaning of the words "mailing list database". The Royal Mail attempted to argue that the Electoral Roll was not a mailing list database (despite the fact that its whole purpose is to facilitate elections and communications with electors). Furthermore, and in complete contradiction of their case, Royal Mail's own web site dealing with the subject of direct mail gave the Electoral Roll as an example of a Mailing List Database. The judge ruled in i-CD's favour and ordered that Royal Mail pay i-CD's costs.

You might consider that this was a satisfactory outcome for i-CD but in fact the judgement in our favour masks the fact that i-CD's business suffered immense damage during the 18 months of proceedings. For a company with sales of £3 Million, legal costs of £700,000 were inevitably a serious drain on the company's resources and almost brought the company to its knees. In addition i-CD had to abandon plans to raise capital in the early part of 2003 in order that it might play a significant part in the de-regulated voice directory market.

From our perspective, this case shows that IP law is inadequate in a number of areas:

1. This case highlights the difficulties that can apply without exhaustion of rights. In this case our data bureau used PAF to validate an existing database upon paying the relevant license fee. The notion that Royal Mail should then enjoy rights in the validated database would be a recipe for chaos since there would be no end to the chain as one database becomes contaminated by another. It would be rather like a dictionary owner claiming IP rights in a book because the author had used the dictionary to spell-check the book.
2. The case highlights the absurdity that an IP provider can litigate against a company that has obtained data from an intermediary in good faith rather than litigating against the intermediary that the IP provider believes has breached license.
3. The case highlights the damage that can be done to a small company if a large company with huge resources litigates against a small company with limited resources. It also raises the question as to whether the courts should require large companies to reach a higher bar in terms of justifying the manner in which they conduct litigation.
4. PAF has become a de facto standard for address format over the years, indeed it should be regarded as a national asset and it is controlled by a monopoly supplier. It raises the question as to whether IP law should subjugate the normal rights of the IP owner in favour of the broader national interest in cases of this sort.

#### **Editor's Note:**

As this example illustrates, the present licensing scheme may benefit from review but its shortcomings are more likely to be a consequence of age and a changing environment and not bias or lack of fairness. Royal Mail's licensing scheme may require updating to meet new challenges posed by the online environment, as well as other changes both in technology and in the use of data. One should note that many public databases deal with personal data, and so although implementation of the PSI directive will certainly be welcomed by those who hope to generate revenue from any exploitation of the data, any new licensing schemes will need to balance the rights and interests of concerned individuals. For example, property owners might be unhappy if the current level of fees for determining the owner of individual properties were dropped to a level that made it economic to compile a directory.

Since this action, Royal Mail has been consulting with those involved in the industry, including i-CD, to try to frame a scheme that is fair to all, and levies appropriate charges on those who benefit commercially from using PAF. Such industry-wide consultation is more likely to produce a sensible and equitable result than legislation, which inevitably cannot deal with detailed and complex issues.



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## Reference Section

<sup>1</sup> The European Commission has launched consultations on simplifying and fine-tuning existing EU legislation on copyright and related rights. The consultations, open until 31st October 2004, are based on a Commission working paper which suggests that current EU copyright legislation is generally effective and consistent, but would benefit from some improvements. The Commission would take into account the results of the consultations before proposing legislative amendments within the next year or so. The review of the existing Directives is in line with the Commission's Better Regulation Action Plan (see IP/03/214). For the full text of the working document, See: [http://europa.eu.int/comm/internal\\_market/copyright/review/review\\_en.htm](http://europa.eu.int/comm/internal_market/copyright/review/review_en.htm)

<sup>2</sup> Lawrence Lessig is a Professor of Law at Stanford Law School and founder of the school's Centre for Internet and Society. Prior to joining the Stanford faculty, he was the Berkman Professor of Law at Harvard Law School. Lessig was also a fellow at the Wissenschaftskolleg zu Berlin, and a Professor at the University of Chicago Law School. He clerked for Judge Richard Posner on the 7th Circuit Court of Appeals and Justice Antonin Scalia on the United States Supreme Court.



Lessig.

More recently, Professor Lessig represented web site operator Eric Eldred in the ground-breaking case *Eldred v. Ashcroft*, a challenge to the 1998 Sonny Bono Copyright Term Extension Act. Lessig was named one of Scientific American's Top 50 Visionaries, for arguing "against interpretations of copyright that could stifle innovation and discourse online."

He is the author of *The Future of Ideas and Code and Other Laws of Cyberspace*. He also chairs the [Creative Commons project](#). Professor Lessig is a board member of the Electronic Frontier Foundation, a Board Member of the Centre for the Public Domain, and a Commission Member of the Penn National Commission on Society, Culture and Community at the University of Pennsylvania.

<sup>3</sup> Lessig warns that a copyright regime that is too strict and grants copyright for too long a period of time (i.e. the current US legal climate) can destroy innovation, as the future always builds on the past. See: [http://en.wikipedia.org/wiki/The\\_Future\\_of\\_Ideas](http://en.wikipedia.org/wiki/The_Future_of_Ideas)

<sup>4</sup> [Creative Commons](#) is a non-profit corporation founded on the notion that some people may not want to exercise all of the intellectual property rights the law affords them. We believe there is an unmet demand for an easy yet reliable way to tell the world "Some rights reserved" or even "No rights reserved." Many people have long since concluded that all-out copyright doesn't help them gain the exposure and widespread distribution they want. Many entrepreneurs and artists have come to prefer relying on innovative business models rather than full-fledged copyright to secure a return on their creative investment. Still others get fulfillment from contributing to and participating in an intellectual commons. For whatever reasons, it is clear that many citizens of the Internet want to share their work -- and the power to reuse, modify, and distribute their work -- with others on generous terms. Creative Commons intends to help people express this preference for sharing by offering the world a set of licenses on our Website, at no charge.

*What problem does Creative Commons intend to solve?*

Creative works are automatically copyrighted as soon as they "are fixed in a tangible medium of expression." The moment you lift your pen from a cocktail napkin doodle, you earn an exclusive right to copy and distribute that doodle. In some countries, including the United States, no copyright notice is required. Many people may prefer an alternative to this "copyright by default," particularly those who do their creating on the Internet -- a place that has always promised unfettered communication and collaboration - in theory, anyway - . In fact, there is no easy way to announce that you intend to enforce only some of your rights or none at all. At the same time -- and again, because copyright notice is optional -- people who want to copy and reuse creative works have no reliable way to identify works available for such uses. We hope to provide some tools that solve both problems: a set of free public licenses sturdy enough to withstand a court's scrutiny, simple enough for non-lawyers to use, and yet sophisticated enough to be identified by various Web applications.

<sup>5</sup> A Vice Chairman of The Conservative Technology Forum and Managing Director of Zentelligence (Research) Ltd, Dr Simon Moores is widely recognized as one of the UK's most respected technology columnists and broadcasters. Dr Moores advises government, business and the media on the evolution, development and application of eGovernment, Internet-related technologies and their impact on social change.

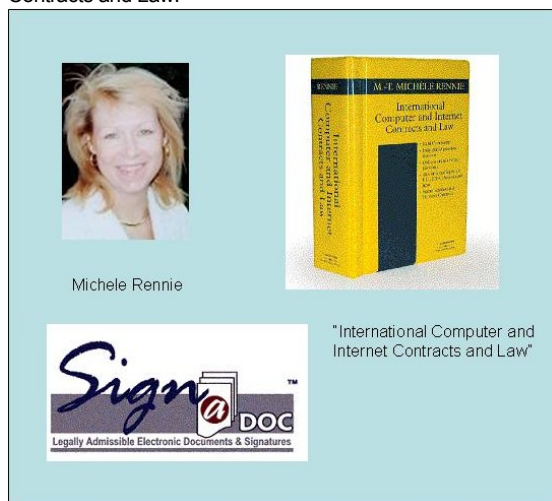


<sup>6</sup> The Conservative Technology Forum is for party members and others, who wish to influence the use of technology in politics and to assist in the preparation of policy for a future Conservative Government; helping the Party discuss and debate technology-related issues in Parliament.

The Conservative Front Bench Teams in Westminster and Europe have a shared objective of stepping up their political initiatives on Information Society issues. Since 2002, a policy "think tank" set up by Malcolm Harbour MEP, has been meeting regularly, and using expertise contributed by supporters with ICT interests. With the arrival of Michael Fabricant MP as Shadow Technology Minister, this group is now actively contributing to Westminster "Front Bench" activities.

Information economy and information society issues now play an increasingly important part in plans for the economic success of the United Kingdom and the future of the European Community. The Conservative Party is committed to the support of practical initiatives that will encourage investment and innovation in new technologies to the benefit of our society.

<sup>7</sup> Michele Rennie, is Head of Intellectual Property and Internet Law at Computalaw Ltd and Chairman of the British Computer Society Electronic Commerce Task Group, is author of "International Computer and Internet Contracts and Law."



Ms. Rennie is also Chairman of the British Computer Society Electronic Commerce Task Group and vice-chairman of the Intellectual Property and Network Governance Working Parties of EURIM

<sup>8</sup> Co-author of "Design Law" published by the Law Society in 2004, Margaret Briffa advises on all aspects of intellectual property protection and enforcement, with particular emphasis on dispute resolution. She has recently been appointed to act as defence lawyer in actions brought by the Motion Picture Association of America against 321 Studios in respect of the new law in the Copyright Designs and Patents Act 1988 dealing with circumvention of technical measures applied by rights owner.



Margaret Briffa

<sup>9</sup> "I regret I am concerned at the general tone of the paper which does not present a balanced view of the value of intellectual property and the importance of its protection. I would refer you to the DTI study "Publishing in the knowledge economy" which notes that UK publishing employed 164,000 people in 2000 with a turnover of £12.03 billion. The creative and media industries are recognized by the Government as extremely important to the UK and the EU economy. The core underpinning of this industry is IP. There are however, academic voices which, for ideological reasons, would like to see IP protection reduced. Many are quoted in your report." – A leading UK publisher.

<sup>10</sup> Copyright industries are perceived to be important in both economic and employment terms, contributing 5.3% of total added value in the EU and 3.1% of total employment in 2000. The UK contributes well above the European average, with copyright industries and activities accounting for 8.4% of GDP and 4.7% of UK employment in 2000 (Media Group (Fin) 2003). The UK creative industries are one of the most successful – and fastest-growing – sectors of our economy, .

<sup>11</sup> The UK is the largest market for online business information consumption in Europe. Overall, the market for online information in Europe amounted to £984m in 2001, up 6% on 2000. Business information, including legal, accounted for 77.6% and STM for the rest. See, "Publishing in the knowledge economy" - [http://www.dti.gov.uk/industry\\_files/pdf/fullreport.pdf](http://www.dti.gov.uk/industry_files/pdf/fullreport.pdf)

<sup>12</sup> The New York Times and The Economist

<sup>13</sup> Should the British Library maintain a register of copyright ownership?

<sup>14</sup> Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights:

"Counterfeiting and piracy, and infringements of intellectual property in general, are a constantly growing phenomenon which has an international dimension, since they are a serious threat to national economies and governments. In the European Internal Market, this phenomenon takes particular advantage of the national disparities in the means of enforcing intellectual property rights. These disparities seem to influence the choice of where counterfeiting and piracy activities within the Community are carried out, and this means that the counterfeited and pirated products are more likely to be manufactured and sold in those countries which are less effective than others in combating counterfeiting and piracy. They therefore have direct repercussions on trade between the Member States and a direct impact on the conditions governing competition in the Internal Market. This situation leads to diversions of trade, distorts competition and creates disturbances on the market." See:

[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003PC0046&model=quichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003PC0046&model=quichett)

<sup>15</sup> See DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 1996 on the legal protection of databases See:

[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996L0009&model=quichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996L0009&model=quichett)

<sup>16</sup> As the Commission stressed already in its "Follow-up to the Green Paper", there is a need to harmonize copyright and neighboring rights at a high level of protection since these rights are fundamental to intellectual creation. Furthermore, the Commission has made clear that their protection ensures the maintenance and development of creativity not only in the interest of authors and of cultural industries, but also in the interest of consumers and the society as a whole.- See :

[http://europa.eu.int/comm/internal\\_market/copyright/docs/conference/2002-06-santiago-speech-walter\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/conference/2002-06-santiago-speech-walter_en.pdf)

<sup>17</sup> See [Berne Convention and TRIPS agreement](#) - According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the making of the work, 50 years from the end of the calendar year of making. See: [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto07/wto7\\_15.htm#note1](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto07/wto7_15.htm#note1)

<sup>18</sup> See New York Times – 8/11/04 – Victoria Shannon – “Earlier this year, the Australian affiliate of Project Gutenberg posted the 1936 novel "Gone with the Wind" on its Web site for downloading at no charge. Last week, after an e-mail message was sent to the site by the law firm representing the estate of the book's author, Margaret Mitchell, the hyperlink to the text turned into a "Page Not Found" "dead end."

At issue is the date when "Gone with the Wind" enters the public domain. In the United States, under an extension of copyright law, "Gone with the Wind" will not enter the public domain until 2031, 95 years after its original publication. See:

<http://www.nytimes.com/2004/11/08/technology/08newcon.html?oref=login&oref=login>

<sup>19</sup> Subscription sites are now being increasingly threatened by use of "Community" passwords. Cyber-savvy folks now have a way to tap shared site registrations and use them to access both free and subscription-only sites. Aggregator BugMeNot.com possesses keys to more than 30,000 sites, according to Lawrence Lessig. See: <http://www.ecommercetimes.com/story/Web-Publishers-Fear-A-Little-Sharing-37454.html>

<sup>20</sup> Advertising typically accounts for 85 percent to 90 percent of an online content provider's revenues.

<sup>21</sup> Fair use is the doctrine in US copyright law entitling the public to access and use copyrighted works even when this would normally be infringement. It is effectively a limitation on copyright.

Copyright law requires that those wishing to reproduce or distribute a work may only do so with the permission of the copyright holder (normally the author or his publisher). Fair use permits certain exceptions to this rule:

- Certain types of educational use (generally by librarians and teachers) criticism and review private non-commercial copying (not in the UK) parody (not in the UK)
- The equivalent doctrine in the UK is called "Fair dealing", and works the same way, but isn't as permissive as the US or German formulation. See [www.eucd.org/issues/eucd/positive\\_fair\\_use.shtml](http://www.eucd.org/issues/eucd/positive_fair_use.shtml)

<sup>22</sup> See [EU Database Directive 96/9/E.C.](http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html) on the legal protection of databases. The Database Directive creates a new protection, termed the "Sui Generis" right which is intended to prevent the unauthorized extraction of the contents of a database. See: <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>

<sup>23</sup> In the UK, a database can potentially be protected in three ways: See: <http://www.simkins.co.uk/ebulletins/archive/TAFDatabaseProtection.aspx>

1. Literary Copyright: The Copyright, Designs and Patents Act 1988 specifically protects the contents of a "database" as a special kind of literary copyright work, but only if the database constitutes the author's "own intellectual creation".

2. Database Rights (aka "Sui Generis") Even where a database fails the normal copyright tests of "originality" and the special test of "own intellectual creation", this is the protection discussed in *British Horseracing Board v William Hill*.

3. Non-Database Literary Copyright: Even where a database fails the special test of "own intellectual creation", it may still qualify for protection as a literary copyright work if it is a "work...which is written...or a table or compilation", provided the author can show that it is not actually a "database" as defined in the Act.

<sup>24</sup> The position before the database directive (and indeed before that – the Berne Convention and TRIPS agreement) was that databases MAY have gained protection as a "literary works" or "collection" but the position was not terribly clear and indeed the position was different throughout Europe. The database directive created a new legal right (the Sui Generis right) specifically to benefit the efforts and investment of database producers. This new right is independent of and separate from copyright. (It's explained in section A-019 to A-029 of Michele Rennie's book)

<sup>25</sup> The AOP Legal Handbook 2004 – "Publishing online: - The Essentials – Denton Wilde Sapte. P6

<sup>26</sup> Sui generis is a (post) Latin expression, literally meaning of its own gender/genus or unique in its characteristics. The expression was effectively created by scholastic philosophy to indicate an idea, an entity or a reality that cannot be included in a wider concept, and in the structure genus > species a species that heads its own genus. - From Wikipedia, the free encyclopedia

In law, it is a term of art used to identify a legal classification that exists independently of other categorizations because of its uniqueness or due to the specific creation of an entitlement or obligation. In intellectual property there are rights which are known as being Sui generis to owners of a small class of works, such as intellectual property rights in mask works, ship hull designs, databases, or plant species.

<sup>27</sup> On 9 November 2004, the European Court of Justice finally ruled in the case of British Horseracing Board v William Hill by giving answers to some key questions regarding interpretation of the Database Right, which was created by an EU directive and implemented in the UK by the Database Regulations 1997. The ECJ ruled in William Hill's favour by finding no infringement of BHB's Database Right – See: <http://www.simkins.co.uk/ebulletins/archive/TAFDatabaseProtection.aspx>

<sup>28</sup> See Spiked Online – Michael Fraas – Copyright in the Digital Age - [www.spiked-online.com/Articles/00000006DA32.htm](http://www.spiked-online.com/Articles/00000006DA32.htm)

<sup>vii</sup> Ian Brown is President of EDRI (European Digital Rights) and treasurer of Privacy International, and was previously Director of the Foundation for Information Policy Research. Fellow of the Royal Society for the Encouragement of Arts, Manufactures & Commerce and a Member of the Royal Institute of International Affairs, the International Institute for Strategic Studies and the Association for Computing Machinery. He is also on the advisory board of Creative Commons UK.



[Ian Brown](#)

<sup>30</sup> EU Copyright Directive (EUCD), 2001/29 allowed nineteen months for implementation by Member States but only Denmark and Greece met this deadline.

<sup>31</sup> To adapt legislation on copyright and related rights to reflect technological developments and, in particular, the information society, and to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organization (WIPO) in December 1996

<sup>32</sup> The Directive exhaustively enumerates permissible exceptions rather than providing a more flexible court-interpreted “Fair use” test as exists for example in the US. Given the balanced approach that copyright law is supposed to represent, Member States should not provide a judicial power which could operate only to further limit the available exceptions.

Why the Copyright Directive is Unimportant, and Possibly Invalid. - Published in [2000] EIPR 11, p. 501-502  
Bert Hugenholz - [www.ivir.nl/publications/hugenholz/opinion-EIPR.html](http://www.ivir.nl/publications/hugenholz/opinion-EIPR.html) Institute for Information Law

<sup>34</sup> Hugenholz observes: “The EU Directive leaves the most important copyright problems of the digital environment unresolved. It does not deal with several of the crucial questions raised in the Green Paper: applicable law, administration of rights, and moral rights - a staple hot potato on the Brussels menu. In fact, the Directive does not do much for authors at all. It is primarily geared towards protecting the rights and interests of the “main players” in the information industry (producers, broadcasters and institutional users), not of the creators that provide the invaluable “content” that drives the industry. The Directive fails to protect authors or performers against publishers and producers imposing standard-form “all rights” (buy-out) contracts, a dreadful practice that is rapidly becoming routine in this world of multimedia. Instead, Article 9 and Recital 30 underscore that the Directive does not affect the law of contract.”

<sup>35</sup> See Page 110 of Implementing the EU Copyright Directive – See: <http://www.fipr.org/copyright/guide/eucd-guide.pdf>

<sup>36</sup> See Computer and Telecommunications Law review – August 1999 – “EU Copyright Directive: May 1999 Amendments to Appease Some Industry Sectors – M.T. Michele Rennie. ISSN 1357 3128 - Vol5 Issue 5

<sup>37</sup> Fair dealing lists exceptions for research, criticism and review and the reporting of current events. There must however be sufficient acknowledgement of the copyright in the work and the use must be “fair”, i.e. not unfairly prejudice the original work. – The AOP Legal Handbook 2004 – “Publishing online: - The Essentials – Denton Wilde Sapte.

<sup>38</sup> The Register reports that Germany's National Library is now fully licensed to duplicate copy protected electronic books and other digital media such as CDs and CD-ROMs.

“In January 2005, the Library signed an agreement with the German Federation of the Phonographic Industry and the German Booksellers and Publishers Association after it became clear that its legal mandate to collect, process and index important German and German-language based works would be hampered by the European Copyright Directive. This directive makes it “a criminal offence to break the copy protection or access control systems on digital content such as music, videos, e-books and software”.

"It is a big question", comments The Register, "whether the Library needed the authorisation. The same Directive clearly states that "member States should be given the option of providing for exceptions or limitations for cases such as educational and scientific purposes, and for the benefit of public institutions such as libraries". See: [http://www.theregister.co.uk/2003/09/17/germany\\_preps\\_second\\_basket/](http://www.theregister.co.uk/2003/09/17/germany_preps_second_basket/)

<sup>39</sup> See Computer and Telecommunications Law review – August 1999 – "EU Copyright Directive: May 1999 Amendments to Appease Some Industry Sectors – M.T. Michele Rennie. ISSN 1357 3128 - Vol5 Issue 5

<sup>40</sup> For a fact sheet on Creative Commons in the UK see "Own It" – Creative Property Intellectual Advice Service - University of the Arts London - The London College of Communication. See: [http://www.own-it.org/assets/library/documents/creative\\_commons\\_factsheet.pdf](http://www.own-it.org/assets/library/documents/creative_commons_factsheet.pdf)

<sup>41</sup> Cory Doctorow was born July 17, 1971 in Toronto, Ontario, Canada to Trotskyist teachers. His first book was The Complete Idiot's Guide to Writing Science-Fiction. See: [http://en.wikipedia.org/wiki/Cory\\_Doctorow](http://en.wikipedia.org/wiki/Cory_Doctorow)

Currently he is a Creative Commons activist, blogger, and science fiction author in favor of reforming copyright laws that grant rightsholders exclusive control over their works for long periods of time. Some common themes of his work include digital rights management, file sharing, Socialist utopias and Disney

<sup>42</sup> See November Wired Magazine CD <http://creativecommons.org/wired/>

<sup>43</sup> See Intellectual Property in the New Millennium - Sir Robin Jacob – See: <http://www.law.ed.ac.uk/ahrb/publications/online/intellec2.htm>

<sup>44</sup> [Professor Vaver](#) is a Fellow of St Peter's College and the Director of the Oxford Intellectual Property Research Centre at the College. He is also a member of the UK Intellectual Property Advisory Committee and chairs the University's IP Advisory Group. Before coming to Oxford in 1998, he taught for 20 years in Canada (UBC and Osgoode Hall Law School) and before that at the University of Auckland (1972-8).

[http://denning.law.ox.ac.uk/lawvie/staff2.phtml?lecturer\\_code=vaverd](http://denning.law.ox.ac.uk/lawvie/staff2.phtml?lecturer_code=vaverd)

<sup>45</sup> A Website may be given some protection as a compilation or database, (Database Rights) and while recent changes in the law have not introduced the concept of a specific "website" or "online" work, they do confirm that a broadcast can contain certain Internet transmissions. - The AOP Legal Handbook 2004 – "Publishing online: - The Essentials – Denton Wilde Sapte.

<sup>46</sup> See: "Spider Spotting: <http://searchenginewatch.com/webmasters/article.php/2168001>

<sup>47</sup> Search engines can be prevented from deep linking to a specific page. Simply include the following meta-tag code in the HEAD part of the page: <META NAME="robots" CONTENT="noindex">. Well-behaved search engines will exclude any such page from their databases.

<sup>48</sup> See [Wayback Machine](#), the Internet archive - The Internet Archive Wayback Machine contains approximately 1 petabyte of data and is currently growing at a rate of 20 terabytes per month. This eclipses the amount of text contained in the world's largest libraries, including the Library of Congress.- <http://www.waybackmachine.org/>

<sup>49</sup> See News.com: - [http://news.com.com/2100-1038\\_3-1024234.html](http://news.com.com/2100-1038_3-1024234.html)[http://news.com.com/2100-1038\\_3-1024234.html](http://news.com.com/2100-1038_3-1024234.html)

<sup>50</sup> A California-based pornographer says it is suing search engine, Google, for easing illegal access to its website. Perfect 10, which offers pictures of "the world's most beautiful natural women", says Google's web search gives users free usernames and passwords. Google searches throw up thumbnails of images owned by Perfect 10, which Perfect 10 claims are posted without permission. See BBC News 25 November 2004 – See: <http://news.bbc.co.uk/1/hi/business/4035257.stm>

He said his company had sent nearly 30 formal requests to Google, asking it to remove the photos and password lists from its search results, but was dissatisfied with the company's response

<sup>51</sup> The LA Times – January 12<sup>th</sup> 2005 – See: [http://www.latimes.com/news/opinion/commentary/la-oe-lessiq12jan12.1.1292618\\_story?coll=la-news-comment-opinions&ctrack=1&cset=true](http://www.latimes.com/news/opinion/commentary/la-oe-lessiq12jan12.1.1292618_story?coll=la-news-comment-opinions&ctrack=1&cset=true)

<sup>52</sup> A provision in the US Digital Millennium Copyright Act (DMCA) includes a safe harbour for Web caching. The safe harbour is narrowly defined to protect Internet service providers that cache Web pages to make them more readily accessible to subscribers. For example, AOL could keep a local copy of high-trafficked Web pages on its servers so that its members could access them with greater speed and less cost to the network. Various copyright lawyers argue that safe harbour may or may not protect Google if it was tested.

<sup>53</sup> See Leslie Kelly vs. Arriba Soft Corp - Netcopyrightlaw.com – See: <http://netcopyrightlaw.com/pdf/0055521.pdf>

<sup>54</sup> An unhappy website owner complains on Slashdot: “have complained before about MSNbot ignoring changes to robots.txt while Google happily changed its habits (I can’t find the link sorry). My recent fighting with Google Bot has come to a head when I had to disallow them access to my gallery completely because they refused to honor anything except Disallow: /. I had to go so far as to point Googlebot at my robots.txt and tell it to remove all the previous links. It was rather annoying dealing with support via email from Googlebot as they have apparently taken on the stance of “we don’t care but you should put Meta tags in all your files so that we don’t index those pages.” Umm, you are crawling MY site for YOUR profit; you do as I say, not the other way around.” See: <http://slashdot.org/article.pl?sid=04/11/11/1724221>

<sup>55</sup> Google: “This tag tells robots not to archive the page. Google will continue to index and follow links from the page, but will not present cached material to users.”

<sup>56</sup> Also see European Legislation on the protection of programs, the [Software Directive](http://europa.eu.int/comm/internal_market/copyright/documents/documents_en.htm) [http://europa.eu.int/comm/internal\\_market/copyright/documents/documents\\_en.htm](http://europa.eu.int/comm/internal_market/copyright/documents/documents_en.htm)

<sup>57</sup> “The computer misuse act might be said to cover this but enforceability is always a problem.”, Michele Rennie

<sup>58</sup> See Hale & Dorr : [www.haledorr.com/publications/pub\\_detail.aspx?ID=2340&type=5543](http://www.haledorr.com/publications/pub_detail.aspx?ID=2340&type=5543)

<sup>59</sup> Copyright can only protect the “expression of code” and not the idea and principles that lie behind it. Code is protected by the Software Directive (as implemented into UK law.

<sup>60</sup> Data is protected by copyright legislation and the EU Copyright Directive as implemented in UK law

<sup>61</sup> See New York Times -<http://www.nytimes.com/library/tech/00/06/cyber/cyberlaw/16law.html>

<sup>62</sup> The Shetland Times vs. Shetland News 1995 <http://www.lectlaw.com/files/elw10.htm>

<sup>63</sup> See Wired Magazine <http://www.wired.com/news/politics/0,1283,35306,00.html> – Judge Huff ruled that websites can legally provide links to any pages on all other sites.

<sup>64</sup> See Search Engine Watch <http://searchenginewatch.com/resources/article.php/2156541#Crawling%20And%20Linking>

<sup>65</sup> [The deep linking court case](#) was brought by the Danish Newspaper Publishers Association against Newsbooster.com. Newsbooster “scrapes” news from thousands of newspapers, extracting direct links to these stories using headlines as the link text. Unlike search engines, which also crawl and index the full text of web pages, Newsbooster and other “scrapers” extract only links and titles.

<sup>66</sup> A lesser protection term of fifteen years from the date of completion, dealing with a compilation of data, e.g. Yellow Pages and different to copyright protection, although the contents of a database may be subject to copyright. Database rights create a problem of their own in the digital environment in that it can be argued that as databases are never finished, their rights may extend indefinitely.

<sup>67</sup> Wired Magazine July 2002 -<http://www.wired.com/news/politics/0,1283,53697,00.html>

<sup>68</sup> Codes of conduct have been agreed by most of Europe’s largest ISPs

<sup>69</sup> In Europe, “safe harbour” protection of ISPs from liability was implemented on 17 January 2002, when the E-Commerce Directive came into force. Article 12 protects the ISP where it provides “mere conduit” with no knowledge of, or editorial control over, content or receiver (“does not initiate or select the receiver”). Benoit and Frydman establish that it was based on the 1997 German Teleservices Act, though with “slightly more burden on the ISPs in comparison with the former German statute”. Where ISPs provide hosting services, under Article 14 they are protected from liability, in two ways:  
[a] the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity is apparent; or  
[b] the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disrupt access of the information. See: <http://pcmlp.socleg.ox.ac.uk/IAPCODEfinal.pdf>



<sup>70</sup> The eCommerce Directive was adopted in 2000 and became legally binding in January 2002. In Articles 12 to 14 three kinds of providers are described, with their respective liabilities. In case of mere conduit (access provisioning) and caching, providers are exempted from any liability. In the case of hosting, providers are only exempted if they have no actual knowledge of “apparent” illegal content and, if so, act expeditiously to remove the content.

<sup>71</sup> See Morrison & Foerster - [The European Directive on Electronic Commerce 2000](#) - [www.mofo.com/news/general.cfm?MCatID=2368&concentrationID=&ID=204&Type=5](http://www.mofo.com/news/general.cfm?MCatID=2368&concentrationID=&ID=204&Type=5)

<sup>72</sup> See: [The Multatuli Project](#) - ISP Notice & take down - [www.bof.nl/docs/researchpaperSANE.pdf](http://www.bof.nl/docs/researchpaperSANE.pdf)

<sup>73</sup> See Internet Watch Foundation <http://www.iwf.org.uk/police/page.22.40.htm> - Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

<sup>74</sup> See Internet Watch Foundation –

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

<sup>75</sup> “Temporary acts of reproduction ... which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right” - Article 5.1 of the EU Copyright Directive:

<sup>76</sup> See Combating Internet Copyright Crime – The Publishers Association - [http://www.publishers.org.uk/paweb/paweb.nsf/79b0d164e01a6cb880256ae0004a0e34/b789b8f162d0e00180256cd8003b259b/\\$FILE/Internet%20Piracy.pdf](http://www.publishers.org.uk/paweb/paweb.nsf/79b0d164e01a6cb880256ae0004a0e34/b789b8f162d0e00180256cd8003b259b/$FILE/Internet%20Piracy.pdf)

<sup>77</sup> See Combating Internet Copyright Crime P 13 –“In Article 12, of the EU Commerce Directive, intermediaries acting as “mere conduits” are relieved of liability, providing the transmissions are truly temporary, and in Articles 13 and 14 intermediaries who are caching and hosting respectively are similarly relieved of liability, provided the ISP acts “expeditiously” to remove or disable access to the information, once it is put on notice it is there. The Directive was implemented by the UK in the Electronic Commerce (EC Directive) Regulations 2002. The general rule of “no liability, conditional on Notice and Takedown” seems to have won general industry acceptance, and as a practical formula it has much to recommend it. It was developed further in the EU Copyright Directive 2001. in the exception for temporary copies “of no independent economic significance” provided by Article 5.1”

<sup>78</sup> A fundamental issue that needs to be examined in Europe is what weight of evidence is required to “prove” an infringement of copyright has occurred?

<sup>79</sup> The settlement process should be compared with that of ICANN, which has proved effective in dealing with Domain Name disputes. A similar body to deal with copyright under WIPO is considered a good potential solution.

<sup>80</sup> The Commission has launched a consultation process on fine-tuning copyright legislation and is expected to propose legislative amendments within the next year. The review of the existing Directives is in line with the Commission’s Better Regulation Action Plan (see IP/03/214). For the full text of the working document see [http://europa.eu.int/comm/internal\\_market/copyright/review/review\\_en.htm](http://europa.eu.int/comm/internal_market/copyright/review/review_en.htm)

<sup>81</sup> The first generation of EU copyright law consists of five Directives (91/250 Computer Programs, 92/100 Rental/Lending Right, 93/83 Satellite and Cable, 93/98 Term of Protection, 96/09 Legal Protection of Databases). In order to ensure that this first generation of EU legislation is able to keep pace with both the technology and the realities of the markets a review was started in 2002 at the Conference on "European Copyright Revisited" in Santiago de Compostela.

<sup>82</sup> See "Gaps of harmonization in existing Directives" - The Future of European Copyright and "Where Should European Copyright Go in the Future?" Michel M Walter - [http://europa.eu.int/comm/internal\\_market/copyright/docs/conference/2002-06-santiago-speech-walter\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/conference/2002-06-santiago-speech-walter_en.pdf)

<sup>83</sup> [The Digital Millennium Copyright Act](#) (DMCA) was signed into law by President Clinton on October 28, 1998. The legislation implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues. See: <http://www.copyright.gov/legislation/dmca.pdf>

<sup>84</sup> A presumption of infringement unless proven otherwise.

<sup>85</sup> See The Register – "How to Kill a Website", 14<sup>th</sup> October 2004 - [www.theregister.co.uk/2004/10/14/isp\\_takedown\\_study/](http://www.theregister.co.uk/2004/10/14/isp_takedown_study/) and the Fishman Affidavit - [http://www.youencyclopedia.net/Fishman\\_Affidavit.html](http://www.youencyclopedia.net/Fishman_Affidavit.html) a landmark Internet copyright case bought by the Church of Scientology – Although a content reversal procedure is not the ideal solution, since it leaves room for powerful interests, like Scientology to shut-down a website and instigate prolonged and expensive litigation, to keep it offline, it does offer some protection of free speech and offer a guarantee to internet users that any counter claim is taken seriously.

<sup>86</sup> After meeting with a number of corporations and regulatory bodies, the authors of Combating Internet ©opyright Crime concluded their trip by meeting with the Electronic Frontier Foundation: "We all agreed that any notice and takedown regime must have in place sufficient safeguards to prevent it being misused for the purpose of censorship" See Spiked Magazine - <http://www.spiked-online.com/articles/0000006DCC2.htm>

<sup>87</sup> See Spiked Magazine – "Copycat, Copyright" - <http://www.spiked-online.com/articles/0000006DCC2.htm>

<sup>88</sup> See Page 7 of Combating Internet ©opyright Crime

<sup>89</sup> The DTI/ Publishers Association report "Combating Internet Copyright Crime" explains in an instructive way the European and US situation regarding Notice and Takedown. However, its policy conclusions are based on the experiences of the Publishers Association during a fact finding mission to the US in August 2002; the current report does not consider the deliberations and cross industry discussions which have taken place since then (e.g. DCF Cybercrime group meetings)

<sup>90</sup> Combating Internet ©opyright Crime P15

<sup>91</sup> The RightsWatch Project was an Accompanying Measure research project affiliated to the Information Society Technology Key Action II Programme of the European Union. RightsWatch aimed to promote a safe environment for electronic commerce in Europe through the development of self-regulatory procedures for notice and takedown of copyright infringing content, for the benefit of Rights holders, Content Providers, Internet Service Providers and Users/Consumers alike. See Rights Watch White Paper - [http://www.rightswatch.com/White\\_Paper\\_20030704\\_v1\\_FINAL.pdf](http://www.rightswatch.com/White_Paper_20030704_v1_FINAL.pdf)

<sup>92</sup> Also see <http://pcmlp.socleg.ox.ac.uk/liberty.pdf> - Programme in Comparative Media Law and Policy Oxford University, Centre for Socio-Legal Studies – "This suggests further that the current framework established by the E-Commerce Directive provides an incentive for ISPs to take down content without investigating the complaint. This is because it does not set forth a detailed "put back" procedure, as it exists in the US."

<sup>93</sup> See [Combating Internet ©opyright Crime](#) P15 &16

<sup>94</sup> It should be clearly noted that some larger publishers declined to be associated with this research in the belief that it is biased and supports a change in the intellectual property regime which they feel is unnecessary and counter-productive.

<sup>95</sup> Combating Internet ©opyright Crime points to "very strong industry and government evidence in the USA that notice and takedown under the DMCA system works effectively, cheaply and well", noting that "tens of thousands of notice and takedown notices have been issued, but counter-notices are very rare (virtually negligible: fewer than 10 out of 20,000)"

<sup>96</sup> See ICANN model – The Internet Corporation for Assigned Names and Numbers - <http://www.icann.org/>

<sup>97</sup> Royal Mail took action against i-CD Publishing (UK) Ltd, the company behind 192.com and publisher of a directory known as the UK Info Directory, available on CD-ROM. The directory, sourced from the Electoral Roll, details the names, addresses and telephone numbers of over 44 million UK individuals and businesses. i-CD's own marketing states that the addresses are "PAF-validated" for accuracy. PAF is an acronym for "postcode address file". It is a database maintained by Royal Mail as part of its statutory obligations under the Postal Services Act. The legislation also requires that the database be licensed by Royal Mail to third parties and on reasonable terms. But Royal Mail sued i-CD, arguing that it was using the database without a license. – See Outlaw.Com – 17-02-2004 [http://www.outlaw.com/php/page.php?page\\_id=royalmaillosesdat1077030413&area=news](http://www.outlaw.com/php/page.php?page_id=royalmaillosesdat1077030413&area=news)

<sup>98</sup> Criminal liability for making or dealing with infringing articles

<sup>99</sup> s.296 - dealing in circumvention devices, or evading technical protection (or rights management) measures. There are also provisions in sections 108 and 109 for delivery up of infringing copies, and for police search warrants.

<sup>100</sup> See How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation - Programme in Comparative Media Law and Policy Oxford University, Centre for Socio-Legal Studies PCMLP - Christian Ahlert, Chris Marsden and Chester Yung - <http://pcmlp.socleg.ox.ac.uk/liberty.pdf>

<sup>101</sup> It is less easy to identify a solution, since those who have made an investment in databases or have created copyright works will not be very keen on broadening the license for others to use them without payment. Those compiling other databases to make new ones with added attributes would be equally unhappy if their database were used in the same fashion. The only solution found to date lies with standard licensing schemes. Arguably the concept of a copyright licensing agency might have a role to play here.

<sup>102</sup> Royal Mail was claiming rights in all name and address databases which include corrected postal addresses

<sup>103</sup> The Creative Commons website enables copyright holders to grant some of their rights to the public while retaining others, through a variety of licensing and contract schemes, which may include dedication to the public domain or open content licensing terms. The intention is to avoid the problems which current copyright laws create for the sharing of information. The project provides several free licenses that copyright holders can use when they release their works on the web. They also provide RDF/XML metadata that describes the license and the work to make it easier to automatically process and locate of licensed works. They also provide a "Founder's Copyright" (<http://creativecommons.org/projects/founderscopyright/>) contract, intended to re-create the effects of the original U.S. Copyright created by the founders of the U.S. Constitution. – see [http://www.wordiq.com/definition/Creative\\_Commons](http://www.wordiq.com/definition/Creative_Commons)

<sup>104</sup> Founded in 2001, Creative Commons is a non-profit US corporation founded on the notion that some people may not wish to exercise all of the intellectual property rights the law affords them. Its aim is to encourage creativity and innovation by paving a middle-ground between "All rights reserved" and anarchy, which it describes as "Some rights reserved." See [http://www.outlaw.com/php/page.php?page\\_id=bbctoopenarchives1086343449&area=news](http://www.outlaw.com/php/page.php?page_id=bbctoopenarchives1086343449&area=news)

In November 2004, [Wired Magazine](#) release a CD with sixteen sample music tracks under a creative commons licence. The songs on this CD use one of two Creative Commons licenses. The Non-commercial Sampling Plus license permits non-commercial file-sharing and non-commercial sampling. Wired Magazine writes: "When we embarked on this project, we knew exactly what we were stepping into: the fight over copyright, perhaps the most polarizing and contentious dispute in today's entertainment industries. Because of copyright issues, the music industry has become a business on the brink of collapse, waging an unwinnable war against technology. See: <http://www.wired.com/wired/archive/12.11/sample.html>

<sup>105</sup> Also see BBC Creative Archive story - Lessig launches Creative Commons for the UK at [http://www.theregister.co.uk/2004/10/04/creative\\_commons/](http://www.theregister.co.uk/2004/10/04/creative_commons/)

<sup>106</sup> The November 2004 European Court of Justice judgment in respect of BHB/William Hill may however increase the likelihood that a court would not protect a database which had not been "substantially" modified.

<sup>107</sup> Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information - Adopted 17 November, 2003 – Published 31 December, 2003 – Also see PIRA International Study on the Commercial exploitation of Europe's public sector information (2001)

<sup>108</sup> "There's no general law that interferes with password-sharing" says Lawrence Lessig. Operating in that legal limbo, the use of community passwords is on the rise. Aggregator BugMeNot.com possesses keys to more than 30,000 sites, according to Lessig. See <http://www.ecommercetimes.com/story/Web-Publishers-Fear-A-Little-Sharing-37454.html>

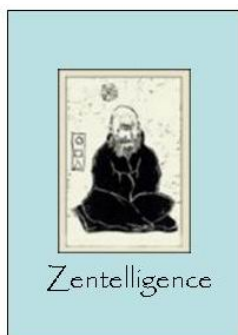
Commenting on the difficulty of stopping sharing, lawyer Robert Bauer of Brown Raysman in New York explains, "There's no way to determine who's using that user name and password." However, he warns, some might hesitate to share some subscriptions because it might enable others to see their credit-card number and other personal information.

<sup>109</sup> See WIPO and Intellectual Property [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

<sup>110</sup> The review of the existing Directives is in line with the Commission's Better Regulation Action Plan (see IP/03/214). For the full text of the working document, see: [http://europa.eu.int/comm/internal\\_market/copyright/review/review\\_en.htm](http://europa.eu.int/comm/internal_market/copyright/review/review_en.htm)

<sup>111</sup> Royal Mail is obliged under the Postal Services Act to license postcodes on reasonable terms including payment. It licenses its Postcode Address file (PAF) under a scheme which has been challenged, but approved by the Office of Fair Trading (OFT). Postcodes are widely used other than for mailing, in sectors such as insurance, tracking, demographic modeling, credit checking and lookup services. To maintain the database and provide PAF updates costs in the region of £19m per annum

<sup>112</sup> Royal Mail claims it intended in its licensing scheme to differentiate between those using PAF for mailing lists, and those using them for other commercial purposes. The Court was asked by i-CD to penalize Royal Mail by awarding costs on an indemnity basis on the arguments put in i-CD's comments on the case, but did not do so, which may suggest that the Court did not consider that Royal Mail was abusing its greater resources to run up costs unfairly.



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