

4 The legal background

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4.1. In this chapter the main provisions of UK and EC law relating to copyright and relevant to this inquiry are briefly set out including UK statutory material and EC Directives, decisions and cases. Mention is made of Irish and US decisions and the functions of the UK Copyright Tribunal are also described. This chapter is necessarily only a brief outline of a complex and extensive subject.

Protection of copyright

4.2. Copyright lies at the heart of the music industry. It ensures that the talents of successful composers and songwriters are rewarded and encourages the production and international marketing of recordings by giving companies legal protection against unauthorized reproduction. Copyright has been known to UK statute law for nearly three centuries, the current law being embodied in the 1988 Act, under which the copyright owner has the exclusive right to copy the work; issue copies to the public; perform, show or play the work in public; broadcast the work or include it in a cable programme service; or make an adaptation of the work or do any of these acts in relation to an adaptation. Copyright is thus a bundle of rights enabling the owner to control the various ways in which his intellectual property can be exploited. Copyright is infringed by a person who, without licence of the copyright owner, does, or authorizes another to do, any of these 'acts restricted by the copyright'. Under the 1988 Act copyright protection is also given to any recording of a literary, dramatic, or musical work (section 5(1)). Until 1995, copyright in a work in the UK lasted for 50 years after the death of the composer (or of the last surviving composer if more than one) and copyright in a sound recording for 50 years after the record was released. The UK was obliged under the EC Directive on the extension of the copyright term to extend the former period to 70 years, as part of the programme of harmonization of European law on intellectual property, by 1 July 1995, though the implementing regulations had not been made by the end of October 1995.

4.3. Other countries have their own regimes. The *droit d'auteur* system which applies in most other European countries developed from considerations of natural justice, viewing the work of an author as the expression of his personality and acknowledging his fundamental human right to control exploitation of his work and to protect its integrity. The system applicable in the UK, and to a great extent in other English-speaking countries, has by contrast as its primary basis the concept of safeguarding the skill, labour and investment of those responsible for the creation of works. Copyright under this system might be characterized as a right to prevent unauthorized people from dealing with others' intellectual property. Despite these conceptual differences, the kinds of materials and the forms of exploitation protected under both systems are essentially the same.

4.4. The UK copyright system is still developing as new technologies for transmitting works emerge. Under various EC Directives recently issued dealing with harmonization of such rights the scope of copyright has itself been expanded and new rights provided to authors.

4.5. The UK is a party to the latest Act (Paris, 1971) of the Berne Convention for the Protection of Literary and Artistic Works. The convention was first concluded in 1886 and the signatories are collectively known as the Berne Union. The convention prescribes minimum rights in respect of literary and artistic works, whatever the mode or form of expression. The rights cover most of the ways in which such works can be commercially exploited. Of the various international conventions on intellectual property, it is this one which is of most importance to the PRS, since it incorporates the protection of the copyright in music (and associated words). This convention does not in general deal with the protection of 'neighbouring rights', rights regarded as adjacent or parallel to the copyright of authors and which had come into existence as a result of technical advances, to extend the protection of copyright in sound recordings. It does, however, cover films.

EC Directives

4.6. The EC has in recent years been working on a programme of harmonization in intellectual property law. The European Commission has stated that this programme is not with a view to a complete harmonization of the substantive law of intellectual property, but is concentrating on those areas where co-ordinating actions at the EC level are considered necessary to prevent distortions to the internal market. Directives have been adopted on a variety of matters. Those of relevance to this inquiry are Directive 92/100/EEC, of 19 November 1992 (known as the Rental Directive), Directive 93/83/EEC of 27 September 1993 (the Satellite Broadcasting and Cable Retransmission Directive), and Directive 93/98/EEC of 29 October 1993 (the Duration Directive).¹

4.7. The Rental Directive requires the grant of exclusive rental and lending rights to authors in respect of virtually all works protected by copyright; the grant of similar rights to performers in respect of copies of recordings of their performances; the grant to authors and performers who assign or are deemed to assign their exclusive rental rights in works or copies of sound recordings and films of an unwaivable right to receive equitable payment in respect of any rental, notwithstanding the assignment or transfer of these rights; and that performers and producers must be remunerated for broadcasting or other forms of communication to the public of sound recordings. The Directive permits derogations in respect of exclusive lending rights, eg loans made by public libraries, provided at least that authors are remunerated in respect of such lending.

4.8. The Satellite Broadcasting and Cable Retransmission Directive harmonizes the application of national copyright laws to satellite broadcasts and cable retransmission. Since a satellite broadcast may be received in more than one member state of the European Economic Area, the Directive contains provisions which determine the applicable law in respect of a broadcast. It also requires the exercise of the cable retransmission rights only through a collecting society established for licensing purposes.

4.9. Draft regulations have been circulated by the Department of Trade and Industry setting out the required amendments to UK law. They would amend the 1988 Act so as to extend the rights of rental and lending to authors, and add a new section on licensing of performers' rights.

4.10. The Duration Directive (also known as 'The Term of Protection Directive') provides that the term of protection for copyright should be harmonized at 70 years after the death of the author, irrespective of when the work was lawfully made available to the public, and for neighbouring rights at 50 years after the date of first protection or of the date of its first communication to the public. Since the copyright term in the UK has hitherto been 50 years, transitional provisions are necessary relating to the extension and revival of copyrights. There is controversy as to who should own the benefit of the extended period of protection: the person who owned the right immediately before the beginning of the extension, or the original author. The draft statutory instruments to implement this Directive in UK law adopt the former solution. Similar considerations apply to revived copyrights.

¹Respectively OJ 1992 L346/61, OJ 1993 L248/15, and OJ 1993 L290/9.

4.11. The Copyright Tribunal would be given new jurisdiction to resolve disputes that may arise under certain provisions of these statutory instruments.

Implications of digital technology

4.12. A Green Paper was issued by the European Commission in July 1995 on 'Copyright and Related Rights in the Information Society'. In this document the Commission said that the creative effort which provided a basis for investment in new services would be worthwhile, and would be made, only if works and other matter were adequately protected by copyright and related rights in the digital environment. Digital technology allowed a large volume of data to be transmitted and copied with far greater ease than was possible by analogue means. A wide variation in the level of copyright protection between member states would give rise to obstacles to the creation of the information society. There was already a measure of Community-wide harmonization in the existing Directives on copyright and related rights; the Directive on the legal protection of databases would probably be adopted shortly. The key question was whether the existing harmonization was enough, and, if not, in what areas it ought to be taken further. It would be necessary to maintain a balance between the interests of all the parties concerned: rightholders, manufacturers, distributors and users of services, as well as network operators.

4.13. As early as 1988, in a previous Green Paper, the Commission had stated that 'these new technologies have entailed the *de facto* abolition of frontiers and increasingly make the territorial application of national copyright law obsolete'. Moreover economic analysis showed the need for a regulatory framework which would facilitate the creation of packages of services aimed at niche markets. Given their cost, the services must reach such markets in all member states in order to be profitable.

4.14. Among several probable developments, the Commission referred to a need to review the role and functions of the collecting societies. 'The pricing structures and the extent of authorizations granted could be modified, since the sound, audio-visual and text sectors, not to mention computer programmes and data, are going to become more and more linked' (1995 Green Paper, paragraph 63). The borderlines between different categories of work would become less clear cut; in particular music and visual works would increasingly converge, and the number of people contributing to an individual work would increase. Digital technology would on the one hand make piracy much easier, but would also facilitate, for the protection of rightholders' interests, identification of use of copyright material.

4.15. The Commission also considered that the acquisition and management of rights would require attention. Collecting societies had grown steadily in importance and were particularly important in the music industry, where it would be hopeless for authors or performers to try to control or manage rights individually. Traditions of management by collecting societies nevertheless varied from one sector to another, from one class of rightholders to another, and from one member state to another. Digital technology multiplied the possibilities of creating composite multimedia works. The number of authorizations needed and the total price demanded had led some users to argue for compulsory licences. The Commission was opposed to users having the right to compulsory licences; it thought it would be preferable for joint bodies in the form of 'one stop shops' to be created by collecting societies and other rights managers, bringing together the repertoires which might be valuable to the new technologies.

4.16. The British Copyright Council (BCC) comprises over 30 bodies representing the interests of creators and other owners of copyright. In a submission to the European Commission in February 1995, the BCC argued for separate exclusive rights in respect of the rendition, recording, transmission and manifestation of protected material in digital form. These rights would be independent of and additional to the protection afforded to the work itself. It would be essential for collecting societies to make international reciprocal arrangements to cover licensing in this area. Networks would bring internationally stored material into the majority of private homes as well as most governmental, educational, commercial and industrial locations. Interlinking of databases in different countries often rendered it difficult, and on occasion practically impossible, to ascertain the point of emission of transmitted material, or to identify each country in which transmission or reception took place. International clearing systems would therefore be necessary.

European cases relating to collecting societies

4.17. The rights required to be assigned to the PRS as a condition of membership are comprehensively expressed in Article 7 of the Articles of Association. These are:

- (a) the performing right incorporating the right to perform the work in public, to broadcast the work, or include it in a cable programme service;
- (b) for writers only, the film synchronisation right; and
- (c) such other rights, or parts of rights as the General Council may direct.

These rights apply to all present and future works of the member and are granted exclusively to the PRS subject only to Article 7(f) which provides for the Society to decline to exercise the whole or any part of the performing right in any work if it serves a notice to this effect on the member. Most performing right societies in other countries, except the USA, also require exclusive assignment of rights.

4.18. Since collecting societies by their very nature tend to hold a dominant position in their respective national markets for the administration of specific rights, it is not surprising that a number of cases have been brought against them under Article 86 of the Treaty of Rome in respect of alleged abuses of that dominant position. An important early case involved GEMA¹ when several of the rules of this German collecting society were challenged. In its first decision, in 1971, the Commission ruled *inter alia* that GEMA had abused its dominant position by binding its members with excessive obligations, and that GEMA's constitution and its assignment contract were infringements of Article 86 inasmuch as they did not leave members free to withdraw from GEMA the administration of certain categories of rights 'after due notice at the end of a year'. These seven categories, set out in the decision, were as follows:

- (a) the general performing right;
- (b) the broadcasting right, including the public performing right of broadcast works (transmission right);
- (c) the right of cinematographic exhibition;
- (d) the right of mechanical reproduction and diffusion, including the public performing right of mechanically reproduced works (transmission right);
- (e) the cinematographic production right;
- (f) the right to produce, reproduce, diffuse and transmit on tape; and
- (g) the exploitation rights resulting from technical developments or future change in the law.

4.19. GEMA referred the matter back to the Commission in the following year asking that the 1971 decision should be supplemented 'in such a way that it could suggest an alternative solution to the abuse'. GEMA was trying to obtain a minimum membership period of three years. The solution adopted by the Commission was to permit members a choice: they could either elect withdrawal from GEMA of the administration of the seven original categories 'after due notice at the end of a year' or, alternatively, withdraw from GEMA 'the administration of certain forms of utilisation after due notice at the end of a period of three years maximum ...'. The 'forms of utilisation' were a list of 12 rights similar to the original seven categories but more narrowly defined, thus increasing their number, as follows:

- (a) the general performing right;
- (b) the broadcasting right;
- (c) the public performing right of broadcast works;

¹Re GEMA (No 1) [1971] JO 1971 L134/15 CMLR D35; Re GEMA (No 2) [1972] JO 1972 L182/24 CMLR D 115. The translation into English of the categories of rights set out below and in the following paragraph is reproduced from CMLR.

- (d) the televising right;
- (e) the public performing right of televised works;
- (f) the right of cinematographic exhibition;
- (g) the right of mechanical reproduction and diffusion;
- (h) the public performing right of mechanically reproduced works;
- (i) the cinematographic production right;
- (j) the right to produce, reproduce and diffuse on video tape;
- (k) the public performing right of works reproduced on video tape; and
- (l) the exploitation rights resulting from technical developments or future change in the law.

4.20. By way of further compensation to members who chose the longer period of three years, they should receive the additional benefit of being allowed to choose which rights for which country were to be assigned to GEMA, for example the general performing right for one country and the broadcasting right for another. This had not been permitted by the 1971 decision.

4.21. The Commission in these cases had found GEMA's conduct abusive primarily because of the interaction between its minimum duration of membership requirement and the breadth of the 'assignment' which it took from its members. The PRS takes the view that how the rights of members should be split should depend not only upon the minimum duration of membership but also to some extent upon the totality of the rights held.

4.22. The European Court of Justice (ECJ) made it clear in *BRT v SABAM and FONIOR*¹ that collecting societies, in drawing up their rules, must take account of all relevant interests in such a way that a balance is ensured between 'the requirement of maximum freedom for authors, composers and publishers to dispose of their works and that of the effective management of their rights'. An abuse could consist in the fact that an undertaking entrusted with the exploitation of copyrights, which in practice authors, composers and publishers could not avoid joining, and occupying a dominant position within the meaning of Article 86, imposed on its members obligations which were not absolutely necessary for the attainment of its object and which thus encroached unfairly upon a member's freedom to exercise his copyright.

4.23. It thus appears that in deciding whether a collecting society in a dominant position is acting in breach of Article 86, both the Court and the Commission balance the freedom of copyright owners to retain control over their works against the need for collecting societies to manage copyright effectively.

4.24. In *Ministère Public v Tournier*² discothèque owners complained about the high level of royalties charged by the French collecting society SACEM and about its refusal to grant licences for only a part of its repertoire. The case was referred to the ECJ for a preliminary ruling. The ECJ was asked, *inter alia*, whether certain activities amounted to a concerted practice contrary to EC Treaty Article 85(1). The activities in question derived from the reciprocal representation agreements made between SACEM and other national copyright-management societies. The Court laid down certain general principles but said that it was for the national courts to determine whether any concerted practice had in fact taken place. The reciprocal contracts in question were held to be contracts for services not in themselves restrictive of competition so as to be caught by Article 85. The Court also indicated that it would constitute an abuse of a dominant position if the fees charged by an undertaking in a dominant position were appreciably higher than those charged in other member states, unless such a difference could be justified by reference to objective and relevant dissimilarities between copyright management in the respective countries. Following the ECJ's *Tournier* ruling, the Commission was instructed to conduct a Community-wide investigation into the fees charged by collecting

¹[1974] ECR 51 and 313:2 CMLR 238.

²395/87 [1989] ECR 2521, [1991] 4 CMLR 248.

societies in all member states. The results of this inquiry were remitted to the competition authorities in France, to assist the French court, which had originally referred the case, in concluding whether, in fact, there had been an abuse of SACEM's dominant position.

4.25. The Court of First Instance of the European Communities delivered judgment on 24 January 1995, in the case of *BEMIM v Commission*.¹ The Bureau Européen des Médias de l'Industrie Musicale (BEMIM), representing discothèque operators, had complained to the Commission that SACEM, the French collecting society, had infringed Articles 85 and 86 of the EC Treaty. The reciprocal representation contracts, the level of royalties, and the refusal to allow use of SACEM's foreign repertoire alone, were all challenged. Following judgments on similar issues in the French courts, the Commission found that royalties charged in France and Italy were appreciably higher than those charged in other member states, but nevertheless considered that there was no Community interest involved, the practices complained of being essentially national. In the course of the proceedings BEMIM claimed that a restrictive agreement existed among national copyright management societies within the Groupement Européen des Sociétés d'Auteurs et de Compositeurs (GESAC) to increase the tariffs in various member states with a view to eliminating any significant differences.

4.26. The Court of First Instance ruled that the European Commission's decision must be annulled to the extent to which it rejected the allegation of partitioning of the market, no grounds for rejecting this complaint having been given. Other pleas by the applicant were rejected. Reference was made, however, to the view of the French *Conseil de la Concurrence* that SACEM's tariffs had not been justified by objective and relevant differences.

Decision by Irish Competition Authority

4.27. On 3 October 1991 the PRS and the Irish Music Rights Organisation (IMRO) jointly notified to the Irish Competition Authority three standard form agreements relating to the assignment of copyright in musical works with a request for a certificate under section 4(4) of the (Irish) Competition Act 1991, or, in the event of a refusal to issue such a certificate, a licence under section 4(2). At that time IMRO was a subsidiary of the PRS. It became independent at the beginning of 1995.

4.28. The PRS argued that its arrangements were the least restrictive of all comparable systems in force in Europe and were indispensable for the attainment of the objectives of the Copyright Act and for securing a proper balance of benefit between creators, users and the ultimate consumers. The PRS said that members were allowed to subdivide the assignment by territory, and a few had done so. It was legally possible to subdivide by category (eg public performance, broadcasting, film synchronisation) and this would be accepted so long as the categories set out in the GEMA cases were respected (see paragraphs 4.18 to 4.21).

4.29. The Authority indicated to the PRS that the arrangements would be acceptable if certain amendments were made to the Articles of Association, in particular if Article 7(f) were changed so as to require the PRS, in response to a request by all the creators and publishers of a work, to allow members to license the use of that work to individual users on a non-exclusive basis. The PRS declined to do so.

4.30. The Authority concluded in its decision No 326 of 18 May 1994 that the arrangements precluded a member of the PRS from administering the performing right himself and had the effect of restricting the freedom of users to purchase from other sources and of restricting competition in supply. They, therefore, offended against the Irish Competition Act, as also did the period of notice required for termination of membership (at that time three years). While a mechanism for creators and publishers to assign their rights to the PRS was clearly indispensable, preventing members from granting non-exclusive licences to individual users for particular purposes was not.

US Consent Decrees

4.31. There are three main licensing associations operating in the USA: ASCAP, BMI, and the much smaller Society of European Stage Authors and Composers (SESAC). They operate under constraints arising from anti-trust law and in particular from an amended consent decree accepted by ASCAP in 1950 and a consent judgment accepted by BMI in 1966. Under the 1950 decree ASCAP was enjoined and restrained from

¹Case T-114/92.

`holding, acquiring, licensing, enforcing or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis', and from `limiting, restricting or interfering with the right of any member to issue to a user non-exclusive licences for rights of public performance'.

4.32. Under the 1966 judgment, BMI was enjoined and restrained from:

failing to grant permission on the written request of all writers and publishers of a musical composition including the copyright proprietor thereof, allowing such persons to issue to a music user making direct performances to the public a non-exclusive licence permitting the making of specified performances of such musical composition by such music user directly to the public, provided that the defendant shall not be required to make payment with respect to performances so licensed.

4.33. Particulars of how licensing and distribution work in practice in the USA will be found in Chapter 9.

The Copyright Tribunal

4.34. The 1988 Act renamed the previously existing PRT, established under the Copyright Act 1956, as the Copyright Tribunal and made provision for its constitution. It consists of a legally qualified Chairman and two legally qualified Deputy Chairmen, all appointed by the Lord Chancellor, and not less than two or more than eight members appointed by the Secretary of State. It may make orders as to costs. Appeals against its decisions on points of law may be made to the High Court.

4.35. The Tribunal has power to make such order as it may `determine to be reasonable in the circumstances' on a reference of a proposed licensing scheme by representatives of prospective licensees or on a reference of an existing scheme by a prospective licensee. Such orders may be made for an indefinite or a specific period. Existing schemes referred to the Tribunal remain in operation until proceedings on the reference are concluded. Schemes may not again be referred, without special leave, within 12 months. Persons refused a licence under a licensing scheme may also apply to the Tribunal for a licence, in certain circumstances.

4.36. The Tribunal may direct that its orders, so far as they vary the charges payable, may be retrospective but not to a date earlier than that on which the reference was made.

4.37. In determining what is reasonable, the Tribunal is required to have regard to the availability and terms of other schemes, or the granting of other licences, to other persons in similar circumstances. It must exercise its powers so as to secure that those granting licences do not unreasonably discriminate between licensees, or prospective licensees. There are special provisions relating to broadcast or cable programmes which are immediately retransmitted to the same, or another, area.

4.38. Where the MMC make an adverse public interest finding in a report on a monopoly or merger reference or a reference under the Competition Act 1980, in respect of conditions in copyright licences, or refusal to grant such licences on reasonable terms, section 144 of the Act enables the Secretary of State to cancel or modify those conditions, or to provide that licences should be available as of right. In default of agreement, the terms of such a licence are to be settled by the Tribunal. This power may be exercised only in circumstances in which it does not contravene any convention relating to copyright to which the UK is a party.

4.39. In their 1988 report on collective licensing the MMC were asked to report on a number of issues relating to the collective licensing of sound recordings for broadcasting and public performance, including the functioning of the Tribunal as a successor under the 1988 Act of the previous Performing Right Tribunal. A number of recommendations were made relating to the workings and procedure of the Tribunal.

4.40. We held meetings with the Chairman of the Tribunal, Mr Michael Bowers (who spoke in his personal capacity), and with a representative of the IPPD of the Patent Office, which supplies the Tribunal's secretariat. We were told that one reason for the protracted nature of proceedings before the Tribunal was often that their other professional commitments made it impossible for the Tribunal's Deputy Chairmen to make the necessary time available except at long notice. This might interact with similar problems arising for

Counsel acting for the parties. We were assured that consideration would be given to augmenting the administrative support made available to the Tribunal should the necessity for doing so become apparent. We noted in this connection that the resources, especially the legal resources, available to the IPPD were severely limited, and that the Government has not found it possible to implement relevant European Directives by the due date: proposals relating to the Rental Directive, for example, which was due to come into force on 1 July 1994, have been the subject of consultation but are not yet (November 1995) in final form.

4.41. We were told that the situation of PPL in 1988, at the time of the MMC report on collective licensing, was quite different from that of the PRS both then and now. The provisions in the Broadcasting Act 1990 amending the 1988 Copyright Act had been intended to deal with 'needletime' constraints maintained in the interests of performers of live music.

4.42. Mr Bowers described the purpose of the practice direction introduced in 1991 and revised in 1995 and indicated that he encouraged private settlement between the parties when appropriate. Alternative disputes resolution procedures had been considered. However, the high costs to the parties of Tribunal proceedings reflected their wish for the best professional representation and expert advice, as was to be expected in commercial litigation with substantial sums of money at stake. The present practice of the Tribunal in regard to the award of costs was like that in the High Court. It would be fair for the Tribunal to have power to award interest on payments made as a result of a retrospective order and such power might be sought by means of a statutory instrument.