BEYOND COPYRIGHT or INTERESTING NEW RESTRICTIONS YOU NEVER KNEW EXISTED

In this article, which originally appeared as a guest Editorial in the influential German periodical "Multimedia Und Recht", Iain G. Mitchell QC looks at the implementation of the WIPO Conventions in the USA and in Europe and considers whether the practical effect is to extend beyond copyright to create a new right on the part of the entertainment industry to prevent access to material to which, under the law of copyright access is otherwise permitted.

Much ink has been spilled over the question of why we have copyright. The conventional starting point is that the creator of a work has a right to the fruits of his labours, but because those labours are intellectual, the only meaningful way that he can be given the chance to earn those fruits is if he is given a monopoly in the exploitation of his work. Historically, society has looked on monopolies of any kind with suspicion as tending to limit creativity (hence the present furore over patenting of genetic material) and, not to put to fine a point on it, to lead to unacceptably high prices. Thus, there is a kind of Faustian bargain struck between the artist and society: the artist enjoys a monopoly for a limited time only, and, whilst that monopoly exists, he cannot stop others dealing fairly with his material. At the end of the period, the work passes into the public domain and thus becomes part of the patrimony of all Mankind.

This model is under threat as a result of profound changes which, it is suggested, are sociological rather than technological. The technological changes are self-evident - we live in a digital age where copying is possible in ways undreamed of by our parents, but the really significant change is that the "authors" (in the Convention sense) of works are increasingly not poor artists starving in a Bohemian garret, but large and powerful corporations with armies of expert lobbyists at their command. This is not to say that they are not equally worthy of protection, just that they have the resources to lean on legislators to upset the balance of the Faustian pact.

The rise of code as code.

The way the author makes his reward (or the corporation the return on its investment) is to take the one creation (a story, a song, a performance or whatever) and sell it over and over again. If there were no copyright, such repeated sale would at least be a great deal more difficult. However, if, notwithstanding the legal code of copyright, sufficiently large numbers of consumers just copied anyway, the ability to make repeated sales is likewise defeated. In response to that, the industry developed the notion of "code as code", which is to say machine code as a substitute for legal code.

The problem is that, as it has developed, "code as code" has increasingly become a means of controlling *access* to digital material, rather than merely the *copying* of it. For example, creation of separate DVD zones, technology to allow an e-book to be read only on the computer on which it downloaded, to make a DVD unplayable after 48 hours and, (my favourite) to stop the viewer skipping the commercials, are all about who has access to material and on what terms (which, of course, are not negotiable). They have very little to do

with copying.

The situation is compounded when you remember that technology is blind - it can have no idea whether the material it is protecting is copyrighted or in the public domain and no conception of whether the person trying to overcome the defensive wall is a hacker, or a person trying to exercise his legal right of fair dealing.

In short, the problem of code as code is that it arrogantly asserts its own values over the values of the carefully-crafted legal regime.

The other problem is that it does not work.

Pride, they say, cometh before a fall. The industry, having turned its back on the lawyers, declaring that it would protect itself by using machine code, turns again to the lawyers when the hackers refuse to follow the script written for them and insist in overcoming the code.

The Digital Millennium Copyright Act

The WIPO treaties envisage legal remedies against "circumvention of effective technological measures that are used by authors in connection with the exercise of their rights..... and restrict acts in respect of their works..." However, in avowedly implementing the treaties in the United States, the Digital Millennium Copyright Act adopted an interesting structure, first by drawing a distinction between unauthorised *access* and unauthorised *copying*, making the manufacture or supply of circumventing devices unlawful in all cases, but forbidding only the act of unauthorised access on the reassurance that to have forbidden copying would have prevented fair use.

These honeyed words, however, are only window-dressing, for, as the Act points out, fair use defences are not available against a charge of unauthorised access.

In practice, therefore, you are potentially committing a crime (not just a civil wrong) for which you can be sent to prison for up to five years and fined $500,000 merely by overcoming machine code on a DVD which you legally own *even if you have every right to do so under copyright law:* and, arguably, *even if the material is in the public domain.* Put another way, the manufacturer has a right to prevent access to the work.

The Infosoc Directive

As the old lady remarked after she had seen Sarah Bernhardt as Cleopatra dying on-stage in a truly spectacular manner: "How very unlike the home life of our own dear Queen". Or is it?

The Infosoc Directive makes a show of specifying possible exemptions and, in article 6.4, requiring appropriate measures to be taken to allow the consumer to enjoy specified exceptions, but even here, there is a partial surrender of the hard-won fair dealing rights. First, the Directive fails to make any more than one of the fair dealing exceptions mandatory, and, of the optional rights, only specified ones can be enforced (both provisions arguably being in breach of the WIPO Treaties which require an exemption for all works permitted by

law).

Furthermore, although article 6.3 attempts to restrict the unlawfulness of circumventing technology to material which is copyrighted, there is a major problem, for technology is blind, and any technology designed to overcome the security of copyrighted material is equally able to overcome the security of non-copyright material. If such technology cannot legally be obtained by the consumer, then *de facto* the consumer is denied his right to access public domain material.

There is thus a crack in the structure, a crack which might be opened wider if the industry considers the full implications of the already existing Conditional Access Directive, which could be used to do rather more than merely protect cable television services.

All to play for

A regime of code as code is profoundly inimical to the balanced rights and exceptions of the copyright regime as it has evolved. The alternatives adopted seem to have been either a surrender to code as code, as in the United States, or to embark upon the thankless task of attempting to reconcile the irreconcilable, as in Europe.

There is a real debate to be had, but it is at a deeper level than the question of how technical measures can be made legally effective so as to prevent copying of copyright material.

Consider this conundrum. The Treaties and the Directive both speak about "effective technological measures." If the measures are effective, there would be no need of legislation, but if there is such a need it must be because the measures are not effective to prevent hacking. This is the world where words mean what you want them to mean, as Lewis Carrol wrote in *Through the Looking Glass:*

> "When **I** use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."
>
> "The question is," said Alice, "whether you CAN make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master - that's all."

This is a world in which what the industry is trying to do is to persuade lawyers to provide a whole new right, a right to control access, which has never existed before. There is a legitimate debate to be had about whether there should be created such a right, but the lawyers need to be aware that this is the debate which they are having, otherwise we shall all end up sleepwalking into a future in which the rodent policeman with his big black ears and his high squeaky voice comes knocking at the door to arrest us for not watching the commercials.