

# Digital Copyright

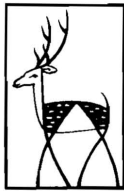
Law and Practice

Fourth Edition

Simon Stokes

Solicitor

Partner, Blake Laphorn; Visiting Research  
Fellow, Bournemouth Law School



• H A R T •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

2014

Published in the United Kingdom by Hart Publishing Ltd  
16C Worcester Place, Oxford, OX1 2JW  
Telephone: +44 (0)1865 517530  
Fax: +44 (0)1865 510710  
E-mail: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)  
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada)  
by Hart Publishing  
c/o International Specialized Book Services  
920 NE 58th Avenue, Suite 300  
Portland, OR 97213-3786  
USA  
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190  
Fax: +1 503 280 8832  
E-mail: [orders@isbs.com](mailto:orders@isbs.com)  
Website: <http://www.isbs.com>

© Simon Stokes 2014

First edition published 2002 by Butterworths Tolley. Second edition published by Hart Publishing 2005. Third edition published by Hart Publishing 2009. Fourth edition published by Hart Publishing 2014.

Simon Stokes has asserted his right under the Copyright, Designs and Patents Act 1988, to be identified as the authors of this work.

Hart Publishing is an imprint of Bloomsbury Publishing plc

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data  
Data Available

ISBN: 978-1-84946-402-4

Typeset by Compuscript Ltd, Shannon  
Printed and bound in Great Britain by  
TJ International Ltd, Padstow, Cornwall

# TABLE OF CONTENTS

---

<i>Preface to the Fourth Edition</i> .....	v
<i>Acknowledgements (Fourth Edition)</i> .....	vii
<i>Acknowledgements (Third Edition)</i> .....	vii
<i>Acknowledgements (Second Edition)</i> .....	vii
<i>Acknowledgements (First Edition)</i> .....	vii
<i>Glossary</i> .....	xvii
<i>Table of Cases</i> .....	xxix
<i>Table of Legislation</i> .....	xxxvii
<b>1 WHY DIGITAL COPYRIGHT MATTERS</b> .....	<b>1</b>
<b>1.1 Overview of this Book</b> .....	<b>1</b>
1.1.1 This Chapter and the Book .....	2
<b>1.2 Copyright: Its Scope and Rationale</b> .....	<b>2</b>
1.2.1 Why Have Copyright? .....	2
1.2.2 The Case Against Copyright and Copyright Reform .....	3
1.2.3 Limits on Copyright .....	5
1.2.4 Justifying Copyright .....	6
1.2.5 Originality and Copyright .....	7
1.2.6 Moral Rights .....	7
1.2.7 Copyright and Other Intellectual Property (IP) Rights .....	8
<b>1.3 The International Aspect of Copyright</b> .....	<b>8</b>
1.3.1 Background .....	8
1.3.2 An Example .....	9
1.3.3 The Internet and International Copyright .....	10
<b>1.4 The Digital Challenge to Copyright</b> .....	<b>11</b>
<b>1.5 Internet Technology and Copyright</b> .....	<b>12</b>
1.5.1 How the Internet Works .....	12
<b>1.6 International Legislation</b> .....	<b>16</b>
1.6.1 Electronic Commerce Directive .....	16
1.6.2 Information Society Directive .....	17

x *Table of Contents*

<b>1.7 The Future</b> .....	18
1.7.1 The Death of Copyright.....	18
1.7.2 A New Future for Copyright.....	19
1.7.3 Concluding Thoughts.....	20
<b>2 DIGITAL COPYRIGHT: THE BASICS</b> .....	<b>22</b>
<b>2.1 Introduction</b> .....	22
2.1.1 Overview.....	22
2.1.2 Sources of Law.....	22
<b>2.2 What Digital Copyright Protects</b> .....	23
2.2.1 UK Law.....	23
2.2.2 Digital Copyright Works.....	23
2.2.3 Criteria for Protection ie Work Must Be ‘Original’.....	27
2.2.4 Who is the Author (Including for Computer-generated Works)?.....	29
2.2.5 The Need for Fixation/permanence of the Work.....	30
2.2.6 Qualifying Factors for Protection and Digital Copyright Formalities.....	30
2.2.7 Duration of Protection.....	31
2.2.8 Other Digital Rights Neighbouring Copyright or Related to it.....	32
<b>2.3 How Digital Copyright can be Infringed</b> .....	39
2.3.1 Digital Aspects.....	41
2.3.2 Remedies for Copyright Infringement.....	42
<b>2.4 Exceptions and Defences to Digital         Copyright Infringement</b> .....	43
2.4.1 Statutory Exceptions.....	43
2.4.2 Licences.....	50
2.4.3 Public Policy Defences.....	50
<b>2.5 Who Owns the Digital Copyright?</b> .....	51
2.5.1 Employees, Directors and Commissioned Works.....	51
2.5.2 Authorship and Joint Ownership.....	52
2.5.3 Collecting Societies.....	53
<b>2.6 The Implementation of the Electronic Commerce         and Information Society Directives into UK Law</b> .....	53
2.6.1 Implementation of the Electronic Commerce Directive.....	54
2.6.2 Implementation and Effect of the Information Society Directive.....	58
<b>3 DIGITAL DATABASE LAW AND THE INTERNET</b> .....	<b>64</b>
<b>3.1 The Relationship Between Copyright and Database Right</b> .....	64
3.1.1 Position Before 1 January 1998.....	64
3.1.2 Position from 1 January 1998.....	65

<b>3.2 Digital Copyright Protection for Databases .....</b>	<b>65</b>
<b>3.3 Database Right Protection.....</b>	<b>67</b>
3.3.1 <i>British Horseracing Board Limited v           William Hill (2001)</i> .....	69
3.3.2 The ECJ Decision .....	71
3.3.3 Impact of the ECJ Decision in the UK Courts .....	72
3.3.4 Future Development of the Database Directive.....	74
<b>3.4 Some Practical Suggestions .....</b>	<b>75</b>
<b>4 DIGITAL MORAL RIGHTS: THE BASICS .....</b>	<b>78</b>
<b>4.1 What are Digital Moral Rights?.....</b>	<b>78</b>
4.1.1 Background .....	78
4.1.2 UK Law.....	80
<b>4.2 How are Digital Moral Rights Infringed?.....</b>	<b>81</b>
4.2.1 Right of Paternity.....	81
4.2.2 Derogatory Treatment .....	82
4.2.3 Moral Rights in the USA .....	84
4.2.4 Performers' Moral Rights .....	84
4.2.5 Implications of Moral Rights for the Digital Environment .....	86
<b>4.3 Dealing with Moral Rights in Practice .....</b>	<b>87</b>
<b>5 DIGITAL RIGHTS AND COMPETITION LAW .....</b>	<b>89</b>
<b>5.1 Overview: Competition Law and Digital Copyright .....</b>	<b>89</b>
<b>5.2 UK Competition Law .....</b>	<b>90</b>
5.2.1 The Competition Act 1998 .....	90
5.2.2 Restraint of Trade Doctrine .....	93
<b>5.3 EU Law.....</b>	<b>94</b>
<b>5.4 Penalties for Breaching Competition Law .....</b>	<b>94</b>
<b>5.5 Implications for Digital Copyright Businesses .....</b>	<b>95</b>
5.5.1 E-commerce Generally .....	95
5.5.2 Software and Other Digital Copyright Licences .....	95
5.5.3 Digital Copyright Distribution Agreements.....	97
5.5.4 Unfair Prices or Predatory Pricing.....	98
5.5.5 Maintenance.....	98
5.5.6 End-user Sales .....	99
5.5.7 Refusal to License Digital Copyright to Competitors .....	100
5.5.8 Excessive Pricing.....	104
5.5.9 Content Bundling.....	104
5.5.10 Exhaustion of Rights in Digital Copyright Products .....	105
5.5.11 E-books .....	108
5.5.12 Collecting Societies .....	109
<b>5.6 Concluding Comments .....</b>	<b>110</b>

<b>6</b>	<b>SOFTWARE COPYRIGHT</b> .....	<b>111</b>
6.1	<b>Code and Copyright: The Basics</b> .....	111
6.2	<b>The Software Directive</b> .....	113
6.3	<b>What Does Software Copyright Protect?</b> .....	116
6.3.1	<i>John Richardson Computers Ltd v Flanders</i> .....	117
6.3.2	<i>Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd</i> .....	118
6.3.3	<i>Cantor Fitzgerald v Tradition</i> .....	119
6.3.4	<i>Navitaire Inc v Easyjet Airline Co. &amp; Anor</i> .....	121
6.3.5	<i>Nova Productions v Mazooma Games; Nova Productions v Bell Fruit Games</i> .....	125
6.3.6	<i>SAS Institute Inc v World Programming Ltd</i> .....	127
6.3.7	<i>Software copyright following Cantor Fitzgerald, Navitaire, Nova Productions and SAS Institute</i> .....	131
6.4	<b>The Challenge of the Open Source Movement to Software Copyright</b> .....	133
6.4.1	Some Issues .....	133
<b>7</b>	<b>DIGITAL COPYRIGHT AND E-COMMERCE</b> .....	<b>135</b>
7.1	<b>Content Reuse</b> .....	136
7.1.1	Specific Issues for Audio-visual Content .....	137
7.1.2	Some Examples from the Case Law .....	138
7.1.3	Lessons to be Learnt .....	139
7.2	<b>Licensing and Linking</b> .....	140
7.2.1	Licensing Digital Copyright Works .....	141
7.2.2	Linking .....	144
7.3	<b>Digital Image Protection</b> .....	150
7.3.1	Copyright in Digital Images .....	150
7.3.2	Infringing Image Rights .....	152
7.3.3	Protecting Digital Images .....	152
7.4	<b>Lawful Use of Search Engines</b> .....	153
7.4.1	Background .....	153
7.4.2	The US Experience .....	154
7.4.3	<i>Kelly v Arriba Soft (USA)</i> .....	155
7.4.4	Practical Issues .....	162
7.5	<b>Napster, Grokster, MP3 and Beyond: A UK view</b> .....	163
7.5.1	The UK Position: Legal Overview .....	164
7.5.2	US Law .....	166
7.5.3	Napster, Grokster and Beyond .....	168
7.5.4	The UK Experience .....	171
7.5.5	Where To Next? .....	174

<b>7.6 Service Provider Liability</b> .....	174
7.6.1 Background.....	174
7.6.2 Clarifying the Position.....	175
<b>7.7 Standards and Web Content</b> .....	176
<b>7.8 Streaming Media and Digital Copyright</b> .....	177
7.8.1 Piracy and Streaming .....	178
7.8.2 Defences Against Piracy.....	178
7.8.3 Concluding Thoughts.....	179
<b>7.9 Technical Protection Measures and Fair Use:</b>	
<b>The End of Copyright?</b> .....	179
7.9.1 Background.....	179
7.9.2 The Position in the USA.....	180
7.9.3 The UK Position Prior to 31 October 2003 .....	182
7.9.4 The European Dimension .....	183
7.9.5 UK Implementation of Effective Technological Measures and ERMI.....	186
7.9.6 Technological Measures and Permitted Acts, Fair Use and Fair Dealing .....	189
7.9.7 The Future of Digital Rights Management (DRM).....	190
<b>8 DIGITAL COPYRIGHT, WEB 2.0, E-PUBLISHING AND APPS</b> .....	<b>192</b>
<b>8.1 Web 2.0 and Copyright</b> .....	192
8.1.1 Web 2.0 Legal Issues: Background .....	193
8.1.2 Dealing with the Issues: The Importance of Contractual and/or Licence Terms .....	193
8.1.3 Some Specific Issues .....	195
<b>8.2 Fair Dealing and Web 2.0</b> .....	196
8.2.1 Google Book Search.....	196
8.2.2 Google News.....	197
8.2.3 <i>Copiepresse v Google</i> .....	198
8.2.4 The UK Position .....	199
<b>8.3 Liability for Hosting and/or Distributing Infringing Content</b> .....	200
8.3.1 <i>Viacom v Google</i> .....	200
8.3.2 Co-regulation: A Future Approach to Illicit P2P Copying of Material? .....	201
8.3.3 Online Infringement and the Digital Economy Act.....	202
8.3.4 Injunctions Against Service Providers .....	203
<b>8.4 E-publishing</b> .....	204
8.4.1 Introduction .....	204
8.4.2 E-books.....	204
8.4.3 Open Access .....	206

xiv *Table of Contents*

<b>8.5 App Development and Licensing</b> .....	209
8.5.1 Introduction .....	209
8.5.2 App Development and Licensing.....	210
<b>9 PROTECTING AND MANAGING YOUR DIGITAL COPYRIGHT ASSETS</b> .....	<b>211</b>
<b>9.1 General</b> .....	211
9.1.1 Acquiring Rights: Ownership of Digital Copyright.....	211
9.1.2 Acquiring Rights: Licensing Digital Copyrights.....	212
9.1.3 Protecting and Exploiting Digital Copyrights .....	212
<b>9.2 Issues for Specific Industries</b> .....	213
9.2.1 General Industrial .....	213
9.2.2 Financial and Professional Services .....	214
9.2.3 Telecommunications and ISPs .....	214
9.2.4 Software and Computer Games .....	215
9.2.5 Publishing and Information Providers .....	216
9.2.6 Broadcasting, Entertainment and Music .....	217
9.2.7 Gaming and Betting .....	218
9.2.8 Auction Houses and Collectibles Sites .....	218
9.2.9 Museums, Galleries, and Picture Libraries .....	219
9.2.10 Pharmaceutical, Biotechnology and Bio-information/ Bio-informatics Industries .....	220
9.2.11 Universities/Higher Education Sector.....	221
<b>9.3 The Role of Collecting Societies in the Digital Environment</b> .....	222
9.3.1 The Future of Collecting Societies in the Digital Environment .....	223
9.3.2 The Major Collecting Societies in the UK .....	226
<b>9.4 Orphan Works, Extended Collective Licensing and Digital Copyright Exchanges/Copyright Hubs</b> .....	228
<b>9.5 Precedent Checklists and Precedents</b> .....	231
9.5.1 Checklist—Acquiring Software (Digital Copyright User Focus) .....	231
9.5.2 Checklist: Acquiring Internet Content (Digital Copyright User Focus) .....	233
9.5.3 Checklist: Digital Copyright Distribution and Licensing (Digital Copyright Licensor Focus) .....	234
9.5.4 Open Source Licences: Checklist of Licensing options.....	237
9.5.5 Creative Commons .....	240
9.5.6 Cloud Computing/Software as a Service (SaaS) .....	241



9.5.7 Linking Agreement.....	242
9.5.8 Website Terms .....	245
9.5.9 Sample Assignment of Copyright, Moral Rights Waiver/Assertion and Licence.....	249
<b><i>Index</i></b> .....	251