The Home Copying Loophole Widens: *Sony & Others* v. *Easyinternetcafé*

DOMINIC FREE and NIC GARNETT

The record industry[1] is engaged in a determined campaign to stop the unlawful copying of music files downloaded via the Internet. In *Sony & Others* v. *Easyinternetcafé* [2003] All ER(D) 249 proceedings were brought by several major record companies[2] to prevent Easyinternetcafé from providing a service copying music files onto CDs for its customers. The claimants succeeded in their aim. However the summary judgment which they obtained had a sting in the tail. It supports the proposition that there is an exception within which copying from the Internet is lawful.

The Facts

Easyinternetcafé offered a CD burning service at its Internet cafés. Customers could download files during their sessions surfing the Internet via one of its café's PCs. In return for payment of a £5 fee, staff at the café would save those files on a CD-R for the customer to take away.

Peter Smith J. accepted the claimants' evidence that files containing sound recordings had been downloaded and copied. The copyright in the sound recordings was owned by the claimant record companies. He also accepted Easyinternetcafé's evidence that its staff were not aware of the contents of the files downloaded because they were prohibited from looking at the contents of the files without the customer's agreement.

The Decision

Clearly there was unauthorised copying and distribution to the public of sound recordings in which the claimants owned the copyright. *Prima facie* there was an infringement of sections 17 and 18 of the Copyright, Designs and Patents Act 1988. The Internetcafé chain had two main lines of defence.

Dominic Free is a partner and Head of Media Litigation at the Simkins Partnership. Nic Garnett is a consultant specialising in digital media at the Simkins Partnership.

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The first was that the copying was 'involuntary'. The judge brushed this defence aside. Liability for copyright infringement is strict. It was no defence that the infringer did not know that he was infringing copyright. There should certainly not be an exception to this basic principle where, as in this case, the defendant chose not to know whether copying involves infringement.

The second line of defence was based on Section 70 of the Act. This section provides:

> The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable programme or any work included in it.

Easyinternetcafé maintained that the Internet was a form of cable programme service and that its customers were recording items from it for their private and domestic use.

The section 70 exception allows home recording of television and radio programmes. It is known as the 'time shifting' exception because it allows the making of copies of programmes for viewing or listening to at a later time.

This defence gave rise to two issues. The first was whether the copying which took place in this case was 'for private and domestic use'. The second issue was whether or not a music file downloaded from the Internet was a 'cable programme' or 'any work included in it'.

Not surprisingly Smith J. rejected the argument that the copying in this case was 'for private and domestic use'. He stated that

> The copying is done by the defendant and the defendant is not copying for the purpose of private and domestic use. It is copying for the purpose of selling the complete CD-R for £5. It is making a profit out of it. It does not seem to me to be relevant that the person for whom it is copied is going to use it for private and domestic use.

Although it was unnecessary for the judge to decide whether or not the Internet is a cable programme service he went on to do so. He approved the Scottish decision *The Shetland Times Limited* v. *Wills* [1997] EMLR 277 in which, on an interlocutory application, it was held that a website on which the operator posted news items was a cable programme service.

The *Shetland Times* case has received a mixed reception from textbook writers. It has been criticised by media lawyer Clive Gringras in his book *The Laws of the Internet*.[3] He rightly points out that a cable programme service is defined as 'sending visual images, sounds or other information by

means of a telecommunication system otherwise than by wireless telegraphy …', but few websites are 'sending' information to visitors. It is more technically correct to speak of information being retrieved from the website by the visitor.

However, other commentators, notably the authors of *The Modern Law of Copyright and Designs* who include the leading intellectual property Judge, Sir Hugh Laddie, have supported *The Shetland Times* decision.[4] This support is at least partly based on the pragmatic consideration that if the Internet does not fall within the definition of cable programme service there will be a gaping hole in the coverage of copyright law.

Peter Smith J. concluded that the decision in the *Shetland Times* case was correct, 'comforted by the fact that it is supported by Laddie'. Therefore, although it was not available to the defendant in this case the judge accepted that the section 70 exception could apply to material copied from the Internet.

How Wide is this Loophole?

The section 70 exception is only available to the extent that the particular Internet service from which the sound recording is downloaded falls within the definition of a 'cable programme service'.

A cable programme service, as defined in section 7 of the Act, means

> a service which consists wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception:
>
> (a) at two or more places … or
>
> (b) for presentation to members of the public … and which is not, *or so far as it is not*, excepted…

There are, as indicated, exceptions to this wide definition. It is important to note that the fact that part of a service falls within an exception does not mean that the entire service is outside the definition of 'cable programme service'. Part of a service may be within the definition and part outside it.

The significant exception[5] contained in section 7(2)(a), relates to interactive services. This means genuinely interactive parts of the service where customers send information back to the service rather than mere instructions as to what programmes they wish to see or hear. The wording of the section makes clear that the fact that there are 'signals sent for the operation or control of the service' does not bring it within the exception.

Given the liberal construction that the Courts appear inclined to give to this language, with the intention that websites and other Internet services will be afforded the protection of copyright law, many of the services available on the Internet are potentially within the definition of 'cable programme service' at least in part.

With this copyright protection also comes exposure to the section 70 exception. The wording of section 70 is not easy to apply. The reference to the making of a recording 'for private and domestic use' is readily understandable. It certainly encompasses home copying.

The requirement that the recording is 'solely for the purpose of enabling it to be viewed or listened to at a more convenient time' is another matter. It will be difficult to prove for what purpose a particular recording was made.

Recordings of one-off webcasts appear clearly to be covered. It is equally clear that recordings from 'on demand' services such as video on demand would be excluded. If a programme is available whenever a customer wants to watch or listen to it the purpose of copying it could not possibly be to watch or listen to it at a more convenient time.

There is however a substantial middle ground where material is available for downloading and it is not clear for how long it will be so available. Arguably all of this material may lawfully be copied for later viewing or listening.

The Implications

Rights owners have no love for the section 70 exception. Its introduction and the form in which it was introduced were at least partly dictated by a recognition on the part of law makers that home copying was in any event impossible to prevent. Parliament accepted that the equipment necessary to copy was widely and lawfully available and that the public was using and would continue to use it.

In consequence the film and television industries have had to suffer lost revenue from home copying of films and other programmes featured in television broadcasts. The music industry has suffered, initially to a lesser extent, from home copying of recorded music included in radio broadcasts.

Since the digital revolution of the 1990s the music industry has been hit hardest. Its main product – the CD – was vulnerable to illegal copying and distribution via the Internet. The arrival of cheap CD copiers exacerbated the problem by turning CD piracy, hitherto the preserve of organised crime, into a widespread cottage industry.

It is difficult to judge how significant this expansion of the section 70 loophole will be for the music industry. Its symbolic impact may be

considerable. Part of the music industry's campaign against copying of music files from the Internet has been advertising with the simple message that this copying is illegal. The Easyinternetcafé decision undermines that simple message because it supports the view that copying from the Internet is not always illegal.

A Change in the Law may be on the Way

The law of copyright within the European Union is about to change, again, pursuant to Directive 2001/29/EC of the European Parliament of 22 May 2001, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. The directive contains two articles particularly directed at the time-shifting exception. Their opaque wording certainly measures up to the brow-furrowing standards of previous directives.

Article 5(2)(b) states that member states may provide for exceptions to copyright 'in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial …'. This is conditional upon rights owners receiving fair compensation which takes into account whether technological measures are in place to prevent copying. Thus the continuation of the time-shifting exception has apparently been linked to 'compensation' for rights owners, to the extent that home copying cannot be controlled by technological measures.

Article 6 requires member states to provide legal protection against the circumvention of these kinds of technological measures. Article 6(4) provides that a member state may take measures to ensure that rights owners make available the means to take advantage of the time-shifting exception. Member states may therefore ensure that technological measures are not used to prevent copying which falls within the time-shifting exception.

Article 6 also provides that where works are 'made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them' the time-shifting exception will not be available. This appears designed to allow consumers and rights owners to contract out of the exception and to retain the exception within its existing boundaries excluding such 'on demand' services.

Conclusion

The debate over home copying continues in the corridors of power. The Easyinternetcafé case may provide the music industry with an argument that

the time-shifting loophole has opened too wide. The boundary between lawful home copying and home piracy has become confused. Parliament has now to decide where to redraw that boundary.

NOTES

1. The music industry has two main parts: the record industry, comprised of recording artists and their record companies, which exploits rights in sound recordings, and the music publishing industry, comprised of songwriters and their music publishers, which exploits rights in musical works, particularly through their incorporation on sound recordings. It is the record industry which has been leading the efforts to stop unlawful copying of recordings.
2. The 'major' record companies are Sony, BMG, Universal, EMI and Warners.
3. C. Gringras, *The Law of the Internet*, 2nd edn. (London: Butterworths, 2003), 229–30.
4. H. Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 3rd edn. (London: Butterworths, 2003), 418–19.
5. The other exceptions deal with cable systems which are not available to the public.