



# A layman's guide to EC law on digital preservation

Intellectual Property Rights  
and Digital Preservation

*Wills Hall, Bristol*

*21<sup>st</sup> November 2011*

**David Anderson**

Future-Proof Computing Group  
University of Portsmouth



# Background



Memory Organisations:



Commercial Organisations:



Game Developers:



University:



Legal Consultants:



KEEPING EMULATION ENVIRONMENTS PORTABLE

# Background

The KEEP project undertook legal studies to ensure:

- Our understanding of the law as it applies to digital preservation:
  - Generally
  - Media Transfer
  - Multimedia Works
  - Legal Deposit
- The tools and services we produce fall *clearly within* the law

The Legal Studies were/are not an end in itself, but a means to an end

- The law is *very complex* but.....  
the overall message is *relatively clear*



# Health Warning!

This is a **LAYMAN'S GUIDE** to the law



- To the best of our knowledge the report is legally accurate but.....
- The conclusions presented are **not** as subtle or nuanced as the advice which a lawyer would give
- Courts (not researchers) determine how the law is **actually** to be interpreted
- Our findings are **not legally definitive**





# A Complicated Legal Landscape



National Law

Community Law

International Law

Trade and other conventions

# The Legal Corpus: A problem of scale

## Legislation at the **National** Level (United Kingdom):

■ Keyword	Pieces of legislation
■ <i>Copyright</i>	>200
■ <i>Software</i>	>200
■ <i>Database</i>	167
■ <i>Intellectual Property Rights</i>	163
■ <i>Trademark</i>	74





# The EC Legal Corpus

Key Legislation at the Community Level includes:

## The Information Society Directive

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

## The Computer Programs Directive

Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (Codified version replacing the abrogated Directive 91/250/EEC of 14 May 1991)

## The Database Directive

Directive 96/9/EC of 11 March 1996 on the legal protection of databases

(Collectively referred to as the “Community Framework”)

# The EC Legal Corpus

Key Legislation at the Community Level also includes:

## Resale Rights Directive

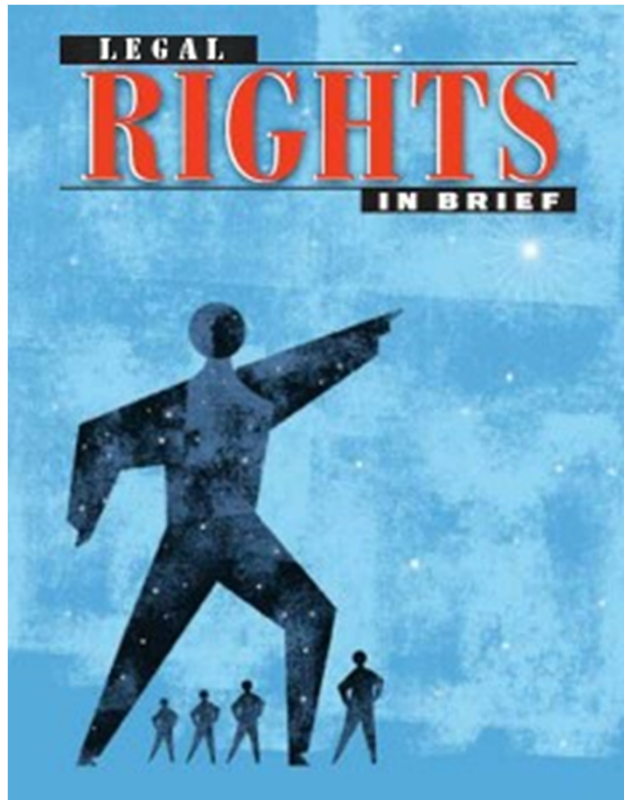
Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art

## The Rental Directive

- Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property")



# Protected Rights



The following rights are protected by European Union law:

Reproduction

Communication to the public

Distribution

Fixation

Rental / lending

# The three-step test

Exemptions to Copyright Protection will.....



- be confined to certain special cases
- not conflict with a normal exploitation of the work
- not unreasonably prejudice the legitimate interests of the rights holder

# Exceptions provided by the Information Society Directive

The Information Society Directive provides just one limitation to copyright protection:

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



*Often regarded by the academic community as a **victory for copyright-owning interests** (publishing, film, music and major software companies) over content users' interests*



# Exceptions provided by the Information Society Directive

The Information Society Directive allows Member states to make exceptions in 20 cases, of which 4 are relevant for KEEP

- *specific* acts of reproduction made by memory organisations, which are not for direct or indirect economic or commercial advantage
- *incidental* inclusion of a work in other material
- use in connection with the demonstration or repair of *equipment*
- making available, for research or private study, to *individual* members of the public by *dedicated terminals* on the premises of establishments



*All* are subject to the Berne '*three-step test*'

# Information Society Directive Legal Study Conclusions



- Important that Member States have no power to introduce new limitations not already included in the Directive.
- Media transfer should primarily be assessed under the **Computer Programs Directive** and the **Database Directive**.

# Exceptions provided by the Computer Programs Directive

The Computer Programs Directive provides three limitations to copyright protection:

- create any copies *necessary* to use the program and to alter the program within its *intended purpose* (e.g. for error correction)
- make a back-up copy for *personal* use
- decompile the program if this is *necessary* to ensure it operates with another program or device, but *not for any other purpose*.





# Computer Programs Directive Legal Study Conclusions

- **None** of the exceptions set out in the Directive serves the purposes of the KEEP project
- Directive **does not provide for legal deposit** requirements
- Directive **does not** provide for scientific, study or education purposes
- *Reproduction of computer programs carried out by memory organisations **even when authorized under national laws**, is in conflict with the Directive.*



# Exceptions provided by the Database Directive

The Database Directive permits Member States to provide limitations to copyright protection:

- in the case of reproduction for *private* purposes of a *non-electronic* database
- for the sole purpose of *illustration* for *teaching* or *scientific research*
- for the purposes of *public security*
- for the purposes of an *administrative or judicial procedure*



# Conclusions on Multimedia Works

The term 'multimedia work' has no clear legal definition.

Multimedia works are generally seen as 'complex' works.

A **distributive, fragmented** approach is adopted: each component part of a multimedia work must be considered separately.

In practice: The work **as a whole** enjoys the same protection as the **best protected of its parts**.

Little scope for economy of scale - **each work must be considered on its own individual merits**.





# Technical Measures of Protection (TMP)

Germany: Circumvention of TMP is illegal. Tools designed to circumvent TMP may be destroyed.

France: : Circumvention of TMP is a criminal act in general and it is not possible to bypass TMP on Multimedia works.

Netherlands: Legal scope exists to bypass TMP.... but in practice TMP has prevailed over the 'exceptions'.



KEEPING EMULATION ENVIRONMENTS PORTABLE

# Overall Legal Study Conclusions

- **None** of the exceptions set out at the EC level serves the purposes of the KEEP project
- EC Law **does not** provide for legal deposit requirements
- EC Law **does not** provide for scientific, study or education purposes across the full range required for KEEP
- Reproduction of computer programs and databases even when carried out by memory organisations and authorized under national laws, *is in conflict with EC Law*



# KEEP Workshop

## Cardiff 24<sup>th</sup>-25<sup>th</sup> January 2012

### Guest Speaker: **Professor Ian Hargreaves**



#### **Digital Opportunity: A review of Intellectual Property and Growth**

**An independent report by Ian Hargreaves**

**In November 2010 the Prime Minister David Cameron announced an independent review of how the Intellectual Property framework supports growth and innovation.**

**Chaired by Professor Ian Hargreaves and assisted by a panel of experts, the review reported to Government in May 2011. The Review makes 10 recommendations designed to ensure that the UK has an IP framework best suited to supporting innovation and promoting economic growth in the digital age.**





# KEEP

KEEPING EMULATION ENVIRONMENTS PORTABLE

Thank you!



Questions?



KEEP has received funding from the European Community's Seventh Framework Programme (FP7/2007-2013) under grant agreement n° ICT-231954

