BLACKSTONE'S GUIDE TO THE

COPYRIGHT, DESIGNS & PATENTS ACT 1988

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then, when that case was accepted, after further dallying with a limited right for a one or two-year period, the government finally accepted the case for a rental right for the full copyright term:

> We are now persuaded that some genuine objections need to be met. . . . Evidence from Japan suggests that over 90% of rented recordings are copied and this has had a serious effect on the record industry in Japan. If the Japanese experience were repeated here, it would entail lost sales of up to £200 million a year . . . Unless we [provide such a full exclusive right] . . . there will be a serious impact upon the industry. . . . The specific mischief that we seek to put right is that of rental shops which effectively rent for no purpose other than that of making possible illegal copying. These are the overnight-type rental arrangements whereby one rents a compact disc, tapes it and returns it the next day. (Mr Francis Maude MP, 24 May 1988.)

The new rental right has been effected by extending the scope of the exclusive right of copyright owners to 'issue copies to the public' so that in relation to *sound recordings, films and computer programs,* the restricted act of issuing copies to the public also includes 'any rental of copies to the public'. The definition of 'rental' is misleading. Section 178 defines 'rental' in terms of commercial rental but tucked away in sch. 7 are provisions extending the rental right to public libraries. Now, rental of copies of such works without permission infringes copyright and, on the same facts, the defendant in *CBS Inc.* v *Ames Records & Tapes Ltd* would be liable, assuming specific acts of unauthorised rentals could be established (see chapter 5).

It should be noted that the right to control the rental of sound recordings and films is conferred only on *producers* and not on authors (for example, composers) and performers. It was felt by the government that owners of these underlying copyrights are already entitled to prevent recording without consent and that if they also were given the new rental right, this might confer upon them too powerful control over the subsequent exploitation of their works. Thus, it is left for authors and performers to ensure that in their contractual negotiations with record and film producers, the royalty position with regard to rental is taken into account. This approach can be criticised on two scores: first, it is an interesting demonstration of the way in which the entrepreneurial copyright interests have been given greater protection than those of authors in the traditional sense; secondly, it is likely that, in practice, many authors and performers will not have sufficient bargaining strength to ensure that their contracts provide them with any, or a satisfactory, share in the proceeds of rental rights.

Licences of right (compulsory licences)

As a corollary to the creation of a rental right the Secretary of State now has power to introduce compulsory licensing of rental (s. 66): *in certain cases* there would be a right for persons to rent to the public copies of certain categories of products subject to the payment of a reasonable royalty (the Copyright Tribunal deciding on that in the case of dispute) and subject also to any licensing scheme that may have been brought into operation. The original government proposal was that this licence of right should arise in relation to all sound recordings, films