

**UK ARTS LAW UPDATE**  
**NEW CHALLENGES FOR LEGISLATION AND THE COURTS**

MIRA T SUNDARA RAJAN<sup>1</sup>

[339] It is a dynamic time of legal changes affecting the arts in the United Kingdom. However, it is not in the area of new policy developments that British law has made significant progress over the past year. Rather, the country has made strides in implementing a number of landmark initiatives undertaken in the past several years, and relating to a great diversity of legal fields. Notably, the UK has seen substantial progress on a new Communications Bill.<sup>2</sup> It has also introduced new cultural property legislation that solidifies its practical commitment to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).<sup>3</sup> The UNESCO Convention is the primary international instrument addressing the illicit trade in art and antiquities. When the UK, one of the world's top 'art market' countries and a favoured destination for stolen and illegally exported cultural property, became a member in 2001, its decision signified a major step forward for the international protection of cultural heritage.<sup>4</sup>

In addition to these areas, copyright law, perhaps the most powerful legal framework for the protection of the arts in the United Kingdom, is also in a state of flux. At the legislative level, the implementation of the EU Harmonization Directive on 'Copyright in the Information Society', is a priority.<sup>5</sup> However, the British Patent Office, like some of its Continental counterparts, is facing [340] unexpected difficulties in its efforts to bring UK law into conformity with its provisions, leading to delays in this process. It seems likely that revisions to British copyright law to meet the requirements of the Directive will not be as superficial as they may have seemed at first glance, instead, raising some

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<sup>1</sup> BA (Hons) (McGill/Paris), LLB (Osgoode), LLM (UBC), DPhil (Oxon). The author currently holds the position of Herchel Smith Fellow in Intellectual Property Law at the Intellectual Property Research Institute, Queen Mary, University of London.

<sup>2</sup> The Bill received royal assent on July 17, 2003, and has become law as the *Communications Act 2003* (UK) c 21; available online at <<http://www.hmso.gov.uk/acts/act18-07.htm>>.

<sup>3</sup> Opened for signature, Paris, 14 November 1970, 10 ILM 289 (entered into force 24 April 1972).

<sup>4</sup> For a discussion of the issues surrounding the *UNESCO Convention*, see Patrick J O'Keefe, 'Unlawful traffic in cultural heritage and UNESCO' (2001) 6(2) *Media & Arts Law Review* 139, 140.

<sup>5</sup> Directive 2001/29/EEC of the European Parliament under the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (22/06/2001), OJ L167/10. The directives are available online through the EU database of Community Legislation in Force, Eur-Lex: <<http://europa.eu.int/eur-lex>>.

interesting problems around the common law treatment of copyright in the internet age.

At the same time, protection of the arts through UK copyright law may have had an unusual opportunity to move forward through the courts. A rather surprising — or 'surreal' — moral rights case has emerged from the 'rap' music industry. It is one of the first cases of its kind in the UK, and raises a number of interesting issues related to the future of the moral right of integrity in UK law, set out in s 80 of the *Copyright, Designs & Patents Act 1988* (UK).

### **The Communications Act 2003**

On 17 July 2003, after steady development over the past year, the new *Communications Act 2003* (UK) became law. The legislation was introduced, in part, to bring UK media regulation into line with European Union Directives in this field — in particular, by replacing the existing system of telecommunications licenses in the UK with a new regime for 'electronic communications networks [and] services' corresponding to the European standards.<sup>6</sup> However, the scope of the Act far exceeds these requirements. With this legislation, the British government has attempted to create a fundamentally new framework for the regulation of broadcasting media in the UK.

The principal innovations introduced by the Act are, first, to streamline the administrative aspects of broadcasting regulation, by creating a single regulator to deal with diverse elements in the broadcasting sector, including television, radio, and telecommunications: the Office of Communications (OFCOM). OFCOM replaces five previously existing regulatory agencies.

Secondly, the Act introduces a more competitive approach to the rules on media ownership, including the removal of nationality requirements which were previously important.<sup>7</sup> In addition to these changes, the legislation attempts to rationalize the regulation of commercial broadcasting, and introduces greater self-regulation in the public broadcasting sector. The Act also attempts to offer a new awareness of the

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<sup>6</sup> See the discussion in 'Communications Act Gets Royal Assent', Department for Culture, Media and Sport archive 2003, 83/03, 17 July 2003, available online: <[http://www.culture.gov.uk/global/press\\_notices/archive\\_2003](http://www.culture.gov.uk/global/press_notices/archive_2003)>.

<sup>7</sup> See Mira T Sundara Rajan, 'A Time of Change in the United Kingdom' (2002) 7(3) *Media & Arts Law*

vulnerability of consumers' and citizens' interests in an era of vastly increased information flows that are likely to be correspondingly difficult to monitor and control. The legislation is expected to revolutionize the British broadcasting industry and, in particular, it is hoped that the new framework will help Britain to develop a competitive and successful broadcasting sector in the 'Digital Age'.

While the *Communications Act* is not directly related to artistic creation, it regulates the environment in which creative work is publicized and disseminated, and, in the age of 'interactive' and digital technology, in which it may eventually be transformed into a new shape by subsequent 'users' or the public at large. The changes introduced by the new Act ultimately seek to facilitate the flow of information through digital technology, while protecting both the rights of those who create works of knowledge and the interests of consumers. As such, the new legislation is highly significant for the arts and arts industries in the UK, and indeed, it is likely to have a major impact on the world of artistic creation for some time to come.

### **Cultural Property Law: Dealing in Cultural Objects (Offences) Bill**

UK membership in the UNESCO Convention signalled the beginning of an era in which the British government would adopt a stance of greater responsibility towards the illicit international trade in cultural property. The UNESCO Convention has long been seen by art source countries, many of whom are in the developing world, as an important tool for the protection of their cultural heritage from the dangers of illicit trafficking. However, the UNESCO Convention has often been resisted by art market [341] countries, who have perceived its measures as a threat, both to their lucrative art trade, and to their own holdings of cultural heritage, which generally include a significant proportion of cultural property from abroad. The decision of the United Kingdom to join the Convention therefore represented a significant international commitment to combating this illicit trade.

A number of developments over the past year reveal Britain's activism in this area, both at the domestic level and on the international scene. For example, the British Museum has been a primary source of assistance to Iraq in the preservation of its heritage from

looting following the military action against Saddam Hussein's regime, while the Department for Culture, Media and Sport — the UK government ministry responsible for a variety of cultural matters, including cultural property — has attempted to intervene and prevent Iraqi cultural objects from finding their way onto the international art market.<sup>8</sup> Within the UK, the Treasury has initiated a consultation process on taxation and funding for museums in July 2003, in order 'to help them acquire works of culture and distinction that might otherwise be sold abroad, and to make those items accessible to the public.'<sup>9</sup>

Britain has also initiated new legislation to support its membership in the UNESCO Convention, the Dealing in Cultural Objects (Offences) Bill.<sup>10</sup> The purpose of the Cultural Objects Bill is to create a specific offence of "dealing in" cultural property that is 'tainted'. The creation of this new criminal offence was recommended by the Illicit Trade Advisory Panel, a panel of experts that initially advised the British government on UNESCO membership.<sup>11</sup> The advantage of the Bill is to remove cultural property offences from the general ambit of theft, or dealings with stolen property.<sup>12</sup> Rather, the Bill attempts to accommodate the peculiarities of cultural property offences, for example, by specifically making it an offence to remove cultural property against the law of any country, and by providing a broad definition of types of objects that may become the subject of an offence, reflecting the great variety of property that may be culturally important. Dealing in tainted cultural objects may potentially lead to a term of imprisonment of six months to seven years.<sup>13</sup>

Like the UNESCO Convention itself, the criminal offence created by the Bill cannot be applied retroactively. It is not therefore relevant to the illicit or unethical removal of cultural property in the past, an unsurprising but, from the perspective of art source

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<sup>8</sup> The matter is discussed by Mr Rammell in the House of Commons debates for June 4, 2003. *Hansard*, 4 June 2003: Column 286.

<sup>9</sup> HM Treasury, July 2003, *Goodison Review: Saving art for the nation — Consultation Document*. The Consultation paper is available online: Department for Culture, Media and Sport, <[http://www.culture.gov.uk/cultural\\_property/default.htm](http://www.culture.gov.uk/cultural_property/default.htm)>.

<sup>10</sup> A copy of the Bill is available online, although it is updated only to 24 January 2003: see Department for Culture, Media and Sport, <[http://www.culture.gov.uk/cultural\\_property/default.htm](http://www.culture.gov.uk/cultural_property/default.htm)>.

<sup>11</sup> The work of Advisory Panel is discussed in Sundara Rajan, above n 7, 242–5.

<sup>12</sup> The Institute of Art and Law observes that this may not be necessary, since 'the existing offence of handling stolen goods ... can apply to things stolen under the law of an overseas country.' See *IAL Newsletter*, September 2002, online: <<http://www.ial.uk.com/news/nw.htm>>.

<sup>13</sup> As of the January 2003 amendments, n 10 above.

countries, potentially disappointing feature of the legislation. One member of Parliament commented, '[I]t is a matter of regret that [the Bill] does not deal with matters such as the Parthenon sculptures. If the Bill had been in force 200 years ago, would Lord Elgin have been committing a criminal offence?'

[342] The Bill received its third reading on 4 July 2003, when a series of amendments to the draft was considered and finalized. In particular, the offence itself was defined in sufficiently narrow terms to meet concerns about the potential reach of the Bill among a number of groups, notably, the British Art Market Foundation.<sup>14</sup>

## **Copyright and Moral Rights**

### ***Implementation of EC Directives in UK Law***

As in the field of cultural property law, changes to UK copyright legislation are largely driven by international developments in this field. The UK is currently undertaking reforms to its copyright law based on two European directives: the 'Information Society' directive of 2001, and the directive on 'droit de suite', adopted on 19 July 2001.<sup>15</sup>

The Directives stand in interesting contrast to one another. The Information Society legislation is one in a series of six harmonization directives related to copyright, adopted over the past decade, and it is perhaps the most ambitious copyright harmonization initiative to date. The Directive attempts to reshape copyright to meet the challenges of digital technology, introducing a broad right of 'communication to the public', including 'on demand' and individual access to copyright works via the Internet. It attempts to harmonize the reproduction right, as well as the rights of distribution and communication to the public — as Michael Hart points out, rights that constitute the very 'core' of copyright protection.<sup>16</sup> From a UK perspective, however, bringing copyright law into conformity with this directive should present relatively straightforward problems of a technical, rather than a policy, nature.

Unlike the broad reach of this Directive, the directive on 'droit de suite', deals with a

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<sup>14</sup> See the discussion and comments of Mr Allan in *Hansard* 4 July 2003: Column 659.

<sup>15</sup> 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 (13/10/2001), OJ L272 ('Directive on Droit de suite').

<sup>16</sup> M Hart, 'The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame About the Exceptions' [1998] *European Intellectual Property Review* 169, 169.

specialized and narrow aspect of copyright: an artist's resale right that allows visual artists to collect a small proportion of proceeds from sales of their work subsequent to the initial sale, and which is essentially based on a recognition that the value of artworks tends to increase over time. While the introduction of this right into UK law may not be an especially complex matter from the perspective of legislation, it involves a thorny tangle of policy issues. In contrast to Continental European countries, common law copyright has always been associated with resistance to 'personal' rights for authors, and the *droit de suite*, although commercial in effect, is generally considered to fall within this genre. For this reason, the UK has been allowed to delay significantly its implementation of this Directive, until 2006 — or 2012, in the case of the works of an artist who is already deceased — and it is expected that the British Patent Office will undertake widespread consultations among the arts industries before making proposals for implementing this right.

In keeping with the EU requirement, the British Patent Office set an initial target of December 22, 2002 for implementation of the Information Society Directive. Since then, however, the deadline has been extended twice, at first, to the end of March 2003, and since then, until further notice.<sup>17</sup> Areas that have proven to be problematic include, not surprisingly, art 3 of the Directive, on the right of communication to the public, particularly via electronic technologies. The British Patent Office cites the difficulty of dealing with the Internet, and distinguishing between different forms of broadcasting and publication [343] activities, as a particular problem. It may be interesting to consider whether the new communications regulation can help to clarify these issues. Article 5 of the Directive, on exceptions to the rights, is a complex section, and one that is also problematic in UK law. Similarly, art 6 of the directive, which looks, in part, at the relationship between so called 'anti-circumvention measures' — technological methods of ensuring that a work cannot be available for unauthorized use — and exceptions to copyright, is also at issue.

### ***Copyright and Moral Rights in the Courts: Confetti Records***

Moral rights have long been well established in Continental legal traditions, where they

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<sup>17</sup> See British Patent Office, 'Implementation of the Copyright Directive' (2001/29/EC), 15 July 2003 update, <<http://www.patent.gov.uk/copy/notices/2003/implementation.htm>>.

protect a number of non-property, 'personal' interests of authors. Based on their presence in European legislation, they have also been a recognized part of international copyright law since their incorporation into the *Berne Convention for the Protection of Literary and Artistic Works* in 1928. The *Berne Convention* recognizes two moral rights, a right of attribution, which ensures that an author's work is attributed to him by name, and a right of integrity. The integrity right allows an author to protest any 'distortion, mutilation or other modification of, ... or other derogatory action in relation to', the work, but only if the mistreatment 'would be prejudicial to his honour or reputation.' The Berne standard is a minimum standard, and many countries, of which France is foremost, allow an author to protest any modification of their work, without a requirement regarding its impact on their reputation.

The *Berne Convention* has now been superseded as the primary instrument of international copyright law by the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs Agreement), one of the founding instruments of the World Trade Organization (WTO). The TRIPs Agreement requires member countries to make provision in their legislation for the protection of the moral rights set out in art 6bis of the *Berne Convention* — although these rights are not subject to the dispute settlement and enforcement mechanisms of the WTO system.<sup>18</sup>

The moral rights of authors were included in UK copyright legislation for the first time in the *Copyright, Designs & Patents Act 1988* (UK).<sup>19</sup> The presence of moral rights in UK copyright law signified a fundamental change of policy towards these rights. Previously, although the UK was a signatory to the *Berne Convention*, the British government had argued that the moral interests of authors received adequate protection through traditional tort actions, such as defamation and injurious falsehood. The decision to introduce moral rights into the new copyright legislation was a product of many factors. It is clear, however, that the influence of international copyright was very strong: the fact that moral rights are mentioned in the *TRIPs Agreement* led to a review of UK compliance with the *Berne Convention*, which was found to be unsatisfactory.<sup>20</sup>

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<sup>18</sup> See TRIPs Agreement, art 9.1.

<sup>19</sup> See above n 5.

<sup>20</sup> See Irimi A Stamatoudi, 'Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators' (1997) 4 *Intellectual Property Quarterly* 478, 488. A general critique of the moral rights

However, the form in which moral rights were eventually expressed in UK copyright reflects the traditional ambivalence of British law towards them. Moral rights are subject to a rigorous regime of conditions, limitations, and exceptions, leading observers to wonder how effective these rights are likely to be in practice. For example, in order to protect his attribution right in court, an author must have asserted it at the [344] time of publication — an unheard of requirement in Continental law, where moral rights, which are rights that are personally associated with the author, are natural rights that he enjoys automatically.<sup>21</sup>

The integrity right, protected in s 80 of the *Copyright, Designs & Patents Act*, generally follows the Berne formula by requiring proof of damage to an author's reputation. However, the right is known as a 'right to object to derogatory treatment of [the] work', suggesting that the requirements of proof to establish a violation of the integrity right may be very stringent.

While UK legislation on moral rights is unusually restrictive, it is nevertheless apparent that, in the common law tradition, the ultimate reach of the provisions may depend on the approach to interpretation adopted by the courts. In fact, moral rights cases in the UK have been quite rare; but a recent case arising out of the music industry provided an opportunity to develop some principles related to the integrity right. The ruling suggests that, indeed, it will be difficult for an author to make a successful moral rights claim before the British courts. Moreover, the High Court of Justice, Chancery Division, may have missed an opportunity to develop a socially useful approach to moral rights interpretation.

The *Confetti Records* case involved a dispute between musicians in the rap music industry — specifically, a kind of music known as 'garage', and, in this case, 'UK Garage' or 'Speed Garage'. Andrew Alcee, one of the claimants, had composed a song called 'Burnin'', which was purchased by Confetti Records. Confetti was a record

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provisions is offered by William R Cornish, 'Moral Rights under the 1988 Act' (1989) 11(12) *European Intellectual Property Review* 449.

<sup>21</sup> See *Copyright, Designs & Patents Act 1988* (UK) s 78. Indeed, this is generally true of economic copyright, as well: among Western countries, only the United States has continued to retain a registration

company specializing in UK Garage music, and planned to have the song recorded by a 'concept group' that it had created. The 'concept group' was called 'Ant'ill Mob'; it was 'promoted and known by [its] name, sound and image', rather than being associated with specific performers.<sup>22</sup> Rather, on performance occasions, musicians were hired by Confetti Records for that particular session.

Over a series of recording and release versions undertaken by Alcee and Confetti Records, 'Burnin'' eventually proved to be very successful, and, in November 2001, it reached the No 1 spot on the charts for UK Garage music. At this point, a UK Garage group called 'The Heartless Crew', which had recently been signed by East West Records, became interested in the song. They wanted to use the track in their special remix process, which they called 'Crisp Biscuit', adding their own 'rapping' over the mix to create a new song. In January 2002, Confetti Records agreed to license the track to The Heartless Crew for a fee. However, later that month, Confetti Records decided that it did not want to go ahead with the deal, after all, and tried to withdraw its permission to use the track. Through a miscommunication, the withdrawal notice did not reach East West. Nevertheless, in May, Confetti Records succeeded in obtaining an interim injunction against distribution of The Heartless Crew's recording, until the dispute was resolved in court.

Initially, Judge Lewison of the Chancery Division had to determine whether a contract for the use of the song had actually been concluded between the parties. In fact, all of the arrangements were carried out on the basis of an initial letter containing the terms of the agreement, but stating that the agreement was ultimately 'subject to contract'. The standard terminology was not actually understood by the person who sent the letter and, for whatever reason, an official contract was never issued. However, based on the conduct of the parties, Judge Lewison was able to conclude that, in spite of this situation, a contract had, in effect, been concluded between the parties.<sup>23</sup>

Somewhat more unusual was the moral rights claim, brought by Alcee, the original composer of the track. Alcee argued that his moral right to object to the derogatory

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requirement for the enjoyment of copyright into modern times.

<sup>22</sup> *Confetti Records* [2003] EWCH 1274 (Ch) [3].

<sup>23</sup> This aspect of the case receives a detailed treatment in CONSEJO — Intellectual Property & Legal Commentary, 'Licensing Law, Copyright Law, Moral Rights — UK Court Decision Dismisses Claim

treatment of his work has been violated by the rap lyrics used by The Heartless Crew in their re-mix of the song. Alcee associated the [345] terms used by the Crew with drugs and violence, and therefore felt that his composition had been subject to derogatory treatment.

This claim presented the court with a number of difficulties. In particular, The Heartless Crew had used a number of special terms and phrases in their rapping, a few of which appear to have originated with the rappers themselves. The Court was therefore unsure of the meaning of the expressions, which they attempted to clarify by consulting an online 'urban dictionary'. Judge Lewison commented, 'This led to the faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as "mish mish man" and "shizzle my nizzle".'<sup>24</sup>

For a number of factual reasons, Judge Lewison felt that Alcee's claim could not be tenable. Most importantly, even with the assistance of the dictionary and some comments by one of the owners of Confetti Records — which, as the Judge pointed out, technically amounted to hearsay evidence that should not be admissible — the exact meaning of the phrases that had been used could not be clarified. In certain cases, the Judge concluded that they were harmless — for example, 'shizzle my nizzle' was said to mean 'for sure' — while others were subject to interpretation — for example, in his view, 'string dem up' could refer to capital punishment rather than 'an invitation to lynching'.<sup>25</sup> The Judge suggested that expert evidence in the case may have been helpful, 'although the occasions on which an expert drug dealer might be called to give evidence in the Chancery Division are likely to be rare.'<sup>26</sup> At the same time, although the rapping was technically in the English language, much of it was so esoteric as to be 'for practical purposes a foreign language' — while the nature of the music made it difficult, in any case, to hear what the rapper was saying.

In the Judge's view, all of these considerations made an allegation of derogatory treatment of the work that was damaging to the author's reputation or 'honour' difficult to prove. Judge Lewison also took a strict view of the language of s 80. The section states

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or Garage Music Track', <[http://consjo.blogspot.com/2003\\_06\\_08\\_consejo\\_archive.html](http://consjo.blogspot.com/2003_06_08_consejo_archive.html)>.

<sup>24</sup> Quoted in *BBC News Online*, 'Rap lyrics confound judge', 6 June 2003: <<http://news.bbc.co.uk/1/hi/entertainment/music/2966646.stm>>.

<sup>25</sup> *Confetti Records* [2003] EWCH 1274 (Ch) [156].

that the treatment of a work will be derogatory if 'it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author.'<sup>27</sup> According to the Judge, the appearance of the word 'otherwise' clearly indicates that the mistreatment in question must be prejudicial to the author before he can take legal action; yet Alcee had not demonstrated such damage, or even, a clear basis for it to have occurred. On these counts, Alcee's action under s 80 of the *Copyright, Designs & Patents Act* failed.

The ruling in this case will have a number of implications for future moral rights cases in the UK. Claiming a violation of the integrity right will depend on the author's ability to prove that his reputation — or, potentially, honour — has been affected. The burden of proof borne by the author will be quite heavy, particularly if the art form or activity in question is somehow esoteric: he may have to call expert witnesses to clarify the nature of the mistreatment to the court.

In the *Confetti Records* case, the Court also missed an important opportunity to further a policy of involving artists in maintaining the quality of work that is released to the public. Alcee's objection to lyrics that he felt were inappropriate was very much in the broader social interest. However, public interest considerations like these may not feature heavily in UK moral rights decisions to come. On the other hand, the judge may have felt that, in this particular case, the rap lyrics in question [346] simply did not encourage or incite the public in any way to violent or abusive behaviour, while the plaintiffs had something to lose from a commercial standpoint. In any case, some reference to the public interest element in this moral rights claim could have made a substantial contribution to the status of moral rights in the UK, regardless of the final outcome of this particular case.

## **Conclusion**

Current legal developments have created a dynamic environment for the arts and art industries in the UK. A wide range of arts related legal disciplines are affected, ranging from copyright and moral rights law, to communications legislation. Above all, UK law

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<sup>26</sup> Ibid [154].

<sup>27</sup> Section 80(2)(b).

is likely to continue to be in a state of flux for some time to come, as international developments in the EU and elsewhere affect the United Kingdom. In particular, the WIPO Internet Treaties have come into effect in 2002, setting a new standard for copyright and broadcasting regulation in the 'Internet Age' — for example, in the creation of a moral right for performers for the first time in international copyright law — a new regulatory approach that the UK will almost certainly aspire to be part of eventually.<sup>28</sup>

Given the common law tradition, courts in the UK are also a potential source of change in the legal treatment of the arts. The recent *Confetti Records* case reveals some of the interesting ways in which courts can influence copyright law and policy. However, the role of the courts in interpreting the law to keep pace with technological and social developments has yet to be fully realized, with policy initiatives in the UK continuing to emanate primarily from legislative sources.

Areas to watch in the future include the developing commitment of the UK government to cultural heritage issues, at both the domestic and international levels, and the UK regulatory response to international harmonization processes, whether in copyright or communications law, including the EU regime, and other, less direct influences via the WTO and WIPO. Finally, how is UK copyright culture likely to develop in the coming months and years? A more consistently favourable approach to the interests of authors and artists may well become a necessary companion to the progress of the 'Digital Age'.

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<sup>28</sup> The two treaties known collectively as the 'Internet Treaties', are the *WIPO Copyright Treaty* and *WIPO Performances and Phonograms Treaty*, adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva; on December 20, 1996. They are available in the WIPO Collection of Laws for Electronic Access, online: <<http://clea.wipo.int>>. The *WIPO Copyright Treaty* entered into force on March 6, 2002; the *WIPO Performances and Phonograms Treaty*, on May 20, 2002.