

Implementing the EU Copyright Directive



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Introduction

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Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society has proven more contentious than its drafters foresaw. This EU Copyright Directive (EUCD), as it is commonly known, allowed only 19 months for implementation by Member States. But controversy in many of the fifteen States meant that only Denmark and Greece met this deadline.

Given the experience in the United States with a similar piece of legislation passed in 1998, this may be less surprising than it seems. The EUCD and the US Digital Millennium Copyright Act (DMCA) both give new protection to “technological measures:” systems that restrict the use of literary and other works in digital form based on instructions from their owners. Even legitimate users of such works are forbidden from circumventing such measures. Tools that facilitate circumvention are also banned. This has led to problems in the US for innovators, researchers, the press, and the public at large.

This guide describes the debate that has occurred within each of the EU states during this process of implementation. It also describes the options that are available in implementation, and how these options have been exercised across the EU. Our aim is to provide information to government and civil society bodies in the countries that will be joining the EU during 2004, and hence who must also transpose the Directive into national law as part of that process. These organisations will then be in a better position to represent the views of copyright users in the debate over transposition, in order to ensure a proper balance between the rights of rightsholders and users.

The European Commission is due to report on the operation of the Directive in December 2004, after which amendments may be made by the Parliament and Council. Until then, careful use of its flexibility in implementation may prevent the recurrence in Europe of some of the problems seen in the US as a result of the DMCA.

The guide will be updated to provide further information as the legal situation evolves, particularly in those countries that have only very recently, or are yet to, publish draft legislation (Ireland, Luxembourg and Sweden.)

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The Foundation for Information Policy Research is an independent body that studies the interaction between information technology and society. Its goal is to identify technical developments with significant social impact, commission and undertake research into public policy alternatives, and promote public understanding and dialogue between technologists and policy-makers in the UK and Europe. The majority of its recent work has been on surveillance, copyright, medical privacy and electronic voting. FIPR is a member of European Digital Rights (EDRi) and the Global Internet Liberty Campaign (GILC). Its homepage is at <http://www.fipr.org/>

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Background

The World Intellectual Property Organisation is the part of the United Nations system responsible for administering various treaties on patents, trademarks, designs – and copyright. WIPO and its forerunner organisations are 120 years old. From the Paris and Berne conventions agreed in 1883 and 1886, WIPO now administers 23 treaties on a wide range of intellectual property¹.

WIPO decided in 1989 to investigate the impact of computers and communications networks upon copyright. Annual meetings of experts were held over the next seven years, culminating in the agreement of the WIPO Copyright Treaty² and Performance and Phonogram Treaty³ in December 1996 by representatives of the 160 member states. These treaties have provided the impetus for many nations around the world to update their copyright laws.

Meanwhile, the Agreement on Trade-Related Aspects of Intellectual Property Rights⁴ (TRIPS) was agreed as part of the treaties establishing the World Trade Organisation in 1994. This was the result of a strategy by United States business to move intellectual property policy development away from WIPO, where developing nation members had different views on the value to their economies, cultures, education and healthcare systems of strong intellectual property rights. The US and later the European Union put sustained pressure on other parties to the WTO treaties to accept strong private rights in TRIPS⁵.

TRIPS covers a wide range of intellectual property, from geographical indicia to integrated circuit layouts. But like the WIPO Copyright Treaty, its provisions on copyright are largely based upon the Berne Convention for the Protection of Literary and Artistic Works⁶. Its most important feature is its binding nature upon all WTO members. Breaking its provisions may lead to trade sanctions being imposed through the WTO Dispute Settlement process⁷.

The United States also uses the absence of “adequate and effective” protection for intellectual property rights as one of the criteria for imposing trade sanctions under the “Special 301” procedure introduced by the Omnibus Trade and Competitiveness Act of 1988⁸. The US used this procedure to remarkable effect in negotiating TRIPS⁹, and has since been using it to impose additional “TRIPS plus” requirements on other nations in parallel with their inclusion in bilateral free trade agreements¹⁰.

Against this background, the EU embarked upon a process to update and harmonise its member states’ laws on copyright and related rights. The EU single market is the European Commission’s most cherished achievement, and the Commission is always keen to “tidy up” disparities between national laws that inhibit the functioning of this market. Differing copyright regimes were seen as a clear obstacle to European trade. The Commission therefore developed a draft Directive on the subject between 1997 and 2000.

As with the development of the Digital Millennium Copyright Act in the US, rightsholder organisations saw the opportunity for a second chance to push proposals that had been rejected by the diplomatic conference that led to the WIPO treaties. In particular, they were keen to reintroduce the detailed anti-circumvention rules previously proposed by the US but rejected in

¹ “About WIPO”. See http://www.wipo.org/about-wipo/en/index.html?wipo_content_frame=/about-wipo/en/gib.htm

² “WIPO Copyright Treaty” (1996). Available from <http://www.wipo.int/treaties/ip/wct/index.html>

³ “WIP Performances and Phonograms Treaty” (1996). Available from <http://www.wipo.int/treaties/ip/wppt/index.html>

⁴ “Trade-Related Aspects of Intellectual Property Rights”, Annex 1C, Marrakesh Agreement Establishing the World Trade Organization (1994). Available from http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

⁵ Peter Drahos with John Braithwaite, “Information Feudalism”, London: Earthscan Publications, pp.108–149 (2002)

⁶ “Berne Convention for the Protection of Literary and Artistic Works”, as amended (1979). Available from <http://www.wipo.int/treaties/ip/berne/index.html>

⁷ “WTO Dispute Settlement Gateway”. See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

⁸ 19 U.S.C. § 2411. See section IV of the Department of Commerce commentary at <http://www.osec.doc.gov/ogc/occic/301.html> (2001)

⁹ *Supra* note 5 pp.99–107

¹⁰ See for example the May 9 2003 letter from US Representatives Lofgren and Boucher to the Secretary of Commerce, available at <http://www.techlawjournal.com/cong108/ftas/20030509.asp>

favour of the simpler and more flexible language of Articles 11 and 18 of the final WIPO Copyright and Performance and Phonogram treaties¹¹.

The developing nations who forced the WIPO compromise¹² were missing from this second round. Copyright user organisations were also grossly underrepresented compared to the number of industry lobbyists in Washington DC and Brussels. Unsurprisingly therefore, both the EU and US ended up with legislation specifically outlawing acts of circumvention and circumvention devices, rather than concentrating on acts of copyright infringement.

Problems in the United States

The Electronic Frontier Foundation has documented numerous problems that anti-circumvention provisions in the Digital Millennium Copyright Act have caused in the US for legitimate users of copyright works¹³. These provisions contain almost identical language to that of the EU Copyright Directive.

Most obviously, the lack of a “legitimate fair use” exception to the DMCA anti-circumvention provisions is already preventing users of works from exercising their rights. Millions of copy-protected CDs are in circulation around the world. It is illegal in the US to circumvent the protection to make a personal copy in another format, such as on a portable MP3 player, or to collect songs by different artists together on a mix CD or tape. The developers of tools allowing the “time-shifting” of streaming media have been threatened and restrained by injunctions. And the author of a tool that allows font designers to enable the embedding of their own fonts in documents was threatened several times under the DMCA.

Free expression has been more widely threatened. Microsoft threatened the Slashdot website after one of its readers republished an access-controlled but public document from the Microsoft website. The DeCSS tool, which allows Linux users to watch legitimately-acquired DVDs, has come under sustained attack by the movie industry. Its developers and web sites containing – and even linking to – the program have been sued. The Russian author of a tool that allowed protected Adobe e-Books to be converted to the more flexible Portable Document Format was jailed for several months after visiting Las Vegas to speak about his work at a conference. Some non-US researchers are now boycotting the country to avoid similar problems. IEEE, the largest publisher of computer science journals, even worried that it might be liable for security articles carried in those journals. It attempted to force authors to accept liability under the DMCA for their work, but an outcry from members prevented this change.

Further problems have been encountered by researchers. An investigation into the problems of filtering software was blocked because the software developer claimed that its encrypted list of filtered sites was protected under the DMCA. A journalist gathering information on airport security was prevented by DMCA worries from using anonymously-provided passwords to read government documents.

The security research that is vital to the safety of critical information infrastructures is particularly at risk, as it examines the strength of mechanisms that may be used in some technological protection measures. This was emphasised by Richard Smith, the adviser to the US President on cyber-security, who said: “I think a lot of people didn't realize that it would have this potential chilling effect on vulnerability research.”

The best-known case is of Princeton professor Ed Felten and his research team, who found problems with rights management information systems proposed for use by the music industry. The Recording Industry Association of America threatened each of the researchers, their employers, and the organisers and hosts of a technical workshop where they were due to present

¹¹ Jessica Litman, “Digital Copyright”, Amherst: Prometheus Books (2001) pp.128–130

¹² Pamela Samuelson and John Browning, “Confab Clips Copyright Cartel”, *Wired* 5.03 (1997). Available from <http://www.wired.com/wired/archive/5.03/netizen.html>

¹³ Electronic Frontier Foundation, “Unintended Consequences: Four Years under the DMCA”. See http://www.eff.org/IP/DMCA/20030102_dmca_unintended_consequences.html

their results using DMCA provisions. This has directly damaged the development of the very technological measures that rightsholders are relying on to protect their content.

Other examples include Hewlett-Packard sending DMCA threats to researchers who had found problems in one of its operating systems; a Dutch programmer who declined to publish research on the weaknesses of an Intel video encryption system in case of future legal action during a trip to the US; and the removal by several scientists of research papers on security vulnerabilities from their websites.

The problems encountered for competition and innovation demonstrate consequences of the DCMA extending well beyond its proclaimed legislative intent. Legal actions have concentrated on stopping the sale of compatible accessories such as printer cartridges, under the pretence of preventing the circumvention of copyright control devices that in reality are used to verify the manufacturer of accessories. Lexmark has brought such a case against Static Control Components. Blizzard Entertainment has sued open source developers who created a free alternative server to allow users of Blizzard video games to compete across the Internet. And Sony has sued the manufacturers of “mod chips” which allow Playstation users to play games purchased in different regions of the world – many of which are not available outside their home markets.

Sony has also sued the developers of emulator software that allows Playstation games to be played on Apple Macintoshes and Windows PCs, and threatened the author of code that customised their Aibo robot pet dogs. Further innovation was stifled by threats from Apple to the developer of software that allowed owners of older Macintoshes to make use of new Apple iDVD software. Apple preferred that users should instead be forced to upgrade to a new machine.

Much more information on all of these cases can be found in the EFF report.

Immediate public policy objectives

There are two important policy goals that are favoured across the EU in relation to Internet policy, and should be emphasised in implementations of the Copyright Directive.

The first is the EU focus on the “**information society**” rather than the “information economy” popular in the US. If this is to mean anything, it is that economic concerns must only be one consideration in government action designed to promote the development of such a society. Other issues such as creativity and a vibrant cultural sphere must also be considered.

While strong intellectual property rights are often promoted as a mechanism to encourage and reward creativity, legislation must allow the creative reuse of content that is a vital part of literature, art and other such endeavours. For the great majority of human history, such creativity has flourished without the existence or enforcement of intellectual property rights¹⁴.

The second is the encouragement of **high-technology research** within the EU, particularly in the area of security. European governments and the Commission are proud of the results of their investment in this area, which has had some notable successes in the past decade – such as the selection in open competition by the US government of a European cipher (Rijndael) as the basis for its Advanced Encryption Standard. Another European competition entry (Serpent) reached the final shortlist of five. It is therefore vital that implementations do not restrict or threaten this research, which is seen as vital to the future competitiveness of EU economies.

Wider public policy objectives

There are several longer-term policy objectives that must be considered when implementing the Directive. The increased security, transparency, reliability and sovereignty provided by open source software must be encouraged. Competition, free expression, cultural diversity and privacy must all be supported rather than hindered by copyright law.

¹⁴ *Supra* note 5 p.36

Open source software

Open source software is becoming increasingly popular within European public and private sector organisations. Governments and companies are keen on the reduced price and higher reliability of software that is constantly being developed by enthusiasts around the world. Software such as GNU/Linux has also provided vital competition in many monopolistic software markets, keeping down prices across the whole sector.

Open source has several additional attractions for governments. Because the complete functionality of the software can be examined, government agencies may determine the security – or otherwise – of a piece of code. And where software features tend to shape citizens' behaviour, open source makes that implicit regulation transparent¹⁵.

Perhaps most attractively, for governments other than that of the United States, freely modifiable software increases sovereignty. It removes reliance on the behaviour of software companies that are largely based in and subject to political pressure from the US. The Swedish government, for example, discovered in 1997 that the Lotus Notes software being used by Members of Parliament, 15,000 tax agency staff and 400,000 to 500,000 citizens allowed the US National Security Agency to decrypt messages “protected” using its security features¹⁶.

Free trade and effective markets

There has long been a conflict between competition policy and intellectual property monopolies. It is ironic that a global agreement on these monopolies (TRIPS) is embedded in a free-trade body such as the World Trade Organisation¹⁷.

It is important that the copyright and related monopoly rights granted by the Copyright Directive are not allowed to be used to restrict other markets, as has already been seen in the US *Lexmark v. Static Control* case described in the previous section. In particular, legal protection for technical measures that restrict access to copyright works should not be usable to protect authentication mechanisms that prevent competition in accessory markets such as printer cartridges.

Nor should the use of technical measures to enforce differential pricing between market segments be protected under this Directive. While there is an ongoing debate over the long-run value to the consumer of price discrimination¹⁸, any such protection should be given through separate and openly debated legislation rather than by copyright law. We suspect such legislation would be extremely unpopular.

A longer-term objective must be to replace the Copyright Directive's “Community exhaustion” of copyright with “international exhaustion”. This would allow the global movement of copyright works once they had been legally purchased anywhere in the world, reducing the impact of price discrimination between different national markets. National exhaustion was pushed by some countries during the TRIPS negotiations, but this proved too controversial a subject to reach agreement upon during that trade round¹⁹.

Freedom of expression

Copyright is always to some extent in tension with freedom of expression. The former is an economic tool intended to “promote the Progress of Science and useful Arts” (in the words of Article I of the US Constitution); the latter is a fundamental human right guaranteed by

¹⁵ Lawrence Lessig, “Code and other laws of cyberspace”, Basic Books (2000)

¹⁶ Duncan Campbell, “Development of surveillance technology and risk of abuse of economic information”, working document for the Science and Technology Options Assessment Panel of the European Parliament, (1999). Available from <http://www.fas.org/irp/program/process/docs/98-14-01-2en.pdf>

¹⁷ *Supra* note 5 pp.210–211

¹⁸ James Boyle, “Cruel, Mean or Lavish?: Economic Analysis, Price Discrimination and Digital Intellectual Property”, 536 *Vanderbilt Law Review* 2007 (2000). Available from <http://www.vanderbilt.edu/Law/lawreview/vol536/boyle.pdf>

¹⁹ *Supra* note 5 p.37

instruments such as the EU Charter of Fundamental Rights²⁰ (which will be binding on all Member States under the forthcoming EU Constitution) and the European Convention on Human Rights²¹. The implementation of copyright must be carefully limited to provide those economic benefits without unduly limiting free speech.

Even in the US, with the robust protection of the Constitution's First Amendment, the DMCA has caused free speech problems, as described earlier. US courts have dismissed free speech arguments in cases against the publication of or even linking to circumvention tools²². Nor does the EU have any equivalent to US legislative precedent²³ protecting the source code of software as speech. Member States must therefore be careful that their implementations of the Copyright Directive do not trample on the free speech rights of their citizens.

Cultural diversity

Many EU States such as France are particularly concerned about "homogenisation" of culture. They have so far resisted attacks on their national quotas for films, movies and music through free trade agreements. They should also resist attempts by large global corporations to lock up content through increasingly strong intellectual property rights, dominating markets for content²⁴ and reducing the rights of European artists to build on previous works.

Privacy

Digital Rights Management (DRM) systems often allow rightsholders to monitor in great detail the use of their products by consumers. Users could therefore find that details of every access to a protected work they have made are stored by rightsholders or their agents, and used for secondary purposes such as marketing related products. This information may also be linked with other personal information on a consumer, creating a detailed profile²⁵.

Several governments have provided law enforcement and intelligence agencies with access to this type of data, and courts could order access in many different circumstances. Copyright holders have already been given expedited access to the personal details of ISP customers they allege are infringing their rights in the US under the Digital Millennium Copyright Act, and are lobbying to obtain these powers in the EU under Article 9 of the draft Directive on the enforcement of intellectual property rights²⁶.

As with freedom of expression, privacy is a right guaranteed by the European Convention on Human Rights (see Article 8) along with the EU Charter of Fundamental Rights (see Articles 7 and 8). Copyright Directive implementations must not allow rightsholders to collect large amounts of personal data on their customers under the guise of "technological protection measures".

²⁰ "The Charter of Fundamental Rights of the European Union", OJ C 364/01 (2001). Available from http://www.europarl.eu.int/charter/default_en.htm

²¹ Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950). Available from <http://www.echr.coe.int/Convention/webConvenENG.pdf>

²² *Supra* note 13

²³ 93 Cal. App.4th 648, 113 Cal. Rptr.2d 338 (2001), appeal granted, 117 Cal. Rptr.2d 167, 41 P.3d 2 (2002).

²⁴ *Supra* note 5 pp. 176–178

²⁵ L.A. Bygrave, "Digital Rights Management and Privacy – Legal Aspects in the European Union", pp.527–529, in E. Becker et al., "Digital Rights Management – Technological, Economic, Legal and Political Aspects", Heidelberg: Springer Verlag (2003) s.4.

²⁶ European Commission, "Proposal for a Directive on the enforcement of intellectual property rights", COM (2003) 46(01). Available from http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0046en01.pdf

The Copyright Directive

The Directive²⁷ is in two parts: the preamble, which sets out the background, and the Articles. The preamble is of a more explanatory nature, and sets out the context within which the Articles should be implemented by Member States. Nonetheless, it does have legal force, and contains some important principles that should be reflected in implementing legislation.

The first eight Recitals of the preamble describe the reasons why the Directive was created. They concentrate on the development and proper functioning of the EU's internal market, and encouragement of creativity and competitiveness and the general development of the Information Society. More concretely, they state that copyright and related rights need updating given technical developments (such as the Internet), and that this updating should be done in a harmonised way across the EU.

Recitals 8–12 then attempt to justify the specific approach taken, and why the authors of the Directive feel that strong Intellectual Property Rights are necessary to meet the objectives described above.

The remaining recitals discuss further objectives and reasoning behind the Articles. We will describe them further in that context in the next section, which describes each Article (as grouped by the Directive).

Objective and scope

Article 1 sets out the scope of the Directive. It limits the Directive's effect on related intellectual property rights in existing EU law, most importantly the Software Directive²⁸. This should mean, for example, that technical measures protecting computer software should not be covered by Article 6 of the Copyright Directive. Articles 5(3) and 6 of the Software Directive should continue to allow the “reverse-engineering” of software for the purposes of creating compatible programs. Without this protection, free software developers could be prevented from fully accessing Application Programming Interfaces or similar features in commercial software.

An ideal implementation of the Software and Copyright Directives would also allow the reverse-engineering of file formats, in order to allow free software to read and write files in commercial software formats. Without this protection, commercial software companies can exploit network effects to impose monopoly prices on software markets.

Rights and Exceptions

Articles 2–4 set out the rights protected by the Directive. Article 2 provides the most fundamental “copy” right. It provides exclusive rights over the reproduction of “direct or indirect, temporary or permanent” copies of works to performers, phonogram producers, film producers, broadcasting organisations and authors. Articles 3 and 4 give “communication to the public” rights to all of these groups except authors, who are granted distribution rights. Recital 30 states that all of these rights may be assigned, transferred or licensed.

Unlike communication rights, Recital 28 states that distribution rights are “exhausted” by a first sale within the EU. This means that publishers may not prohibit the resale of books, whereas the groups given communication rights may prohibit secondary markets in those works. This prevents resale of their services, supporting the effectiveness of any differential pricing employed. Recital 29 states that rights in services, particularly those supplied on-demand, should not be exhausted by a sale within the EU.

Article 5 sets out the limitations and exceptions that may be applied to the rights provided in Articles 2–4. It is an exhaustive list, which means that any exception outside this list is not

²⁷ See http://europa.eu.int/comm/internal_market/en/intprop/docs/

²⁸ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, as amended by Directive 93/98/EEC. OJ L 122, 17/5/91, p. 42.

allowed, even if it currently exists in Member State law. This is justified in Recital 31 given the “new electronic environment” and the effect of exceptions on the internal market. This Recital also states that a fair balance between different types of rightholders, and with consumers, must be safeguarded in these exceptions. Recital 32 says that Member States must come to a “coherent application” of the exceptions, which will be reviewed in implementing legislation later.

The mandatory exception to the reproduction right in Article 5(1) provides for “transient and incidental” reproduction that is an “essential and integral” part of network transmission by an intermediary or allows lawful use of a work with no “independent economic significance.” Recital 27 emphasises that providing communications facilities does not by itself qualify as making a communication. This exception must be implemented in full, and prevents coercion of Internet Service Providers running services such as Web caches with no independent value for their users.

It also prevents rightholders from controlling all access to works through digital technologies, which by their very design make temporary “copies” of works as they are transferred from a medium such as a DVD to the player’s memory for processing, and then to a display or speaker. Rightholders have previously argued that they should control such reproductions: “Even the most fleeting cascade of electrons is being claimed by them as part of their income stream”²⁹.

This one mandatory exception demonstrates that the communications industry concentrated their lobbying on the provisions that directly affect their business, unlike their actions as part of a broader coalition at the WIPO negotiations. The same thing happened in the US, resulting in Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act. Its s.512 contains some very similar provisions to those of the Copyright and E-Commerce Directives.

Recital 33 of the EUCD prevents proxies from altering cached data, and mandates “widely recognised and used” technology that provides information on access to data by users to rightholders. Given the minimisation requirement of Article 6 of the Data Protection Directive³⁰, such technology should provide anonymised rather than personally identifiable information.

Article 5.2 sets out optional exceptions to the reproduction right. As with articles 5.3 and 5.4, which of these are implemented is entirely up to Member States. The five possible exceptions are: (a) photocopying (except sheet music); (b) non-commercial private use, when fair compensation is paid; (c) non-commercial acts by libraries, educational establishments, museums and archives; (d) ephemeral recordings made by and for broadcasting organisations; and (e) non-commercial reproduction of broadcasts by social institutions, provided fair compensation is paid. Recital 35 states that when fair compensation is required, the level set should take account of damage done to the rightholder by the exception. If minimal damage is done, no payment may be required. But Recital 36 says that Member States may require payment of fair compensation even when it is not required by the Directive.

Article 5.3 sets out a longer list of exceptions to both the reproduction and communication rights. These exceptions were valued strongly enough for those States where they exist to bargain for their inclusion in the Directive. Most important of these for general purposes are (a) teaching and scientific research; (b) use by disabled persons; (c) news reporting; (d) criticism or review; and (k) caricature, parody or pastiche. Recital 14 emphasises the necessity of exceptions for education and teaching to encourage learning and culture. Recital 43 says that “all necessary measures” should be taken to enable the use of works by disabled persons.

Article 5.4 allows any exceptions to the reproduction right contained in Articles 5.2 and 5.3 to be applied to the distribution right “to the extent justified by the purpose of the authorised act of reproduction.”

The “three-step test” from the Berne convention and TRIPS is included in Article 5.5. This limits copyright exceptions to “special cases” which do not conflict with “normal exploitation” of

²⁹ *Supra* note 5 p.186

³⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23/11/95, p. 31.

copyright materials or “unreasonably prejudice” legitimate rights held. Recital 44 repeats that exceptions should be “exercised in accordance with international obligations”. Rightsholders have argued that this test should be explicitly included in national legislation as a further court-interpreted limitation on exceptions, but some States (such as the UK) have instead used it as a test of whether exceptions may properly be included in the implementing legislation.

Protection of Technological Measures and Rights-Management Information

The general purpose of this section is set out by Recitals 13 and 47. They state that common development and use of technological protection measures and rights-management information is essential, because both technologies give effect to copyright and related rights.

Article 6 is by far the most controversial part of the Directive, as are the similar provisions of s.1201 of the Digital Millennium Copyright Act in the US.

Article 6.1 requires that Member States provide “adequate legal protection” against the deliberate circumvention of technological measures – regardless of whether such an act infringed any copyright. A user must know or have reasonable grounds to know they are causing such circumvention, but the purpose for which it is done is irrelevant. Even fast-forwarding through a commercial at the start of a DVD could therefore be illegal if restricted by the rightsholder. Sanctions are expanded upon in Article 8.

Article 6.2 expands this protection by banning the manufacture, import, distribution, sale, rental or advertisement of circumvention devices or services – and also their possession for commercial purposes. This applies to any device or service that is marketed or primarily designed to circumvent technical measures, or has only limited other commercial purpose. Again, it is irrelevant whether the purpose to which such a device is put is copyright infringement. It is unclear whether open source software could be said to have a commercial purpose. Recital 49 says that States may further ban private possession of circumvention devices.

The definition of “technological measures” and whether they are “effective” is contained in Article 6.3. Both are wide definitions. The former covers any mechanism normally used to restrict acts not authorised by a rightsholder. The latter covers any access control, protection mechanism or copy-control mechanism, whatever its technical effectiveness. Therefore even the weakest protection measures gain legal protection against even the simplest types of circumvention. Under this definition, a marker pen – which can be used to defeat several types of CD protection mechanisms by drawing on the CD – could be classed as a circumvention device if it was advertised as such.

Recital 48 provides some limit to any further extension of protection for technical measures by Member States. Protection should not prevent “normal operation of electronic equipment and its technological development;” nor should technical measures be required in products or services. Member States should not use the Directive as a justification to introduce legislation mandating the inclusion of protection measures in electronic devices.

Senator Fritz Hollings twice introduced such legislation in the US Senate. His initial Security Systems Standards and Certification Act³¹ covered all “interactive digital devices”, while the Consumer Broadband and Digital Television Promotion Act³² was slightly more narrowly aimed at “digital media devices”. But neither made any significant progress in the Senate.

Recital 48 also states that implementations “should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection.” These other significant uses must include those of open source software. Such software may not be sold commercially but is commercially significant in its benefits to its users and its effects on markets that might otherwise be monopolies. Implementations should make clear that software need not be sold commercially for its purpose to qualify as commercially significant.

³¹ See <http://cryptome.org/ssca.htm> (2001)

³² See <http://cryptome.org/s2048.txt> (2002)

Finally for Recital 48, legal protection for technical measures “should not hinder research into cryptography.” Implementations should provide a strong generic exemption for such research if this is not already provided by overarching law (as it is by the German constitution, for example).

Cryptographic research involves far more than the theory of cryptologic mathematics; most cryptographic mechanisms fail for engineering reasons connected with protocol design or the implementation in hardware and/or software. Such research cannot be very productive unless it is targeted at real systems. ‘Toy’ systems developed in the laboratory are inadequate as many of the novel and interesting failures arise from the interaction of components designed by people from different disciplines, or from the scale and complexity of real systems³³. Nor should this exemption be limited to “recognised” researchers such as academic university staff; much important security research is carried out by hobbyists and students.

Article 6.4 is perhaps the most crucial part of the Directive. It specifies the procedures that should be used to reconcile the “fair dealing” exceptions in Article 5 with the ability of consumers to exercise them given technological measures protected under Article 6.

Unlike the DMCA, Article 6.4 does not give protection to certain groups (such as security researchers) against liability for circumvention offences. In the first instance, it merely requests that rightsholders take voluntary measures to allow the exercise of certain exceptions. Recital 51 emphasises that these may include “the conclusion and implementation of agreements between rightsholders and other parties concerned.”

The measures taken must facilitate the reproduction right exceptions in Article 5.2 (except private use in 5.2(b)) and a limited subset of the reproduction and communication rights exceptions in Article 5.3 (for teaching and research, use by disabled persons and public security functions). They may also include the private use exception, but must allow rightsholders to restrict the number of private copies so made. Any technical measures used in any of these voluntary measures must also be protected by Article 6.1.

If voluntary measures are not taken, Member States must take “appropriate measures” of their own to ensure that citizens may benefit from the exceptions. However, this is not the case with works made available through on-demand services. Such services are defined very broadly – 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.” This definition is also included in Recitals 25 and 53.

Several of the exceptions and limitations permitted by Article 5 require fair compensation. However, Recital 35 makes clear that one of the factors that must be taken into account in setting the level of such compensation is the use of technical measures protected under Article 6. This is explicitly restated for the private copy exception in Article 5.2(b) and in Recital 52. It is likely that fair compensation levels will be reduced as the use of technical measures increases.

Article 7 gives protection to electronic Rights Management Information. This is any type of data provided by rightsholders that identifies a work, its author or the terms and conditions of access. It must be associated with a copy or communication to the public of a protected work (Article 7.2). The development and use of compatible systems is encouraged by Recital 54.

Article 7.1 and Recital 56 state that Member States must provide “adequate legal protection” against removal or alteration of such information. This protection must also be provided against the communication to the public (and related acts) of a work where rights management information has been removed, if this would encourage or conceal copyright infringement.

Recital 57 emphasises that rights-management systems should protect the privacy of users, in accordance with the Data Protection Directive.

Article 7 contains several interesting differences with Article 6. It allows removal of rights management information given “authority” – hence allowing the entity that applied the

³³ “FIPR response to the UK government consultation on the implementation of the Copyright Directive” (2002). Available from <http://www.fipr.org/copyright/FIPR.html>

information to authorise its removal, unlike an entity that has applied a technical protection measure. The restrictions in subparagraph 1(b) also require intent to infringe a right, uniquely amongst all of the Directive's measures. Nor are there any controls on devices that remove rights management information, as Article 6 provides for circumvention devices.

Common provisions

Member States must provide “effective, proportionate and dissuasive” sanctions and remedies under **Article 8**, and take all necessary measures to ensure they are applied. Article 8.2 and Recital 58 say that rightsholders must be able to bring actions for damages, obtain injunctive relief and apply for seizure of infringing materials and circumvention devices. Despite the mandatory exception in Article 5.1(a) for online services, Article 8.3 and Recital 59 require that rightsholders must also be able to apply for an injunction against an intermediary whose services are being used to infringe their rights. Article 12 of the E-Commerce Directive³⁴ provides a “mere conduit” defence for intermediaries, but this may be overridden by a court or administrative authority action³⁵. Recital 16 states that the Copyright Directive should be implemented without prejudice to the liability provisions of the E-Commerce Directive.

Article 9 expands on Article 1 and reaffirms that existing legal provisions in a wide range of other areas – including but by no means limited to other intellectual property rights – should not be affected by the Directive.

From a public policy perspective, the most important of these areas are privacy and competition law. Many Digital Rights Management systems track the usage of protected materials. Article 9 and Recital 57 confirm that this tracking will be subject to the requirements of the Data Protection Directive³⁶ – notably that data collected should be relevant, not excessive for purpose, and kept for the minimum time necessary in identifiable form; and that users should be notified of and consent to the collection, and be able to access data concerning them.

Nor should technological measures be allowed to override competition policy. Anti-circumvention rules must be tailored as tightly as possible to protect copyright but not accessories. Under the DMCA, they have been used to control accessory markets (such as for printer cartridges). This would directly contradict the EU's recycling directive³⁷ as it affects printer cartridges.

Recital 17 states that the compliance of collecting societies with competition rules should also be enforced.

Recital 50 explicitly says that provisions on reverse engineering for software compatibility in the Software Directive must not be affected. Therefore, circumvention of technical measures protecting software for developing compatible software, and the development of devices that perform such circumvention, must not be prohibited in implementing Articles 6.1 and 6.2.

The administrative provisions of **Articles 10–11** and **13–15** cover timing and other implementation details. They specify the Directive's retrospective effect; adaptations of directives 92/100/EEC³⁸ (rental and lending rights) and 93/98/EEC³⁹ (term lengths); deadline for implementation; entry into force; and the addressees (the Member States).

Article 12 sets up a procedure for a triennial review of the Directive, and a contact committee made up of representatives of the Member States and chaired by a Commission representative.

³⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. OJ L 178, 17/07/2000, p.1.

³⁵ Article 12.3 *ibid.*

³⁶ *ibid.*

³⁷ Directive 2002/96/EC of 27 January 2003 of the European Parliament and of the Council on waste electrical and electronic equipment. OJ L 37, 13/02/2003, p.24

³⁸ Council 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. OJ L 346, 27/11/92, p. 61. As amended by Directive 93/98/EEC.

³⁹ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights. OJ L 290, 24/11/993, p.9

The Commission must submit a report by 22 December 2004 and then every three years on the effects of the Directive given the development of the digital market. The effects of Article 5, 6 and 8 are particularly pertinent. If necessary, this report may propose amendments to the Directive – especially to improve the functioning of the internal market.

The contact committee is charged with reviewing the functioning of the internal and digital markets, organising consultations on the Directive and exchanging information on relevant developments between Member States.

Options for implementation

There are several parts of the Directive that are important for the achievement of the public policy objectives outlined earlier in this chapter. Good national implementations should use the flexibility contained in the Directive in the following ways:

Article 5

Both for the benefit of their own citizens as well as best achieving the original intent of the Directive⁴⁰ – the harmonisation of copyright law across the EU – Member States should include the maximum number possible of the exceptions from Article 5 paragraphs 2, 3 and 4 in their implementing legislation. If the initial implementation is done using a legislative procedure such as that in the UK and Ireland – where only mandatory changes may be implemented in a fast-track process – the States should later use primary legislation to implement new exceptions.

To reduce legal uncertainty implementations should not explicitly include the three-step test in Article 5(5). Instead, as in several countries such as the UK (see the table below for others), it should be applied to exceptions as they are considered for inclusion in legislation.

The Directive exhaustively enumerates permissible exceptions rather than providing a more flexible court-interpreted “fair use” test as exists for example in the US. Given the balanced approach that copyright law is supposed to represent, Member States should not provide a judicial power which could operate only to further limit the available exceptions.

Article 6

The best implementation of Article 6(1) would only prohibit circumvention when it resulted in infringement of the rights in Articles 2–4. Norway provided for this in its draft implementation, and the Danish Minister of Culture claimed that the final Danish implementation also has this effect.

A remote second-best option is to provide only minor civil sanctions for circumvention acts. Italy’s draft provides for a fine of 154€, which may be reduced for minor offences. The UK draft allows for damages for loss or recovery of profit to be awarded, neither of which is relevant for non-infringing circumvention.

Even with a “fair circumvention” right such as in the Danish and draft Norwegian implementations, citizens will find it increasingly difficult to exercise such a right without the tools to do so as technological protection mechanisms improve. Definitions of circumvention devices or services should carefully exclude products intended to facilitate the exercise of exceptions by legitimate owners of a work.

The Directive suggests a voluntary approach from rightsholders to allow exceptions to be exercised by beneficiaries. We believe this will only be effective if it is backed up with “effective, proportionate and dissuasive” sanctions for rightsholders who do not provide a timely means to do so. Many rightsholders will be based outside the EU with a primary focus on other markets. Meanwhile, for example, a visually impaired person may require immediate access to a work for educational or employment purposes.

An ideal implementation would withhold the benefits of copyright for technically protected works (and at the same time withhold protection against circumvention of the protection for them) until this requirement was met by rightsholders. This could be implemented in exactly the same way as the UK Patents Act of 1977 prevented the enforcement of a patent if a license existed anywhere that illegally tied it to other contractual conditions (such as the supply of raw materials). There is no reason why the intellectual property rights in the Copyright Directive should not be limited in the same way.

⁴⁰ P. Bernt Hugenholtz, “Why the Copyright Directive is Unimportant, and Possibly Invalid”, EIPR 2000-11, pp. 499–505. Available from <http://www.ivir.nl/publications/hughenoltz/opinion-EIPR.html>

A less ideal implementation would, in the same manner as the Data Protection Directive, allow beneficiaries to complain to a national authority who would undertake speedy and effective action on their behalf. Beneficiaries and groups representing them should also have a direct right of action through the courts against rightsholders. The Spanish Minister of Culture, for example, will be able (under the current draft) to impose 6,000€ per day fines on rightsholders who prevent the exercise of exemptions using technological prevention measures. Government bodies given this task should contain representatives from all interested parties – competition and privacy commissioners, consumer representatives as well as rightsholders.

In either case, the outcome should protect all beneficiaries of exceptions against a particular rightsholder. Rulings may also provide advice to other rightsholder in similar situations on how to remedy problems before enforcement action is taken against them.

The definitions in Article 6(3) should be transposed carefully to limit the effect of Article 6 to technological measures that are focussed on protecting copyright⁴¹. As per Articles 1 and 9 and recital 48, this protection should not interfere with the circumvention of devices that limit accessory markets, security research or consumer privacy. For example, a device that monitored consumers' use of digital media does not prevent or restrict unauthorised acts in the normal course of its operation, and hence should not be protected⁴². The personal data collected by rightsholders should be minimised as per the Data Protection Directive. And consumers should not be prevented from protecting their privacy by circumventing technological measures that report personal information back to rightsholders, or obtaining the tools necessary to do so.

As with the Danish implementation, mechanisms such as DVD region codes, which are used to release DVDs in different markets at separate times and at different prices, should be excluded.

Finally, Article 6(4)(4) attempts to remove all protections for beneficiaries when works are supplied “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.” This is a dramatic reduction of copyright users' rights that needs urgent revision in the review of the Directive. For the time being, implementations should emphasise how unlikely this condition is to be met, given the slow progress of high-bandwidth high-quality mobile browsing devices. Content supplied to a home or office PC is obviously not accessed “from a place... individually chosen by” members of the public.

⁴¹ “From the Explanatory Memorandum, however, it can be concluded that only when a measure prevents acts that the copy-right holder can prohibit on the basis of copyright law does it need to be protected.” K.J. Koelman and N. Helberger, “Protection of Technological Measures” in B. Hugenholtz, ed., “Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management, London: Kluwer Academic Publishers (2000), p.171.

⁴² *Supra* note 25 pp.526–529

Summary of implementations

	at	be	de	dk	es
<i>Status</i>	Became law 1/7/03	Latest draft amendments 18/10/02	Approved by Bundesrat 11/7/03	Approved by Parliament 17/12/02	Draft 6/11/02
<i>Circumvention penalties</i>	Damages; 6 months; 360 daily income rates fine	2.5—2500€; repeat offence fine+3 months— 2 years	1 year	Fines and general liability	Not specified
<i>Devices/ services penalties</i>			1 year; 3 years for commercial purposes		Determined by IP Commission
<i>Explicit three- step test</i>	No	Yes	No	No	No
<i>Procedure for exercising exemptions</i>	Judicial order	Will be defined later in secondary legislation	Judicial order	Complain to Board for Intellectual Property Rights; users may circumvent if rightsholder ignores longer than 4 weeks; appeal to courts. Not for 5(2)(b)	Complain to Commission on Intellectual Property which may recommend a penalty of 6000€/day to Ministry of Education, Culture and Sport
<i>Circumvention research exemption</i>	No	No	Via Constitution	Yes	No

fi	fr	gr	it	nl	pt	uk
Draft 10/10/02	Draft 4/4/03	Became law 10/10/02	Became law 29/4/03	Draft 22/7/02	Draft 2/12/02	Draft 7/8/02
Fine, 2 years prison, confiscation	2 years, 150,000€ fine	1 year, fine of 2,900— 15,000€	154€ fine, 1,032€ for repeated offence	Court- ordered damages, unlikely to be more than legal costs	3 years, fine of 250— 125,000€ (150— 75,000€ for attempt)	Damages for loss or recovery of profit
			6 months – 4 years, 2,500— 15,000€ fine			2 years, unlimited fines ⁴³
No	Yes	Yes	Yes	No	Yes	No
Via courts	Complain to 3-person mediation body; appeal to Appeal Court of Paris	Complain to mediator; appeal to Court of Appeal	Complain to Permanent Copyright Consulting Committee; appeal to courts	None – government will wait to see if there is a problem before creating	Complain to Comissão de Mediação e Arbitragem	Complain to Minister; resulting breach of directions by rightsholders gives right of action for breach of statutory duty
Yes	No	No	No	No	No	No

⁴³ For commercial or large-scale dealing

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Implementation of the Directive

The Directive was implemented belatedly into Austrian law at the end of April 2003. The original schedule for the “Urheberrechtsnovelle”⁴⁴ (Amending law on Copyright; see explanation below) to pass Parliament in autumn 2002 had to be postponed, due to a government crisis, which was followed by preliminary elections.

The first proposal of the Amending law on Copyright was published in September 2002. It got extensive comments and critiques from a variety of different groups and organisations who filed close to 40 in part lengthy documents to be taken into consideration by lawmakers. Input ranged from government institutions, various lobbies from IT and electronic entertainment industries, from consumer and data protection activists to composers, playwrights and other artists. The full list of all organisations along with their statements can be found on the web site of the Austrian Parliament⁴⁵.

The second proposal was made publicly available in March 2003. It passed Cabinet and was approved by the Parliament’s Justice Committee on April 8, 2003. On April 29, 2003 the proposed law passed the Austrian Parliament with a majority of votes. The revised Urheberrecht will come into force on July 1, 2003.

The notions of Copyright and Urheberrecht

It should be noted that the EU Directive uses the term “copyright”, whereas in Austria (as in Germany) the author’s rights are covered by the “Urheberrecht”. German-language law systems distinguish between “Urheberrecht” (author’s right), which cannot be removed or sold and is therefore inalienably linked to the author, and derivative rights of exploitation (“Verwertungsrechte”). While the American copyright model is oriented towards distributors, the “Urheberrecht” was born out of a philosophical discussion dealing with a fair balance between authors, publishers and the public. Whether this was achieved is uncertain to us as the “Urheberrecht” derives historically from the 19th century habit to idolize the creative process as that of a genius prevailing.

The Austrian legislative process in general

The Austrian Ministry of Justice (Bundesministerium für Justiz) is responsible for first draft proposals. The first draft is published and passed to the Parliament’s Legal Affairs Committee (Justizausschuss) for review and alteration. The process is public, since the law text is publicly available. After passing the Legal Affairs Committee, the law is taken to Parliament for voting. In the case of the “Urheberrechtsnovelle”, this process broke up and came to a halt because it took the Conservative Party (ÖVP), after it had won the elections, more than three months to form a new government. During this interregnum there was not much of a public discussion about the Copyright Directive. There were just a few weeks left until the proposed date for the parliamentary debate.

⁴⁴ See <http://www.parlinkom.gv.at/archiv/XXI.pdf/ME/oo/o3/ooo363.pdf>

⁴⁵ See http://www.parlinkom.gv.at/pd/pm/XXI/ME/his/oo3/MEoo363_.html

Exceptions and limitations

New legal definitions of “public availability” and “private use”

Austrian legislation translates the term of “making publicly available” from Article 3 of the Copyright Directive and the WIPO treaties⁴⁶ in a rather peculiar way rather as *Zurverfügungstellung*, which is not only an ugly word that no stranger to the German language should ever try to pronounce, but also slightly off the original term; literally it means “to put at the disposition of the public”. In accordance with the Directive and both treaties, section 18a, which has been newly introduced⁴⁷, states:

Right to put at the disposition of the public

The author holds the exclusive right to put the work at the disposition of the public in a manner, be it wired or wireless, that members of the public may access it at times and places of their choice.

In various sections, the previous formula “for his own use” has been added to, making it “for his own private use”. This applies in particular to section 42, which states in subsection 4:

Every natural person may produce single copies of a work (...) for his own private use and neither for direct nor for indirect commercial ends.

In subsection 5 of the same section, it says:

A copy for one’s own or private use is not valid when the copy is produced with the aim of making the work available for the public with the help of the copy.

Although the term of “putting at the disposition of the public” is introduced in about a dozen sections of the amended law, and its antagonist, the term of “private use” in a few more, the law contains no clear definition to define the border line between public use, private use and the original term of “own use”, which lies somewhere in between the two. The only thing close to a definition is in section 42, subsection 5, where it now says “copies produced for own or private use may not be used to make the work accessible to the public”.

Regulations on private copies

Section 42 contains the regulations on private copies. In this section, the amending law introduces numerous limitations to the former provision, where it simply said:

Every person may produce single copies of a work for his own use.

In the future, such private copies will be explicitly allowed only in the following cases:

- copies for private use and non-commercial purposes (subsection 4)
- copies on paper or a similar matter for own use (subsection 1)
- copies for own non-commercial research purposes (subsection 2)
- analogue copies of current event news reports (subsection 3)

It is generally not allowed – in subsection 8 the law says “only with the consent of the rightsholder” – to copy whole books, whole magazines or sheet music; even when the copy is produced from another copy. There are however two exceptions to this ban: it is allowed to copy even whole works by transcribing them by hand, and it is allowed to produce copies of works that have not been published or are out of print. It must however be pointed out that unpublished and no more available works will in the digital world increasingly be available in electronic form only. In

⁴⁶ Article 6 of the WIPO Copyright Treaty and Article 8 of the WIPO Performances and Phonograms Treaty

⁴⁷ The German transposition of the EU Directive uses “öffentliche Zugänglichmachung”, which is not nicer, but has the advantage of being a literal translation of the original term of public availability, first mentioned in the two WIPO treaties.

practice, therefore, the right to produce copies of such publications will be countered by copy protection, which will enjoy special privileges also in Austria (see below).

An entirely new provision, laid down in section 42d, concerns special rights for disabled persons: it is now explicitly allowed to copy and distribute copyrighted works for disabled people, who would otherwise have no or only limited access to those works. There must however be no commercial ends to doing so, which in effect will limit this right to charities. These again will have problems with the provisions in subsection 2, where it says the author has the right to an “appropriate compensation” for copies even under this regulation. In practice, anyone who has recourse to this right will have to walk a very thin line between the obligation not to act commercially on the one hand and the royalties he will have to pay on the other. Also, Austrian lawmakers have not introduced, as their German colleagues have, a regulation obliging rightsholders to lift copy protection mechanisms for the purpose of producing copies of a copyright work on a medium legible for disabled persons.

Consumer advocates as well as manufacturers of IT equipment consider a brief amendment in section 42b as especially problematic. It extends the obligation to pay lump-sum royalties from pieces of work that are broadcast to all pieces that are “put at the disposition of the public”.

In order to understand the likely effects of this provision, it is necessary to look briefly at the Austrian system of lump-sum royalties. Currently, everyone who buys a blank cassette or any other media, as well as everyone who buys a video recorder or any other recording device, pays, most of the time unknowingly – a certain percentage of the price, which is then redistributed to artists who are deemed the authors of the work. In fact, though, only a very small percentage of authors profits from these payments. In music-ridden Austria only about 350 composers of all kinds earn enough money to make a living, according to “Austro-Mechana” (Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH). Those 350 get close to all of the funds coming in from copyright taxes on hardware, which are imposed on CD Burners and even satellite receivers, and on empty media. All in all there are about 10,000 composers in Austria currently, who earn little or nothing.

To extend this provision to pieces of work “put at the disposition of the public”, which means in general posted online, means mainly to impose the same kinds of royalties that buyers of videotape recorders already have to pay on the buyers of computer equipment also. Anxiously, Austrian computer dealers look to neighbouring Germany, where such a tax imposed on buyers of computers amounts to 30 Euro apiece. Possible effects, the industry is afraid, might include a slowdown in the spread of the Internet, a disadvantage for Austrian dealers in electronic equipment as compared to their competitors in other EU countries where no such tax exists, and, last but not least, a double burden imposed upon consumers, who will under Digital Rights Management schemes have to pay for the hardware they are using as well as for each single piece of work they want to have access to.

Copy regulations for public institutions

Section 42, Subsection 6 deals with provisions for schools and universities, who may produce copies of copyrighted works in the following cases:

- copies for teaching purposes
- copies on paper or a similar matter

According to subsection 7 of the same section, public archives and libraries, who were formerly simply allowed to produce copies for their own non-commercial ends, will have to observe some restrictions in the future. They may still produce copies on paper or a similar matter indiscriminately, but in contrast to the former regulation, copies on any other media may be produced only for non-commercial ends. For all copies, the following conditions must apply:

- one single copy may be produced of own pieces of work; this copy may be exhibited, lent or used under same provisions as the original

- just like private persons, libraries and archives may produce single copies of works which have not been published or are out of print; the same provisions on exhibiting, lending and using the work apply to these copies as to the original work.

A deletion in Section 56c extends the right to screen feature films for educational purposes, which was formerly reserved to universities, to all schools.

Right to produce temporary copies

An amendment to section 15, subsection 1 extends the author's exclusive right to produce copies from permanent copies to temporary. This passage raises concerns that software might be turned into a product for rent. Models of selling software by using licence schemes requiring the user to pay on a monthly or yearly basis already exist. Software licenses of this kind enable the software industry to force costly upgrades on their customers. Another concern deals with warranties. By choosing an adequate timeframe, software manufacturers could bypass warranty periods and elude bug fixing claims.

Technological protection measures

The Directive does not leave much room for interpretation on this issue, so Austria transposed the regulations on technological protection measures quite literally. Three new sections (90b, 90c and 90d) are being introduced into the Austrian copyright law, dealing with "protection for technical measures" (90c), "protection for computer programs" (90b) and "protection of labelling" (90d), where most of the provisions from the Directive's Article 6 are packed into section 90c.

Much in the same way as the Directive, section 90(c)(2) of the Austrian law defines "effective copy protection measures" as follows:

(...) all technologies, devices and components that, in the normal course of their operation, are designed to prevent or limit the breaches of right specified in subsection 1, and which ensure achieving this protection objective.

As is the case with all other laws that transpose the EU Copyright Directive, the protection of copy protection measures means legal protection for weak technological solutions. In the future, easy-to-bypass protection mechanisms such as the CSS (Content Scrambling System) protection for DVDs or Sony's Key2audio for music CDs will suffice, because they are protected by the law. The battleground shifts from the technical side to legal scenarios.

Not surprisingly, given the provisions in the EU Directive, the Austrian law does not contain any exceptions to the ban on circumventing copy protection, even for those copies that are explicitly allowed. As mentioned before, there is not even a provision obliging publishers to lift copy protection e. g. in order to produce copies for the use of disabled persons, as is the case in the German transposition of the Directive.

Section 90c, subsection 1 defines the cases in which these measures are legally protected against circumvention. The introduction of the term of "circumvention tools and services" is an Austrian particularity in the transposition of the EU Directive. The term is used to transpose the provisions contained in Article 6, paragraph 2, of the Directive and is defined as follows:

Devices, products or components or the provision of services

- 1. which are part of a promotion, advertisement or marketing for the purpose of circumvention of effective technological measures,*
- 2. which have only a limited commercially significant purpose or use other than to circumvent effective technological measures,*
- 3. which are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures*

The law then defines three different ways of protection, one of which must be applied to gain legal protection. All three definitions are literally taken from the EU Directive, Article 6, paragraph 3, sentence 2:

1. by an access control measure,
2. by a protection mechanism such as encryption, scrambling or other transformation of the work or other subject-matter or
3. by a copy control mechanism.

These provisions in section 90c, subsection 3, apply to all kinds of electronic media, but not to computer programs, which are deemed literary works under the Austrian law (section 1, subsection 2). As subsection 3 actually limits the scope of this section to certain kinds of copy protection, excluding computer programs means opening to software publishers ways of preventing the use of their product even besides the aforementioned ones, which may e.g. become the case with web-based applications. The technological copy protection of computer programs is dealt with in a section of its own, section 90b:

The owner of an exclusive right to a computer program, who uses technological mechanisms for the protection of this program to prevent an infringement of this right, can sue for prevention of the unlawful circumstances when tools are issued or held for commercial purposes the sole purpose of which is to facilitate the unauthorized removal of these technical measures.

As compared to other national transpositions of the EU Directive, this provision has a relatively restricted focus. The expression “sole purpose” limits its scope to cracker tools such as serial number generators and the like, but does not extend to tools used e.g. for reverse engineering or decompiling, which may also be used for testing self-written or open source programs. Additionally, the ban is only on distributing such tools and on having them with at least the intention to make money from them, whereas simple possession of these tools is not punishable.

Note, however, that commercial ends are not necessary to make distribution an offence. The use of such tools will normally fall under the provisions of section 90c, subsection 1, which does not exclude computer programs, and is therefore illegal, also. And in most cases, proprietary commercial software will come with an End User License Agreement that makes circumventing its copy protection illegal, also.

It remains to be clarified if the law covers the publication of security flaws and other problems in protection methods, which might allow access to media protected by these methods. Such was the case repeatedly in the past, and has under the U.S. Digital Millennium Copyright Act, the U.S. transposition of the WIPO treaties, led to the criminalisation of some computer experts. This affects anyone working in the field of digital security or even scientific publications. Since security experts frequently deal with bugs in software, the law may even affect the publication of security-relevant information. This could seriously hamper the successful full-disclosure mechanism and may lead to the degradation of software quality.

Enforcement and penalties

Civil law sanctions against infringers

In concordance with Austrian legal tradition, the main effect of these provisions is in the field of civil law, focussing on “prevention and elimination of the circumstances in contradiction with the law” (Section 90c, subsection 1 and, in the same words, section 82, subsection 1). Section 81 defines the rightsholder’s “right to damages”, which can also be claimed from a firm the infringer may work for and from a third person who has been acting as a intermediary. This does not mean, however, that breaches of copyright do not fall under criminal law. Sections 91 and 92, to be discussed below, provide for strict sanctions for infringements.

In addition to the “right to damages”, the rightsholder may also ask for “removal”, i. e. the destruction of all illicit copies as well as the means used for their production (tapes, films etc.). While copyright law up to the present said only means used “exclusively for the production of illegal copies” should be destroyed, the amended version says “exclusively or predominantly”, giving authorities the possibility to seize computing equipment used for the production or distribution of illicit copies, even if it was also used for other purposes.

New provisions also say that anyone who has been judged guilty of a copyright infringement has to provide information on all circumstances necessary for law enforcement (section 87a,; subsection 1), including the identity of any third persons involved in the production or distribution of the copies (Section 87b, subsection 2 and 3)

Criminal law sanctions against infringers

The new provisions protecting technological copy protection mechanisms (Section 90c), computer programs (Section 90b) and rights management information (section 90d) have been included in the catalogue of copyright infringements punishable with up to six months in jail or a fine of up to 360 daily income rates (section 91, subsection 1). Up to now, punishments this high were limited to offences of illicitly exploiting a work of art or literature. What is remarkable about this new provision is that it extends the possibility of prison sentences and very harsh financial fines to people who haven’t even financially profited from what they were doing; who were merely producing copies for their own use.

The national debate

Industry lobbies

The consumer electronics industry lobby (Fachverband der Elektro- und Elektronikindustrie), led by Hewlett Packard Austria, pressed hard for an abolition of the hardware taxation that compensates artists. Instead of these hidden computer and Internet taxes, industry wanted a complete shift towards a “Digital Rights Management” (DRM) model. In their own words, they are promoting a model where “people should pay royalties only for the music they really listen to”. Composers and artists opposed that, due to the present uncertainty regarding the possible introduction of DRM payment systems.

According to lobbyist IFPI (International Federation of the Phonographic Industry), 2002 was the first year during which more CDs have been burnt than bought in Austria. Music industry sales dropped by eight percent in 2002, and revenues went down from 283 to 260 Million Euro. During the first quarter of 2003, sales at Universal Music Austria showed an even a sharper drop – five percent less whereas the overall rate of people buying music CDs dropped by 10 percent.

The Austrian branch of IFPI was satisfied with the inclusion of a passage on the use of circumvention tools (sections 90b to 92⁴⁸) with sentences of up to six months for the circumvention of those “copyright protection measures.”

Consumer advocates

Consumer advocates were not happy, as lawmakers proved unable to solve the basic dilemma: the right to produce a private copy of a legally bought CD or DVD versus copyright protection measures. The most common interpretation of the related passage in the new law is now that consumers have a right to copy their own music CDs, they are allowed to possess circumvention tools, but it is an offence to use them. The possession passage was included after network security experts and other white hat hackers had complained loudly about possible, severe restrictions on practising their craft.

⁴⁸ The German language section and sub-section titles have been translated as follows: Paragraph – Section; Absatz – Subsection; Punkt – Item

Despite the frequent mention of artists endangered in general by the current alleged wave of music piracy, the music industry did not support artists strongly enough to force any changes according to their wishes. Only three days before the adoption of the “Urheberrechtsnovelle” the European Council of Artists filed a protest to the Austrian government claiming there had been no dialogue between artists and lawmakers at all. Any suggestions from artists had not been considered or commented upon.

Political parties

During the discussion of the law proposal there were different points of view from some party delegates. Johannes Jarolim of the opposition Social Democrat Party (SPÖ) criticised the protection of technical protection measures because consumers could not use the products in a “normal” way. Johann Maier (SPÖ) said that the law proposal meant the end of fair use for consumers and would only favour the industry’s position. Gabriela Moser (Green Party; formerly opposition, now junior partner in the government coalition) criticised the transition of the author-based Urheberrecht to American-style copyright. Maria Fekter (ÖVP; Conservative, in power before and after the elections) countered these arguments, stating that her adversaries tried to “legalize illegal copies” under the cloak of consumer rights. She asserted that the private copy would be untouched by the new law. Werner Miedl (ÖVP) claimed that the law aimed at “protecting the interests of artists from immense financial damage”. He referred to the allegedly rising number of copied CDs as a signal for the legislature to act. The SPÖ tried to change the proposal with regards to the copying of CDs, but found no majority for this request.

Belgium

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Implementation of the Directive

The draft legislation is an update to the Author Rights law of 30 June 1994⁴⁹. It is currently only a proposal and several further stages need to be passed before a final vote.

On 23 March 2001, the initial draft⁵⁰ was deposited at the Belgian Senate by Philippe Monfils. Monfils is a Senator from the MR (a liberal political party in the French part of Belgium). The initial proposal (2-704-1) was a strict transposition of the Directive with a restricted view on the exceptions in Article 5.

The last examination of the draft was done by the “Commission Finance et Affaires économiques” on 19 March 2003. The commission will be reconstituted after the election (by the end of June 2003) and its examination will continue at that date.

Exceptions and limitations

As stated in the proposal’s explanatory text, the Belgian legislation already includes nine of the twenty proposed exceptions. It argues that the existing remuneration system is built upon the nine exceptions and extending this would cause the existing private remuneration system to collapse:

“...Si l'on accepte d'étendre les exceptions au droit d'auteur, il faut être d'accord d'abandonner le système du droit d'auteur pour entrer dans celui des subventions publiques. Ce n'est pas le choix qui est proposé. Le système actuel est maintenu mais adapté à la société de l'information. Selon nous, il importe uniquement d'adapter les exceptions existantes aux conséquences du développement de la société de l'information.”

Regarding caching, an amendment⁵¹ to section 3 of the law has been proposed in order to remove the restriction proposed on caching in the first legislative draft.

The proposal also states that two of the nine existing exceptions conflict with the Directive and should be updated during the implementation:

- The current definition of private copy includes every usage. The authors of the proposal want to restrict the scope of the definition to non-commercial use. An amendment would restrict the private copy to the family circle (with all of the difficulties that exist with this terminology).
- Media libraries have a specific exception regarding public loans but the authors of the proposal want to limit the exception to a non-industrial public loan service.

The proposal explicitly includes the three-step test from Article 5.5:

“Les exceptions prévues dans la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins, ont été maintenues, adaptées ou reprises en tenant compte du test à trois étapes. Les Cours et tribunaux doivent également prendre en compte l'article 5.5 de la directive précitée comme ligne directrice pour l'application de la loi.”

⁴⁹ Loi du 30 juin 1994, Droit d’auteur et droits voisins, Codes Larciens.

⁵⁰ <http://www.senat.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=2&NR=704&VOLGNR=1&LANG=fr>, 2-704/1, Proposition de loi, 23/3/2001

⁵¹ <http://www.senat.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=2&NR=704&VOLGNR=8&LANG=fr>, 2-704/8, Amendements à la proposition de loi, 25/2/2003.

Technological protection measures

The proposal implementation includes the protection of “Technical Protection Measures” (Article 6) in section 7 of the proposed text. They include legal protection of technological protection measures (Article 6.1); a legal protection against devices and services that circumvent technical measures (Article 6.2); and access to a protected work to benefit from an exception (Article 6.4). The enabling of such access is defined by the author.

The proposal does not discuss conflicts between technological protection measures and the exercise of exceptions, but this was brought up by an oral question⁵² in the Senate during March 2000. The authors of the proposal considered that the use of technical protection measures is part of the exercise of the author’s rights:

“Le principe du respect des mesures techniques de protection des oeuvres est donc indissociable.”

They note that the protection of technical protection measures in the proposed text could be “surprising” but consider that these measures are necessary for the information society.

The government has proposed an amendment regarding the definition of “effective technical protection measures” and uses the definition of WIPO (20 December 1996 Treaty). The government amendment⁵³ tends to take into consideration the notion of “playability”. The current proposal does not protect this “playability” (we think that this is related to interoperability) although this is not clearly stated.

The procedure to reconcile protection for TPMs with copyright exceptions will be specified by an “arrêté royal” (decree) after the primary legislation has passed. This should provide a mechanism by which the TPM may be circumvented.

Regarding levies, Belgian law is evolving to tax only the media and not the hardware used to make a reproduction. A specific amendment of the government⁵⁴ has been proposed in order to remove the references to the hardware used for copying and only the media is specified in the proposed text. The main reason is the difficulty of taxing multi-purpose hardware such as personal computers. The remuneration system is a key part of the balance with the private copy in the current scheme.

Regarding rights management information, an amendment⁵⁵ to section 8 of the law has been added by the initial requestor of the draft legislation about the legal obligation to include identification in a work. The initial amendment was only the transposition of Article 7 of the Directive on the legal protection against the removing of rights-management information. Section 8bis goes further by adding protection for a request from the author to include information in the copies.

Enforcement and penalties

There is a penal sanction in the new section 79.1 for the circumvention of technical protection measures and the import, distribution etc. of circumvention devices. The current penal sanction in the author right law⁵⁶ is between 100 and 100,000 BEF (2.5–2500€) for the first offence. A repeat offence is punishable by 3 months to 2 years imprisonment and the 100–100,000 BEF (2.5–2500€) fine.

⁵²

<http://www.senat.be/www/?Mival=/publications/viewSTBlok&COLL=B&DATUM=05/23/2000&DOSID=33555262&MINID=421&LEG=2&NR=16&VTYPE=svid&LANG=fr>, Questions de Mr. Monfils et Réponses de Mr. le Ministre de la Justice, SESSION DE 1999-2000, Sénat de Belgique

⁵³ <http://www.senat.be/www/?Mival=/publications/viewPub.html&COLL=S&LEG=2&NR=704&VOLGNR=4&LANG=fr>, 2-704/4, Amendements à la proposition de loi, 18/10/2002.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Supra* note 50

The national debate

Belgian Association for Documentation

The ABD-BVD, the Belgian library and documentation association, has made a statement⁵⁷ on free access to information including digital information. It stresses the importance of equality of access to the information and the education in Belgian society.

The current author rights law has a specific exception for public loans (section 22, §1, 6) and private copies (section 22, §1, 5) are permitted for loaned material. The draft legislation will reduce the scope of both exceptions and will complicate the services to the public provided by these types of organisation. This will be a major problem for public access to information and education.

Free Software Association

The Association Electronique Libre has complained several times to the various commissions about issues in the implementation of the Directive. Its main concern is the protection of technical protection measures and Article 6 of the Directive. These could cause difficulties of for the distribution of free software (e.g. the DeCSS case), damage the overall security of computer systems, reduce interoperability in computer systems and more generally, limit access to information and education.

AEL proposed a specific amendment⁵⁸ to the transposition of Article 6 that would exclude “technical methods”. The amendment has been accepted in the legislative draft 2-704/8. It will not solve all the issue around the conflict between Articles 5 and 6 but it will help to avoid problems such as with the distribution of the DeCSS software, and prevent usage of the legal framework to impose monopoly on the distribution of “technical methods”.

AEL also criticized the new section 8bis in the proposal on privacy grounds because the type and scope of tagging is not specified at all.

Summary

The draft law for the implementation of the Directive focuses on a strong transposition. The discussion regarding technological protection measures is at a low level; most attention is paid to the various remuneration issues, and keeping exceptions at the lowest possible level.

Debate has been confined to the association of authors (SABAM) and the lobbies for strong enforcement of author rights. As the matter is so complex (in both legal and technical aspects), the general public cannot easily understand the real dangers of the implementation of the Directive.

The draft law is only a proposal for the moment and we hope that the new government will focus on the central issue of the balance between author rights and the public interest.

⁵⁷ <http://www.abd-bvd.be/misc/lib/ds-fr.html>, Libre accès à l'information même numérique, Position des bibliothécaires et documentalistes, Vlaamse Vereniging voor Bibliotheek-, Archief- en Documentatiewezenen; Association Belge de Documentation - Belgische Vereniging

⁵⁸ <http://www.ael.be/docs/eucd/proposition/clarificationeucd.pdf>, Proposal to clarify the article 7 in the proposal law of the implementation of the directive 2001/29/CE in Belgium.

Denmark

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Implementation of the Directive

The Directive was implemented in Danish legislation on 17 December 2002 as a revision of the existing Danish law on intellectual property right ("Ophavsretloven").

The last major revision of the Danish law was carried out in 1995 when the law went through a general revision and was brought up to date with the latest technological developments. Since then a number of smaller revisions of the law have been carried out, especially to deal with the issue of private copying of digital works.

The proposal for a new law was put forward to Parliament by the Minister of Culture on 2 October 2002. It was discussed in great detail in the parliamentary Committee of Culture and at a closed expert hearing in Parliament, but ended up being approved more or less unchanged at the parliamentary session on December 17.

- Most of the existing Danish law was already in accordance with the Directive. The main areas where the Directive gave rise to changes in Danish law were:
- Narrowing of the scope of a number of existing exceptions (to cover only non-commercial use)
- Clarification of the legal status of intermediate copies
- Narrowing of the scope of the exception allowing for private copying (regarding non-digital works)
- Protection of effective technical measures (DRM-systems)
- The relation between exceptions and the protection of technical measures
- Protection of rights management information
- Change from international to Community exhaustion

These issues are described in detail below.

Furthermore the Directive gave rise to a number of minor changes in the structure, the legal concepts and the wording of the Danish law. Since these changes were mainly of a technical nature they will not be discussed here.

Other changes

Although the main purpose of the new law was to implement the Directive, some additional changes are implemented that were not related to it. The most important were:

- addition of a new legal licence to allow libraries to distribute articles and text excerpts to their users in digital form (by e-mail etc.)
- addition of a new legal licence to allow public service broadcasters to reuse material from their archives
- widening of the exception regarding study and research at public libraries to cover all published works (allowing the libraries to supply the users with radio, television and Internet browsing).

Since the scope of this report is to discuss the implementation of the Directive these changes will not be discussed here.

Exceptions and limitations

For most part the exceptions listed in Article 5 of the Directive are identical to the exceptions that were a part of the existing Danish law.

The main differences are as follows:

Photocopying

Photocopying (Article 5.2(a)) was not treated as an exception in the existing Danish law. Instead the law allowed for a legal licence that requires schools and universities to negotiate compensation with a collective rights management body (approved by the Ministry of Culture) representing the authors. This was kept unchanged in the new legislation.

Satire and explanation of equipment

Exceptions for satire (5.3(k)) and explanation and repair of equipment (5-3-l) were not part of the existing law and were also not included in the new legislation.

Non-commercial use

A number of exceptions had a broader scope in the existing Danish legislation than is allowed for in the Directive. In the existing Danish legislation exceptions for libraries and museums, exceptions for time shifting in hospitals and prisons and exceptions for disabled people allowed for copying also in connection with commercial activities. Since the Directive allows for only non-commercial use it was clarified in the new Danish law that the exceptions only apply for non-commercial activities. In these areas the implementation of the Directive (in principle) meant that the scope of existing exceptions had to be narrowed. Still the practical implications will probably be few since the exceptions in nature deal with non-commercial use (hospitals, libraries etc).

Intermediate copies

In the existing Danish legislation intermediate copying that takes place as a part of an integrated technical process (caching etc) was not regarded as copying in a legal sense and was therefore not protected by the law. Article 2 of the Directive explicitly states that both permanent and intermediate copies are protected. In the new Danish law it was therefore clarified that intermediate copies are protected. This was done simply by including the wording of Article 2 of the Directive in section 2.2 of the new law.

At the same time, however, the Directive requires an exception for intermediate copies (Article 5.1). This was implemented as a new section 11a in the new Danish law. (Since intermediate copies were not protected the exception was not needed in the old law).

Overall the legal status regarding intermediate copies was left more or less unchanged.

Private copying

The exception for private copying of non-digital works in the existing Danish law was quite broad, allowing for private copying to people in the private sphere of a (physical) person: friends, acquaintances, relatives and (in some cases) even colleagues. For digital works the exception was narrower allowing only for copying for personal use by the person himself or by people in his household.

Since the Directive does not allow for private copying in connection with commercial activities the scope of the exception for non-digital works was narrowed to cover only non-commercial use in the new Danish law. The exception for digital works was left unchanged since it was already in accordance with the Directive.

Singing at meetings

The existing Danish law contains an exception allowing for (non-digital) copying of sheets with song lyrics to be used at a public meeting. For historical reasons singing at meetings is regarded an important part of the Danish democratic tradition and the exception was therefore kept in the new law with reference to Article 5.3(o).

Article	Subject	Part of existing legislation?	Implementation in Danish legislation
5-1	Intermediate copies	No	New section 11a
5-2-a	Photocopying	Yes	Covered by legal licence for educational institutions etc.
5-2-b	Private use	Yes	Sections 12-1 and 12-2. Limited in new legislation to rule out copying in connection with commercial activities.
5-2-c	Libraries, museums, archives	Yes	Section 16. New legislation rules out commercial activities.
5-2-d	Broadcast	Yes	Section 31
5-2-e	Time shifting in hospitals etc.	Yes	Section 15 New legislation rules out commercial activities.
5-3-a	Education and research	Yes	Sections 13, 18 and 21. New legislation rules out commercial activities. Education is covered by legal license
5-3-b	Disabled people	Yes	Section 17 New legislation rules out commercial activities.
5-3-c	News	Yes	Section 23-3
5-3-d	Quotes	Yes	Section 22
5-3-e	Public safety, administration etc	Yes	Sections 26 and 28
5-3-f	Public debate	Yes	Sections 26 and 32
5-3-g	Religious ceremonies	Yes	Section 21
5-3-h	Art on public display	Yes	Section 24-2
5-3-i	Inclusion	Yes	Sections 23-4 and 25
5-3-j	Exhibition or auctions	Yes	Section 24-1
5-3-k	Satire, parody	No	Not implemented in new legislation
5-3-l	Display of equipment, Repair	No	Not implemented in new legislation
5-3-m	Construction	Yes	Section 24-3
5-3-n	Study or research at libraries	Yes	Section 21-3 Extended in new legislation to cover radio, television and Internet browsing
5-3-o	Existing exceptions of lesser importance	Yes	Section 18-3. Used to keep exception in existing legislation that allows for the copying of song lyrics to be used at a public meeting.

Compensation for private copying

Compensation for private copying is implemented in Danish legislation as a flat rate tax on blank audio and video recording media (audio and video tapes, CD-ROMs etc). The compensation is redistributed through the organisations representing rights owners. Part of the compensation is distributed through funds offering grants that rightsholders must apply for. The remainder is distributed through a fixed system containing a complex set of weights that decides the size of the share that each art form and each artist gets.

Digital copying was made legal by a revision of the Danish law in 1998. Since then a revision of the system for compensation has been discussed between representatives of the rights owners, representatives of the IT industry and the involved ministries (Culture, Science and IT). In the discussions rights owner organisations argued for higher taxes and to extend taxes to also cover hardware devices (hard discs etc) in order to compensate for the lost sale (arguably) caused by private copying.

Because these negotiations have not yet been completed a revision of the compensation system was not implemented as a part of the new Danish law. When the negotiations are completed a separate law on compensation is expected to be put forward.

Technological protection measures

Article 6 is implemented in section 75 of the new Danish law. The existing law already included a section (s78) that prohibited distribution or (with commercial intent) possession of technical means that had the sole purpose to circumvent technical measures to protect works in digital form. With the implementation of the Directive in the new law the *circumvention itself* was made illegal.

Article 6.1 in the Directive was implemented in the new section 75(c)(1). This states that circumvention of effective technical measures is illegal unless permitted by the rights owner. The circumvention is illegal even when the purpose of the user is to exercise his rights according to one of the exceptions of section 2. (The relation between the exceptions and the technical measures is discussed below).

Article 6.2 was implemented in section 75(c)(2) and 75(c)(3). The first section states that actions that can facilitate circumvention of effective technical measures are illegal. These actions include:

- production, import, distribution, sale, rent of
- advertising for sale or renting of
- possession with a commercial intent of
- devices that can facilitate circumvention of effective technical measures if (either:)
 - the devices are sold with the intent to circumvent effective technical measures
 - the devices have no (or limited) other commercial purpose or use other than circumvention of effective technical measures
- the devices were developed primarily to facilitate circumvention of effective technical measures

Section 73(c)(3) states that 75(c)(2) (dealing with devices) also applies for services. This implies that companies offering help to circumvent effective technical measures can be punished. Also people publishing instructions on how to circumvent effective technical measures on a web page would most likely fall under the section's provisions.

In the explanatory text of the new law several points regarding circumvention of effective technical measures were clarified:

- Measures should be effective in order to be covered by the protection of the law. Copy protection schemes that in reality do not prevent the user from copying the work (and where the user might not know he is circumventing a system) are not protected
- Measures are only protected if they are used to prevent copying of a work that is protected by the law. Circumvention of a DRM system that is used to protect a work that is not protected by the law (if protection is expired, if the rights owner has not agreed to use the system etc) is therefore legal.
- Only measures that are used to prevent copying are protected. The law does not protect systems that are designed to control the user's own use of the work – this includes (in the view of the Danish Ministry of Culture) the DVD region coding system. Also it is not illegal for a user to circumvent a system if the (sole) purpose is to make use of a work he has lawfully acquired – for example to make it possible to view a DVD on a Linux platform (which turned out to be an important point in the debate on the new law).

Interoperability and research

The Danish law simply repeats the statement in the Directive that the law doesn't prevent research in cryptography. In the discussions of the law the Minister of Culture was asked to clarify that. In his response he stated that the section implies that it would be legal to circumvent a DRM system if it is done as a part of cryptographic research and that it would also be legal to teach methods to break DRM systems at a research institution.

The discussions on interoperability were dismissed by the Minister in the debate by referring to the fact that the sections on effective technical measures do not apply for software and that reverse engineering of software will still be allowed according to the old rules that allow for reverse engineering when the intent is to ensure interoperability.

Exceptions and effective technical measures

The relation between the exceptions of section 2 and the protection of effective technical measures is addressed in section 75(d) of the new Danish law.

As in Article 6.4 of the Directive the starting point is that rightsholders should make it possible for users that are covered by the exceptions in section 2 to make use of the exceptions. One way of doing this is through an agreement between the rights owner and the group of users covered by the exception (i.e. disabled people).

If an agreement can not be reached section 75(d) of the Danish law gives the users (and the rightsholder) a right to take the case to an administrative body: The Board for Intellectual Property Rights ("Ophavsretslicensnævnet"). The board can instruct the rights owner to make the works available for the affected group of users in a form that allows the users to make use of the exception. How this should be done will be decided on a case-by-case basis: by making cryptographic keys available, by making the work available in non-digital form, by making decryption devices available etc.

If the rights owner has not complied with an instruction of the board to make the work available after a period of four weeks the user will be allowed to circumvent the technical measure on their own. Notably this is the only way that users can exercise their rights if rightsholders refuse to make the work available. The law establishes no sanctions for rightsholders that do not comply with the instructions of the board.

Complaints over decisions made by the board can be brought up before the Danish courts.

It is important to clarify that section 74d *does not apply* for the exception that allows for private copying.

In the explanatory text of the proposal for the new law the reason for this is stated as follows:

- that the main reason for Article 6 in the Directive is to encourage rightsholders to use effective technical measurements in order to stop widespread piracy
- that it would undermine the development and use of these systems if rightsholders can be instructed to hand out decryption tools to every private user who wishes to make a personal copy

Private users that are prevented from making use of the exception that allows for private copying by a DRM system therefore have no other means to exercise their right than to perform an illegal circumvention.

Protection of rights management information

Article 7 of the Directive is implemented in the new section 75(e) of the Danish law.

Section 75(e)(1)(1) makes it illegal to remove or change rights management information.

Section 75(e)(1)(2) makes it illegal to distribute, publish, broadcast or in other ways transfer works where rights management information is removed or changed.

The second part of the section (75(e)(2)) clarifies that the acts above are only illegal if the person performing them knows or should know that the consequence of the act is that a protected work is illegally copied or that illegal copying of a protected work is facilitated, made easier or hidden.

Also the explanatory text of the Danish law clarifies that the section only applies when rights management information is used on works that are protected by the law (as for the protection of technical measures).

Enforcement and penalties

The penalty for violating section 75(c) on effective technical measures and 75(e) on rights management information is a fine. The Danish law contains a specific section on liability for copyright infringement (section 83) but this does not apply for section 75(c) or 75(e). Persons that circumvent effective technical measures or remove rights management information can however be liable according to the general Danish rules on liability.

A number of organisations representing rightsholders have asked for more severe sanctions for copyright infringement. Also they have pointed out that the sanctions for violating section 75(c) and 75(e) in their view are too mild.

In September 2002 a Commission on Cyber Crime (under the Ministry of Justice) proposed to increase sanctions for copyright infringement which would also naturally affect the sanctions for violating section 75(c) and 75(e). The Ministry of Culture felt that this proposal should be discussed broadly among affected parties before changing sanctions. Sanctions for copyright infringement in the new Danish law are therefore not altered and sanctions for violating 75(c) and 75(e) are relatively mild. At the same time it must be expected that a proposal to increase sanctions will be put forward when the report from the Commission on Cyber Crime has been discussed.

Circumvention of effective technical measures is illegal if done with intent or if the perpetrator should have known that the consequence would be that an effective technical measure was circumvented. Likewise possession, distribution etc. of devices that facilitate circumvention is illegal if done with intent or if the perpetrator should have known.

Removal of rights management information is only punishable if done with intent.

International to Community exhaustion

In order to comply with the Directive the new Danish law moves from international to Community exhaustion of rights. In the negotiations of the Directive the Danish government strongly opposed Community exhaustion (together with other Nordic countries). Since the Directive ended up demanding Community exhaustion the Ministry of Culture had no other choice but to change it in

the new Danish law (although it is pointed out that the Danish government will continue to put pressure on other Member States in order to change the principle back to international exhaustion).

The national debate

Since the main focus of this chapter is the implementation of the new rules on circumvention of effective technical measures and rights management information the description below of the discussions of the new Danish law will focus on these issues leaving out discussions of other parts of the new law (Community exhaustion, new legal licenses etc).

The "climate"

As in most countries, illegal copying of digital works (CD burning, file sharing on the Internet etc.) has received a lot of attention in Denmark over the past 2—3 years. Recording companies have been especially eager to point out the "devastating effect" of piracy on their sales.

Organisations representing rightsholders have formed an anti-piracy organisation ("Anti-piratgruppen") that has been very active in their fight against piracy, among other things through:

- actions directed towards "net-parties" where users (mostly teenagers) swap files
- actions directed towards the file sharing networks – surveying the use of the network, registering IP-addresses of users that supply selected files (popular music or DVD movies) and (with a court order) getting names and addresses of these users from their ISP in order to prosecute them
- lobbying and PR

All in all the organisations representing rightsholders and the big media companies have succeeded in creating a public sentiment that:

- piracy and file sharing is a serious threat for the creative businesses – especially the recording business
- it is the artists (musicians, authors...) that are the main victims because dropping sales means less income for artists
- piracy therefore is a threat to the creation of art in society

A few commentators have tried to point out that file sharing and digital distribution channels could be a new opportunity for (especially smaller) artists and that what is really threatened is the old distribution channels of big media companies. This view has not received much attention, however, because it has been overshadowed by high profile artists (such as (Danish) drummer Lars Ulrich from Metallica) complaining that piracy destroys their sales and because most artists let their organisations and distributors (recording companies, publishers) represent them in the debate rather than getting personally involved.

In general the media has taken the views of rightsholders and media companies. A few stories of frightened 13-year-old teenagers that have been accused of creating damages of millions of Euro for rightsholders and fined huge amounts after having participated in rather innocent net-parties have reached the media. But although most journalists realise that it is probably not a good solution to take it all out on a poor teenager in general they accept the fundamental premise of media companies that file sharing and piracy destroys the income for media companies and artists.

Public opinion before the debate on the new Danish law must be described as follows:

- that computer and Internet users cannot be trusted
- that piracy will flourish if nothing is done
- that this is a serious threat to artists and creation of art in society

Against that background it was a natural conclusion that DRM systems are a necessary means to stop this development and that circumvention of DRM systems must be avoided in order to prevent the new solution being undermined.

Supporters of the proposal

As could be expected the rightsholders and media companies formed a broad front to support the provisions in the new law that prohibit circumvention of DRM systems. Organisations representing artists (authors, musicians etc), organisations representing media companies (publishers, recording companies etc), various rights management organisations (Gramex, Copy-Dan, Koda etc.) all expressed strong support for the new provisions.

At the same time a number of these organisations expressed concerns that the penalties for circumventing DRM systems in the proposal were too mild and that imprisonment (up to one year) should be used as a penalty in severe cases.

(As described above the discussion on sanctions was postponed because of a pending report from the Ministry of Justice Cyber Crime Commission. Based on the comments on the new Danish law from rightsholders it must be expected that there will be strong support for stronger penalties when the report from the Cyber Crime commission is sent out for comments).

More surprising, the Danish Council of Consumers ("Forbrugerrådet") expressed support for DRM systems in the discussions of the new law. This was based on the view that DRM systems are a better way of ensuring that the consumer gets what he pays for and that the money ends up with the right artist: better than with the system of compensation through a flat rate tax on blank recording media. The problem with the tax on blank media is that:

- all consumers have to pay the tax – even consumers that do not use the media to copy protected works
- the compensation is returned to the artist through grants and fixed distribution systems that do not ensure that the artist whose work is actually copied is also the artist that receives the compensation.

The Council of Consumers therefore supports the development of DRM systems – provided that the tax on blank media is reduced when DRM systems gain widespread use.

Opponents of the proposal

IDFR

The main opposition to the proposal to prohibit circumvention of DRM systems came from a newly formed organisation: The Initiative for Digital Consumers Rights ("Initiativet Digitale Forbruger Rettigheder, IDFR").

IDFR was formed directly as a response to the proposal for the new Danish law and consisted of a broad group of people interested in the subject: people from the Open Source community, IT-experts, legal experts, etc.

IDFR conducted an effective lobbying campaign directed towards Members of Parliament and media and ran a petition on the website: www.digitalforbruger.dk that collected more than 4000 signatures.

In their campaign IDFR focused on the following points:

- That DRM systems will constitute a new "technical" copyright system that takes precedence over the legal copyright system and shifts the balance between consumer rights and the rightsholders giving too much power to the rightsholders and preventing the user from exercising his rights to fair use.

- That the prohibition of circumvention of DRM systems will leave the user without any means (technical or legal) to challenge the rules constituted by the DRM systems
- That the prohibition of technical devices and knowledge on how to circumvent DRM systems will hinder competition and IT development and endanger research in IT security
- That the prohibition of technical means to circumvent DRM systems will further monopolise the software market since software that allow file formats to be viewed on other systems (such as Linux) could become illegal
- That DRM systems can never be fully effective and therefore will create problems for users and for IT development without stopping piracy.

As one example of the negative effect of the new legislation, IDFR used the problem of playing DVDs on Linux – explaining how the necessary software to convert and play DVDs on Linux will also allow for the DVD to be copied and could therefore be considered illegal according to the new law.

The fundamental view of IDFR was that DRM systems are not the right solution to stop piracy. Instead IDFR proposed to stop piracy using existing regulation by prosecuting users that use file sharing networks to distribute protected works. As a consequence IDFR proposed to use the opportunity in the Directive to include private copying as one of the exceptions where users are granted the right to demand from rightsholders the means (by handing out keys etc) for the user to exercise his right.

Danmarks Radio

Apart from IDFR, the main public service broadcasting company in Denmark, DR (Danmarks Radio, "The Danish BBC") expressed strong concerns about the new provisions to prohibit circumvention of DRM systems.

In general DR found that the provisions on technical measurements shifts the balance between rightsholders and users giving too much power to rightsholders and that provisions of this character ultimately do not belong in the legislation on intellectual property rights.

DR expressed fears that rightsholders will use DRM systems to gain control over the legal use of works in DR:

- gaining influence on editorial decisions, deciding which records to play on which channels etc.
- creating a monopoly on technical platforms for playing works
- preventing new technical platforms for broadcasting from being developed

DR pointed out that the prohibition of devices to circumvent DRM systems could prevent DR from exercising its rights according to exception 5-2-d to use works in connection with broadcast, by preventing DR from possessing the necessary means to circumvent systems used by rightsholders to control the activities of DR.

Also DR pointed out that the procedure set up by the law to allow DR to make use of the exception (in case a DRM system prevents this) is too inflexible and time consuming:

- requiring DR to take each case to the Board of Intellectual Property Rights
- providing the board with no sanctions if rightsholders do not comply with the instructions
- requiring DR to wait four weeks before they can legally circumvent a DRM system if the rightsholders refuse to comply with the instructions of the board

These requirements are not compatible with day-to-day operations in a modern broadcasting company.

In order to solve these problems DR proposed to limit the implementation of Article 6 of the Directive such that the prohibition of circumvention of DRM systems would only apply in situations which are not covered by one of the exceptions in section 2.

As an alternative DR proposed to set up a more flexible system of dealing with conflicts between the exceptions of section 2 and the provisions of Article 6.

Process in parliament

At the outset most parties in Parliament were supportive of the new legislation based on the general sentiment that something had to be done to stop piracy and a general lack of awareness among Members of Parliament of the problems caused by widespread use of DRM systems.

Through an effective lobbying campaign IDFR succeeded in changing that. When the proposal was transferred to the Committee of Culture after the first discussion in Parliament, a number of parties were already genuinely concerned by the objections raised by IDFR. Also the MPs in the Committee of Culture had started to realise that they were dealing with a new and complex issue and that they didn't know enough about it.

As a consequence the Committee of Culture dedicated a lot of time and energy to the discussion of the new law:

- inviting experts (among others IDFR and DR) to give testimony at their meetings
- conducting an expert hearing in Parliament with selected legal and technical experts (IDFR, legal professors...)
- asking the Minister of Culture to clarify and explain a number of points based on the objections raised by IDFR and other experts

The most concrete outcome of this was that the Committee of Culture agreed to include a revision clause in the law such that the sections on effective technical measures (75c) and rights management information (75e) should be revised based on the experiences in Denmark and the EU with the use of DRM systems, no later than the parliamentary year 2005/2006.

Furthermore the process clearly had the effect that MPs got a better understanding of the problems caused by DRM systems and must be expected to have greater awareness of the problems when DRM systems gain more widespread use.

On the other hand the discussions in the Committee of Culture did not change the fundamental sections of the new law which was passed unaltered. In spite of the expressed concerns and uncertainties the parties in government (Liberals and Conservatives) supported the proposal all the way, as did the largest opposition party (the Social Democrats).

The smaller opposition parties on the left clearly had genuine concerns regarding the prohibition of circumventing DRM systems – especially regarding the possible effect on Open Source development which they support strongly. On the other hand the same parties have a strong commitment to support artists and seemed to have difficulties in finding the right middle way. Towards the end of the negotiations they tried to postpone the adoption of the law in order to allow for more time to consider these complex issues (which was rejected because of the EUCD deadline for implementation on December 22, 2002.)

The strongest opposition against the new law came from "Dansk Folkeparti" – a party on the extreme right that normally supports the government. The party put forward a number of proposals to change the law in order to limit the damaging effect of DRM systems but didn't succeed in getting them through.

Opposition of the proposal was made more difficult by the Minister of Culture whose strategy towards the objections of IDFR for a great part was to deny that the problems existed and to refer to them as "technical details" that will always exist when you are putting forward new legislation on technical issues.

Use on other platforms

The debate on the damaging effect of DRM systems on the freedom of users to access works they have legally acquired ended up concentrating around the issue of accessing works on alternative platforms.

As described above, IDFR argued that the prohibition of technical means to circumvent DRM systems could prevent users from accessing legally acquired works, because access on other platforms such as Linux would require the use of software to convert file formats, bypass country codes etc. – software that would also facilitate copying of the work and that therefore could be considered illegal.

This concern was raised in the Committee of Culture where a member asked the Minister of Culture to clarify the issue.

In his response the Minister maintained that:

- circumventing DRM systems is only illegal when done with the intent to copy the work – circumventing DRM systems with the intent to use (view, listen to...) the work is legal
- although software designed to convert file formats and in other ways make it possible to use the work on another platform could also be used to copy the work it would not be illegal, because the primary purpose of the software would not be to facilitate copying of the work
- it will be the rights owners' responsibility to design DRM systems in such a way that copy-protection and use-protection is separated – that is: that one system is used to control how the users use the work (such as the DVD region code) and another system is used to prevent copying.

In their comment to the response by the Minister IDFR tried to explain that

- the process of converting file formats, using (playing) a work and copying a work in digital form cannot be separated since they are essentially the same
- it will be impossible to prove that a software component (such as libcss) is designed with the primary purpose of converting file formats or of playing a file when it in essence will be identical to a software component designed with the purpose of copying files
- it is not technically realistic to separate DRM systems in the way the Minister imagines.

In response the Minister essentially repeated his initial arguments and dismissed the points raised by IDFR as "technical details".

Private copying

As described above, section 75d allows users that are covered by one of the exceptions in section 2 to take their case to the Board for Intellectual Property Rights if the ability to exercise their right is prevented by a DRM system and it is not possible to reach an agreement with the rights owner on how to get access to the work.

This does not apply for the exception that allows for private copying since the Ministry of Culture found that it would undermine the development and use of DRM systems if right owners can be instructed to hand out decryption tools to every private user who wishes to make a personal copy.

At the expert hearing this point was contested by the professor of law Mads Bryde Andersen (University of Copenhagen, Former chairman of the Danish IT security Council) who proposed that the right to private copying was included under the system established by section 75d.

The Ministry of Culture was asked by the Committee of Culture to comment on this but essentially repeated the arguments put forward in the explanatory text of the law: that this would undermine the development of DRM systems.

Research in IT security

In their comments on the law IDFR pointed out that research in IT security to a great extent is based on continuing efforts to circumvent security systems. The prohibition of circumvention of DRM systems and possession of software designed to circumvent these systems can therefore hinder research in IT security and lead to a situation where known security problems are not published and only criminals have knowledge of security breaches in the systems.

In his response to this comment the Minister of Culture referred to section 75c-6 in the law that states that the law does not impede research in cryptography.

In response to this IDFR pointed out that neither the law nor the Directive defines "research in cryptography" and that this can lead to uncertainty and doubts that in practice will hinder research in IT security.

In the last parts of the negotiations the MP from Dansk Folkeparti of the Committee of Culture tried to broaden the scope of the section on cryptography (to include education in cryptography and IT security in general). The proposal did not go through.

Use in broadcasting organisations

In response to the concerns expressed by DR the Committee of Culture agreed that it is not the intent of the law to give rightsholders the power to control the legal use of works in DR or other broadcasting organisations.

This was included as a note in the report from the committee but did not give rise to any changes in the law.

The proposal by DR to change the implementation of Article 6 was not considered.

Adoption

Although the Committee of Culture devoted a lot of time and energy to the discussions of the proposal the law ended up passing more or less unaltered.

The only substantial change in the law was the inclusion of a revision clause (as described above) which requires that the sections on effective technical measures and rights management information should be revised at the latest in 2005/2006.

Finland

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Implementation of the Directive

Finnish civil servants have had more influence on the US Digital Millennium Copyright Act and the EU Copyright Directive (EUCD) than most people realise. Jukka Liedes, who wrote the Finnish copyright law proposal, was also the chief drafter behind the WIPO copyright treaties signed in 1996. Mr. Liedes is a high profile lawyer who started his career as the lawyer for Teosto (the Finnish Copyright Collection Society for Artists) and has worked now for some 20 years as a government special advisor on copyright matters. Mr. Liedes is often referred to as Mr. Copyright in Finnish newspapers.

Mr. Liedes is responsible for the Directive's Article 6.4.4, also known as the "e-commerce safety clause". Mr. Liedes announced that he was able (with some help from his colleagues) to "save e-commerce" by removing all limitations on copyright holders' exclusive rights in the digital environment. He actually had proposed something similar at WIPO, but at that time, there were also copyright sceptical developing countries among others to push for a more balanced outcome.

In Finland, there had not previously been any public discussion of detailed copyright policy. Collecting societies, institutional users (libraries, museums and the like) and media industries have been the main lobbyists and weak academia (there are no copyright law professors in Finland) has been left to defend the general public. This changed significantly during the implementation of the Directive.

First Hearing, Autumn 2001

The process began officially with a public hearing on 14 September 2001. A background document, in which the possible changes to the Finnish law were outlined, was prepared for the event. The document was clearly in favour of a very strong copyright regime. For example, criminal sanctions were considered to be the only useful remedy against the circumvention of technical protection measures. In general, the document did not give that much detail on how the changes were planned to be made.

The hearing was open to all interested parties and it turned out to be very popular. Approximately 200 people, including three members from the EFFI board listened to the presentations from the civil servants.

The discussion after the presentation was interesting. The harshest criticism came from Mr. Urho Ilmonen, who was at that time the chief legal counsel of Nokia. He questioned the scope of the law and the role of the Finnish collecting societies in his very strongly worded presentation. Another strong statement came from the Finnish Library association.

The EFFI representatives participated to the discussion although EFFI was not among those invited to talk (EFFI was officially founded just a week before the event). Our comments focused on technical protection measures and especially on their effects on scientific research.

Copyright Committee, Late 2001 – Early 2002

After the first hearing, the public process stalled for a while. A preparatory committee was nominated on 28 November 2001 with Mr. Liedes in the chair and other members from academia and institutional players. The committee did not work in public at this time but some of its information leaked out. EFFI received mainly informal information from academic participants on the committee.

At this point EFFI also selected the right of scientific research as its first lobbying target. It was something that was easy to explain and hard to argue against. The authors of this report published opinions in Helsingin Sanomat (the biggest newspaper in Finland with a circulation over

500,000). It was aimed at the civil servants and the Finnish companies that operate in this field. In the second phase, we wrote an article that was published in practically all university newspapers around Finland. In that article, we strongly encouraged the research community to contact the Ministry of Education and explain why the law would harm their research.

The committee requested eight expert reports, which were supposed to help preparing the most difficult parts of the law. Unfortunately, all of these statements were written without technical input.

The most striking report discussed copy protection technologies and their regulation⁵⁹. This was written by Ms. Katherine Sand from the International Federation of Actors. It contained little substantive material. Having a document full of errors on copying technologies was very unfortunate for everyone involved. Nor did the civil servants have a deep understanding of the underlying technical issues.

First Proposal by Committee, Spring 2002

The first proposal for the law was published on 2 May 2002. Perhaps the only positive point was a narrow and unclear protection for encryption research. It showed, nevertheless, that our actions could have some effect on the outcome.

A second hearing process started after the proposal was released. The Ministry of Education requested opinions from about 20 parties. The list included all the collecting societies and the biggest institutional users (e.g. The Finnish Broadcast Company).

Electronic Frontier Finland was not invited to participate. In fact, we did not even get any information about the hearings, because our organisation was removed from the mailing list that was set up after the first hearing. The official explanation was first that we were not an “official” association, and then that they did not know who we were. This was puzzling, because at that point we had been in contact with them several times.

We anyway prepared a twelve-page statement, in which we requested a wide range of changes. The biggest problems from our point of view were:

- The proposed law did not allow private copies of protected works;
- The protection for technological protection measures did not have any kind of limitations or provisions against misuse, which would have made it possible to extend copyright indefinitely;
- Criminal sanctions were proposed even if civil remedies would have been enough;
- DVD region codes, CD copy protection and similar systems would have been defined as legally protected access restriction systems.

We managed to get a very short appointment at the Ministry, during which Mr. Jorma Walden (the deputy to Mr. Liedes) agreed to hear our statement but declined to comment or discuss its content at all. Instead, he repeated that authors need protection. The atmosphere during the meeting was extremely chilly and it was very clear that they did not plan to consider our criticism.

We got further confirmation for this. Mr. Liedes gave an interview to IT-Viikko (a Finnish IT news magazine) after we sent out a press release about the problems during the hearing process. He defended their position and claimed that Electronic Frontier Finland was just a group of “hobbyists”, and that there were many parties whose opinion they just could not take into account. He maintained that the Ministry only requests comments from the parties affected by copyright legislation.

⁵⁹ Katherine Sand: Technological Measures. Strategic Considerations and Conclusions Relevant to the Legislative Work, Copyright Studies, April 2002, available at <http://www.minedu.fi/opm/tekijanoikeus/study4.pdf>

Therefore, it was clear that our only hope was to get Parliament to change the forthcoming final proposal. The only way to do this was to turn public opinion against the law. We started writing opinion pieces for newspapers around Finland and had many of them published. Some of the newspapers did follow-up articles on the topic. We also appeared on mainstream radio and TV channels a couple of times. Especially EFFI board members Mikko Välimäki and Kai Puolamäki commented on the law proposal in the public eye.

The proposal soon reached a mass audience and EFFI started to receive wide support. For example, a group of legal researchers from the University of Turku published very critical report on the law. Another group that was furious was researchers of Asian and African culture. They were worried that in the future it would be very difficult to get material thanks to the European Economic Area first sale doctrine. Finally, DVD enthusiasts voiced concerns over not being able to modify their players, and the inferior region two (Europe) markets compared to US and Asia.

Final Proposal at the Parliament, Autumn 2002

The final proposal was delayed considerably. While the proposal was initially supposed to be presented to the Parliament before the end of August, it was delivered on 10 October 2002 around two months behind schedule. Now we became more optimistic: the Ministry did not update their homepage but insisted that the proposal had come out in August and would be in force before the Directive's deadline in December. This seemed unlikely!

We started to investigate where the delay came from. As far as we now know, there was an argument between the Ministry of Telecommunication and Transportation (MTT) and the Ministry of Education over the copyright levies on devices (also known as hardware taxes). Nokia and other Finnish IT companies were worried that the Ministry of Education would not have been a neutral party to decide which devices should be taxed and how much. Industry managed to lobby the MTT to defend their position. In the end, MTT won and the right to decide these hardware taxes was removed from the Ministry of Education.

The main parts of the Committee proposal were not changed that much. There were, however, a few quite promising changes.

The proposal now said that private circumvention was legal as long as the user had legal access to the work and could do the circumvention without any help from others. This part looked good at first sight but really did not have any practical meaning and was most likely contrary to the Directive anyway.

A somewhat major win for EFFI was the classification of region codes. The explanatory part of the proposal had a vague definition of technical protection measures and used DVD country codes as an example of a system that could not be regarded as an efficient technical protection measure. Therefore, it would have been legal to make DVD players region-free.

Parliamentary Process, Late 2002 – Early 2003

The first plenary hearing of the proposed law at the Parliament was on 16 October 2002. Then the proposal was sent to the Committee of Education and Culture (CEC) after a lively discussion. The discussion gave us some hope, because some of the Members of Parliament (MPs) seemed to be aware of the problems with the law. For example, one MP demanded that the CEC should start an investigation into CD pricing and possible price fixing.

Mrs. Suvi Linden was the chairwoman of the CEC. She was also a former Minister of Culture at the time the preparation of the law was begun. Ville Oksanen from EFFI knew her and her aide also personally from his political past and was able to get a confirmation at an early stage that he would be invited to give expert testimony.

The time before Christmas was very busy due to the forthcoming elections. The government was trying to finish as many laws as possible before the end of the session but the Parliament made clear that it could not handle all of these proposals, especially because there were some serious

quality issues. The message started to get out that there might not be enough time for the proposed copyright law either.

At the same time EFFI started a very popular campaign against CD copy protection, which was featured in practically all of the mass media in Finland including TV and radio interviews and debates. EFFI also commented publicly on the ElcomSoft decision in December 2002 and the DeCSS and Eldred decisions in early January 2003. All of these publicity events had a natural connection to the copyright law currently under parliamentary review and we assume this publicity helped our job considerably.

The CEC did not have time to start the hearings before the end of January 2002 and at that point it was clear that there would hardly be enough time to get statements from other committees. One of the most crucial questions was consequently does the law include anything that should be reviewed by the constitutional law committee. If this was the case, the committee would have to work at a really fast pace in order to get the law corrected before the parliamentary elections coming in March

While the constitutional question remained more or less unanswered, the CEC moved on to the expert hearings. At this point, EFFI chairman Mikko Välimäki had secured his participation and thus Electronic Frontier Finland had effectively two chances to present its position.

At this point EFFI got some unexpected help from one of biggest newspapers, which ran a story about copyright payments in childcare centres. The story and its follow-ups framed Teosto (the Finnish Copyright Collection Society for Artists) as an overly greedy organization. At the same time, a lawyer from Teosto kept arguing that the singing of children is a public performance and thus Teosto were entitled to compensation. They were perhaps technically right, but the timing was very unfortunate because family issues were one of the main themes of the election.⁶⁰

Ville Oksanen from EFFI was invited to a coordination meeting with other the parties, who were scheduled to give their testimonies along with Nokia and the country's three largest Telecom operators Sonera, Elisa Communications and Finnet. The mood was very upbeat and the consensus was that the main goal was to try to block the law. A common position was also formed about several subject matters, although the issues were not very interesting from EFFI's point of view (like who has to pay cable transmission fees etc.)

EFFI was also informed of the actions of other Finnish scholars, who were scheduled to give their presentations earlier. The message coming from the CEC was clear – the MPs hated the law and just wanted to have reasonable grounds to let it fail. One of their main worries was that the law was so unclear that normal people just could not understand it. This would have been a major problem because the law would at the same time have harsh criminal sanctions.

Ville Oksanen also managed to get some last minute information from the Coalition Party's secretariat and from the MTT. The Coalition party did not like what was happening since it was in charge of the Ministry of Education and the CEC, but it was ready to accept that the law had to be rewritten if most of the expert witnesses suggested that. They also realised that there was a likelihood that the next version would actually be worse if the government was going to change.

The hearings went very well. The MPs were clearly worried about the poor quality of the proposed law and also had serious issues with the content. Ville Oksanen had borrowed an Apple iPod from Apple Finland for the event. It turned out to be a very effective tool to demonstrate that the current models of content distribution and use are under pressure from technological innovation. The legislation should not prevent consumers benefiting from these possibilities.

At one point, a question about the necessity of the law was raised. The answers were along the line: it is not a problem not to have a law at this time, because only a few other countries have implemented the law so far. Instead, it is more important to get it right.

⁶⁰ A related story on how Finnish Teosto charges taxi drivers for playing music from CDs and radio went through to Slashdot in December 2002: <http://slashdot.org/article.pl?sid=02/12/03/216234&mode=thread>

Meanwhile another delay came from the Constitutional Law Committee, which had started to review the proposal. Some of the expert scholars had connections to EFFI and we were able to confirm they were suggesting that the law proposal had many possible conflicts with the Constitution and human rights treaties.

Mikko Välimäki presented his testimony with a cable television lobby group, consumer agency and law professor on 31 January. The consumer agency supported our cause significantly reporting how consumers had had bad experiences with copy protected CDs which often do not work as consumers expect. Also the law professor pointed out problems in understanding the proposal and possible negative implications for markets.

In his speech, Mikko mainly criticised the logical inconsistencies and hard-to-understand language of the proposal and possible threatening implications of technical protection measures. The session was a clear win for us and MPs pointed most of the questions directly to EFFI. It was a pleasant surprise to learn that some MPs and especially the CEC chair had grasped the big picture and wanted to know what they could do.

Thus, on 31 January, a short official statement was given by chairwoman Linden at the hearing that the committee would let the proposal fall.

Next Proposal, August 2003?

Finland recently got a new centre-left government. Adding Digital Rights Management (DRM) extensions to the copyright law is mentioned in the programme of the new government. The new Minister of Education Tanja Karpela has informed us that the process has started again and the next draft should be released before the vacation season. The law should be ready for the Parliament in late August or early September.

Content of the Final Proposal

The following discussion is based on the content of the final (dismissed) proposal. For now, we have no information on how much the future law proposal will differ from the dismissed one but it is evident that most of what is said here will also apply to the future proposal.

In summary, the proposal included two types of changes to the Finnish Copyright Law:

1. Main changes based on the Copyright Directive, and
2. Other more specific changes (mostly to extend copyright further) which were either independent from the Directive or described as “necessarily following from” the Directive.

This chapter focuses on the first category of changes although some more specific changes that were said to follow from the Directive are also discussed.

The tone of the proposal was definitely in favour of rightsholders at the expense of individual users. In general, the writers of the proposal seemed to have institutional users in mind and did not emphasise that copyright law now affects more and more individual computer users. The traditional balance between authors and users (see the Directive preamble section 31) was not mentioned in the whole 200-page proposal!

Instead, the proposal was very optimistic about DRM: it seemed to say that DRM solves all problems if we simply give all control to rightsholders. From that principle it follows that any vague fair or private use exemption was seen as hostile to DRM. The proposal for example stated at the beginning that “In the current situation, one must consider if there is any need for exceptions to the exclusive rights” and “rights management must be stricter in the digital environment... it might be the case that rightsholders cannot even allow users to exanimate the work”.

Neither did the proposal take into account constitutional rights such as freedom of speech and privacy, stating confidently: “This law proposal introduces no changes to the law that would require the investigation of its constitutionality”.

Obviously, balancing freedom of speech and the private use exemption with exclusive rights is not an easy task. But that is no reason to skip the process.

Exceptions and limitations

Finland has among other European countries a limited exemption approach to user rights: just some special exemptions listed in copyright law are supposed to reflect the interest of the general public in copyrighted works. It should be noted that balancing the interests of authors and users has not been mentioned in Finnish copyright law nor did the dismissed final proposal refer to it.

In the US the approach is different: there is an open ended and more flexible fair use right balancing the scope of exclusive rights. It is interesting to note that the Finnish proposal voiced concerns that there probably is no reason to allow these special and narrowly interpreted exemptions to copyright in the future. At the same time the Finnish proposal called for more clarity in the language of the law and a more simplified logical structure. Recently in Australia a committee recommended the simplification of the long list of almost non-understandable exemptions by introducing a US-style open-ended exemption clause.⁶¹

The proposal intended to change exemptions fundamentally. This was not derived from the Directive but was rather Finland's own invention, which appeared in the final proposal (no one had anticipated it since it was not in the Committee's proposal). The proposal essentially required that for any copyright exemption to apply the user must first have obtained a legal copy of the whole work. It would not have been possible to e.g. cite any given work found on the Internet or download a work to a Finnish home computer from the Internet unless the author had been contacted. Internet users simply can not know if works on other homepages are there legally or not.

The exemptions were also narrowed because of the Directive. Technical protection measures and especially Article 6.4.4 were the main problems. The proposed exemptions can be seen in the following table:

Exemption	Only with compulsory license	Protected by "6.4.1" = 50c §1 paragraph	Valid after "6.4.4" = 50c §4 paragraph
11a § Temporary copies	No	No	No
12 § Private use	No	"6.1.2."	No
13 § Photocopying	Yes	No	No
13a § Internal publications	Yes	No	No
14 § Educational use (matriculation exam)	Yes	Yes	No
15 § TV and Radio in governmental facilities (hospitals, prisons etc)	No	Yes	No
16§-16d§ Museums, archives	No	Yes	No
17 § Disabled persons	No	Yes	No
18 § Composite works	Yes	No	No
20§ Showing a copy	No	No	No
21§ Public presentation	No	No	No

⁶¹ Simplification of the Copyright Act 1968, Part 1, Report on the Simplification of the Copyright Act 1968 Part 1 - Exceptions to the Exclusive Rights of Copyright Owners, February 1999, available at <http://www.law.gov.au/clr/Simplification%20of%20the%20Copyright%20Act%201968%20-%20Part%201.htm>

22§ Quotations	No	No	No
23§ Reuse in newspapers	No	No	No
24§ Concert programmes	No	No	No
25 b § Recording news events	No	No	No
25 c § Repeating public statements	No	No	No
25 d § Document publicity, public security	No	Yes (only public security)	No

Technological protection measures

The proposal's section on technical protection measures was written quite closely according to the Directive with some notable differences. On the positive side, there was a clear encryption research exemption with a reference to Recital 48. On the negative side, private use of technically protected works was an unclear mess.

The proposal stated vaguely that "CDs may be copy protected ... technical protection may restrict their use on devices which do not support the protection technology" but was careful not to take any further position on whether circumvention would be allowed. On DVD region codes the proposal was, surprisingly enough, more clear: "DVD region codes – with the technology used today – cannot be interpreted as a technical protection measure that would be protected according to Article 6 of the Directive". It seemed that it was acceptable to break DRM for private use at least in some cases.

But immediately after discussing situations where circumvention could be legal the proposal went back on track and remarked that "technical features and markets will progress and it is unclear whether it is justified to allow circumvention for private purposes". It was especially clear that circumvention was possible only in the case of private use and not with any other exemption (such as citation). The proposal bizarrely continued that "possible problems more often concern institutions rather than individual users". Also, it claimed that while circumvention for private purposes could be allowed, no external help for circumvention could be used or offered. Finally, following Article 6.4.4 of the Directive, for on-demand content no exemption or circumvention would apply.

One interesting side note concerning implementation of Article 6 was that the proposal claimed it was necessary to limit software reverse engineering. It is a well founded legal principle – also stated in the EU Software Directive from 1991⁶² – that reverse engineering (decompilation) of binaries is allowed for interoperability purposes. But the proposal included an amendment to the reverse engineering section of the copyright law stating that reverse engineering is not allowed for any DRM system software.

Enforcement and penalties

The proposal would have added three new crimes to Finnish criminal law and four misdemeanours to copyright law:

Act	Location	Level of Intent	Punishment
General copyright misdemeanour	Copyright law 56a § 1. paragraph	Should have known	Fine, confiscation
Illegal (private) import of pirated work	Copyright law 56a § 2 paragraph	Should have known	Fine, confiscation

⁶² Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

Circumvention	Copyright law 56e §1 paragraph	Should have known	Fine, confiscation
Enabling circumvention	Copyright law 56e §2 paragraph	Should have known	Fine, confiscation
Removing rights management information	Copyright law 56f §	Should have known	Fine, confiscation
General copyright crime (including import)	Criminal law 49.2§	With intent	Fine, 2 years prison, confiscation
Circumvention	Criminal law 49.3§	With intent	Fine, 2 years prison, confiscation
Enabling circumvention	Criminal law 49.4§	With intent	Fine, 2 years prison, confiscation
Removing rights management information	Criminal law 49.5§	With intent	Fine, 2 years prison, confiscation

Device levies

The proposal contained some substantial changes to the rules concerning device and media levies. The definition of such a product is:

“Audio or video tape or other such a device, which can be used to store the work and which is able to make private copies in substantial amounts” (26 a §)

The fee is based on storage capacity and the government decides on a yearly basis which devices meet the criteria. There are four exemptions to the fee, which are:

- Professional use (radio, TV etc.)
- Devices that are designed to help disabled persons
- Tools used in professional data processing
- Other very important reasons based on the Ministry of Education’s consideration

The proposal also requires that the use of technical protection is a factor that should be taken into account while deciding the fees.

A note on Norway and Sweden

While Norway is not an EU member it is obliged as a member of the European Economic Area to implement the Copyright Directive⁶³. A law proposal was presented to the national Parliament on 2 April 2003. Concerning Article 6 the proposal allows circumvention of copy protection and other technical measures for private use. Elektronisk Forpost Norge⁶⁴ has lobbied for more balanced rights during the preparation process of the law and is expected to publish a closer analysis of the proposal soon at their homepage.

Unfortunately, in Sweden there has not been any notable public effort and we can only fear what will result. So-called grass root resources are scattered and do not enjoy media publicity. Electronic Frontier Sverige exists but is not active. Several Linux user groups might be more active but lack knowledge and political connections. Finally, the rather informed and well-connected editors of the popular Slashdot-like gnuheter.org are not politically active.

Also quite surprisingly, the editor of gnuheter.org who has participated as an expert to the Swedish law preparation wrote in a recent column that he was very surprised that Norway could propose a private use exemption to the circumvention ban. He concluded that it was a novel idea and would be clearly against the Directive. The reader of this report should by now see that the Norwegian approach is not unique.

⁶³ See http://europa.eu.int/comm/external_relations/eea/

⁶⁴ <http://www.efn.no/>

France

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Implementation of the Directive

In France, the Copyright Directive should be mainly transposed by the *Law on author rights and related rights in the information society* (Loi relative au droit d'auteur et aux droits voisins dans la société de l'information). The implementation process of this law is at its very initial steps in France. On December 4, 2002, a copy of an initial draft law was revealed by a daily newspaper, *Libération*⁶⁵, and by a Web site called *planetelibre*⁶⁶.

This early version of this draft text has been expanded upon by the government, and submitted to some relevant official organisations for comments before its adoption by the Council of ministers to become a draft law. During this process, the draft text is generally not publicly available.

The December 2002 version is however available on the Web site of the High Council on Literary and Artistic Work Property, or High Council on Copyright (*Conseil supérieur de la propriété littéraire et artistique*, CSPLA)⁶⁷. This version⁶⁸ of the initial draft law is dated December 5, 2002. The French government has announced that a draft law should be submitted to the Parliament in early May 2003, such that a first reading could be completed before summer⁶⁹. Despite this announcement, the draft law is still awaited on June 15, 2003. Moreover, a second version of the initial project law, dated April 4, 2003, has been made public by the Belgian association AEL⁷⁰ on May 5, 2003.

The first version of the initial draft law, as well as the report on its discussion by the CSPLA during its session of December 5, 2002⁷¹, remain, until now, the only publicly available official documents on the implementation process of the Directive in France. Although the final draft law may differ from its initial versions, these official documents will be the main basis of the discussion in this chapter, taking also into account the unofficial April 2003 version. For a better understanding of the whole process and the evolution of the different arguments, this report will successively analyze both versions of the initial draft law.

The government presented its plans for the transposition of the Directive to the CSPLA as early as December 2001⁷², while the issue of private copy management in the digital environment has been discussed by a specialised commission of the CSPLA established in May 2001⁷³.

In addition, parts of Article 8 of the Directive (namely Article 8(3) provisions) are also implemented in section 3 of the draft *Law on the digital economy* (Loi pour la confiance dans l'économie numérique) which transposes the E-commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market). This draft law has already been adopted in first reading by the National Assembly on February 26, 2003. The next step is its discussion by the Senate in June 2003⁷⁴.

It should be noted that the political majority has changed in France after the presidential and legislative elections of Spring 2002. This change of government and of the National Assembly,

⁶⁵ *Libération*. CD, DVD: menaces sur la copie privée. December 4, 2002. <http://www.liberation.fr/page.php?Article=71735>

⁶⁶ <http://www.planetelibre.org>. This website has now been closed by its owner for an undetermined period.

⁶⁷ CSPLA web site.

<http://www.culture.gouv.fr/culture/cspla/conseil.htm>

⁶⁸ Initial draft law on author rights and related rights in the information society. December 5, 2002.

<http://www.culture.gouv.fr/culture/cspla/avantproj.pdf>

⁶⁹ CSPLA. Press release of March 7, 2003. <http://www.culture.gouv.fr/culture/cspla/com70303.htm>

⁷⁰ <http://www.ael.be/action/2003/eucd/france/text/>

⁷¹ CSPLA. Report on plenary session of December 5, 2002. <http://www.culture.gouv.fr/culture/cspla/cro51202.pdf>

⁷² CSPLA. Report on plenary session of December 20, 2001. <http://www.culture.gouv.fr/culture/cspla/corendu201201.pdf>

⁷³ CSPLA. Report on first plenary session of May 11, 2001. <http://www.culture.gouv.fr/culture/cspla/cr110501.pdf>

⁷⁴ See IRIS detailed dossier on the transposition process of the E-commerce Directive. <http://www.iris.sgdg.org/actions/len/index.html>

from a social democrat to a conservative majority, may partly explain the delay in the implementation process.

The delay may also be a consequence of the fact that the transposition has been seen as an opportunity to introduce or modify provisions on highly sensitive issues in France: legal deposit of digital work, increased control of royalty collection and redistribution organisations, and author right in the “work for hire” situation. The transposition process is developing in the highly controversial context of the extension of private copy compensation through a tax on computer hard discs. The discussions on this issue obviously relates to technical protection measures such as those preventing some CD or DVD reading – and *a fortiori* copying – on computers. Finally, the reluctance of the French government itself to implement the Directive, especially because of the exceptions and the technical measures which are not well known yet, adds to the delay.

French context and background

Intellectual property and copyright laws differs between European countries. It is thus important to explain the national context and background so that the national implementation specifics may be better understood⁷⁵.

Main features of the French intellectual property regime

The French copyright regime is, as in some other European countries, based on the author right rather than on the producer right. This applies to the moral right of the author, protected by Article 6bis⁷⁶ of the Berne Convention for the Protection of Literary and Artistic Works⁷⁷, as well as to the patrimonial right. This centrality of the author right allows at the same time for the best – an extended protection of the author against, e.g. his/her employer⁷⁸ – and for the worse – a limited regime of exceptions, even for non-commercial use. The French legislation is consolidated in the Intellectual Property Code (IPC)⁷⁹.

The author right

The author right is made up of a moral part and a patrimonial part, and allows for an exclusive and intangible property right in the creative work that can be applied to all⁸⁰. The intangible feature of this property is related to the creative work itself and implies that the author right cannot be transferred with its material medium (e.g. a journal article or a book or a painting or any other medium). The exploitation right must be negotiated in itself, and renegotiated for further use, if any. The moral right can never be extinguished. The exclusive feature of the property right remains with the author, unless in the case of a collective work⁸¹ where the personal contribution of each creator cannot be distinguished. In this latter case, the author is the natural or moral person in whose name the work is published.

The author right protects any creative work provided that it is original, i.e. it expresses the personality of the author, and that it is fixed in tangible form. This last condition excludes the protection of ideas, concepts and methods.

An exploitation right, as part of the patrimonial right, is simply intended in the French legislation as either a right to reproduce the work or a right to communicate it to the public. As noted in a

⁷⁵ An extended bibliography of reports, articles, and jurisprudence can be found on the CSPLA web site. <http://www.culture.gouv.fr/culture/cspla/biblio.htm>. See also the technical index on the applicable law, prepared by the French ministry of Culture (<http://www.culture.gouv.fr/culture/infos-pratiques/droits/index.htm>)

⁷⁶ In summary, this article deals with the author's moral rights to claim authorship, to object to certain modifications and other derogatory actions, even after the author's death and with means of redress for safeguarding these rights.

⁷⁷ <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>

⁷⁸ This also applies for journalists, as shown by jurisprudence. See the related dossier on the web site of the Syndicat national des journalistes (SNJ, the main French journalist trade-union). http://www.snj.fr/droits_auteur/droits_auteurs.htm

⁷⁹ Code de la propriété intellectuelle. <http://www.legifrance.gouv.fr/WAspad/ListeCodes>. Also available in English (last update: 1995): <http://www.aidaa.org:591/Dir/loi/fcodep.htm>

⁸⁰ Article L.111-1 of the IPC.

⁸¹ Article L.113-2 al.3 of the IPC. The collective work should not be confused with the collaborative work (al.1 of the same article), where all the co-authors are identified and share the author right.

report by the French Conseil d'Etat⁸², this formulation is general enough to allow for its easy adaptation, especially in the digital world, by case law.

The author right is protected during the whole life of the author and until 70 years after his/her death. Infringements of the author right are subject to civil and criminal penalties: two years of imprisonment and about 150,000 € fine. Additional penalties may apply.

Exceptions to the author right are strictly limited and only apply to the exploitation right⁸³. There are five categories of exceptions that the author cannot forbid, once the work has been divulged:

- The private and free communication of the work, exclusively to the family circle, i.e. at home. This excludes, e.g., members of groups, like associations or companies, or even classrooms;
- The private copy of the work, strictly for the personal use of the person who makes the copy, and not to a collective use. This exception doesn't apply to artwork copies intended for the same use as the original, to software (except only one saved copy), and to databases;

Provided that the author name and the source are clearly identified:

- The analyses and short citations of the work, when they are incorporated in a critical, polemic, pedagogical, scientific or informative work;
- Press reviews;
- The circulation, even integrally, of public speeches made in political, administrative, judicial or academic assemblies, as well as in public political meetings and official ceremonies. This diffusion should have a news character;
- The partial or integral reproduction of graphic or plastic art work in a sell by order of the court catalogue;
- The parody, pastiche or caricature of the work, taking into account the normal exercise of this activity;
- The necessary process to access an electronic database, within the conditions specified by contract.

In addition, the author cannot forbid any act necessary for a lawful judicial or administrative procedure, or undertaken for the purpose of public safety.

The proof of a right infringement can be established by law enforcement authorities (LEA) as well as by sworn-in agents. Police chief officers or magistrates may seize illicit reproductions of works. Preventive seizure procedure⁸⁴ may also apply under the injunction of a magistrate. This preventive procedure may be stopped by a request made to the magistrate within 30 days.

Finally, the concept of legal license has been introduced in order to allow for a compensation of photocopying for collective use, which has developed in practice, especially in schools and universities. This applies to any reprographic reproduction of a work on paper (photocopying or printing, but not digitising). In this case, the author must transfer the reproduction rights to a collective right management organism, which must be recognised by the Ministry of Culture. These organisms are the exclusive negotiators of such reproduction rights.

The related rights

The related rights apply to performers, phonogram and videogram producers and audiovisual communication companies. They allow for an exclusive right of authorising or forbidding the use

⁸² Conseil d'Etat. *Internet et les réseaux numériques*. La Documentation Française, Paris, 1998 (http://www.conseil-etat.fr/ce/rapport/index_ra_lian01.shtml)

⁸³ Article L.122-5 of the IPC.

⁸⁴ This special procedure is called "saisie-contrefaçon". It is preventive in the sense that the reproductions are seized to prove the right infringement.

or exploitation of their performance or production and of being remunerated for it. They are independent from the author right and cannot be exercised at its prejudice.

Their protection lasts for 50 years after the performance or the first fixation on a material medium (phonograms and videograms) or the first communication to the public of the audiovisual program. The related rights are limited by the same list of exceptions as the author right⁸⁵. Infringements of the related rights are subject to the same civil and criminal penalties as the author right.

The proof of a related right infringement can be established by law enforcement authorities (LEA) as well as by sworn-in agents. The preventive seizure procedure is more extended than in the case of the author right: law enforcement authorities (LEA) can seize illicit reproductions and equipment especially installed for illicit reproduction purposes, as soon as the infringement has been established. This preventive procedure may be stopped by a request made to the magistrate within 30 days.

A legal license system has also been established for phonograms published for commercial purposes. The performer or the producer of the creative work cannot forbid direct communication to the public (unless in a spectacle) or audiovisual diffusion. In this case, the performer or the producer must transfer reproduction rights to a collective right management organisation, which must be recognised by the Ministry of Culture. These organisations are the exclusive negotiators of such reproduction rights. The resulting compensation is equally shared by the performer and the producer.

Private copy compensation

Since the private copy is one of the exceptions to the author right as well as to related rights, a special remuneration system has been implemented since 1985 in the French legislation for the compensation of the rightsholders in this case.

The private copy compensation benefits authors, performers and producers of phonograms and videograms. It also benefits authors and publishers of works fixed in any medium, when they are reproduced on a digital medium. The compensation amount is a flat rate, collected as a tax paid by the consumer on any audio or video recording media bought.

The compensation is collected on behalf of the rightsholders and redistributed to them by special organisations (75% of the total amount goes to the rightsholders, the remaining being used as a fund for promoting creativity). Phonogram compensation is shared among authors (1/2), performers (1/4) and producers (1/4). Videogram compensation is equally shared between them. Remuneration for works fixed in other media is equally shared by authors and publishers.

The tax rate, as well as the list of media affected and the compensation modalities, are established by a special commission, called the “Commission for the private copy” (or *Commission Brun-Buisson*, after the name of its president) established in 1985⁸⁶. This Commission is headed by a government representative and composed in half by representatives of rightsholder organisations, and in half by an equal number of both the audio and video media industry and consumer organisation representatives. The Ministry of Culture nominates eligible organisations. There can be no appeal of the Commission’s decisions, which enter into force one month after having been made unless its president calls for another deliberation. They are published in the Official Journal of the French Republic.

Current rates and affected media are detailed in a document⁸⁷ from one of the main rightsholder organisations, the Society of Dramatic Authors and Composers (Société des auteurs et compositeurs dramatiques, SACD)⁸⁸.

⁸⁵ Article L.211-3 of the IPC.

⁸⁶ Article L.311-5 of the IPC.

⁸⁷ SACD. *Le droit de copier : un principe de liberté*. November 2002. http://www.sacd.fr/telechargement/info_copie_privée02.pdf

⁸⁸ SACD English web site. <http://www.sacd.fr/us/>

In 1986, the first rates were established and only analogue recording media were considered: 0.23€ (audio) and 0.34€ (video) per recording hour.

In January 2001, these rates saw a 25% increase (becoming 0.28€ and 0.42€, respectively), and the tax was extended to digital retractable recording media, be they audio, video, or data: Minidisc, CD-R, CD-RW, DVD-R, DVD-RW, DVD-RAM, DVHS, and retractable memories for audio recording. The rate for data media is established per memory capacity.

In July 2002, the Commission again extended the tax to a new recording medium: those embedded in commercial equipment dedicated to music and video, when this equipment has recording features. This applies to TV sets, video recorders and “personal video recorders” (video: 10€ under 40GB capacity, and 15€ for 40-80GB) as well as to MP3 Discman and other digital audio recorders (scaled from 8€ under 5GB to 20€ for 20-40GB).

The extension of the “private copy tax” to computer hard discs was discussed as early as 2001, but has faced severe opposition mainly from consumer organisations and the recording media industry. The then Minister of Culture, who first supported the idea, received strong criticism, even from her colleague from the Ministry of Economy, Finance and Industry who already favoured at that time the alternative of technical controls⁸⁹. The proposal was then dropped, though periodically discussed again, always facing the same opposition.

The High Council on Copyright

The High Council on Copyright (CSPLA) was created on July 10, 2000, and started its work on May 11, 2001. Its role is to advise the Ministry of Culture on Literary and Artistic Work Property.

The CSPLA is composed of seven representatives from various ministries, eight qualified personalities⁹⁰, and 32 representatives from the following organisations: authors (10), authors and publishers of software and databases (2), performers (2), phonogram producers (2), press publishers (2), book publishers (2), audiovisual producers (2), movie producers (2), radio broadcasters (2), TV broadcasters (2), on line services producers (2), consumers (2). Apart from other ministries’ representatives, CSPLA members are nominated by the Ministry of Culture.

The CSPLA can create specialised Commissions to study and make recommendations on specific issues. Seven of them have been created up to now, including one on private copy remuneration (created on June 15, 2001) and the newest one, dealing with literary and artistic work property and individual liberties (created on October 16, 2002). The letter⁹¹ commissioning the president of the latter explicitly mentions the Copyright Directive transposition, and the possible individual liberties violations resulting from the technical controls protected by the Directive, especially regarding personal data protection concerns. This letter however states that the Directive does not impose the implementation of such technical control, only their judicial protection. The Commission has yet to publish anything.

The first draft implementation (December 5, 2002)

The initial draft law was composed of five Titles:

Title I – Provisions transposing the Copyright Directive;

Title II – Legal deposit;

Title III – Fighting right infringement;

Title IV – On royalty collection and distribution organisations;

Title V – Author right of civil servants.

⁸⁹ ZDNet France. *Taxe sur les disques durs : le débat se déplace*. March 12, 2002. <http://news.zdnet.fr/story/0,,t118-s2106434,00.html>

⁹⁰ Among them academics, lawyers, etc, as well as Leonardo Chiariglione, the Executive Director of SDMI (Secure Digital Music Initiative).

⁹¹ CSPLA. Letter creating the specialised Commission on literary and artistic work property and individual liberties. October 16, 2002. <http://www.culture.gouv.fr/culture/cspla/letviennois.htm>

As one can easily see, the Directive transposition is not the only purpose of this initial draft law. Moreover, some of the other provisions may become highly controversial when the draft law is examined, possibly receiving most of the public and media attention⁹².

Additional very controversial provisions may be added later, such as a modification of the author right regime of private sector employees to the benefit of their employer. This modification would introduce a major shift in the French author right regime, leading to a more Anglo-Saxon copyright regime.

A coalition of journalist trade unions, associations of photographers and two author right organisations have already started a petition campaign⁹³ against such a modification, which has been promoted for several years by publishing corporations. A report commissioned by the French Ministry of Culture in October 2002 concluded that such an important modification is not recommended at this point since the positions of the employer organisations on the one hand and of the trade unions on the other could not lead to a consensus. But unexpected modifications may appear in the draft law or during its discussion by Parliament.

Title I of the initial draft law is made up of 3 chapters.

Chapter I (sections 1–6) – exceptions to the author right and related rights. This chapter transposes Article 5 of the Directive.

Chapter II (section 7) – duration of the related rights. This section is the transposition of Article 11(2) of the Directive (“Technical adaptations”).

Chapter III (sections 8–19) – technical measures for protection and information. This chapter transposes Articles 6 and 7 of the Directive.

Title III (sections 27–30) of the initial draft law partly implements Article 8 of the Directive, whose remaining provisions are implemented in section 3 of the draft law on the digital economy.

Exceptions and limitations

Article 5(1) of the Directive is the only mandatory exception. It is thus implemented in its exact terms by sections 1 (exception to the author rights) and 2 (exception to the related rights) of the initial draft law. It has to be noted that section 1 is however more restrictive than the Directive since it excludes software and databases; although this can seriously affect caches and proxies in several cases, the government justification for this is the Directive Article 1.

Article 5(3)(b) of the Directive – exceptions for the benefit of persons with disabilities – is implemented by sections 3 (exception to the author rights), 4 (exception to the related rights) and 5 (extraction and reuse of a database as an exception to database producer rights; one can note that the Directive’s Article 1 seems not to apply anymore in this case in the French government’s understanding) of the initial draft law.

The resulting provisions are far more restrictive than the Directive:

- The exception only concerns reproduction and communication to the public made by moral persons designated by the Ministry of Culture on a special list;
- The people who can benefit from this reproduction or communication to the public made by these organisations should be affected by the following precisely defined disabilities: mental, hearing or visual impairment, which in addition must have been recognised by special Commissions and quantified at a minimal disabling rate of 50% of the person’s ability;

⁹² Such a probability has already been clearly announced by the main royalty collection organizations at the CSPLA plenary session of December 5, 2002.

⁹³ <http://www.creationsalariee.org>

- The designated moral persons must prove that they have an effective professional activity of design and development of products dedicated to the so defined disabled public.
- Where the Directive allow for uses to the benefit of disabled persons, the French implementation thus restricts these uses to the inclusion of a work in dedicated products for only the most disabled public.

Article 5(3)(a) of the Directive should be transposed by section 6. Nevertheless, the transposition of this provision is not yet known. It is only mentioned in section 6 of the initial draft law that “possible exceptions for the benefit of teaching and scientific research await proposals from the Ministry of Education”. From the position already expressed by rightsholders, especially publishers, it can be expected that the implementation of this provision would be minimal, if any.

This issue seems to have further delayed the transposition process: the draft law should have been submitted to the Parliament during first quarter of 2003, while the discussions between the Ministry of Culture and the Ministry of Education were not yet finished on March 6, 2003, when the Minister of Culture announced to the CSPLA that the draft law would be examined by the Parliament in May.

None of the other exceptions is transposed in this initial draft law. Some of them already exist in the French Intellectual Property Code, as shown in the previous section on French context and background, even though they are sometimes more restrictive than their equivalent in the Directive. The remaining exceptions have not been implemented because the French government has favoured the position of rightholders organisations. These positions have been strongly expressed on several occasions and especially during CSPLA plenary meetings, not to mention the intensive lobbying of these organisations. Representatives from the government have themselves stated many times during CSPLA meetings their preference for a minimal transposition of the Directive, by implementing only mandatory provisions⁹⁴.

Technological protection measures

Article 6 of the Directive is implemented by sections 8 and 10–15 of the initial draft law.

The concept of technical protection measures and more generally of Digital Rights Management does not exist in the French Intellectual Property Code. It is therefore introduced in the legislation in order to implement their judicial protection, of which transposition is mandatory.

Section 8 of the initial draft law introduces a new section L.331-5 to the “Procedure and sanctions” title of the IPC. This new article applies to authors (excluding software authors), performers, producers of phonograms or videograms and audiovisual communication companies.

It states that these rightsholders may implement technical measures protecting their rights recognised by the IPC. When implemented, these measures are imposable on all. However, they should allow the benefit of some exceptions when they are exercised in the framework of a lawful access to the work. These exceptions are limited to the exception of the private copy for personal use, the exception for the benefit of disabled people, the exception for the benefit of teaching and scientific research⁹⁵, and the exception for the purpose of public safety, all as defined in the French legislation.

The new section L.331-5 further states that the rightsholder is not compelled to remove the technical measure when the work has been made publicly available such that any person may access the work at the time and place of his/her choice, provided that this is a lawful access.

Finally, the article states that a judge may compel any rightsholder to ensure the benefit of the exceptions provided for in this section.

⁹⁴ This position of the French government has been repeated during each CSPLA plenary session discussing the Directive and its implementation. Moreover, this has been constant regardless of the political majority.

⁹⁵ Although this exception is not yet implemented, there is here a precise reference to Article 6 of the initial draft law, still awaiting proposals from the Ministry of Education.

The last two provisions have been considered very ambiguous by rightsholder organisations, who consider that this may forbid any implementation of technical measures. They would favour an explicit reference to private copies made through external sources (e.g. the possibility of making a private copy of a movie only through its TV broadcast should be, for them, enough to allow the exercise of the private copy exception benefit).

As a final comment on section 8 of the initial draft law, it should be noted that the concept of “effectiveness” of the technical measures is completely absent from the French transposition. Therefore, there is no reference to any particular technical measure, and the scope of this article may be very large.

The remaining provisions of Article 6 of the Directive are implemented by sections 10–15 of the initial draft law. The most important is section 14, while the others ensure consistency of the IPC with the provisions of section 14.

Section 14 equates the circumvention of a technical measure with a right infringement (which is considered as a counterfeit of the work in the French legislation), punishable by the same criminal penalties (two years imprisonment and about 150,000€ fine). While the French government claims it is aiming to minimally transpose the Directive, this is quite an extensive implementation, given that Article 6(2) of the Directive provides only for “appropriate” judicial protection against technical measure circumvention.

Section 14 equates the following activities to a right infringement:

- To undermine, in the knowledge of pursuing this objective, any technology, product, equipment, device, mean, service or component which, in its normal use, allows the control of the usage of a work;
- To manufacture, import, sale, lend, rent, to possess for sale, lend or rent purpose, to put at disposal or to provide any service, information or means intended to achieve, partly or integrally, this undermining;
- To order, design, organise, reproduce, or distribute an advertisement, to make known, directly or indirectly, any technology, product, equipment, device, mean, service or component designed to or which purpose is to ease or allow this undermining or the previously described activities.

Protection of rights-management information

Article 7 of the Directive is implemented by sections 9 and 16–17 of the initial draft law.

Section 9 introduces a new section L.331-6 to the “Procedure and sanctions” title of the IPC. It is symmetrical to section 8, but related to rights-management information. This new section applies to all rightsholders except software authors. It states that these rightsholders may implement any technical measure, in the form of electronic rights-management information allowing the identification of a work, performance, phonogram or videogram or audiovisual programme as belonging to the rightsholder, as well as to detail its usage conditions and modalities. When implemented, these measures are imposable on all.

Sections 16 and 17 equate the suppression or modification of rights-management information to a right infringement (which is a counterfeit of the work in the French legislation), and punishes it with the same criminal penalties (2 years of imprisonment and about 150,000 € fine). This is an even more extensive transposition of the Directive than in the case of the Article 6 transposition.

Section 16 equates the following activities with a right infringement, when they are undertaken without the author’s authorisation:

- To remove or modify, in the knowledge of pursuing this objective, any piece of information in electronic form related to the right regime;

- To distribute, import, introduce or make known to the public, directly or indirectly, a work whose rights-management information has been removed or modified;
- To organise or distribute any advertisement on the means to achieve the activities described in the previous two items.

Enforcement and penalties

Article 8 of the Directive is transposed in three parts. **Article 8(1)** provisions are implemented by the definition of the penalties themselves described in the previous sections, as part of the implementation of Articles 6 and 7 of the Directive; **Article 8(2)** provisions are implemented in sections 27–30 of the initial draft law on author right and related rights in the information society; and **Article 8(3)** provisions are implemented by section 3 of the draft law on the digital economy, which transposes the E-Commerce Directive.

On **Article 8(1)** provisions, one should further note that, apart from the general judicial process remedies, the only remedy when technical measures do not allow the exercise of the recognised exceptions is by judicial injunction.

Article 8(2) of the Directive is transposed into sections 27–30 of the initial draft law. Section 27 deals with actions for damages. It extends the scope of author organisation capacities in that they can now themselves bring an action for damages, when the direct or indirect prejudice due to the right infringement concerns the collective interest of authors. Nevertheless, section 27 restricts at the same time the kind of author organisations benefiting from this extended scope, since these organisations must now be accredited by the Ministry of Culture, following conditions that should be stated by an application decree.

Section 28 deals with the establishment of the right infringement by sworn-in agents hired by rightsholder organisations, including technical measure circumvention and rights-management information modification or removal. The conditions for their agreement by the Ministry of Culture are restricted.

Section 29 specifies and restricts the conditions for the sworn-in agents to access professional places in order to establish the right infringement and possibly seize material. The consent of the person responsible for this place is needed.

Section 30 states that, in the absence of consent to access the professional place, a magistrate's injunction is needed.

Article 8(3) provisions of the Directive are implemented by section 3 of the draft law on the digital economy, which transposes the E-Commerce Directive. This can be explained by the fact that this draft law deals with Internet Service Providers (ISP) liability and obligations. Section 3 of the draft law on the digital economy concerns author right and related right holders. It mainly provides for ordering, by a magistrate's injunction, a French ISP to stop hosting content infringing the author right or to block access to it. This is, again, a preventive procedure since the right infringement has not yet been proved under the magistrate's supervision. This preventive procedure may be stopped by a request made to the magistrate within 15 days.

Changes made in version 2 (4 April, 2003)

The general architecture has slightly changed in this second version, with the merging of Title III into Title I, which now covers all the provisions transposing the Copyright Directive. The content of some articles has changed, and some important new provisions have been added.

The 4 April 2003 version of the initial draft law is now composed of four Titles.

Title I – Provisions transposing the Copyright Directive;

Title II – Legal deposit;

Title III – On royalty collection and distribution organisations;

Title IV – Author right of civil servants.

Title I of the initial draft law is still made up of 3 chapters.

Chapter I (sections 1–5) – Exceptions to the author right and to the related rights. This chapter transposes Article 4(2), Article 5(1) and 5(3)(b) of the Directive.

Chapter II (section 6) – Duration of the related rights. This article is the transposition of Article 11(2) of the Directive (“Technical adaptations”).

Chapter III (sections 7–14) – Technical measures for protection and information. This chapter transposes Articles 6, 7 and parts of Article 8 of the Directive, whose remaining provisions are implemented in section 3 of the draft law on the digital economy.

Details of the changes article by article

The following table shows the resulting modifications, article by article. Only Title I (new version) is taken into account in this table.

Version 1, December 5, 2002	Version 2, April 4, 2003
Chapter I, Title I	
s.1	s.1: almost unchanged (Transposition of Article 5(1) of the Directive).
s.2	s.2: almost unchanged (Transposition of Article 5(1) of the Directive).
s.3	s.3, item 1: changes made (Transposition of Article 5(3)(b) of the Directive): mobility impairment is now also taken into account eligible moral persons now includes those having a communication activity An application decree is now needed for this provision
s.4	s.3(2): unchanged (Transposition of Article 5(3)(b) of the Directive).
s.5	s.3(3): unchanged (Transposition of Article 5(3)(b) of the Directive).
	s.4. (New) . Transposition of Article 5(5) of the Directive.
	s.5. (New) . Transposition of Article 4(2) of the Directive.
s.6	Removed . There will be no exception for the benefit of teaching and scientific research in the French transposition.
Chapter II, Title I	
s.7	s.6: almost unchanged, now with videograms taken into account

Chapter III, Title I	
	s.7. (New): subsection 1: Efficient technical measures for right protection are protected under the same conditions as for the rights themselves (equated to counterfeit, with similar criminal penalties). subsection 2: such technical measures, and their efficiency, are now defined in the sense of the Directive, Article 6(3).
	s.8. (New) : Transposition of the Directive, Article 6(4).
s.8(1)	Removed. The concept of technical measures for right protection is now supposed to implicitly exist in the French legislation.
s.8(2)	Now covered by new s.8.
s.8(3)	Removed. No reference to a judge anymore.
	s.9. (New): This article introduces a mechanism of alternative dispute resolution to ensure the benefit of both exceptions of private copy for personal use and for the benefit of disabled people. This exclusive mechanism replaces the recourse to a judge. Decisions are made by a mediation body, chaired by a magistrate and also composed by two “qualified personalities” proposed by the ministers of Justice, Culture and Industry, and nominated by Decree. Any person benefiting from the relevant exceptions or his/her representing organisation may file a case with the mediation body. The mediation mechanism should find a solution to any case within 2 months, renewable once. The mediation body first tries to find an agreement between the parties. In case of failure, it makes a decision, which is public and may be appealed within 15 days before the Appeal Court of Paris. The Appeal Court should make a decision within 2 months. This appeal suspends the mediation body decision. The mediation body publishes an annual public report. All its decisions are public. Finally, this new s.9 is subject to the publication of an application decree.
	s.10. (New): subsection 1: Technical measures for rights-

	management information are protected under the same conditions as for the rights themselves (equated to counterfeit, with similar criminal penalties). subsection 2: such technical measures are defined in the sense of the Directive, Article 7(2), including traceability mechanisms in the work.
s.9	Removed. The concept of technical measures for rights-management information is now supposed to implicitly exist in the French legislation.
s.10	s.11. Ensures consistency of the IPC with the provisions of new s.12
s.11	Now covered by new s.11.
s.12	Now covered by new s.11.
s.13	Now covered by new s.11.
s.14	s.7(1) and s.12(1): almost unchanged
s.15	s.13(1): almost unchanged
s.16	s.10 and s.12(2): almost unchanged
s.17	s.13(2): almost unchanged
s.18	s.14. Protection of technical measures is extended to databases right holders with the same conditions and penalties as for author right and related rightsholders
s.19	Now covered by new s.14.
Title III	
s.27	Removed.
s.28	Removed.
s.29	Removed.
s.30	Removed.

The national debate

Supporters of the technical measures

Supporters of the technical measures for rights protection and management mainly expressed themselves in lobbying meetings, rather than by public positions. However, minutes of the CSPLA meetings reveal some of their arguments. These arguments may be summarised in a single word: piracy.

The CLIC (Cultural industries liaison committee, formed on 21 June 2001, containing most of the rightsholders organisations, royalty collection and redistribution societies, and syndicates of book publishers, music and movie producers, etc. – a very powerful coalition), has always been in favour of technical measures, as recalled in its declaration during the MIDEM (music producers' annual

fair) in January 2003. Its position is that a single private copy is enough, and this copy does not even need to be of the same quality as the original (meaning that such a copy could perfectly well be made through recording equipment, when the work is broadcast on radio or TV). The CLIC also supported the mediation body, at that time only a proposal from the CSPLA, and now implemented in the second version of the initial draft law. Members of the CLIC are very well represented in the CSPLA, and very active during its meetings.

Apart from these French supporters, the MPAA⁹⁶ also entered the French debate, in a joint declaration⁹⁷ from Jack Valenti, MPAA Chairman and CEO, and Jean-Jacques Aillagon, French Minister of Culture, published during the Cannes movie festival. This declaration states that the fight against audiovisual piracy needs political will by government to “facilitate the tracking, prosecution and punishment of digital thievery, a firm resolve to pursue technological innovation so that we have the technical tools to challenge pirates, and to implement by parliamentary approval, where necessary, those legal protections and technologies which are considered to be the best way to protect creative works.” At stake being, as claimed in the declaration, the sake of creativity and cultural diversity.

Private copy exception

The main argument used against the Directive and its transposition is related to the threat to the private copy exception, due to technical protection measures and to the equation of their circumvention to a right infringement. The technical protection is considered by its opponents as the end of the private copy exception.

Opponents to the Directive on this basis are:

EUCD.info⁹⁸, an initiative founded by French members of the free-software movement to “rescue the private copy” in the transposition of the Directive. Its actions will be further detailed in this chapter. It is supported by the main French free-software defence organisations (APRIL⁹⁹, FSF-France¹⁰⁰, AFUL¹⁰¹).

UFC-Que Choisir¹⁰², a consumer organisation, which fights against excessive private copy remuneration, and especially its extension to a tax on computer hard discs. Since UFC-Que Choisir is one of the major French consumer organisations, its position has very well been reported in the media. UFC-Que Choisir has recently sued¹⁰³ two majors: EMI Music and Warner Music for violating the right of private copy, and two big French distribution companies, Auchan and FNAC, for failure to inform consumers.

CLCV¹⁰⁴, another French consumer organization also sued¹⁰⁵ EMI Music, BMG and Sony Music, for failure to inform and for misleading the consumer on the actual use of the product. Prior to these actions, CLCV and UFC-Que Choisir have called on consumers to give evidence. These calls have received hundreds of answers.

CPHL¹⁰⁶, the Confederation of Free Disabled persons, which sent a letter to the Ministry of Culture when the transposition project was unveiled by a daily newspaper. Their argument is that disabled persons have difficulties using CD readers, thus they must use their computers for playing CDs.

⁹⁶ <http://www.mpaa.org>

⁹⁷ “Cannes Declaration”, May 17, 2003. <http://www.culture.gouv.fr/culture/actualites/index.htm>

⁹⁸ <http://www.eucd.info>

⁹⁹ <http://www.april.org>

¹⁰⁰ <http://fsffrance.org>

¹⁰¹ <http://www.aful.org>

¹⁰² <http://www.quechoisir.org>

¹⁰³ UFC-Que Choisir Press release, May 27, 2003.

<http://www.quechoisir.org/Position.jsp?jsessionid=oKWWAOcMMXCo5UoZBQ5HLFI?id=Ressources:Positions:38C9E038ECC50E10C1256D3100354086>

¹⁰⁴ <http://www.clcv.org>

¹⁰⁵ CLCV press release, May 27, 2003. <http://www.clcv.org/index.php?v=detail&a=info&id=66>

¹⁰⁶ <http://www.cphl-france.org>

They have not reacted – at least publicly – to the restrictive transposition of the exception for disabled people.

Author (SACD¹⁰⁷, and others like SACEM to a lesser extent) and performer organisations (ADAMI¹⁰⁸, SFA¹⁰⁹, SNAM, SPEDIDAM¹¹⁰), on the basis that the technical measures may suppress any possibility of private copy, thus they may endanger authors' and performers' remuneration for private copy. On the issue of technical protection measures, they are opposed to the music and movie industry. However, regarding other aspects of the Directive transposition, authors' and performers' organisations have a very aggressive defence strategy.

SIMAVELEC (French syndicate of electronic audiovisual equipment manufacturers), has affirmed in February 2003 that the private copy exception is a right of the consumer, which has nothing to do with piracy¹¹¹. The SIMAVELEC is in fact more fighting the private copy remuneration system than the technical measures for rights protection and management.

Educational exception

This exception was expected in the 5 December 2002 version of the initial draft law, but has disappeared in the second version of 4 April 2003. This could have already been inferred by the positions expressed by publishers during CSPLA meetings, and has been clearly stated in a public written exchange.

The CPU¹¹² (Conference of the presidents of the nearly 100 French Universities), has published a position¹¹³ on 21 February 2003, asking the government to introduce in the draft law an “educational exception” for the benefit of teaching and scientific research, and for use in public libraries and museums, without any financial compensation. The argument used was that in the absence of such an exception, the transposition law would result in a double financial penalty for such institutions, since a new law is in the process of applying remuneration for authors on each book borrowed from a public library.

Major book publishers, including university work publishers, replied to this position in an article published on 18 April 2003 in *Le Monde*, the main French daily newspaper¹¹⁴, accusing the CPU of trying to simply kill university work publishers. The arguments used appealed to a kind of “patriotism”: remunerating French publishers was claimed as the only way to avoid publication of their work in English only by French academics and to avoid the transformation of the French author right into an Anglo-Saxon like regime of copyright. In addition, this remuneration would avoid the replacement of true editors by “printed papers merchants”... In its reaction¹¹⁵, the CPU said that this article clearly showed that the publishers were defending their own rights, and not those of the authors, especially since, when their works are published, academics give all their patrimonial rights to their publishers, and only receive a symbolic flat remuneration. Moreover, the CPU reaffirmed the right to knowledge, and its position against a double financial penalty.

Other arguments

Other arguments against the Directive and its transposition, especially regarding Article 6, have only been raised by the EUCD.info initiative. These arguments are shared by the European coalition of organisations against the Directive, of which EUCD.info is the French part, and are explained in a document entitled “Economic and social damages due to Article 6 of the EUCD”¹¹⁶.

¹⁰⁷ <http://www.sacd.fr>

¹⁰⁸ <http://www.adami.org>

¹⁰⁹ <http://www.sfa-cgt.fr>

¹¹⁰ <http://www.spedidam.fr>

¹¹¹ “Le Simavelec réaffirme son soutien à la copie privée”. O1Net, February 6, 2003. <http://www.o1net.com/article/201090.html>

¹¹² <http://www.cpu.fr>

¹¹³ CPU press release, February 21, 2003. <http://www.cpu.fr/ActU/Actu.asp?Id=555&Inst=CPU>

¹¹⁴ “Pourquoi l’Université veut-elle la mort de l’édition universitaire?” *Le Monde*, April 18, 2003, page 15. <http://www.lemonde.fr/article/0,5987,3232--317159-,00.html>

¹¹⁵ CPU press release, April 18, 2003. <http://www.cpu.fr/ActU/Actu.asp?Id=573&Inst=CPU>

¹¹⁶ EUCD.info. “Economic and social damages due to Article 6 of the EUCD”. January 3, 2003. <http://www.eucd.info/eucd.fr.php>

Besides the risk to the private copy, the main arguments are (examples and references are provided in their document):

- violation of the right to read and to use a work even with lawful access, since the technical measures may restrict the use to some materials only;
- negation of the principles of access to culture and the public domain, especially in the case of usage by libraries, because the technical measures would remain even after the duration of the author right or related right;
- violation of privacy, when the technical measure relies on personal data information collection; a document entitled “DRM systems and personal data protection”¹¹⁷ has been published on this issue;
- obligation of dependent sale, when the technical measure imposes the purchase of special equipment to use the work;
- endangering of innovation, since reverse engineering would be a circumvention of technical measures;
- creation of digital file format monopolies, if a technical measure is part of a given format
- encouraging the abuse of dominant positions, illegal agreements, and endangering competition;
- threat to interoperability;
- violation of a software author’s right to make public his/her work, if it is considered as a circumvention of a technical measure, especially since these measures are not precisely described;
- difficulty of legal approximation, especially given the high number of optional exceptions;
- suppression of the benefits due to unauthorised though lawful uses, since private copy and fair use may increase the number of consumers.

The main activities of the EUCD.info initiative since it was created in December 2002 have been:

- to raise awareness on this issue (organisation of and participation in conferences and meetings, participation in radio programmes...);
- to ask for participation in the CSPLA. This was not accepted, but the EUCD.info representatives have had the opportunity to discuss this matter with the Ministry of Culture representatives and to participate in a hearing organised by the CSPLA Commission especially established to examine the impact of the transposition on individual liberties;
- to raise funds in order to hire lawyers in charge of analysing the initial draft law and proposing alternatives to this text. This is quite unusual for French activists, who normally either make their own alternative proposals to draft laws, or work with volunteers (be they lawyers or other specialists that are members or sympathisers of the activist organisation).

EUCD.info leaders have not apparently made the connection with the draft law on the digital economy, which implements some provisions of the Copyright Directive, as shown in the previous section. The fight against the transposition of the E-commerce Directive in France is led by other actors, who are mainly active on civil rights and public liberties defence in the digital world. As part of their action against the draft law on the digital economy, a petition campaign¹¹⁸ has been launched against provisions dealing with ISP liability, asking for the withdrawal of sections 2 and 3 of this draft law.

¹¹⁷ EUCD.info. “DRM systems and personal data protection”. February 7, 2003. <http://www.eucd.info/cspla-2003-02-07.pdf>

¹¹⁸ The IRIS petition has collected up to now more than 100 signatures of NGOs, trade unions and political parties and more than 2700 individual signatures. <http://www.iris.sgdg.org/actions/en/petition.html>

After the second version of the initial draft law for transposition was unveiled, EUCD.info strongly criticized¹¹⁹ this new version, noting that it is worse than the former one in several aspects:

- Legalisation of the limitation of the number of private copies
- Organisation of the traceability of works or parts of works, possibly infringing people's privacy
- Introduction of the mediation body, which is not seen by the initiative as a solution to the many problems introduced by the initial draft law.

¹¹⁹ EUCD.info. Press release, May 8, 2003. <http://eucd.info/pr-2003-05-06.fr.php>

Germany

by Andreas Dietl with contributions from Max Dornseif and Volker Grassmuck

Implementation of the Directive

Four months after the deadline set by the European Union, Germany has almost finished transposition of the mandatory provisions in the Copyright Directive. In certain areas, it has done so with the proverbial German thoroughness, while other topics from the Directive and the two WIPO¹²⁰ treaties remain untouched by the Law on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft¹²¹). Together with other objectives of the German government and Parliament, these are to be dealt with in a second legislative package, the first draft of which is currently being worked out by parliamentary officials.

The German law faithfully reproduces the contradictions of the Directive. On one hand it explicitly gives a right to produce private copies of copyrighted material, while on the other it punishes the circumvention of technological protection mechanisms, apparently even if circumvention serves the sole purpose of producing a legal private copy. There are tough fines for the circumvention of copy protection measures, and if circumvention is done commercially, it can even lead to a prison sentence of up to two years. Copy-protected media have to be identified, however, and producers of such media have to provide the ability to unlock the protection for a few narrowly defined legitimate uses.

The draft law has passed the Bundestag, the German Parliament, and now has to be agreed in the Bundesrat, the Second Chamber in Germany's federal system. Though the Bundesrat has expressed criticism of the Government's first draft before and majorities differ in the two chambers,¹²² it is likely that the law will pass. In the Bundestag, it found support among a vast majority of Social Democrats and Greens (the two parties that make up the government) and the Christian Democrats. Together, these three parties hold 92% of the seats in the Bundestag. Only the presently unimportant Liberal Democrat Party voted against.

While differences between the political parties will be discussed in more detail further on, it is important to know that copy protection was largely uncontroversial in Parliament. Discussions in the media and in the general public centred on a provision allowing educational institutions and research collectives to post small proportions of copyright works on intranets without the permission of the rightsholder. Although the provision will expire in 2006, the discussion on this was coloured by an industry campaign that claimed it would cost thousands of jobs and put the very existence of small and medium-sized printing houses at risk.

The two opposition groups, Conservatives (CDU/CSU) and Liberals (FDP¹²³) adopted the tone of this industry campaign. They claimed the government draft still did not contain enough legal backing for technological protection measures, and the obligation to identify copy protection or to lift it in certain cases was detrimental to the interests of rightsholders, etc. The distinction between authors, rightsholders and publishers was ignored; measures that are in the interest of publishers only were repeatedly depicted as being in the interest of "artists". The discourse thus created is best described as populist culture.

Overall, not one group in the Bundestag acted as an advocate of users. That was left to individual members, such as the Social Democrat media expert Jörg Tauss, who were isolated on this issue within their own factions.

All but a few technical changes decided in Germany affect the Law on Copyright and Related Rights (Gesetz über Urheberrecht und verwandte Schutzrechte, normally cited as

¹²⁰ The WIPO Copyright Treaty (WCT; <http://www.wipo.org/copyright/en/index.html>) and the WIPO Performances and Phonograms Treaty (WPPT; <http://www.wipo.org/treaties/ip/performances/index.html>)

¹²¹ http://www.urheberrecht.org/topic/Info-RiLi/ent/Bundesrat_Drucksache_271_03.pdf 1 MB

¹²² The opposition Christian Democrats hold a majority in the Bundesrat.

¹²³ Since the September 27, 2002 elections, the socialist PDS is only present with two Members who do not have any parliamentary rights.

Urheberrechtsgesetz – Copyright Law - or UrhG). Since it was passed in 1965, this has been one of the most amended German laws. Within the last ten years alone, it has been changed 16 times, with the last major change in March 2002 affecting no less than 20 sections.

The changes decided in the draft Law on the Regulation of Copyright in the Information Society are the most extensive ones the Copyright law has experienced so far. They affect a third of the law's 186 sections. Considering the fact that the EU Copyright Directive has only 15 Articles, it is hard to believe, therefore, that the present law project aims at transposing only "what the Directive and WIPO treaties bindingly proscribe", as the German Minister of Justice, Mrs. Brigitte Zypries, put it, speaking to the Bundestag on November 14, 2002.

New provisions in the Law mainly affect the following topics:

- Introduction of the new legal definition of "making available to the public" that applies mainly to online content
- Changes in provisions concerning private copies
- Legal protection for technological copy protection mechanisms.¹²⁴ Media protected by these mechanisms must be clearly labelled¹²⁵
- On similar terms, legal protection for copyright information attached to works¹²⁶
- The exclusive right of the producer of a sound carrier to distribute is extended to all kinds of distribution. He may sue for indemnities if this right is infringed¹²⁷
- "Exceptions" limit copyright in favour of disabled persons and of news reporting. Exceptions in favour of schools, educational and research institutions¹²⁸ have also been passed, but will expire in 2006.¹²⁹ There are numerous limitations to the exceptions. One such rule refers to copies for private use, but it is countered by a regulation forbidding the circumvention of copy protection¹³⁰

Other, minor provisions include the following:

- Copyright of standards papers published by private institutions under state auspices (section 15)
- Costs of compensation procedures
- A definition of copy that includes temporary storage of a file on a computer, but excludes technical copies (caching etc.)¹³¹
- Pictures from catalogues cannot be used for free any more, not even to illustrate an exhibition review¹³²
- The performance of a piece of folklore is now also protected by copyright¹³³
- Performing artists have in most cases the right to be named and to distribute copies of their performance exclusively¹³⁴

¹²⁴ s.95 a; 108b; 111a

¹²⁵ s.95d

¹²⁶ s.95c

¹²⁷ s.85

¹²⁸ s.45a, 46, 48, 50, 52a, 95b

¹²⁹ s.137k

¹³⁰ s.53, 95a

¹³¹ s.16; s.44a

¹³² s.58

¹³³ s.73

¹³⁴ s.77, 78

The legal term of “making available to the public”

A central element of the draft law is the introduction of a new legal term, taken from Article 3 of the Copyright Directive, which in turn was taken from Articles 6 and 8 of the WIPO Copyright Treaty: “to make a work or other protected subject-matter available to the public”. In the newly introduced section 19a of the German copyright law, the term is defined as follows:

*“The right to make available to the public is the right to make publicly accessible the work, on a wired or wireless basis, and in such a way that it is accessible for members of the public from places and at times of their choice.”*¹³⁵

The amended version of section 15 puts the term in context:

“A work is publicly reproduced when it is made available to the members of the public or when it is made perceptible simultaneously.”

In simple English this means there is no more legal difference between broadcasting something (making it “perceptible simultaneously”) and posting it online: the same provisions that already apply for radio broadcasts obtain legal force for web contents. This is confirmed by section 22, which now says:

“The right to present broadcasts and publicly available material is the right to make publicly available radio broadcasts and reproductions of the work based on public availability by ways of screens, loudspeakers or similar technical devices“

Consequently, the term of “making available to the public” is introduced in numerous sections throughout the law where it couples formulas that are already in force for broadcasting a protected work. “Making available to the public” clearly applies to posting contents or files on a web site on the Internet or in a public newsgroup.

The draft law contains no provisions whatsoever that address the fact that at least part of the content legislators want to tackle – namely files transmitted on a peer-to-peer basis – is not broadcast or widely spread but passed on from one individual to another. Therefore, it will be for the courts to decide whether placing a file in a shared folder of a file-sharing client also falls under the definition of making available to the public. They will have to consider section 15(3) (amended), where it says:

“A member of the public is anyone who isn’t connected by personal links to the person exploiting the work or to the other persons who have access to or can perceive the work in a non-physical manner.”

One might argue that users of file sharing networks enter into a personal relation based on their common interest in music or computer games, but anyone who has followed the discussion in the German Parliament and the media will have to admit that this interpretation must be considered quite exotic.

Exceptions and limitations

In accordance with Article 5 of the Directive, Article 10 of the WIPO Copyright Treaty and Articles 2bis and 13 of the Berne Convention¹³⁶, the German law introduces a number of exceptions and limitations to the exclusive rights to reproduce, to communicate and to make available to the public a work. These exceptions, laid down in a number of sections of Part 6¹³⁷, oblige the rightsholder to allow for copies of his work in the following cases:

¹³⁵ Translations of all German law provisions in this text by the author.

¹³⁶ <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>

¹³⁷ Sections 44a – 63e; in particular sections 44a to 53. Additional provisions on fines and punishments for non-compliance can be found in section 95c

- if the copy is only short-term for technical reasons such as browsing or caching (section 44a). This provision was newly introduced.
- for the uses of law enforcement and the judiciary (section 45)
- for persons with a disability, in order to gain access to a work (e.g. the visually impaired, who may scan a book or paper to have it read by a machine; section 45a). This is also a new provision
- for the use in schools and educational institutions, but only copies of small parts of a work or of small works. Copies of school books are not allowed at all (section 46)
- for use in school broadcasts (section 47)
- in the case of public speeches, but not for publication in monographs (section 48)
- newspaper articles and radio commentaries for inclusion in press digests (section 49)
- for use in reports on current-day events (section 50) This provision was extended to cover reports in all kinds of media, including the Internet
- Citations (section 51)
- For public performance, if royalties are duly paid or in the scope of beneficial events (section 52)

“It is permitted to make available to the public, in as much as this is required for a certain purpose and justified by non-commercial ends, small published parts of a work, works of small size and single contributions from newspapers and periodicals, for the purpose of illustration in education at schools, universities, non-commercial institutions of education and further education and institutions of vocational training, and exclusively for a delimited group of instruction participants, or published parts of a work, works of small size and single contributions from newspapers and periodicals, exclusively for a delimited group of persons for their own scientific research” (section 52a).

This provision, newly introduced for digital content but parallel to the provisions for printed matter in section 46, has caused outrage in the publishing industry. A consortium of printing houses published a Web page¹³⁸ and advertisements claiming “the draft section 52a puts the future of science, research and printing houses in Germany at risk” and “Universities and schools have to economise. That’s why you will be allowed to steal books and magazines.” This claim is, to say the very least, exaggerated, because the section allows for no more than portions of a work to be published on access-controlled parts of an intranet or the Internet.

The problem seems to be more that if educational and research institutions can claim a right to copy portions of works, that might put a hole in a future market for copy-protected eBooks that printing houses are trying to build up – with little success at the moment. Nevertheless, the Conservative and Liberal opposition parties adopted the arguments of the publishing industry, and section 52a was the main reason for the Liberals’ voting against the government’s draft law. Under the pressure of the Conservatives, who threatened to block the whole draft law in the Bundesrat, the First Chamber, where they hold a majority, this provision was heavily amended as compared to the government’s first draft and earmarked with an expiry date at the end of 2006.

In the debates of the German Bundestag, Members of the Conservative and Liberal factions have attacked all exceptions, claiming they are undermining DRM schemes.

Private use

One might think that downloading a file from the Internet, be it from a Web site, a newsgroup or within a P2P network, is an action similar to making a copy of a radio broadcast for private use,

¹³⁸ <http://www.52a.de/>

which has always been allowed in Germany. Amendments to section 53, which deals with “Copies for private use”, have no effect on non-paper copies. It used to postulate very simply that “single copies of a work for private use are allowed”, adding that for the transmission of works to visual or audio media and for the production of copies this was only true when it happened free of charge. Now it even allows for charges “if the copies are on paper or a similar material and by any photo-mechanical or other method with similar results”. This formula is mainly directed at copy shops, which will now be able to offer all-around service without infringing copyright legislation.

But what is legal in the analogue world is not necessarily also legal in the digital world. Section 53(2) states that it single copies of a work may be produced only if very complex conditions apply. If the copy is for personal scientific use, it must be a paper copy or it must be used in an exclusively analogue way. It would be forbidden, therefore, for a scientist to copy a colleague’s article from a scientific magazine Web page to his hard disk and to paste a citation into his own article later. It would be allowed, however, to print the text out and to re-type the citation himself. The same applies to copies for “personal information on current events, when the work is broadcast” or “for other personal use, when it refers to small parts of a work or to single contributions published in newspapers or magazines or when it refers to a work that has not been on sale for at least two years”. Even in these cases, digital copies are not allowed.

In principle the situation is different for media, even digital, which has been bought. In such cases, the provision of section 53 allowing production of copies for personal use applies in full. Still, it is limited by section 95a, which deals with copy protection mechanisms, such as CDs non-compliant with the Audio CD standard or CSS for DVDs.

Technological protection measures

Germany has almost literally translated Article 6 of the Copyright Directive, changing little more than the order of the provisions. They have been written into section 95a of the revised version of the German copyright law. Subsection 1 of the new section transposes the obligations from Article 6.1 of the Directive and Article 11 of the WIPO Copyright Treaty. It reads as follows:

Effective technological measures for the protection of a work protected by this law or of any other subject matter protected by this law may not be circumvented without the consent of the rightsholder, when the person concerned acts with the knowledge or with reasonable grounds to know, that the circumvention takes place to gain access to such a work or protected subject matter or to make use of it.

Subsection 2 takes its inspiration from Article 6.3 of the Directive, and defines “effective technological measures in the same way¹³⁹:

For the purposes of this law, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent and limit actions in respect of protected works or other subject-matter protected by this law, which are not authorised by the rightsholder. Technological measures shall be deemed effective where they may be used by a rights owner to control use of a protected work or of any other subject-matter protected by this law by ways of access control, a protective mechanism such as encryption, scrambling or any other such commutation or mechanism to control reproduction, which assures achievement of the protection objective.

Subsection 3 is taken almost literally from the German translation of the Copyright Directive; it is equivalent to Article 6.2 of the Directive:

¹³⁹ Note that, just like the Directive, the German Law uses the term “effective measures” although it does not seem to believe in the effectiveness of the measures, or else the kind of legal protection provided for in this law would not be necessary. According to this definition, the term “effective” essentially means “effective in a legal way”, i.e. sufficient to serve as a way to gain the protection of the law, but not necessarily sufficient to discourage even the most illiterate potential offender. It is an open invitation to publishers not to invest too much into effective technical copy protection, and to leave that work to their legal departments.

It is forbidden to produce, to manufacture, to sell, to lease or to advertise the sale or the leasing of, or to hold for commercial purposes devices, products or components or to provide services which:

are part of a promotion, advertisement or marketing for the purpose of circumvention of effective technical measures, or

have only a limited commercially significant purpose or use other than to circumvent effective technical measures, or

have been designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technical measures.

This section is backed up with criminal law provisions, which are laid down in section 108b. It takes its inspiration mainly from the draft Directive on measures and procedures to ensure the enforcement of intellectual property rights, COM (2003) 46, which is the EU transposition of the obligations laid down in Article 14 of the WIPO Copyright Treaty.

The draft Enforcement Directive, which was presented by the Commission at the end of January 2003 as a follow-up to the Copyright Directive, contains detailed proposals for legislation to protect Digital Rights Management (DRM) schemes. In its Article 20, it calls for “criminal sanctions, including imprisonment” for infringements of copyright.

The German law transposes this demand, which has no legal power yet, quite fiercely: it calls for imprisonment of up to a year if infringements are not for the exclusively personal use of the infringer or persons related to him. The same goes for “producing, importing, distributing, selling or leasing a product or device” that can be used to circumvent copy protection. If any of the above is done for commercial purposes, the maximum imprisonment is three years.

In the same way, the German law protects electronic information that appears in connection with a protected work, as laid down in Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO Performances and Phonograms Treaty. These provisions refer as well to embedded information under DRM schemes, such as copyright notices in movie trailers on DVDs. Section 95c, Par. 1, reads as follows:

Information from rightsholders for the purpose of safeguarding rights may not be removed or altered, when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject matter or if the removal takes place in a knowingly unauthorised manner and, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright.

In the two other paragraphs of this section, it is clarified that only electronic information is protected this way (it refers to any information embedded in the code of the media, but not printed on its exterior or its package), and that all kinds of distribution – including “making publicly available” – of such material are also forbidden. This is also valid for broadcasting, which probably means TV stations can’t snip away the copyright notice, usually at the end of the closing credits, any more. The provisions laid down in section 95c do not figure among the summary offences as defined in section 111a, which means infringements against the ban on removing copyright information can only be pursued under civil law.

Obligation for the rightsholder to identify protection mechanisms

In the U.S., the Electronic Frontier Foundation is currently leading a campaign in favour of an obligation to label copy protection mechanisms that disable certain types of media from being played. For example, labels would be required on CD-RW drives, but also in normal CD-ROM drives, car stereos, and DVD players (in the case of audio CDs). Thanks to Article 6.4 of the Copyright Directive, EU citizens do not have to fight for this right. An obligation to identify copy

protection measures, as laid down in section 95d of the German copyright law, may be regarded as the natural offspring of these articles. Under the title of “Obligation to identify”, the law says the following:

Pieces of work and any other items protected by technical measures must be marked in a clearly visible manner with indications on the properties of the technical measures.

Any person or company who protects works or other protected subject matter by technical measures has to mark these with his name or company name and postal address, in order to enable the assertion of claims according to section 95(b)(2) [limitations to copy protection for law enforcement, handicapped persons, educational and research purposes; etc.]

In the debate of the German Parliament of November 22, 2002, Conservative Member of the Bundestag Steffen Kampeter has denounced this provision as “a hint for the thief-to-be”, and his party has made it quite clear that they would rather not have copy protection mechanisms identified.

Infringements of this provision are, however, punished just as hard as tampering with copy protection. The maximum jail term for rightsholders who do not duly identify copy protection mechanisms they have introduced is one year.

Constitutional exemption for scientific research

The German constitution will provide notable exceptions to Section 95a of the draft implementation prohibiting circumvention acts. Article 5(III) of the constitution states: “Art and science, research and teaching are free. The freedom of teaching does not release teachers from allegiance to the constitution.” These constitutional rights can only be constrained by other constitutional rights, which means practically that s.95a cannot narrow scientists’ rights to do research on technical protection measures.

The government acknowledged this by stating in their notes on the law:

“Acts of circumvention committed solely for scientific purposes (e.g. cryptography) will not be prohibited.”¹⁴⁰

This will create a new battlefield in the courts on the question of whether certain acts constitute “scientific research” or are merely commercial product development. This problem will be worsened by the fact that much cryptography research has previously been done by amateurs and industrial laboratories.

Forthcoming legislation

The German Government has made it quite clear that it plans to follow this law up with a second one that will most probably contain even stricter regulations on copy protection. Speaking to the Bundestag on November 22, 2002, Germany’s Minister of Justice, Mrs. Brigitte Zypries, questioned in particular Germany’s present system of paying royalties to rightsholders from an exploitation society financed by obligatory contributions from operators of copy machines, sellers of blank media and the like. Mrs Zypries said¹⁴¹:

“The time has not yet come to replace our system of global compensations [...] by a system of per-use payment, of individual licensing in the digital domain. [...] I know of course that there is an important pressure group that sets a high value on these individual payments being part of the next package. We will have to negotiate this, and we will also have to see how far technical developments will have gone by then. [...] Let us take the next step together in the course of the next year.”

¹⁴⁰ http://www.urheberrecht.org/topic/Info-RiLi/ent/RegE_UrhR_InfoG.pdf

¹⁴¹ <http://dip.bundestag.de/btp/15/15010.pdf>, page 626

The opposition seems to be more than willing to do this. On the same day, Günter Krings, the Conservatives' shadow rapporteur said on the issue:

"The future of copyright is [...] Digital Rights Management, a new, intelligent protective strategy. [...] Copyright will be the central market structuring branch of law in the digital age."

Half a year later, Mrs. Zypries announced that immediately after the vote on the law presently discussed – that is, probably already in April, 2002 - officials from her ministry would start working on the draft for what she called a "second package". No details have been published so far on the contents of that package, but it is possible to draw conclusions from the discussions in the Bundestag Legal Affairs Committee, where it was part of a deal between the Government and the opposition in order to pass the first package. Mr. Krings told the Bundestag on April 11, 2003:

"We have to tackle the topics yet to be dealt with in a speedy manner: legality of the source of a copy, copies from an original, sending copies and the creation of real incentives for the development of Digital Rights Management schemes. We offer our hands and are ready to start preliminary work on the second package already during the next session week, because time is scarce."

Agreement was reached, it seems, between the four parties in the German Parliament that individual licensing schemes will replace the present regime of global levies sooner rather than later. These will be backed up by advanced DRM schemes that allow for pay-per-use policies and eventually replace the very foundations of copyright legislation presently in force. Differences seem to remain only on whether portions of the old system will be preserved, or whether it will be replaced altogether.

For the user, it won't make a difference. If the German copyright lobby and their parliamentary allies get what they want – and there is no reason to believe they won't – digital media that can be used on any machine at any time, that can be passed on from one user to another, or that can be legally copied and recompiled, will soon be a thing of the past.

Speaking to the Bundestag on April 11, Mrs. Zypries said, referring to the second package:

"The Bertelsmann Foundation was as kind as to declare its willingness to join us for a part of this way. I think this is a good thing."

The Bertelsmann Foundation holds a majority of the shares of Bertelsmann AG, Germany's media conglomerate with revenues of 18.3 billion Euro from various TV, radio, print and online media. It is rare for a politician to admit the direct influence of an industry lobby in such an open manner, and it can only be explained by the fact that the vast majority of the Bundestag do not regard it as problematic.

Greece

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This chapter aims to provide a succinct description of the proceedings for the implementation of Directive 2001/29/EC (“the Directive”) in Greece, of the changes brought about as a result in pre-existing Greek legislation on intellectual property rights and of the views of groups or organizations interested in the matter.

A summary presentation of the national legislative background will precede an account of the implementation procedure. A detailed description of the amendments to the Greek law on Intellectual Property will follow. An account of the reactions and respective positions of the organizations, corporations or groups interested in the matters touched by the Directive will close the report.

Implementation of the Directive

Until fairly recently, regulation of intellectual property matters in Greece was ensured by a number of laws enacted at wide intervals. The fundamental legislative text, Law 2387/1920, had been the first attempt at a comprehensive treatment of intellectual property matters; it afforded a degree of protection of rights in compliance with the requirements prevailing at the time of its promulgation and enabled Greece to participate in the international initiatives for a more effective protection of intellectual property rights.

Greece became a party to the International Treaty of Berne and its subsequent revisions (Royal Decree 16/31.3.1921, Law 5257/1931, Law 3565/1956) and to the 1952 World Treaty of Intellectual Property of Geneva (Legislative Decree 4254/1962).

After the fall of the military regime in the mid-1970s, a number of laws (1064/1980, 1597/1986, 1805/1988) regulated various aspects of intellectual property. In 1990, the Government took the initiative to put an end to fragmentation of intellectual property law; a new law was passed on February 11, 1993 and published in the Government’s Gazette on March 4, 1993, as law 2121/1993. It entered into force on the day of its publication and has been ever since the main instrument of regulation of intellectual property matters, alongside the above-mentioned international treaties to which Greece is a party.

Law 2121/1993 originally implemented the pre-existing EU Directives, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and Council 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. It was thereafter repeatedly amended either to address regulation needs that arose subsequently to its promulgation or to implement EU legislation.

Thus, new EU legislation was incorporated into law 2121/1993 first by law 2819/ 2000 implementing the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, then by law 2557/ 1997 implementing the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission as well as Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

Greece was the first EU member state to incorporate the Directive 2001/29/EC (“the Directive”) into its intellectual property legislation. It did so well ahead of the deadline set by the Directive (December 22, 2002). On August 27, 2002, the Minister of Culture introduced a bill comprising, among other things, the provisions implementing the Directive before the second formation of the vacation section of the Parliament; the bill was eventually voted into law by the third formation of the section on September 19, 2002. Law 3057/2002, entitled “*Amendment and Completion of Law 2725/99, regulation of matters pertaining to the Ministry of Culture and other provisions*” was

published in the Government's Gazette on October 10, 2002 (issue 239A). Section 81 of Law 3057/2002, entitled *"Implementation of the Directive 2001/29 EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and other provisions"* ("Section 81") implements the provisions of the Directive. According to section 84 of law 3057/2003, its date of entry into force coincided with the circulation of the issue of the Government's Gazette unless otherwise stipulated by any of its provisions. Since Section 81 contains no such stipulation, the implementation of the Directive was effected on October 10, 2002. A translation into English of Section 81 is available at the website of the Greek Ministry of Culture (<http://www.culture.gr/8/84/e8401.html>).

In keeping with an unfortunate but well-established habit of the Greek legislature, the provision implementing the Directive was inserted into an unrelated bill of which it formed, quantitatively, but an insignificant part. As a result, on September 19, 2002, when the group of sections comprising section 81 was brought for discussion before the Parliament, the limitations imposed by the tight time-schedule forced the MPs of the various political parties to use their allotted time debating other sections related to politically charged issues and all but ignore the implementation of the Directive.

The Minister of Culture, Evangelos Venizelos told the Parliament that the proposed provision of section 81 of the Bill essentially consisted of a translation of the Directive to be implemented, thereby implying that there really was no sense in extensively debating it. An MP of the Greek Communist Party, Ms Liana Kanelli, deplored this state of affairs and regretted the rejection by the Government of her party's proposed amendments to section 81 (which however were not specific to the provisions of the Directive but identical to those proposed by her party in 1993 during the parliamentary debate on the bill that was to become law 2121/1993) but declared that her party would vote for the implementation of the Directive as proposed, since such implementation is mandatory under the EU treaty. Section 81 was eventually unanimously voted into law in the form proposed by the Government.

Description of the amendments to law 2121/1993

The Minister's statement describing the provision of section 81 essentially as a translation of the Directive was accurate; all of its mandatory provisions were adopted. As for the optional provisions, most of the exceptions enumerated by Article 5 of the Directive were already provided for by law 2121/1993.

As the latter is a reasonably recent legislative text, it should come as no surprise that many of the matters mentioned by the Directive (modern aspects of the intellectual property rights, the extent of their protection and the sanctions safeguarding their respect) were already recognized and regulated. This state of affairs allowed the implementation of the Directive in the manner already adopted with respect to implementation of previous EU legislation as mentioned above, i.e. by adapting, modifying or adding to the provisions of the existing law rather than by passing a new one.

The amendments brought about by section 81 are threefold: the meaning of intellectual property rights is now expressly construed – and the extent of their exclusivity newly defined – so as to encompass the aspects relating to the enabling by digital technology of new forms of dissemination of protected content; new provisions were inserted to protect the technological measures and rights-management information; the pre-existing system of sanctions was updated to comply with the newly defined needs. Needless to say, the layout of the provisions of Section 81 more or less follows the layout of the Directive.

The author's property right

Paragraph 1 of section 81 amended section 3 paragraph 1 of law 2121/1993 on the power of the right holder to permit or forbid reproduction of his work by listing "the direct, indirect, temporary

or permanent reproduction by any means and in any form, in whole or in part” as instances of reproduction, in compliance with the provision of Article 2 of the Directive.

It also replaced the reference, (letter d of section 3 paragraph 1) to circulation of the works by the term “right of distribution” (Article 4 paragraph 1 of the Directive) and added that the distribution right shall be exhausted within the Community only where the first sale or other transfer of ownership in the Community of the original or copies is made by the rightholder or with his consent (Article 4 paragraph 2 of the Directive).

It listed (letter e of section 3 paragraph 1) the rental or public lending with respect to the original or copies of the works as distinct rights and specified that such rights shall not be exhausted by sale or other act of distribution of the original or of the copies, except in the case of architectural works and works of applied arts; it also specified that the rental and public lending shall have the meaning provided by Council Directive 92/100 of November 19, 1992.

Finally, it specified the various manners of presentation to the public which come within the scope of the rightholder’s power (letter h of Article 3 paragraph 1), by listing the transmission by wire or wireless means or by any other means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them; it also specified that these rights shall not be exhausted by any act of communication to the public (Article 3, paragraphs 2 and 3 of the Directive).

The property rights of the holders of related rights

Paragraphs 3, 4 and 5 of section 81 amended sections 46, 47 and 48 of law 2121/1993 regarding the related rights held by performers or performing artists, producers of sound recordings and audiovisual recordings and radio and television organizations and aligned them with the stipulations of Article 2, Article 3 paragraphs 2 and 3 and Article 4 of the Directive, especially concerning the rights of reproduction, distribution, reproduction or communication to the public, rental and public lending as well concerning the question of exhaustion of the rights.

With respect to performing artists, the new paragraph 2 of section 46 supplemented the definition of their rights (the recording of the performance, the reproduction of the recording, the circulation by transfer of ownership, lease or public lending of the material, support of the recording and radio or TV transmission whether by electromagnetic waves, satellite transmission or cable) to bring them in line with the provisions of articles 2, 3 par. 2 and 3, 4 of the Directive.

Regarding producers of sound recordings and/or audiovisual or visual recordings, paragraph 4 of section 81 added two new sections to section 47 of law 2121/1993, rena-med producers of sound recordings “phonogram producers” and producers of visual or sound and visual recordings “producers of audiovisual works” and brought their rights in line with above-mentioned provisions of the Directive.

As to radio and television organizations, paragraph 5 of section 81 also redefined their rights in compliance with above-mentioned provisions of the Directive.

Exceptions and limitations

Paragraph 2 of section 81 implemented the provisions of Article 5 of the Directive concerning exceptions and limitations.

The mandatory exception

The mandatory exception provided for by Article 5 paragraph 1 of the Directive was implemented by the insertion into law 2121/1993 of a new section 28B which reproduces exactly the content of said Article of the Directive with a rearrangement of the wording which however does not in the least deviate from the meaning of the original provision.

The optional exceptions

Of the permissible exceptions listed in paragraphs 2, 3 and 4 of Article 5 of the Directive, section 81 only implemented the exception of paragraph 3 letter (b) concerning uses for the benefit of people with a disability by extending it to blind and deaf-mute persons and by providing for the possibility of future extensions for the benefit of additional categories of disabled people (new section 28A of law 2121/1993).

It should be mentioned, however, that law 2121/ 1993 already comprised a wide range of exceptions analogous or identical to most of those mentioned in paragraphs 2, 3 and 4 of the Directive, such as exception for reproductions on paper or similar media by the use of any kind of photographic or equivalent technique for private use (Art. 5 par. 2 letters a and b of the Directive corresponding to section 18 of law 2121/1993), reproduction by public libraries, educational establishments or museums, or by archives (Art. 5 par. 2 letter c of the Directive corresponding to section 22 of law 2121/1993), use for the sole purpose of illustration for teaching (Art. 5 par. 3 letter a of the Directive corresponding to section 21 of law 2121/1993), use of protected works or other objects while presenting topics of current interest or of broadcast works to the extent justified by the purpose to inform (Art. 5 par. 3 letter c of the Directive corresponding to section 25 of law 2121/ 1993), quotations for criticism or review to the extent required by the specific purpose (Art. 5 par. 3 letter d of the Directive corresponding to section 19 of law 2121/ 1993); use to ensure the proper performance or reporting of administrative or judicial proceedings (Art. 5 par. 3 letter e of the Directive corresponding to section 24 of law 2121/1993); use during official celebrations (Art. 5 par. 3 letter g of the Directive corresponding to section 27 of law 2121/1993); use of works, such as works of architecture or sculpture, made to be located permanently in public places (Art. 5 par. 3 letter h of the Directive corresponding to section 26 of law 2121/1993), use in anthologies used for teaching purposes and in school textbooks.

Finally, paragraph 2 of section 81 incorporated the general clause on exceptions (three steps test) into law 2121/1993 (new section 28C).

Technological protection measures

The provisions of Article 6 of the Directive concerning protection of technological measures were implemented in their entirety by the provision of subsection 11 of section 81, which inserted a new section 66A into law 2121/1993. In essence, section 66A reproduced verbatim the content of the first three paragraphs of Article 6 of the Directive and provided for a mechanism implementing the provisions of the last paragraph of Article 6 with respect to voluntary or mandatory exceptions or restrictions as provided therein.

The definition of Article 6 paragraph 3 of the Directive is reproduced in new section 66A paragraph 1 of law 2121/1993. Paragraphs 2 and 3 of section 66A introduced prohibitions of the acts described in paragraphs 1 and 2 of Article 6 of the Directive respectively. Paragraph 4 provides for sanctions in the event of violation of the prohibitions of the preceding paragraphs; it threatens imprisonment of at least one year and a fine of 2,900—15,000€ and entails the civil sanctions of section 65 of Law 2121/1993: payment of damages, pecuniary penalty, personal detention, restitution to the rightholder of the illicit profit realized by the transgressor etc. It also empowers the one-member first instance court to order an injunction in accordance with the Greek Code of Civil Procedure as well as seizure of the objects constituting proof of the infringement of the protected rights. Alternatively the court may order the creation of a detailed inventory (including photographs) of such objects.

Lastly, paragraph 5 of section 66A introduced the mechanism for the implementation of the exceptions and restrictions referred to by paragraph 4 of Article 6 of the Directive. It stipulates that, relating to the limitations to certain intellectual property rights¹⁴², should the rightholders fail

¹⁴² i.e. reproduction for private use on paper or any similar medium, for teaching purposes, by libraries and archives, for judicial or administrative purposes, as well as the use for the benefit of people with disability, the rightholders are under the obligation to give to the

to take voluntary measures including agreements between themselves and third parties benefiting from the exception, then the rightholders themselves as well as such third parties may ask for the assistance of one or more mediators selected from a list set up by the Copyright Organization. The mediators make recommendations to the parties. If no party objects within one month from the forwarding of the recommendation, all parties are deemed to have accepted the recommendation. Otherwise, the dispute is submitted to the Court of Appeal of Athens for final settlement. It is furthermore stipulated that this provision shall not apply to works or other subject-matter 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.

Rights-Management Information

Article 7 of the Directive on the obligations of member states in regard of information on rights management is another instance of almost verbatim transposition of its provisions into law 2121/1993. Paragraph 11 of section 81 added a new section 66B to law 2121/1993. Paragraph 1 of the new section exactly reproduced the definition of "rights management information" as given by the Directive. Paragraph 2 introduced a general prohibition of the activities described in paragraph 1 of Article 7 of the Directive. Paragraph 3 declared transgression of the prohibition punishable by imprisonment of at least one year and a fine of 2,900—15,000€ and by the civil law sanctions of section 65 Law 2121/1993 as described in the preceding section. The one-member First Instance Court may order injunction in accordance with the Code of Civil Procedure, and may order seizure of the objects constituting proof of the infringement of the protected rights. Alternatively the court may order the creation of a detailed inventory (including photographs) of such objects.

Enforcement and penalties

As previously mentioned, law 2121/1993 being a recent piece of legislation, it provided, right from the time of its promulgation, for a high degree of protection of intellectual property rights. Chapter 11 of the law is exclusively devoted to sanctions, civil as well as penal, threatened against transgressors of the protected rights. It also provides for provisional relief in the event of an emergency or in order to avoid an imminent danger.

In view of this situation, the requirements of the provisions of paragraphs 1 and 2 of Article 8 of the Directive were already fulfilled and no extensive amendments were required for their implementation. Paragraphs 9 and 10 of section 81 adjusted the wording of the existing provisions particularly regarding the description of the actions constituting offensive behavior in order to make it coincide with the terminology of the Directive concerning protected rights.

Two new provisions were inserted by virtue of paragraphs 8 and 14 of section 81 respectively. The first allows, in compliance with the provision of Article 8(3) of the Directive, for provisional relief against intermediaries whose services are used by a third party to infringe a copyright or related right or the *sui generis* right of a data base maker (new section 64A of law 2121/1993). The second submits felonious infringement of copyright and related rights directly to the jurisdiction of the three-member Court of Appeal for Felonies (addition to section 66 paragraph 3 of law 2121/1993).

For penal sanctions, infringement of the rights protected by law 2121/1993, as currently in force, or by multilateral international conventions on the protection of copyrights ratified by Greece, is punishable by imprisonment of not less than one year and by a fine from 2,900—15,000€.

However, in the event the illegal benefit of the transgressors was exceedingly high, the minimum penalty of imprisonment and the fine margins are doubled. Finally, in case the transgressor commits the illicit actions on a professional basis or the circumstances under which such actions were committed show that the transgressor represents a particular danger to intellectual property rights, the penalties threatened are further raised to a minimum 10 years of imprisonment, a fine of 14,673—58,694€ and revocation of the license of the enterprise through the medium of which

beneficiaries the means to enjoy the benefit of the exception to the extent necessary to the extent those beneficiaries have legal access to the protected work or subject-matter concerned

the illicit acts were committed. Punishment of the transgressions requires criminal intent (of any degree) on the part of the transgressor; acts committed by negligence are not punished.

The national debate

The haste with which the Greek Government introduced the provisions of the Directive into Greek law, the fact that it happened to introduce the relevant bill for discussion before Parliament during the summer, the adoption of the method of embedding the provisions on intellectual property in a thematically unrelated legislative context, and the presentation of the matter as the carrying out of a formal task consisting in introducing a translation of non-negotiable EU legislation of a technical nature (particularly regarding the measures of protection, circumvention and circumvention devices) effectively prevented any public debate at the time of promulgation of law 3057/2003.

As far as the writer of this report was able to ascertain, the Greek Intellectual Property Organization (a public law entity, supervised by the Ministry of Culture) has not up to date published or otherwise made available a critical appraisal of the implementation of the Directive.

The same applies to A.E.P.I. (<http://www.aepi.gr>), a long-standing company for the collective management of intellectual property rights which administers and represents in Greece almost the whole of Greek and foreign repertory. A.E.P.I.'s chief concern is to collect the due to the copyright holders and to suppress illegal exploitation of intellectual rights; therefore it is not averse to measures leading to an enhanced degree of protection.

Organizations such as BSA (Business Software Alliance) or the Union of Greek Producers of Phonograms (the Greek branch of the International Federation of Phonographic Industry), anxious to see piracy curbed, predictably expressed themselves in favour of strict measures of protection of intellectual property rights and consider the provisions of the Directive as a step in the right direction.

Critical voices emanated from Digital Rights Greece, an online site dedicated to promoting the freedom of speech online (<http://digitalrights.uoa.gr>). It took issue mainly with the provisions of Article 6 of the Directive on technological measures and complained that the restrictions these end up imposing overshoot the needs of copyright protection. It pointed out that the exceptions to the rules of Article 6 of the Directive are practically insignificant. The Hellenic Linux Users Group (<http://www.hellug.gr>), in a statement issued after promulgation of law 3057/2003 also complained of the excessively restrictive effects of technological protection measures, especially regarding the use of audio CDs and region-locked DVDs.

Finally, the provisions of the Directive and their implications on the various fields of activities affected by its scope were discussed in a conference organised in April 2003 by the Athens Bar Association. The contributions of the participants and the conclusions of the discussion that ensued were unfortunately not available for review at the time of drafting of the present report; they are however due for publication in the course of the summer and would then provide an opportunity for an update of this section.

Summary

Directive 2001/29/EC was implemented in Greece by Law 3057/2002 (publication date October 10, 2002). Virtually no debate or exchange of views between the interested parties preceded the introduction of the relevant bill before Parliament. The implementation itself, effected in an unquestioning manner, more or less amounted to embedding a translation of the Directive's provisions in the text of law 2121/1993 on intellectual property rights on an "as is" basis. As a result, no steps were taken to mitigate the potential side-effects of the protection granted by the Directive to copyright holders of digitally available content (protection of technological measures and bans on circumvention) or to address other related issues, such as interoperability; therefore, no national policy, in the sense of attempting to balance the requirements of the Directive against equally legitimate concerns arising from the danger of unwarranted consequences of the measures newly adopted, can be said to exist.

Ireland

By Rachel Kramer, FIPR, with contributions from Robert Clark, Eoin O'Dell, Martin Keegan and Liam Herrick.

Implementation of the Directive

Ireland has not yet transposed the Copyright Directive into national law, and no draft text of any such implementation has been made public. There is a declared intention to transpose by statutory instrument (SI) by mid-2003, but little evidence exists for this intention. The current Government Legislation Programme, commencing May 7, 2003¹⁴³, has no reference to the Directive or copyright legislation.

The office responsible for drafting the SI is the Intellectual Property Unit of the Department of Enterprise, Trade & Employment (DETE¹⁴⁴), and the primary point of contact for the Directive is Tony McGrath. The Intellectual Property Unit's Web pages state that "draft instructions are currently being prepared for the Attorney General's Office which will enable Ireland to fully transpose this Directive into Irish law."¹⁴⁵

The transposition will likely be minimalist for a number of reasons. First, in many respects Irish law is already compliant. Directives from 1991–1996 already in place are TRIPS compliant, the 1996 treaties are ratified, and all these directives are incorporated in the Copyright and Related Rights Act 2000¹⁴⁶. The expected SI to implement the Directive is not expected to alter the 2000 Act to any great extent. Second, Irish Constitutional law restricts the freedom of a Minister to legislate by SI, so many of the options available in the Directive may be closed off by the choice of SI as the transposition means. Thirdly, the 2000 Act required Herculean effort, which no one wants to repeat in the transposition of the Directive. Although passed earlier, the 2000 Act tried to anticipate the requirements that would be present in the Directive.

Typically Ireland misses the deadline for transposing and implementing EU directives by 18 months to 3 years. Therefore, the missed deadline for the Copyright Directive implementation comes as no surprise.

Exceptions and limitations

Current copyright law in Ireland is among the most liberal in Europe. Therefore, most of the exceptions in Article 5 are already available to users. It is not clear how the resulting SI will specifically address the Directive exceptions.

Technological Protection Measures

Under current Irish law, any act to further the use of a copyrighted work under the premise of fair dealing is legal. It is not clear how the anti-circumvention restrictions in the Directive will affect this. It will be difficult to separate circumvention for the legal purpose of fair dealing from circumvention that illegally infringes copyright.

There is little in the existing law that directly addresses circumvention devices. The SI to transpose the Directive may change how the law targets the devices of circumvention or the intent to circumvent as an infringement of copyright.

The most relevant sections of the Copyright and Related Rights Act 2000 are:

Section 140 - Copyright Offences

Section 258 - Performance Offences

¹⁴³ www.taoiseach.gov.ie/taoiseachgov/legislation/index.asp?lang=ENG&loc=-1

¹⁴⁴ www.entemp.ie

¹⁴⁵ <http://www.entemp.ie/tcmr/ipuwork.htm>

¹⁴⁶ <http://www.irlgov.ie/bills28/acts/2000/a2800.pdf>

Section 370 - Rights Protection Measures: Devices designed to circumvent protection

Section 374 - Non-interference of rights protection measures with permitted acts.

The relevant sections pertaining to interoperability and research are:

Chapter 6 - Acts permitted in relation to works protected by copyright

Section 50 - Fair dealing: research or private study

Section 81 - Lawful copies of computer programs

Chapter 8 - Acts permitted in respect of database right

Section 329 - - Fair dealing: research or private study

Under the 2000 Act, protection of free speech and privacy issues are generally technology-neutral, meaning that specific reference to technology is not included in the act. Therefore certain acts that exercise free speech would be considered legal, but in practical terms they may still be prohibited by technological protection measures that limit access to material.

The Directive is generally without prejudice to data protection laws. Issues regarding privacy relate to digital rights management systems. The nature and functionality of these systems is a technical issue, but they could be used to monitor access to and use of copyright materials. The Directive recognises that a possible consequence of managing rights in this way could be that patterns of use (either online or offline) of certain material could be tracked and/or recorded. The aim is therefore to ensure that technical standards comply with the data protection principles in the 1995 Directive and national data-protection law.

The national debate

The public debate in Ireland concerning the Copyright Directive has been deafening in its silence. As the treaties and directives of the 1990s were being passed there was also very little debate regarding their impact on copyright law.

Italy

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Implementation of the Directive

The Italian law implementing the Copyright Directive is known as:

Decreto Legislativo 9 Aprile 2003, n. 68: Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione. (GU n. 87 del 14-4-2003 - Suppl. Ordinario n.61)

[Legislative Decree of April 9th, 2003, no. 68: Implementation of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.]

The law has been effective since April 29, 2003. A copy of the law is available at:

<http://dbase1.ipzs.it/cgi-free/db2www/artifree/arti.mac/report1?numrec=1&swpag=&pubbldal=+&nart=&nprv=&ggprv=&mmprv=&aapr=&tipo=&emett=&mat=&tit=diritto+autore&testo=&dagiorno=&damese=&daanno=&agiorno=&amese=&aanno=&maxrec=>

A compressed archive with the text of the law (one PDF file per page) is also available at:

<http://www.softwarelibero.it/progetti/eucd/legge-eucd.en.shtml>

The pathological slowness of Italian bureaucracy and political institutions seems to have caused the implementation to have been five months late. The first draft of the law became public quite early (July 2002), but it was approved only on March 28, 2003.

The debate on the Directive doesn't seem to have interested the Parliament, excluding a small minority of deputies and senators. Furthermore, nobody in the Government (that produced the decree implementing the Directive) cared about the warnings from several people and associations that are described later in this chapter.

Exceptions and limitations

Most of the exceptions in Article 5 of the Directive have been fully implemented in the Italian decree (or were already provided by Italian copyright law). It is necessary, however, to make some notes:

Art. 5.2(a): “reproductions on paper or any similar medium” are limited to 15% of the whole work. The “fair compensation” must be provided by those who make the reproduction equipment available: they must pay a bill for every page being copied. There are a few exceptions for public libraries: they must pay a fixed annual bill (instead of the per-page one), and the 15% limit doesn't apply to rare works. All these limitations, however, already existed in Italian copyright law before the implementation;

Art. 5.2(b): “reproductions on any medium made by a natural person for private use” are allowed as long they are performed by the person herself (without the help of third parties), and as long as the reproduction does not imply the circumvention of effective technological measures. The “fair compensation” for right-holders has been implemented as a bill on devices such as blank CD-ROMs, hard disks, VCR equipment.

Art. 5.3(d): “quotations for purposes such as criticism or review” are allowed, but they must not have commercial purposes when performed for scientific research and teaching. This is introduced by s. 9 of the Italian implementation, which modifies the old copyright law (no. 663, April 22, 1941). The old law, however, allowed quotations without referring at all to their “non-commercial purposes.” The implementation introduces a clear limitation to the old exception's extent, and the reason of this change cannot be justified by the need to fulfil the European Directive;

Art. 5.3(g): “use during religious or official celebrations organised by a public authority” is not mentioned in the Italian implementation, but the existing copyright law stated that the musical bands of the Italian army are allowed to execute copyrighted works without any “fair compensation” for right-holders (as long as the exhibition has no commercial purposes);

Art. 5.3(h): “use of works, such as architecture or sculpture, made to be located in public places” is not mentioned;

Art. 5.3(i): “incidental inclusion of a work in other material” is not mentioned;

Art. 5.3(j): “use for the purpose of advertising the public exhibition or sale of artistic works” is not mentioned;

Art. 5.3(k): “use for the purpose of caricature” is not explicitly mentioned, but it is regarded by the copyright law as “quotation for criticism” (see above);

Art. 5.3(l): “use in connection with the demonstration or repair of equipment” is not mentioned;

Art. 5.3(m): “use of an artistic work in the form of [...] a drawing [...] for the purposes of reconstructing the building” is not explicitly mentioned, but the existing copyright law excluded plans of buildings from the exclusive reproduction right.

There are also some (formal) exceptions and limitations to the extent of effective technological protection measures. For further details, see section {11}.

As a final note, the implementation remarks that all the exceptions provided by the law could be applied only as long as they don't conflict with the normal use of copyrighted works, and don't cause unjustified prejudice to rightsholders.

Technological protection measures

The Directive requires “adequate legal protection against the manufacture, import, distribution or provision of services” which are primarily designed to circumvent TPMs. This provision has been almost literally copied into the Italian decree.

But the place in which it has been copied is important. The old Italian copyright law contains a section (173-bis) that assigns the same penalty to a list of copyright infringements – but the penalty is only prescribed when these infringements are performed for commercial non-personal uses. Sections 26 and 27 of the Italian implementation (see above) just add the Directive provision at the end of that list.

After the new decree, the Italian copyright law says that “it is punished, if the act is committed for non-personal use, [...] anyone who with commercial purposes [...] gives over on any ground [...] devices [...] or provides services [...] primarily designed [...] for facilitating circumvention”.

There is no clear punishment for non-commercial distribution of circumvention devices. The reason for this choice can't be related to a rationale of the Italian copyright law, since the old law still had an section (s. 171) that prescribes sanctions for various non-personal infringements (e. g. unauthorised distribution of copyrighted works), without making any distinction between commercial and non-commercial purposes; this section, however, has not been extended to cover the distribution of circumvention devices.

It makes the Italian copyright law logic hard to understand: there is a sanction even for purchase, hire or personal use of circumvention devices (154€, see above), but there is no penalty for the non-commercial distribution or acquisition of such devices. It is hard to guess how the law will be interpreted in a court. When considering the rationale of the Directive, there is the risk that the sanctions for “commercial, non-personal” infringements will be considered as sanctions against “commercial or non-personal” distribution of circumvention devices.

Exceptions

There are a few exceptions and limitations to the protection of technological protection measures, even if their extent is very limited, and their utility is questionable. Specifically, the Italian implementation says that:

1. TPMs should allow people to make one private copy (even if analogue) of the works they've had legal access to, as long as it doesn't interfere with the normal use of the works themselves, and doesn't cause unjustified prejudice to rightsholders;¹⁴⁷
2. TPMs must be removed if it is required for public security, or in order to allow administrative, parliamentary or legal proceedings;
3. rightsholders are required to adopt suitable solutions and agreements, to allow people and institutions to obtain the exceptions they are entitled to (for example, to allow visually impaired people to reproduce a protected e-book using a different format, in order to process it with a speech synthesiser).¹⁴⁸

Nobody, however, is allowed to circumvent TPMs, even if they forbid, for example, making a private copy.

Furthermore, when people are dissatisfied with the “suitable solutions” in point 3 above, any dispute caused by TPMs must be evaluated by the Permanent Copyright Consulting Committee, which will try to mediate between the conflicting interests of users and rightsholders. If this mediation fails, the dispute will be passed to the normal legal system.

The Permanent Copyright Consulting Committee already existed in Italian copyright law, and is nominated directly by the Prime Minister every four years. Until now the Committee had mostly bureaucratic and technical consultation functions, but the implementation gives it a new role: the mediation of disputes between users and rightsholders.

This approach has two fundamental flaws:

1. the Committee is a centralised authority that will handle disputes from the whole nation, causing bureaucratic delays and complications that will discourage people trying to defend their rights (the same critique has been raised about the English law proposal that implements the Directive¹⁴⁹);
2. as far as the law prescribes, the Committee members only come from the entertainment and copyright industries, without any users' representatives; it is going to mediate in disputes regarding a matter in which it cannot be impartial, due to the evident conflict of interests.

Interoperability and research

The existing Italian copyright law provided the right to study and reverse-engineer a program to ensure interoperability (as required by the Software Directive), and section 23 of the Copyright Directive implementation, after defining technological protection measures, explicitly says that all the reverse-engineering guarantees are still valid. Thus, the law punishes circumvention, but allows reverse-engineering for interoperability. When the first cases arise, the legal uncertainty will benefit the parties with the strongest legal support.

When dealing with scientific research, the situation is even worse: Italian copyright law only justifies reverse engineering for interoperability purposes, and it doesn't guarantee the right to

¹⁴⁷ This is one of the aspects of the law that has changed for the worse: the early drafts of the decree were much more definite, and required that all TPMs always allow at least one personal copy (without the “even if analogue”, “normal use” and “unjustified prejudice” mentions).

¹⁴⁸ Here is another negative evolution of the decree: early drafts explicitly required right-holders to remove TPMs when it was necessary to allow people and institutions to obtain the exceptions they are entitled to.

¹⁴⁹ Critique of the Proposed UK Implementation of the EU Copyright Directive (by Julian T. J. Midgley): http://uk.eurorights.org/issues/eucd/ukimpl/critique_uk_impl.html

communicate the information obtained in the process – unless it is necessary to ensure the interoperability of a computer program. It means, for example, that the mere distribution of the results of cryptographic research on a technological protection measure could have been prohibited by a rightsholder, even before the Directive's implementation. With the new decree, the distribution of such information (that could be considered as a “provision of a service designed to facilitate circumvention”) is further limited at least for non-commercial purposes.

Privacy

The implementation does not seem to take users' privacy into particular account. There is (and there was before the Directive was created) a National Privacy Committee which should handle all cases of privacy violation, which are covered by a specific law (n. 675/96). However, even if we can reasonably expect the Italian implementation to raise serious privacy concerns, the Privacy Committee is already severely understaffed and it is plausible that it will not be able to handle additional load.

Enforcement and penalties

The penalties for infringing copyrights and circumventing controls are provided by sections 26, 27 and 28 of the Italian implementation, which in turn modify the old Italian copyright law.

Sections 26 and 27 cover the penalties for infringements performed for commercial non-personal purposes.

The penalties are the same as the old Italian copyright law, which already had provisions for commercial non-personal copyright infringement; these penalties, however, have been extended to the new felonies introduced by the Directive. The sanctions apply to:

- the commercial manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the commercial provision of services with the aim of facilitating the circumvention of TPMs
- the removal of rights-management information, when made for commercial non-personal purposes, and the commercial distribution, importation for distribution, broadcasting, communication or the act making available to the public works from which electronic rights-management information has been removed or altered

All the penalties are listed in law no. 663, April 22, 1941, s. 173-bis. Specifically, the law prescribes:

- from six months up to three years of imprisonment, that becomes from one up to four years when there is an active organisation with the aim to infringe the law, or when the infringement is performed in the context of a legal commercial activity;
- a sanction from 2,500—15,000€;
- suspension (for a period from one month up to five years) of the license for every activity related to the infringement (for example, dealers who trade in circumvention devices have their business closed);
- suspension from executive and representative roles both in commercial companies and political life;
- publication of the sentence in at least one newspaper with national circulation, and one or more specialised magazines;
- suspension (for at least one year) of the ability to obtain commercial or radio/television broadcasting licenses;
- a further monetary sanction for every item being abusively duplicated or reproduced.

The law, however, also says that these penalties (with the exception of point no. 7 above) may be reduced when the infringement is particularly tenuous.

Moreover, s. 28 of the implementation adds a new section to the old Italian copyright law, introducing new sanctions for some infringements made for personal and non-commercial purposes.

The new section covers:

- abusive utilisation, duplication or reproduction of copyrighted works protected by TPMs;
- purchase or hire of devices made to circumvent TPMs;
- purchase or hire of devices and items on which the "fair compensation" bill has not been applied.

The meaning of "abusive" in point no. 1 above is not defined, but it could be deduced from the TPM definition on s. 23 of the Italian implementation: it indicates any action that has been forbidden by right-holders by using TPMs (for example, printing an encrypted e-book, or skipping the advertisement at the beginning of a DVD movie).

The penalties prescribed for these offences are:

- a monetary sanction of 154€;
- sequestration of the offending material;
- publication of the sentence in a newspaper with national circulation.

For habitual offenders and grave infringements, the decree also prescribes:

- a monetary sanction up to 1,032€;
- publication of the sentence in at least two newspapers with national circulation, and at least one magazine specialised in the entertainment field;
- in the case of business activities, the revocation of commercial and radio/television broadcasting licenses.

The national debate

The debate about the Italian implementation suffered, as often happens in Italy, from a lack of communication between the Parliament and civil society. Despite efforts by several non-profit organisations, the legislative decree proposed by the Italian government was accepted by the Culture Committee of Parliament.¹⁵⁰ First and foremost among these organisations was the Associazione Software Libero (AsSoLi, <http://www.softwarelibero.it/>), which kept contacts with political representatives in order to make Italian politicians aware of the perceived perils of the Directive.

The parliamentary debate was not held in the Parliament at large but mainly in the Culture Committee.¹⁵¹ The discussion began on February 13, 2003.¹⁵² The spokesperson was Guglielmo Rositani (AN).¹⁵³ The presentation of the decree focused on a brief explanation of its goals (integrating the existing Italian legislation as far as the rights of reproduction, communication and distribution of works are concerned). Rositani stressed the inclusion of Internet communications as far as the above mentioned rights were concerned, and the introduction of new rules to cope with technological advances. Of particular interest, in the context of the public debate that

¹⁵⁰ With the notable exception of the PRC party (see below).

¹⁵¹ The Constitutional Affairs Committee of the Senate was asked for an opinion on the legislative decree, but this is a formality when European directives are being implemented.

¹⁵² <http://www.camera.it/dati/leg14/lavori/bollet/200302/0213/html/07/comunic.htm#60n3>

¹⁵³ AN is the acronym for Alleanza Nazionale, a right-wing party which is currently a member of the governing alliance (composed of Forza Italia, Lega Nord/Padania, Alleanza Nazionale, UDC and some other smaller parties).

preceded and accompanied the parliamentary acceptance of the legislative decree, is s. 39, which dictates what is considered "fair compensation" for private copies (this was a point the public debate was particularly sensitive to).¹⁵⁴

The debate was then postponed to February 18, 2003¹⁵⁵, when Franca Chiaromonte (DS)¹⁵⁶ noted that technological innovation had produced a profound change in how culture is perceived, used, and made. In this context, she feared that *droit d'auteur* could be overly damaged, but at the same time she expressed the feeling that a balance should be found, in order to avoid more rights being bestowed only to those who already have them and forgetting about those who currently don't.

Chiaromonte's opinion was that this balance would be possible only by "rooting [*droit d'auteur*] inside the innovation processes". She expressed the conviction that this legislative decree should be just the start, and that a "coherent and progressive adjustment of the Italian and European laws" will be necessary. Finally, she stressed the subject of "fair compensation", and the negative reaction it produced in the civil society: although she recognised the principle as valid, Chiaromonte recalled a proposal by the DS party to create a ministerial fund which should promote young artists, financed through a quota of SIAE funding collected thanks to the "fair compensation". There were other small interventions, not particularly important for the subject at hand.¹⁵⁷

The debate was then postponed to February 20, 2003¹⁵⁸ when the spokesperson proposed a text to be presented to the Government by the Committee. The text stressed (amongst other points):

- the opportunity to have a strong protection of *droit d'auteur* and related rights, in the "interest of authors, interpreters, executors, producers and consumers";
- the importance of the "fair compensation" disposition which will "guarantee the involvement of the users of intellectual and artistic products in sustaining and promoting creativity and cultural production";
- the obligation to reserve at least 20% of the income derived from "fair compensation" to a fund for promoting and supporting musical activities as well as those activities which cannot currently use existing resources (such as the "Fondo Unico per lo Spettacolo", literal translation "Unique fund for performance works");

The text gave a positive opinion about the legislative decree¹⁵⁹, with some proposals for modifications to the original text.

The proposal by the spokesperson was then discussed on February 25, 2003¹⁶⁰, when the spokesperson himself presented a slightly modified proposal.¹⁶¹ Titti De Simone (PRC)¹⁶² presented an alternative text¹⁶³ to be debated by the committee; she also stated that her party wouldn't vote for the current proposal.

Titti De Simone's proposal contained many criticisms of the original proposal, including:

- the "high level of protection" which the legislative decree talks about is not actually protecting authors, but the media majors;

¹⁵⁴ The acts are available at http://www.camera.it/_dati/leg14/lavori/bollet/200302/0213/pdf/07.pdf

¹⁵⁵ http://www.camera.it/_dati/leg14/lavori/bollet/200302/0218/html/07/comunic.htm#73n2

¹⁵⁶ DS is the acronym for Democratici di Sinistra, a social democrat party that is currently a part of the parliamentary opposition (together with many other parties).

¹⁵⁷ The acts are available at http://www.camera.it/_dati/leg14/lavori/bollet/200302/0218/pdf/07.pdf

¹⁵⁸ http://www.camera.it/_dati/leg14/lavori/bollet/200302/0220/html/07/allegato.htm#87n1

¹⁵⁹ Which, it should be remembered, was a governmental proposal.

¹⁶⁰ http://www.camera.it/_dati/leg14/lavori/bollet/200302/0225/html/07/allegato.htm#73n1

¹⁶¹ http://www.camera.it/_dati/leg14/lavori/bollet/200302/0225/html/07/comunic.htm#65n3

¹⁶² PRC is the acronym for Partito della Rifondazione Comunista, a left-wing party which is currently in opposition.

¹⁶³ http://www.camera.it/_dati/leg14/lavori/bollet/200302/0225/html/07/allegato.htm#75n1

- the decree doesn't consider the new forms of distribution, such as "copyleft", which guarantee the moral rights of the authors and do not limit the private, non-commercial uses of the works¹⁶⁴;
- the vast diffusion of literary, musical, visual and multimedia works, made possible thanks to the "digital revolution", did not hinder but actually helped selling the original works;
- protected works as per s. 23 (which gives rightsholders the possibility of adopting "technological means of protection") already have an intrinsic expiration date, because they depend on proprietary formats, specific operating systems and hardware, which in the future will be obsolete or not longer available; the legal and technical impossibility to transfer the aforementioned works to another format will produce an "attack on our cultural memory";
- s. 28 punishes "private" and "security" copies;

"fair compensation" causes a plethora of problems, amongst which:

- it causes a grave economic prejudice to the production of "private copies", even though "private copies" are allowed by the very same Directive which is being implemented;
- it is applied without regard to specific cases (as considered by the Directive) and in an indiscriminate way, so that even people who reproduce personal works are subject to the "fair compensation" (in the form of more expensive blank CDs, for example);
- it will favour criminal organisations that deal with copied CDs and tapes, which will become even cheaper than the original;
- it will place a noticeable burden on the Public Administration, which uses digital formats and will have to pay for the "fair compensation" – in the end, it will be citizens at large who will pay for it;
- the 15% limit to copies made in public libraries is too strict and has already caused many interpretation and implementation difficulties, which in the end will damage public usage of libraries;
- research is seriously hindered by the proposal (for example, copying a scientific article that constitutes more than 15% of a piece of work);

In the end, Titti de Simone expressed her (and her party's) negative opinion.

After Titti de Simone spoke, the Committee drafted up and voted on a modified proposal.¹⁶⁵ This was basically identical to the original from Guglielmo Rositani (AN) with the following notable exceptions:

- as far as "fair compensation" for printed works reproduction is concerned, the Committee suggested a fixed price scheme until the implementation of a working and practical model which more closely followed the legislative decree;
- as long as the legislative decree won't be effective, the Committee suggested the adoption of the transitional regulation, in order to avoid legal problems in the day-to-day work of those businesses which sell or deal with recording and reproduction devices.

It should be noted that none of Titti de Simone's proposals were accepted.

The parliamentary debate demonstrated the lack of a thorough understanding of the problems involved, and the tendency to address a hard problem – how to adapt *droit d'auteur* and related rights of the new "digital era" – with old solutions.

¹⁶⁴ It should be noted that Titti de Simone did not fully explain the implications of copyleft as far as commercial distribution and use is concerned.

¹⁶⁵ <http://www.camera.it/dati/leg14/lavori/bollet/200302/0225/html/07/allegato.htm#77n1>

It should be noted that Titti de Simone's proposal was the one which best addressed the actual problems – without having to agree with it. It's possible, by reading the full parliamentary reports, to notice a thorough attention towards existing bureaucratic organisations (such as SIAE) and a formal, but not real, attention towards users' and small producers' rights regarding the implementation.

The debate in civil society was, as one would expect, much more focused on these issues. There were two distinct aspects that worried the various civil organisations and citizens who participated in the debate:

1. the "fair compensation" issue, and the consequent indiscriminate raising of prices on copy-enabled media;
2. the "DMCA perils", i.e. the problems that the U.S. law with the same background produced that are likely to result from the Directive;

As far as point (1) is concerned, several organisations and newspapers raised the issue, with a specific focus on how blank CD prices would be raised in an indiscriminate way, as a sort of preventive tax to cover the "fair compensation" costs:

AFDigitale was the first organisation to launch the alarm about the possible (and very real) effects of the implementation on the prices of copy media.

<http://www.afdigitale.it/nntp/Ndtazebao.nsf/tazebao?openframeset>

Altroconsumo is a non-profit organisation that focuses on consumers' rights. The article reported in the above URL focuses on the higher prices for CDs.

<http://www.altroconsumo.it/map/show/266/src/31221.htm>

"Liberazione", a printed newspaper, published on 21 August 2002 an article about the raising of prices for CDs and audio tapes.

"diritto@softwarelibero.it" is a mailing list, promoted and hosted by AsSoLi, which focuses on the legislative and juridical aspects of libre software use and production. The above URL links to a report, made by Stefano Maffulli, of a meeting held on 28 October 2002, at SMAU in Milan. The title of the meeting was "Droit d'auteur and information society: the law-makers at a fork of the road". Pietro Folena (DS), Mr. Laurenzi (director of SMAU), Mr. Giardina (AFDigitale) held the main discussions. <http://lists.softwarelibero.it/pipermail/diritto/2002-November/001733.html>

The central point discussed at the meeting was, as Stefano Maffulli reported it, the exact definition of "fair compensation" and its implications for industry and consumers. The problems raised were very complex and not addressed nor resolved at all by the legislative decree and the committee work. Amongst them were the problem of estimating in a precise way the costs of unauthorised copies, the real possibility of importing blank CDs and other media from EU countries where the "fair compensation" costs are lower than in Italy, and the fact that imposing a hidden tax – in the form of raising CD prices – to all consumers, without proving that all consumers are making unauthorised copies, is a completely broken and, to many extents, not so lawful idea.

On the "diritto@softwarelibero.it" there was a very long discussion, archived starting from the above URL, on the subject of copying, authorised or not, the rise of prices for copy media and the inherent injustice of the "fair compensation" as it is applied in Italy.

<http://lists.softwarelibero.it/pipermail/diritto/2003-February/thread.html#2045>

An Italian summary of the above discussion can be found at the following URL:

<http://lists.softwarelibero.it/pipermail/diritto/2003-February/002110.html>

This article, by Gianfranco Giardina, explained in very precise terms the possible economic effects of the implementation as intended by the governmental decree.

<http://www.edisport.it/edisport/afdigitale/petizione.nsf/Editoriale?Openpage>

As far as point (2) is concerned, the vast majority of discussions were held on, or inspired by, the mailing lists created by AsSoLi:

discussioni@softwarelibero.it <http://lists.softwarelibero.it/mailman/listinfo/discussioni>

diritto@softwarelibero.it <http://lists.softwarelibero.it/mailman/listinfo/diritto>

AsSoLi promoted a campaign to make people aware of the perils of the Directive,¹⁶⁶ and created an ad-hoc page to act as central point of reference: <http://www.softwarelibero.it/progetti/eucd/>

The seminal work by AsSoLi, and specifically the analysis by Alceste Scalas,¹⁶⁷ was the basis for a great¹⁶⁸ deal of discussion on the Internet:

<http://lists.softwarelibero.it/pipermail/diritto/2002-March/000719.html>

This mail message by Adriano Sponzilli, and the following thread, reported on a French article about the possible effects of the Directive on scientific publications and the resulting difficulties in widespread communication of experimental results and theoretical articles, which is a basic need for scientific research to proceed.

<http://www.mytech.it/mytech/internet/art006010044219.jsp>

This article, by Edoardo Dezani, reported the possible effects of implementing the Directive on libre software development; amongst which, one of the most serious is the legal impossibility of studying how a particular piece of software works, in order to create compatible or inter-operable programs without having to pay huge fees to the original authors (fees which libre software projects can very rarely afford).

<http://punto-informatico.it/p.asp?i=43190>

This article also reported on the possible effects of the Directive on libre software development, with a particular focus on how the DMCA already has hindered or threatened to hinder libre (and non libre) software development in the US – as a study by the Electronic Frontier Foundation reported – as well other effects which the Directive could have, consciously or not, on practically every field in which software plays a role.

<http://softwarelibero.it/progetti/eucd/lettera-aperta.shtml>

An open letter by Adriano Sponzilli to all Italian deputies, to make them aware of the perils of the Directive and the necessity to further study it and strike a balance between the various interests involved, with the help of the civil organisations which are most active on the issue.

The letter was signed by 34 associations and by more than 1.000 private citizens:

<http://softwarelibero.it/news/030316-01.shtml>

<http://www.softwarelibero.it/progetti/eucd/firme/firmatari.php>

The latter URL can be used as a reference to see how many and which organisations were involved in the debate around the Directive, with the obvious caveat that the aforementioned URL simply shows who signed the petition by AsSoLi and nothing more.

<http://lists.softwarelibero.it/pipermail/discussioni/2003-March/006523.html>

This mail message reports the text of an article, published on "L'Unità" by Pietro Folena (DS). The article presented, in the form of a short quasi-SF story, the problems and the perils which could result from the implementation and the vast assignment of rights to producers away from consumers.

<http://occhiaperti.net/index.phtml?id=853>

¹⁶⁶ <http://www.softwarelibero.it/progetti/eucd/annuncio-campagna.shtml>

¹⁶⁷ <http://www.softwarelibero.it/progetti/eucd/analisi.html>

¹⁶⁸ The word "great" should be read considering the usual attention given by Italian civil society to European directives and national laws (quite low) and the fact that the Directive deals with something that, although it can have very concrete effects, is quite abstract – *droit d'auteur* and related rights.

This small editorial, on the portal of the City of Ferrara, reported on the various perils which the Directive could produce, ranging from the rise of prices for blank CDs to legal problems which software developers could face. The cases of Dmitry Sklyarov (arrested in the US for the supposed crime of circumventing Adobe E-books copy protection) and Jon Johansen (the supposed author of the DeCSS code, which allows people with GNU/Linux or “alternative” operating systems to watch the DVDs they legally bought) were cited.

Notwithstanding the thriving debate which was held outside of the Parliament, and even though AsSoLi contacted many political representatives in order to make them aware and provide them with the technical expertise in the field – which the committee members somewhat lacked – the actions by Italian civil society didn't seem to have a perceivable impact on the Committee decisions (aside from Titti de Simone's proposal).

Particularly dissatisfying was the position of the DS party, which was contacted on many occasions on this and other related issues, and had expressed interest for libre software users' and producers' positions (as well as those of the general public, which is being penalised by “fair compensation” first and foremost and by all the other DMCA-like effects of the Directive, even if indirectly).

The Netherlands

Sjoera Nas (sjoera@bof.nl), Bits of Freedom

Implementation of the Directive

The main copyright law in the Netherlands dates from 1912. Related rights have been recognised in Dutch law since 1993¹⁶⁹.

The Copyright Act is written in generally technology-independent language, centred on the two key terms of reproduction and ‘making public’. In other countries like Germany, the United Kingdom and the United States every media revolution (radio, television, cable, computer, the Internet) caused a copyright crisis. Since the Dutch framework wasn’t built around media-specific exploitation rights, legislators were able to modify specific sections, without having to rewrite the full body of the law.

This chapter opens with a time line. During the full five years between the release of the first draft of the European Copyright Directive (10 December 1997) and the final transposition deadline (22 December 2002), there has been a long and serious debate in the Netherlands about the renewal of the Copyright Act. The debate centred on the future of the private copy and the translation of ‘fair compensation’. Many lawyers argued the Dutch system of putting levies on blank recording media could be maintained, as long as ‘compensation’ could also be understood to mean zero compensation in specific cases. Another issue of great disagreement was the transposition of Article 6.1, the protection of technological measures.

To allow comparison of the Dutch debate with discussions in other EU member states, this report deals with four specific themes separately: Exceptions and limitations (Art. 5.2 and 5.3); the circumvention ban (Art. 6.1); the private copy (Art. 5.2b) and levies (translating ‘fair compensation’).

Timeline

November 1997: creation of copyright committee

The debate in the Netherlands about new copyright legislation for the information society begins in November 1997, a month before the release of the first draft of the Copyright Directive. The Minister of Justice creates a special copyright committee to advise him on the application of copyright legislation to new media such as CD-ROMs. In August 1998 this committee produces its first report, based on the initial EUCD proposal¹⁷⁰.

The committee advises that consumers should be protected against overly restrictive end-user licenses by granting ‘minimum user rights’. That way, reading, listening and watching can remain free in a digital environment. The committee also recommends that the legislature provides that legal limitations on copyright that reflect interests ‘of a general and fundamental character’ (freedom of information, privacy and property) can not be undone contractually¹⁷¹.

May 1999: Letter of intent from Dutch government

In May 1999 the Minister of Justice, together with the State Secretary of Culture (residing in the Ministry of Education, Culture and Science) presents a letter to parliament with his main intentions for the transposition. The Minister advises there should be minimal changes to the

¹⁶⁹ Copyright Act 1912 (Auteurswet), english translation October 2000 by Ministry of Justice, http://www.justitie.nl/Images/11_7837.doc; Neighbouring Rights Acts 1993 (Wet op de Naburige Rechten), english translation October 2000 by Ministry of Justice, http://www.justitie.nl/Images/11_7838.doc

¹⁷⁰ Advies over auteursrecht, naburige rechten en de nieuwe media, Commissie Auteursrecht (copyright committee), Den Haag, 18 augustus 1998. The 8 members were: Prof. mr D.W.F. Verkade (chair), Prof. mr E.J. Dommering, Prof. mr F.W. Grosheide, Prof. mr P.B. Hugenholtz, Prof. mr K.J.M. Mortelmans, Mr E.J. Numann, Prof. mr J.H. Spoor en Mr J.A. Schaap.

¹⁷¹ Elektronische handel en intellectuele eigendom, P.B. Hugenholtz, in Elektronische handel en intellectuele eigendom, WPNR, Themanummer E-commerce, nr. 6443, jrg. 132, 28 april 2001, p. 399-406, <http://www.ivir.nl/publicaties/hugenholtz/wpnr.html>

Copyright Act, that self-regulation should be used to solve practical problems and, generally, that parliament should seek a balance between the right to make copies for private use and the rights of rightsholders.

In November 1999 the letter is discussed by the Lower House Committee on Legal Affairs. A month later the Minister answers their questions, and in May 2000 the proposals are discussed in a general session of the committee¹⁷². The Minister promises the House that the “Dutch government will do its best (in Brussels) for ‘credible and enforceable’ protection of rightsholders”, whilst also lobbying for a compromise on the private copy.

“The Minister attaches great value to a certain freedom of consumers to copy material for their own private use. It doesn’t matter whether it concerns cassette tapes, CDs, the Internet, magazines or digitally distributed broadcasting signals.” At that point in time, the Minister reassures the House that he expects Brussels will make sure that technological protection measures won’t extend so far that they will make the legal limitations on copyright useless. “There have also been pleas to guarantee the private sphere in the digital environment. A private copy must be possible.”

October 2000: public consultation

In September 2000, the Minister asks the copyright committee to produce a second report, following the new draft Copyright Directive proposed by the Council, after the first draft was rejected by the European Parliament. From October onwards, the Ministry of Justice opens a public consultation on the proposal. Though there is much applause for the initiative to use a website to consult the public, the 76 questions are so complex that only expert copyright lawyers can answer¹⁷³.

Meanwhile, in February 2001, the European Parliament concludes a second reading of the proposal and adopts nine amendments to the Council’s common position. The amended Directive is accepted by the Council on 22 May 2001 and published in the official journal on 22 June 2001 as 2001/29/EC. The transposition deadline is set for 22 December 2002.

July 2001: Second copyright committee report

The second report of the copyright committee appears – most timely – in July 2001. This report is also available in English¹⁷⁴.

The committee was asked to answer four main questions.

1. Should there be a fundamental revision of the existing legislative system of copyright and related rights?
2. Should the current list of limitations to copyrights be amended?
3. In what manner may the term ‘fair compensation’ (‘billijke vergoeding’ in the Dutch version of the Directive) be implemented?
4. How should the circumvention of technical protection measures be restricted in national legislation?

Roughly summarised, the committee answered as follows:

1. No, adaptation of the Copyright Act is sufficient
2. The directive is self-contradictory, striving for a maximum level of protection (Recitals 7 and 9) whilst also recommending a fair balance between the rights and interests of rightsholders and users (Recital 31). The Ministry should stick to the limitations and exceptions already incorporated in the Copyright Act. The only new limitation that should

¹⁷² TK (Lower House of Dutch Parliament) 1999-2000, 26538, nr. 3

¹⁷³ The 76 questions were divided in 8 chapters. Full responses were given by 18 collecting societies, organisations and companies. See <http://www.justitie.nl/themas/wetgeving/dossiers/auteursrecht/forum/forum.asp?ComponentID=7429&SourcePageID=7845>

¹⁷⁴ Advice on the implementation of the EC Directive copyright and related rights in the information society, copyright committee, July 2001, English translation by Ministry of Justice, http://www.justitie.nl/Images/11_7843.doc

be added is the parody exception (5.3(k)).

3. Use the term 'reasonable reward' (redelijke tegemoetkoming) instead of 'equitable remuneration'. A reward can consist of something other than 'money', specifically in the cases mentioned in Article 5.2 under a, b and e (i.e. the photocopy, the private copy and re-broadcasting in prisons and hospitals).
4. Adhere to the text of the Directive as closely as possible. According to the committee, the topic is subject to maximum harmonization and Member States are not free to deviate from the Directive's provisions. Just include a delegation provision to enable the legislature to take rapid and effective measures.

May 2002: Report to Council of State on draft Copyright Act

On 15 October 2001, the Minister presents his conclusions on the report of the copyright committee to the Lower House. In November 2001, experts are asked once again to give their input on a draft version, published on the website of the Ministry of Justice.

On 1 May 2002 the draft Copyright Act is sent to the Council of State for formal legal advice. The advice of the Council is discussed in the outgoing Council of Ministers on 12 July, and sent to the Lower House on 22 July 2002.

The Council of State rejects the proposed difference between equitable remuneration and reasonable reward. Only one term should be used in the Act and that should be remuneration (billijke vergoeding). This remuneration should be fixed in the text of the Act itself, and not referred to in delegated provisions, as the Minister proposed. The Minister, in his answer, refers to Recital 35 of the Directive. This leaves ample space to introduce a system of remuneration later on through delegated provisions.

In an interesting side note, the Council criticises the Minister for interpreting the Directive too narrowly when it comes to the private copy. The draft Copyright Act speaks of 'a few copies' for private use, while the Directive speaks of 'reproductions' without any limit on the number. According to the Minister, the Member States are free to limit the limitations, and therefore he is allowed to narrow down the right to make copies for private use.

The Council of State agrees with the copyright committee on the literal transposition of Article 6.1 (section 29A in the Dutch Copyright Act). On top of that, the Council recommends the criminalization of any circumvention of technological measures. Under the current Copyright Act, circumvention is only a criminal act when it comes to computer programs (section 32a).

Finally, a large section of the report of the Council of State is dedicated to criticism of the vagueness of the 'three-step test' embedded in the Directive's Article 5.5 to decide whether limitations and exceptions apply. Debate about these very open norms (special, normal, unreasonable) forms an important part of further parliamentary debate, but is legally too complex to be dealt with in this overview.

July 2002: draft proposal in Lower House Committee

On 22 July 2002, six months before the transposition deadline, the Lower House receives the modified draft Copyright Act¹⁷⁵.

In October 2002 a coalition of 31 experts, scientists, lawyers and cryptographers sends an open letter to members of parliament, urging them to respect user rights when it comes to the circumvention provisions and to explicitly protect cryptographic research. A summary of this letter is also published in the Financial Daily (Financieel Dagblad), in February 2003¹⁷⁶.

¹⁷⁵ TK 2001-2002, 28482, nr. 1-2, English translation by Ministry of Justice, http://www.justitie.nl/Images/11_14575.doc

¹⁷⁶ Open brief namens 31 deskundigen op het gebied van technologie en auteursrecht (Open letter), October 2002, <http://www.xs4all.nl/overxs4all/auteursrecht/auteurswet.html#brief>; Nieuwe auteurswet bedreigt innovatie culturele uitingen (Opinion article), Financieel Dagblad, 5 Februari 2003, <http://www.bof.nl/nieuws/030206.html>

Some of this criticism is reflected in questions asked by members of parliament in the Lower House Committee on Legal Affairs in November 2002. The Minister answers in March 2003, but doesn't answer any of the criticism on user rights and cryptography. However, the Minister makes it explicit that downloading music or film via peer-to-peer networks does not constitute a criminal act.

May 2003: extra session Lower House Committee on Legal Affairs

Members of the Liberals, the Green Party and the Social Democrats agree the new proposal still does not do enough to protect user rights, and insist on an extra round of questions. Some of the 31 experts participate in this extra round in early May 2003, including Bits of Freedom in collaboration with IT lawyer Christiaan Alberdingh Thijm.

MPs from these three parties (representing a majority in parliament) protest against the general ban on the circumvention of digital locks. According to the proposal, it is not just prohibited to break locks in order to make illegal copies. The circumvention ban prevents any restricted use, even if the lock prevents perfectly legal behaviour.

Within two weeks, the Minister answers the questions, basically not changing the law except for the removal of the limitation of the private copy to 'a few copies'. In spite of the parliamentary majority, he refuses to limit the circumvention ban to (legitimate) protection of copyright.

Answering questions about the negative effects of copyright protection mechanisms on CDs, the Minister asserts that it is enough for the industry to label their CDs. If a CD cannot be played in a regular CD player, the store is required to change it. But the Minister doesn't want to extend this right to CDs that don't play on CD-ROM players built into computers, because, according to the Minister, "they are not made for that purpose."¹⁷⁷

The amended Copyright Act is not yet on the agenda for plenary debate in the Lower House, but is expected to appear in September, after the summer recess.

Exceptions and Limitations

Since the Dutch already enjoyed most of the exceptions and limitations described in Article 5.2 and 5.3, there was not much debate about this part of the Directive, except for the right to make a (digital) private copy (which is dealt with separately in the next section of this chapter). However, the legal discussions about the interpretation of Article 5.5, the so-called 'three-step test' make interesting reading.

The (second) copyright committee started with four principles: to keep as many exceptions as possible; to accommodate the widely felt need for new or newly formulated exceptions (notably parody); to create technology-independent definitions and finally, to find creative solutions for the problem that the Directive does not allow for a generic 'fair use' principle.

Following these principles, the committee advised to add the parody right, but to refrain from including 5.2(e), 5.3(b) and 5.3(l). In the words of the committee: "the fact that some exemptions are not explicitly included in the legislation must not give rise to any *a contrario* arguments. Exemptions are usually expressions of an underlying principle and related to the protection of the public interest. In some cases, the committee has taken the opportunity to codify the existing legal practice, but it may not be deduced from the fact that this does not occur with respect to other cases referred to by the Directive that such an underlying principle or general interest is not at issue."¹⁷⁸

This way, the committee sought a solution for the fact that in the Directive the rights are formulated in an open-ended manner and apply to new exploitation techniques while the statutory exceptions focus on specific cases. The Minister agreed with this solution, and explicitly referred to

¹⁷⁷ TK 2002-2003, 28482, nr. 8, p. 17

¹⁷⁸ Advice on the implementation of the EC Directive copyright and related rights in the information society, copyright committee, July 2001, p. 9. English translation by Ministry of Justice, http://www.justitie.nl/Images/11_7843.doc

the need to allow judges to explain the law with respect to the public interest and rapidly changing technology. The exceptions mentioned in paragraphs 5.2 (d) and (e) (usage and rebroadcasts in non-commercial institutions like prisons and hospitals), 5.3(b) (physically disabled people) and 5.3(l) (demonstration and repair) were rejected because there are already self-regulatory arrangements in place.

A refined legal debate centered on the so-called three-step test introduced via Article 5.5. This Article is not directly incorporated in the Dutch Copyright Act. The provisions in treaties on which this paragraph is based (Article 9(2) Bern Convention, Article 13 TRIPS) are not included in the Act either.

According to both the copyright committee and the Minister, Article 5.5 addresses the Member States' legislatures. The Article establishes a normative framework against which the legislature must test the exceptions and limitations to the rights. Still, (civil) courts can apply this provision to specific cases.

The Council of State was very critical about this interpretation and wished to see Article 5.5 embedded in the actual text of the legislation.¹⁷⁹

The Minister defended his position with a reference to Recital 44, that all limitations must anyway be applied in accordance with international agreements. The law is the end-result of this test, and thus, logically all limitations have been subjected to this test by the legislature. Besides, the Minister added, at that point in time (12 July 2001) none of the other Member States had chosen to include Article 5.5 directly in their copyright legislation.¹⁸⁰

In the following Explanatory Memorandum accompanying the Act the Minister explained:

“The “three-step test” serves as a general assessment framework for the legislator. However, this has not led to its inclusion in the actual text of the legislation. The article offers a normative framework against which the legislator can assess limitations to the rights. This framework also offers the court some grip in interpreting a certain limitation and specifically on how it is to be applied in practice. Court rulings in this context may well be occasion for the legislator to adjust the provisions that are now proposed.”¹⁸¹

Members of parliament saw a contradiction in this approach, and asked for further clarification. A large majority of liberals (VVD and D66), Greens (Groen Links), conservatives (LPF and SGP) and Christian Democrats (CDA) want to see the three-step test embedded in the Act, in order to clearly enable courts to apply the test.¹⁸²

While repeating his earlier arguments, the Minister also summed up some disadvantages of inclusion of the test in the Copyright Act. First, the logical consequence would be that some very specific limitations would need to have a more open character, to be corrected only by the three-step test. Such a way of formulating the limitations would create great uncertainty about the validity of any appeal to the limitations and exceptions. Second, the Minister referred to international literature in which it is argued that the three-step test was not developed to answer specific questions about limitations. Finally, including Article 5.5 in the Dutch Copyright Act would give this implementation a ‘status apart’, because government had purposefully refrained from doing so during all previous implementations of international agreements.¹⁸³

During the second debate members from the social-liberal party (D66) insisted once more on inclusion of the test in the Act. According to them, Article 5.5 is different from the tests embedded in other international agreements, because it does directly address citizens and courts. Besides, they don't understand the difference between this test and the test described in Article 8 of the

¹⁷⁹ Council of State report (Advies Raad van State en Nader Rapport), KS 28 842 B, p. 4.

¹⁸⁰ *Ibid*

¹⁸¹ TK 2001-2002, 28 482, nr. 3 (Explanatory Memorandum), p. 20. English translation by Ministry of Justice, http://www.justitie.nl/Images/11_14576.doc.

¹⁸² TK 2001-2002, 28 482, nr. 4 (Report of the Lower House Legal Affairs Committee), p. 6-8.

¹⁸³ TK 2001-2002, 28 482, nr 5 (Note following the report), pp 17-19.

Database Act (EC Publication Official Journal 1996, L 77/20) that is directly included in the Dutch Database Act.

According to the Minister, the Database test is only a two-step test, lacking the reference to ‘special cases’. The three-step test is a correction mechanism for the balance between users and rightholders, the Database Act only sets a minimum standard for usage of databases.¹⁸⁴

The private copy

The Dutch debate about the private copy is centred on the interpretation of Recital 35 of the Directive: “in cases where rightholders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due... In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.”

The Dutch government has always held the view that under the Directive it should be possible not to demand financial compensation for the digital private copy, but instead to rely on levies to compensate rightholders. As described previously in the timeline, government officials have actively promoted this point of view in Brussels, at least since 1999, when they made their intentions known in a letter to Parliament. With the report from the copyright committee, this line of reasoning becomes clearer.

Reasonable reward versus equitable remuneration

The copyright committee introduced the new term ‘reasonable reward.’ “The Committee prefers the term ‘reasonable reward’ (redelijke tegemoetkoming) in order to make it clear (as apparently intended by the Directive) that this term differs from the already well-known term ‘equitable remuneration’ and also to make clear that the reward may also be made in a form other than a claim to compensation (e.g. a subsidy claim) and also consist of something other than ‘money’. The term ‘reasonable reward’ provides the Member States with a great deal of freedom.”¹⁸⁵

The committee noted that according to the Directive all kinds of private copying must be tied to a reasonable reward. In the Dutch Copyright Act of 1912, the private copy, if limited to a few copies and strictly for personal practice, study or non-commercial use, is exempt from copyright. Only when music and moving images are reproduced for private use is compensation required, specifically through the levy system for blank media.

The Directive requires the creation of a reasonable reward for all private copies, and that is unreasonable according to the committee. Instead, they propose the introduction of a distinction between two kinds of private copy, namely “reproductions on objects intended to play or show works” on the one hand, and on the other “reproductions for private use, such as reprographic reproductions, but also resketching, reknitting, remaking and other forms of ‘handicraft’.”¹⁸⁶

The minister followed this advice, creating two kinds of private copy.

Analogue private copy and digital private copy

The first kind of private copy specifically deals with analogue copies, like photocopies and handicrafts. For these copies a ‘zero-levy’ can be introduced, to make sure grandma is not violating copyright when she knits a sweater for her grandchild with a picture of Mickey Mouse without the explicit permission of Walt Disney.¹⁸⁷

“It shall not be deemed an infringement of copyright in a literary, scientific or artistic work, to reproduce it in a limited number of copies for the sole purpose of private practice, study

¹⁸⁴ TK 2001-2002, 28 482, nr 8 (Note following the second report), pp 5-7.

¹⁸⁵ Supra note 174 p.11

¹⁸⁶ Supra note 174 p.25

¹⁸⁷ The example of the Mickey Mouse sweater was first mentioned by the Dutch copyright lawyer Dirk Visser. In his widely acclaimed thesis from 1997 he argued the term ‘reproduction’ lost all relevance in the digital era, was impossible to enforce and completely superfluous when it is much easier to control publication

or use of the natural person who makes the copies or orders the copies to be made exclusively for himself and for non-commercial ends.”¹⁸⁸

To allow for digital private copies, the existing provision about reproducing sound and moving images is amended. For reproductions of sound and moving images on ‘objects’ a ‘reasonable reward’ (redelijke tegemoetkoming) is due. In practice this compensation is collected through the levy on blank recording media.

“It shall not be deemed an infringement of copyright in a literary, scientific or artistic work to reproduce (part of) this work for non-commercial ends on an object intended to play or show the work provided that the sole purpose of the reproduction is for personal practise, study or use of the natural person making the reproduction.”¹⁸⁹

This second provision extends the private copy to the entire digital domain, including for example copies of a text CD-ROM. According to the Minister, the ‘fair compensation’ for these new kinds of digital private copies should be sought within the levy system, until new digital rights management techniques make the levy superfluous.

Closely read, this first draft transposition tried to balance the different interests, with some creative extras. The limit of the number of allowed private copies (‘a few’) seems invented by the music industry. On the other hand, the introduction of the term ‘reasonable reward’ is a brave attempt to extend the right of the free private copy to the digital domain. However, in combination with the suggested transposition of Article 6.1 of the Directive, the legal discussion about the quantity and exact kinds of private copy seems almost futile.

Demand for legal original

During the first debate in the parliamentary committee on legal affairs on the draft, in November 2002, members of parliament asked for more clarification on the two terms. Members of the Christian Democrat Party, the Greens and the SGP asked for clarification about the two terms and claimed they would much rather see one term instead of two.¹⁹⁰

Members from the Christian Democrat party also wanted the Minister to add that an original must always be legally obtained before a legal private copy can be made. In the explanatory memorandum, the Minister explained why he declined to do so, but the Christian Democrats are concerned about the laundering of illegal copies through peer-to-peer networks. To further clarify this, they wished to add that a private copy can never be made for a third party.¹⁹¹

The Minister explained once more why the different terms were chosen (equitable remuneration and reasonable reward), to be able to distinguish between special kinds of reproduction that don’t cause any prejudice to rightsholders (like knitting) and the private copy of music, text and moving images. But to prevent further confusion, he changed the wording to the literal translation of ‘fair compensation’, i.e. ‘billijke vergoeding’.¹⁹²

The Minister agreed with the necessity to limit the possibility to create a private copy for third parties. Under the old Copyright Act the limitation was valid for “the person who makes the copies or orders the copies to be made exclusively for himself.” To limit the possible role of third parties, a new paragraph is added to the proposal that only allows these orders within the closed circle of family and friends.

¹⁸⁸ Supra note 169 Copyright Act 1912, section 16b paragraph 1

¹⁸⁹ Supra note 169 Copyright Act 1912, section 16c paragraph 1

¹⁹⁰ TK 2002-2003, 28482, nr. 4, p. 13

¹⁹¹ Supra note 190 p.14

¹⁹² TK 2002-2003, 28482, nr. 5, p. 31

Downloading is legal...

When it comes to KaZaA and other peer-to-peer services, the Minister drew a clear line. That kind of private use is exempted from copyright. "That also applies when a private copy is made from an original that is illegally made available, without the permission of the author."¹⁹³

The term laundering is not appropriate, the Minister said, since it is a copyright infringement when such a private copy is made available to the public again. The Directive simply doesn't allow for such a 'legal original' demand, according to the Minister, and even if such a demand was allowed, enforceability would be highly dubious. Finally, the demand for a legal original would clearly harm the collecting societies, since that would be a reason to lower the levies.¹⁹⁴

In the extra debate in the Lower House Committee on Legal Affairs, in May 2003, members of the Christian Democrat Party indicated that they did not understand this last argument. They are not happy with the possibility of allowing third parties to make a private copy, even when that's limited to the 'closed circle'.¹⁹⁵

Members from the Social Democrat party demanded the exact opposite; they wanted to know whether a virtual circle of friends, people that for example only meet online, can also rightfully share their collection of music and films.

But uploading is definitely not!

In the most recent series of answers, the Minister explained that the use of 'fair compensation' doesn't exclude the possibility of a 'zero-levy' for specific exceptions. The provision about ordering a third party to make a few private copies will be removed from the draft, to make it absolutely clear that the private copy can never be made by a professional third party or shared outside the literal circle of family and friends. Finally, the reason the Directive and the Dutch draft omit the need for a legal original is because the compensation is meant for every private copy. If only legal originals were subjected to a levy, government would put a premium on the copying of illegal originals.¹⁹⁶

The final proposal for the digital private copy will be presented to the Lower House after the summer recess.

"It shall not be deemed an infringement of copyright in a literary, scientific or artistic work to reproduce a work or part of it, on condition that reproduction happens for ends that are neither directly nor indirectly commercial and for the sole purpose of private practice, study or use of the natural person who makes the reproduction."

Levies (fair compensation)

Since 1977 the Netherlands has had a levy system to compensate authors and publishers for reproductions on paper. In 1991 a new levy was introduced, to be collected on blank recording media such as CDs or cassette tapes. Like Denmark, Finland and Sweden, the Netherlands do not have a levy on recording devices or equipment¹⁹⁷. Since 1 July 2003, a levy has also been collected on blank DVDs.

The Dutch debate about levies is focused on the possibility of including new media within the copyright framework. There is no debate about expansion of the levy system to equipment or devices like hard disks.

¹⁹³ Supra note 192 p.32

¹⁹⁴ Supra note 192 p.32

¹⁹⁵ TK 2002-2003, 28482, nr. 7, p. 9

¹⁹⁶ TK 2002-2003, 28482, nr. 8, p. 12-13

¹⁹⁷ EICTA, <http://www.eicta.org/levies/issues/levies.html>, this website is an initiative of the European Information, Communications and Consumer Electronics Technology Industry Association (EICTA) with strong arguments against levies on digital equipment such as PCs, printers, mobile phones, CD burners and MP3 players.

With regards to the future, the Dutch government has high hopes that digital rights management will make levies in a digital environment superfluous in the near future. Unfortunately, there is no debate about the negative side effects of these systems, for example the privacy aspects of the ability to monitor reading patterns of individual users.

Though from time to time some criticism surfaces about levies on media like CDRs that are often used to make back-ups or for other non-copyright related purposes, in general the levy system on blank media seems to create a fair balance between the interests of users and rightsholders.

Collection of the levies

According to the 1912 Copyright Act (Auteurswet) and the 1993 Law on Related Rights (Wet op de Naburige Rechten), everyone who imports or manufactures blank recording media is required to pay a levy. The levy is collected by the Stichting Thuiskopie (Private Copy Foundation). The levy is compensation for the reproduction at home – for strictly non-commercial purposes – of music and moving images.

The Private Copy Foundation divides the money amongst authors (composers, scriptwriters, poets, photographers and visual artists) and owners of neighbouring rights (performing artists and producers of audiovisual works).

Individual artists only receive compensation if they are member of a Collecting Society. The collected funds are divided amongst ten collecting societies. The exact division is based every year on detailed market research, but roughly speaking the funds are split equally between authors, performing artists and producers when it comes to audio and video. Twenty percent of the revenues from the new levy on writeable CDs is distributed to producers of games, while 80% of the amount goes to the receivers of the audio levies.

Levy rates

The exact amount of the levy is decided every year by SONT, the Foundation for Negotiation of Private Copy Compensation (Stichting Onderhandeligen Thuiskopievergoeding).

In typical Dutch conciliatory style, this Foundation is comprised of three rightsholders (members of the Private Copy Foundation) and three industry representatives (from the STOBi foundation, Stichting Overlegorgaan Blanco Informatiedragers). The Minister of Justice appoints the chairman and an independent adviser.

In 2000 the collected funds on blank recording media were 16 million Euro. In 2001 the levy included data CDRs for the first time. The total amount rose to 18 million Euro. More recent figures are not yet available.

15 percent of the total amount collected is used to fund general cultural and social activities.

Compensation for private copies on blank (non-professional) recording media are as follows: (2003 same level as 2002)

- blank analogue audio tape : €0.23 per hour;
- blank analogue video tape : €0.33 per hour;
- blank digital minidisc : €0.32 per hour;
- blank digital audio CD-R/RW : €0.42 per hour;
- blank digital data CD-R/RW : €0.14 per disk.

New levy on DVDs (fees valid through to December 2004):

- blank DVD-R/RW: €1.00 per 4.7 Gigabyte;
- blank DVD+R/RW : €0.50 per 4.7 Gigabyte;

- blank DVD-RAM : no levy

For blank DVDs with less or more capacity than 4.7 Gigabytes the compensation is set proportionally.

Legal framework

The legal framework for the collection of levies in the Copyright Directive is Article 5.2(b). The equivalent in the (final draft version of the) Dutch Copyright Law is section 16C, paragraphs 2 and 6:

“For the reproduction, described in the first paragraph, the manufacturer or importer of an object intended to play, show or reflect the work owes a reasonable compensation to the author or his legal successor(s).”

“Further rules and conditions may be laid down by order in council with respect to the objects regarding which the reasonable reward referred to in the second paragraph is owed. Further rules and conditions may also be laid down by order in council with respect to the performance of the provisions in this section relating to the form, applicability and amount of the reasonable reward.”

In the first transposition proposal (October 2001), the ministry created the ability to expand the levy obligation to new media by decree (without parliamentary control). In the explanatory memorandum, the ministry wrote: “This element must be seen in parallel with the provisions on technological measures (...).”¹⁹⁸ When it comes to enforcement, the ministry is very hopeful about pay-per-use models, and expects technological solutions to help decide on the amount of the compensation and the fight against piracy¹⁹⁹. More specifically, the ministry thinks levies on new recording media are a temporary solution.²⁰⁰

In the revised explanatory memorandum, almost one year later, these high hopes for the technology-controlled private copy have evaporated. The Minister now opens the possibility of creating a new levy by delegated provision “when in the near future the volume of a certain type of reproduction for private use suddenly increases considerably”.²⁰¹

This rather vague formula was criticised by members of parliament in the first round of questions, in November 2002. Why not arrange for this levy in the text of the Act, and what exactly is a considerable increase?²⁰²

The Minister answered that he is not currently considering creating a delegated provision to put levies on new media, but if he does, members of parliament will be duly notified once the rule is published in the official journal.²⁰³

In the second round of parliamentary questions, on 2 May 2003, members wanted to know on what products exactly a levy can be put. This specification would limit the ability to impose a levy on every medium that can carry text, audio or (moving) images. “Already too many people are paying a copyright levy on CD-Rs, while they only use them to record private (digital) pictures.”²⁰⁴

The Minister loudly rejected this request, but made it clear that he has no intent of creating new levies anytime soon. These issues must be solved by self-regulation, according to the Minister. On top of that, rightsholders must prove they suffer (economic) damages from private copies, otherwise Recital 35 of the Directive applies; there should not be compensation if the prejudice to the rightsholder is minimal. Secondly, the Minister referred to technological measures; if they are

¹⁹⁸ Ontwerp wetsvoorstel Wet uitvoering richtlijn auteurswet en naburige rechten in de informatiemaatschappij, 15 October 2001, p. 43

¹⁹⁹ Supra note 198 p.44

²⁰⁰ Supra note 198 p.57

²⁰¹ Supra note 207 p.45

²⁰² Supra note 190 p.13

²⁰³ Supra note 192 p.30

²⁰⁴ Supra note 195 p.9

available practically and on an economically sound basis, new levies might not be appropriate. Thirdly, the Minister underlined that the measures in other Member States must be taken into account before creating a new decree.

Technological protection measures

Like in most other Member States, the transposition of the Directive's Article 6 provisions on the circumvention of technical measures such as Digital Rights Management (DRM) tools caused the greatest public and scientific controversy.

Circumvention not a criminal act

Since 1994, as a result of the Software Directive (91/250/EEC), it is forbidden to circumvent protection measures applied to computer programs. Article 32a of the Dutch Copyright Act makes it a criminal act to "facilitate the removal or overriding [...] of a technical device for the protection of a [computer program]".

The Dutch government was well aware of the large impact on society the very general Copyright Directive anti-circumvention provisions could have and specifically asked the copyright committee for advice.

In their second report of 1999, the committee recommended that the text of the Directive should be followed as closely as possible. "This topic is subject to maximum harmonization and Member States are not free to deviate from the Directive's provisions."²⁰⁵

The committee also recommended basing enforcement on civil law, on the standard of the unlawful act. Instead of immediately introducing a sanction under criminal law, the committee advised that experience was needed of the application of this provision. Besides, once the Council of Europe's Convention on Cybercrime is adopted and ratified, the section of the Dutch Penal Code dealing with deliberate and unlawful modification of computer data (s. 350a) will be amended in such a way that the Copyright Directive's Article 6 will fall within its scope. The Minister agreed, and repeated this line of reasoning in the first legal draft. Later, the Council of State again recommended criminal sanctions for any circumvention of technological measures, but the minister declined.

Liberals, Christian Democrats and members from the SGP (a small Christian party) put this question on the agenda during both parliamentary rounds of discussion, but the Minister stuck to references to the future ratification of the Cybercrime Convention. In the ten years since the introduction of s.32a criminal sanctions have hardly ever been used. For pragmatic reasons the Minister refused to introduce more criminal law before the need was absolutely apparent.

No extra provisions to guarantee consumer rights

The transposition of Article 6.4 caused further difficulty for the committee. This creates an obligation for rightsholders to ensure that beneficiaries of an exemption or limitation are not denied those freedoms as a result of technological protection measures.

The committee suggested the Minister should wait for the introduction of an order in council (a decree). Extra measures should only be introduced, according to the committee, "in the absence of any voluntary agreements concluded by the rightsholders, including agreements between the rightsholders and other parties concerned". Also, such a measure cannot forbid rightsholders from taking "adequate measures with respect to the number of reproductions" in the field of private copying. Last but not least, the committee recommended a periodic report to Parliament on the developments in this field.²⁰⁶

²⁰⁵ *Supra* note 174 p.12

²⁰⁶ *Supra* note 174 p.27

The Minister ignored the request for a periodic report, but followed the advice to be very cautious with extra provisions to protect consumers: “There will be no reason to take measures if rightsholders, if necessary after being urged to do so, voluntarily furnish the means to allow users to benefit from the limitations, for example as part of agreements with the users. The adoption of implementation legislation is thus an ultimate remedy. Under the Directive, implementation legislation is conditional: it is only adopted if rightsholders fail to take measures on a voluntary basis, or if no agreements are concluded between rightsholders and users (or their interest organisations).”²⁰⁷

Although the Minister believes that rightsholders and users will find a reasonable agreement, he did list some situations in which government might take action. “The justified expectations of consumers may play a role, as well as the need of market parties to be able to design, produce and market systems in which standardized access to – and effective use of – protected works is guaranteed.” The three other possible solutions the minister described are an obligation to file an original in a central place so that a copy may be accessible at all times, an obligation to deposit a DRM key and finally, the possibility of granting subsidies to rightsholders.

In the first round of discussions with the Legal Affairs Committee of the Lower House in November 2002, MPs from the Green, Liberal and Social Democrat Parties expressed explicit concerns about the protection of consumers. Do consumers have to depend on the benevolence of rightsholders when buying works that are protected by technical measures?

MPs from both the Social Democrat and the Christian Democrat Party refer to the self-regulatory practice of putting logos on copy-protected music CD’s. Wouldn’t it be a good idea to make such notification obligatory?

The Minister disagreed. In May 2003 he explained why. He doesn’t want to introduce any further obligations for rightsholders; secondly, because of a peculiar view on “justified expectations of consumers”. If a consumer buys an audio CD that contains a technical protection that makes it impossible to play that audio CD on a computer’s CD-ROM player, the justified expectation of that consumer is not violated. According to the Minister, audio CDs are not primarily designed to be played on a computer.

The conclusion of the debate about consumer rights was that the Minister refused to take any pre-emptive measures to protect consumers. Industry and users should first try to sort it out amongst themselves, no matter how unfair the negotiation position of consumers dealing with multinationals. Further legislation is an “ultimate remedy” that will only be introduced when everything else fails.

Cryptographic research

Another matter of great concern is the future of cryptographic research. In October 2002 a coalition of 31 experts, scientists, lawyers and cryptographers sent an open letter to members of parliament, urging them to respect user rights when it comes to the circumvention provisions and to explicitly protect cryptographic research.²⁰⁸

The experts believe that publication of research on cryptographic protections of works and the discovery of weaknesses in those protections could lead to the prosecution of scientists. Therefore they asked for an explicit measure to protect cryptographic research.

They also argued that the Netherlands has a leading position in scientific research in cryptography and security. The importance of this kind of research increases with the growing dependence on the reliability and security of networks and systems in our information society. This kind of research is also very important for rightsholders, to determine if the technical measures they use have the desired effect. The proposed implementation threatens to make publication of this

²⁰⁷ TK 2001-2002, 28482, nr. 3, p. 24 in English translation by Ministry of Justice, http://www.justitie.nl/Images/11_14576.doc

²⁰⁸ Supra note 176

research unlawful, in spite of the fact that publication is an essential element of the scientific process.

A specific example, mentioned in the open letter, is the research of the Dutch cryptography expert Niels Ferguson into vulnerabilities of the HDCP encryption of video signals. He did not dare publish the results of his research in English, out of fear of being prosecuted in the United States under the Digital Millennium Copyright Act. Under the proposed transposition of the Copyright Directive he fears losing his freedom of expression in the Netherlands as well.

The Minister refused in spite of repeated questions from MPs, and argued that cryptographic research should not be aimed at breaking technical protections and therefore does not constitute an unlawful act. Specifically answering questions about Niels Ferguson, the Minister bluntly stated: “A scientist may well be expected to act carefully and prevent his research from enabling third parties to easily circumvent technical protection measures.”²⁰⁹

²⁰⁹ Supra note 177 p.18

Portugal

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Implementation of the Directive

The office responsible for proposing changes related to copyright in Portuguese law is GDA (Gabinete de Direito de Autor – Copyright Office). The GDA is part of the Ministry of Culture and its proposals are presented to the Portuguese parliament by the government. The law is then voted on in the national parliament and, if approved, sent to the Republic's President for signing (he can only refuse the law if it is unconstitutional).

The Directive has been analysed and two revisions of it have been discussed with copyright management entities. According to the copyright law, these are entities that represent authors; some of them are entitled to the money gathered from a levy on blank media. After those discussions a draft version of the law that implements the Directive was published for public comment in 2 December 2002. The deadline for submitting comments was 10 December 2002. The copyright code resulting from the implementation of the current draft will be referred to from here on as the proposal.

The comments were taken into account in another draft that has been sent to the Culture Minister's Office. So far there is no public knowledge of this latest version. It is not yet known if there will be further changes and if the law will go through the national parliament or will just be approved by the government under an authorisation from the national parliament. In any case the law should be approved because the government is supported by a coalition of two parties in the national parliament that has more than half of the seats.

Two factors have been the main cause of the delay of the implementation of the Directive:

- Unplanned change of government: the previous Prime Minister quit and the President chose to have new elections that resulted in a new government.
- Late start of the legislative process: the first consultations on the proposal for the implementation of the Directive started in June/July 2002.

Exceptions and limitations

Almost all the exceptions proposed in Article 5 of the Directive are implemented either in the proposal or were already present in the Portuguese copyright code. The following paragraphs describe if each exception is implemented, where it is in the proposal and if there are any limitations or other related information.

The exception to the right of distribution defined in the Article 5.1 of the Directive has been transposed in section 75.1 of the proposal. It has been explicitly added that network navigation (browsing) and caching are processes of distribution that fit the definitions of the exception.

For the exceptions in Article 5.2 of the Directive we have:

- a) (photocopying) is implemented in section 75.2(a) of the proposal, with the rightsholders' compensation guaranteed in section 76.1(b).
- b) (private use) is implemented indirectly because the reproduction by a natural person for private use is not covered by the copyright law (See section 62 of the proposal). The rightsholders' compensation is established in section 82.2.
- c) (libraries, museums and archives) is implemented in section 75.2(e) of the proposal.
- d) (ephemeral broadcasting purposes) is not implemented in the proposal.
- e) (social institutions) is implemented in section 75.2(p) of the proposal, with the rightsholders' compensation guaranteed in section 76.1(d).

For the exceptions in Article 5.3 of the Directive we have:

- a) (teaching and research) is implemented in section 75.2(f) and h) of the proposal.
- b) (disability) is implemented in section 75.2(i) of the proposal.
- c) (news reporting) is implemented in section 75.2(m) of the proposal.
- d) (criticism and review) is implemented in section 75.2(g) of the proposal.
- e) (public security) is implemented in section 75.2(n) of the proposal.
- f) (political speeches and public lectures) is implemented in section 75.2(b) of the proposal.
- g) (religious or official celebrations) is implemented in section 75.2(j) of the proposal. In the case of religious celebrations only works of a religious nature are covered by the exception. For official celebrations only officially accepted songs and hymns like the national anthem are covered.
- h) (public places) is not implemented in the proposal.
- i) (incidental) is not implemented in the proposal.
- j) (advertising exhibition or sale) is implemented in section 75.2(l) of the proposal.
- k) (caricature, parody and pastiche) is not implemented in the proposal.
- l) (equipment demonstration or repair) is not implemented in the proposal.
- m)(architectural) is not implemented in the proposal.
- n) (library, museum and archive public-access terminals) is implemented in section 75.2(o) of the proposal.
- o) allows the existence of all the other exceptions present in section 75 of the proposal.

Technological protection measures

There are no limitations defined to the bans on circumvention or circumvention devices. The proposal creates a section 221 in the copyright code that defines that copyright owners should adopt voluntary measures in order to allow the exercise of the exceptions defined in the Article 5 of the Directive. In cases where technological protection measures restrict fair uses and negotiation is not possible or the copyright owner doesn't provide a way to exercise fair use, a person or organisation can request the adoption of the necessary measures.

It is expected that such exceptions will be created for particular cases through the appeal process to "Comissão de Mediação e Arbitragem" (the equivalent to a small claims court whose decisions have judicial value) that was created by law 83/2001, of 3 August 2001 when rightsholders refuse to provide access for lawful uses.

Every such process will be treated as urgent. The copyright owner may limit, through TPM, the number of reproductions allowed for private use.

There is nothing to deal with interoperability or research regarding technological protection measures.

The limitations on freedom of speech in the Directive result from the ban on communications related to technological protection measures (Article 6.2 of the Directive) and as an indirect effect of the "take-down" clause (Article 8.3 of the Directive). Freedom of speech is not considered in limiting the disclosure of technical protection measures.

As for the "take-down" clause it should be considered a non-issue in the proposal because it is implemented through court injunctions (section 227 of the proposal), meaning that any action taken against intermediaries has to be evaluated by a judge. It is hoped that this will avoid the abuse of this clause that has been observed in other countries.

For privacy issues, section 228 of the proposal states that the copyright code cannot override the protection provided by personal information and privacy protection legislation in Portugal.

Enforcement and penalties

In the proposal no changes are made to the penalties for copyright infringement. These are up to 3 years in jail or a fine of between 150 and 250 days. In case of a repeated offence these limits are doubled and, in that case, there is no possibility of a suspended sentence. Neglect is punishable with a fine of 50 to 150 days.

In order to comply with Article 6.2 of the Directive, the proposal defines the crime of “Tutela penal” in section 224 which is punishable with up to three years in jail or a fine of up to 250 days. An attempt is punishable with a fine of up to 50 days. In section 225 it is defined that all material used for the crime may be seized, disabled or even destroyed. Any civil liability is independent of any criminal prosecution.

The crime of “Tutela penal” does not require any intent. The acts defined in sections 218 (circumvention) and 219 (Article 6.2 of the Directive) are criminal. It is expected that, in court, some kind of criminal intent must be present for a conviction.

The national debate

The organisations contacted by the GDA for the non-public debate were:

- GDA - Coop. De Gestão dos Artistas Intérpretes ou Executantes (Management Cooperative of Interpreters)
- SPA - Sociedade Portuguesa de Autores (Portuguese Authors Society)
- AFP - Associação Fonográfica Portuguesa (Portuguese Recording Association)
- APE - Associação Portuguesa de Escritores (Portuguese Writers Association)
- APEL - Associação Portuguesa de Editores e Livreiros (Portuguese Publishers and Booksellers Association)
- DAP - Coop. De Gestão dos Artistas em Portugal (Management Cooperative of Portuguese Artists)
- GEDIPE - Associação para a Gestão dos Direitos dos Autores, Produtores e Editores (Association for the Management of Rights of Authors, Producers and Publishers)
- GESTAUTOR - Associação para a Gestão dos Direitos Reprográficos (Association for the Management of Reprographic Rights)
- UEP - União de Editores Portugueses (Union of Portuguese Editors)
- Assoft - Associação Portuguesa de Software de Informática (Portuguese Information Software Association)
- APAD - Associação Portuguesa de Argumentistas e Dramaturgos (Portuguese Association of Script and Play Writers)
- AGE COP - Associação para a Gestão da Cópia Privada (Association for the Management of the Private Copy)
- AFI - Associação Fonográfica Independente (Independent Recording Association)

The Copyright Office contacted these associations in July with a draft of a law that implements the Directive. As far as we know there were two positions on this proposal: one from AGE COP and one from AFP, AFI, APEL, GDA and SPA (it should be noted that AFP, AFI, APEL, GDA and SPA are associates of AGE COP).

AGE COP's main concerns were with the changes of section 82 (that defines the compensation for reproduction or recording of copyrighted works). This is also the section which implements the “fair compensation” defined in Article 5.2(b) of the Directive. The issues raised by AGE COP were not related to the Directive's implementation.

The position of AFP, AFI, APEL, GDA and SPA criticises the choice of the legislators to include more exceptions than the ones already present in national law because, they claim, the reason so many exceptions exist in the Directive is not because they should be implemented in all countries, but because the European Commission tried to include most of the exceptions already present in

each country. So, they argue, those exceptions should really be ignored if they are not already present in national legislation.

Other than trying to reduce the number of exceptions, they also argued that the majority of the exceptions should have some kind of compensation for the rightsholders.

The rest of their position includes some corrections to the form of the proposal.

After evaluating these positions, the Copyright Office brought forward a new proposal that was made public in December 2, 2002. This proposal was subject to public comment with a deadline of December 10, 2002.

SPA commented on the proposal focusing, once again, on the exceptions defined in Article 5 of the Directive. They have proposed some limitations to the exception present in section 75.2(a) and that the exception (l) in the same paragraph (that deals with advertising) should either be removed or, at least, its use should result in compensation for the rightsholders. They also proposed some minor corrections to the draft.

ANSOL - Associação Nacional para o Software Livre (National Association For Free Software) – has stated its position. Its major issue with the proposal is that the protection provided by Article 6 in the Directive is so broad that, if Free Software is used to implement technological protection measures (TPM), it could mean that the source code that is implicitly available for all Free Software contains information that might be considered as facilitating the circumvention of a TPM. In such a case or in the event that someone promotes or advertises such a use, the distribution of the source code becomes illegal and the software that implements the TPM will no longer be Free Software, as it would not provide its user with the ability to study, adapt or modify it.

ANSOL has also proposed a new paragraph for section 221 that would result in the loss of the protection given by Article 6 of the Directive if rightsholders refuse to provide the means to exercise some lawful use of the work protected by a TPM.

ANSOL has also presented its position against the media tax as a way to compensate rightsholders because it is hampering the ability to distribute Free Software and, with the extensions proposed, part of the money resulting from that tax might even go to those who consider Free Software a competitive threat.

So, most of the public debate on the proposal has been focused on the compensation defined in Article 5.2(b) of the Directive, the proposed exceptions in Article 5 and the protection of technological protection measures of Article 6. At the moment it is not possible to identify if those debates had any effect as the current law draft is not public.

Spain

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Implementation of the Directive

This chapter presents the status of the new Spanish law of intellectual property (as in the first Draft of November 2002). As of late May 2003, this is the only public proposal; a second Draft, dated 23 January 2003, that includes some modifications has not been made public.

There is not official date for the final proposal but it is most probable that it will not happen until the end of the summer 2003. Few changes are expected in the area of “technical protection measures”.

The Law of Intellectual Property that is currently in force in Spain dates from 1996. The law is the successor of the first modern law of intellectual property that dates from 1987.

The reformulated text of intellectual property (TRLPI 1/1996) was promulgated through a royal legislative decree to comply with the European directives on questions of legal harmonization, specifically 1998/93/EC.

The responsibility for implementation of the new Copyright Directive 2001/29/EC in the Spanish national law lies with the Ministry of Education, Culture and Sport (MECD). On 6 November 2002, the sub-secretary of the Ministry, Mariano Zabía, and the general technical secretary, Jose Luis Cádiz, presented a draft²¹⁰ with the proposed modifications to the TRLPI 1/1996. The Draft, composed of 68 sections, outlines the suggested changes to the 164 sections of the existing Spanish Law of Intellectual Property of 1996.

The motivation of the government behind this Draft is not only to update the Spanish law to reflect the Copyright Directive but also comply with the unanimous decision, taken by the Spanish Congress on 11 June 2002, to introduce significant changes to intellectual property rights management. The Congress’ decision requested the Government to introduce and implement the changes necessary to enable effective conflict resolution in intellectual property matters.

The Draft includes a considerable reform and increase in power of the Commission for Intellectual Property. The aim of the reform is to make the Commission a key organization when it comes to resolution of intellectual property conflicts.

Explanatory text of the proposed draft

During the presentation of the Draft in November 2002, the Government included a brief explanatory document on the proposed changes. In it the Government stated that due to the complex and very technical character of the sections concerning legal protection of “technical protection measures”, the new Spanish law of intellectual property tries to reproduce the European Copyright Directive as faithfully as possible:

“The Directive establishes a system to protect the technical measures that are used to protect works and digital rights management information. These new measures constitute a novel matter, extremely technical, and very much discussed during the development of the community Directive, and that is the reason why the incorporation of the related text sticks faithfully to the original text of the Directive.”

In the same document, following the same reasoning, the government stated that is not enough to legally protect “technical protection measures” but that it is also necessary to create provisions that protect the work against devices, services or any auxiliary act that can lead to the circumvention of protection measures.

²¹⁰ Draft of the Spanish law of intellectual property. Available from http://www.mcu.es/Propiedad_Intelectual/indice.htm

It seems clear that the Spanish Government has not been able to create a national policy related to “technical protection measures” and remains unaware of the possible implications in areas such as computer security or interoperability.

Exceptions and limitations

The reformulated text of intellectual property (TRLPI 1/1996 or LPI 1996) describes in sections 31 to 41bis the situations where a work or other subject-matter is exempted from the reproduction right.

The draft proposed by the Spanish Government, in sections 6 to 14, presents the changes and additions to the limitations and exceptions included in the law of intellectual property of 1996.

The final result is that the suggested modifications to the reformulated text of intellectual property (LPI 1/1996) are mainly to include exemption cases that the Directive allows including some extra limitations.

The following section compares the exceptions and limitations to the reproduction right described in the Directive, the Spanish law of intellectual property (LPI 1996) and the proposed new draft (Draft).

- use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

Section 8 of the Draft modifies section 32 of LPI 1996. (Draft includes the limitation that the research work must already been made available to the public).

- uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

Section 6 of the Draft modifies section 31 of LPI 1996 that removes the specific exception in the case of blind people and Braille. Section 7 par.2 of the Draft adds a new section 31bis to include any kind of recognized disability. (Draft similar to Directive).

- reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author’s name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author’s name, is indicated, unless this turns out to be impossible;

Section 9 of the Draft modifies section 33 of LPI 1996. (Draft similar to Directive, states that Parliament and public body speeches do not need to be about current events to be exempted from the reproduction right).

- quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

Section 8 of the Draft modifies section 32 of LPI 1996. (Draft similar to Directive, specifically states that press quotations that are part of a press review or press summary are also exempted).

- use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

Section 7 par 2 of the Draft adds a new section 31bis to LPI 1996. (Draft similar to Directive)

- use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

Section 9 of the Draft modifies section 33 of LPI 1996. (Draft similar to Directive)

- use during religious celebrations or official celebrations organized by a public authority;

Included in section 38 of LPI 1996. (*Draft includes a limitation:* musical works, performed in religious or official celebrations, are exempted from the reproduction right if the entrance is free and the artists involved are not receiving any specific economic compensation).

- use of works, such as works of architecture or sculpture, made to be located permanently in public places;

Section 11 of the Draft modifies Art 35 of LPI 1996. (Draft similar to Directive).

- incidental inclusion of a work or other subject-matter in other material;

Included in section 35 of LPI 1996.

- use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

Section 11 of the Draft modifies Art 35 of LPI 1996. (Draft similar to Directive)

- use for the purpose of caricature, parody or pastiche; (section 39)

Included in section 39 of LPI 1996 (Draft includes two limitations: the parody should not create confusion with the original work and should not damage the original work or its author)

- use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

Section 13 of the Draft modifies section 37 of LPI 1996. (Draft contains many vague limitations concerning the exemptions for libraries. The exemption is limited to public libraries and institutions that are part of the Spanish education system. Institutions must not make any direct or indirect commercial use of copies.)

- use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

The Draft includes in sections 10 and 12 specific exemptions and limitations for the uses of works *under certain technologies*. Both articles of the Draft are technology specific as they refer to databases and works broadcasted by cable, satellite or radio stations.

For example:

- Section 10 that modifies section 34 par 2 of the LPI 1996 refers to the right of the owner of the data in a database to access the registers without the authorization of the owner of the database (Section influenced by Directive 96/9/EC).
- Section 12 that modifies section 36 describes the technical transformations of the work that are allowed to cable, satellite or radio when authorized to broadcast a work.

Technological Protection Measures

When it comes to technical protection measures, the Draft tries to reproduce the Directive as faithfully as possible. The Spanish proposal does not deal with over-protective technological

protection measures or any other related aspects such as interoperability, implications for the research community or security issues.

The new section 174 establishes a penalty of 6000€ per day to those who prevent recognized beneficiaries taking advantage of exemptions using technical protection measures. The Minister of Education, Culture and Sport, upon a proposal of Commission of Intellectual Property, can legally impose this penalty.

Enforcement and penalties

The Spanish Draft does not propose any concrete penalties for infringing copyright or circumventing controls. In that respect, the Draft in sections 64 and 65 adds two new articles to the LPI 1996 (sections 173 and 174) that refer to the limits of property rights and technological measures.

Section 173 establishes the Commission on Intellectual Property as the legal body to intervene in cases of property rights conflicts and technological protection measures. The Minister of Education, Culture and Sport, upon a proposal of Commission of Intellectual Property, can legally impose sanctions and penalties.

The national debate

Organisations

SGAE

The General Society of Authors and Publishers of Spain (SGAE), founded in 1899, is a private intellectual rights management organization dedicated to the defense and management of the intellectual property rights of its more than 66,000 members. Authors declare their works to the organization, which then manages them.

SGAE's monopolistic position has lately been questioned in continuous lawsuits by DAMA (Derechos de Autor de los Medios Audiovisuales). DAMA, formed in 1999, is a new rights management organization that includes the majority of the directors and screenplay writers of the cinema and television.

According to the Spanish Government, the new Draft includes a reform of the Commission of Intellectual Property whose main objective is to facilitate the resolution of this kind of conflicts between intellectual right management organizations. This opinion is strongly opposed by the SGAE that sees in the Commission a clear threat to their interests. SGAE has made numerous public statements against the new Draft and the functions of the Commission²¹¹.

FESABID

The Libraries and Intellectual Property Working Group (BPI-WG) is part of the Spanish FESABID (Federación Española de Sociedades de Archivística, Biblioteconomía, Documentación y Museística). The BPI working group has been very active representing the interest of the libraries in the discussions with the Spanish Government and supporting the new roles of the Commission for Intellectual Property.

As can be read in their last public statement of April 2003²¹², one of their points of disagreement is related to the content of section 13 of the Draft that modifies section 37 of LPI 1996. FESABID argues that the limitations for the exemption included in the Draft are far more restrictive than the

²¹¹ Discussions between the SGAE and the Spanish Government. <http://es.news.yahoo.com/030305/4/2l410.html> and http://www.porlared.com/cinered/noticias/i_acto3030601.html

²¹² Opinion of FESABID's Intellectual Property Group. Available from <http://www.bib.uab.es/project/cas/piadr8.htm>

ones included in the Directive. According to the intellectual property working group the Spanish Draft gives unfounded privileges to state-owned libraries versus other kind of libraries.

Another of the arguments presented by FESABID's BPI working group is the need to include in the Draft the limitation for copies made for the purpose of conservation or research.

Proinnova and Sincanon

Proinnova is an interest group of Hispalinux and ATI (Asociación de Técnicos de Informatica). Their work focuses on software patents and innovation. The group supports the petitions of the The Foundation for a Free Information Infrastructure (FFII)²¹³ and consider the European Union Copyright Directive and the Spanish proposal for a new law of Intellectual Property a threat to free software and innovation in Spain and Europe. Proinnova also believes that legal protection of "technological protection measures" will make the development of inter-operable products impossible and degrade software security.

Sincanon emerged in early 2002 as another interest group of Hispalinux after the Spanish Government agreed to apply a tax to computer CD-ROMs, on the assumption that these were regularly used for recording copyrighted music. Sincanon argues that the assumption clearly damages the free software community as free software has no right of remuneration for copying.

N.B. The Draft presented by the Spanish Government includes in section 5 (modifying section 25 LPI 1996) the power to apply an equitable "tax" to any equipment and media that can be used to reproduce a work. The "tax" is conceived as a compensation mechanism to the authors of copyrighted work. The Government is responsible for publishing and updating a list of "taxed" equipment at least biannually.

CPSR-ES

In March 2003, the newly formed Spanish Chapter of Computer Professionals for Social Responsibility made public an analysis of the Draft²¹⁴. Their position is aligned with the public statements of the European Chapter of the Free Software Foundation²¹⁵. CPSR-ES's statement brought attention to the implications of the legal protection of technical protection measures. Their Draft's analysis points out five worrying trends:

1. The Internet is considered as a public communication and authors of works are required to have digital rights management intermediaries.
2. All cultural works are treated as a pure commercial product; the law does not refer to non-commercial works.
3. The Draft provides to the digital (intellectual) rights management bodies the power to monitor not only distributors but also the final consumers.
4. The editors are given more benefits than the author themselves. Editors receive the compensation rights when authors renounce its exercise.
5. The technologies that can be used to circumvent technological protection measures are banned. This measure limits the freedom of expression, hinders scientific research in mathematics and computer science and threatens the right of using legitimate digital material.

Main arguments

There have been five main arguments present in the debate on the new Spanish Law of Intellectual Property. The discussion related to technological protection measures has been overshadowed by

²¹³ Opinion of Proinnova. Available from <http://www.spain.cpsr.org/20022003.php>

²¹⁴ Opinion of Computer Professionals For Social Responsibility (Spanish Chapter). Available from <http://www.spain.cpsr.org/20022003.php>

²¹⁵ Schenier Declaration in Felten v. RIAA, August 2001. Available from http://www.eff.org/Legal/Cases/Felten_v_RIAA/20010813_schneier_decl.html

other issues as the role of the Commission for Intellectual Property or the limitations and exemptions for private copies.

The role and functions of the Commission for Intellectual Property

The governmental initiative of reinforcing the role of the Commission for Intellectual Property has been well received by most of the parties involved in the discussion. The major concerns about the Commission come mainly from the SGAE. The SGAE has made numerous public statements criticizing the Draft that they consider will bring big losses to “their” sector.

The private copy in libraries

One of the main arguments in the debate has been the need of exemptions for private copies in cases of research or conservation and the legal requirements imposed on the different kind of libraries in their statutes or mission to enjoy the related exemptions. The debate is still open and FESABID issued a new statement on 1 April 2003 insisting that the limitations included in the last Draft are not consistent with the Directive.

The reproduction equipment and media “tax”

As a result of a court case between the SGAE and the CD-R producer Traxdata in January 2002, Traxdata has been forced to pay the SGAE a fee for every CD produced since 1997. Despite the protests from some groups such as Sincanon that consider the “tax” discriminative against the free software community, the Government’s Draft imposes a fee on equipment and any other reproduction media.

The free software and intellectual rights management organizations

Civil organizations as Hispalinux, the Spanish chapter of CPSR and Linux Users Groups have been trying to create awareness about the implications of the Draft for free software development in Spain. The Draft does not provide any alternative to free software programmers to manage their property rights than with the services of an intermediary (i.e an intellectual rights management organization). During the creation of the Draft, the Government consulted the eight recognized management organizations and some consumer groups such as hotel federations and commercial television associations. But very little attention was given to other important sectors such as non-commercial software developers and civil society groups.

The technological protection measures

Very little public debate has occurred over the legal protections for technical protection measures. The government confessed in November 2002 that the topic was too complex and they have limited themselves to faithfully reproduce (i.e. copy literally) the content of the Directive. Unfortunately neither the Draft nor a proper social debate has dealt with important issues such as interoperability and technical protection measures.

The media has not paid much attention to this issue. The confrontation between the SGAE and the government concerning other aspects of the Draft such as the role of the Commission of Intellectual Property, has taken much of the space in the newspapers.

Summary

The Spanish Government presented in November 2002 the first Draft of the new Law of Intellectual Property. The Draft, that included a set of changes to the old law of 1996 (LPI 1996), was intended to implement the European Copyright Directive and introduce changes to the Commission for Intellectual Property.

The main arguments in the debate have focused on the roles of the Commission and the definition of a “private” copy. Other topics as the vulnerable position of free software or the legal protection of technical protection measures have rarely been included in the Ministry of Education’s (MECD)

official statements. The research and free software community has been excluded from the official debates and most of the discussions have been driven by the main intellectual rights management organizations and other pure commercial sectors (television, music and radio).

A consequence of this lack of awareness is that the Spanish Government has not developed a national policy concerning “technological protection measurements” at this point, and has limited itself to reproducing the Directive as faithfully as possible.

UK

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Implementation of the Directive

The UK Government is implementing the Directive as a Statutory Instrument amending the Copyright, Designs and Patents Act 1988 under the European Communities Act 1972. This procedure removes the opportunity for Parliament to amend the legislation; it may only accept or reject the S.I.

Given the Government's large majority in the House of Commons, it is extremely unlikely to fall there. It is also rare for the House of Lords to reject secondary legislation, but not unknown; the threat of such rejection forced the Government to withdraw a surveillance-related S.I. in June 2002.

The Patent Office (the responsible government agency) initially planned to have the S.I. passed into law by the Directive's 22 December 2002 deadline. However, it received so many responses to a consultation on its draft implementation (over 300) that it postponed this date to 31 March 2003 to allow further analysis of the responses. On that date, it then postponed the publication of a final S.I. until "late spring." On 18 June 2003, it was postponed yet again until "as soon as possible." It remains to be seen how significantly this version will have changed, but it is unlikely to be by much.

Exceptions and limitations

The UK Government's basic approach during negotiations on the Directive was to seek to maintain existing UK exceptions as far as possible²¹⁶. It now proposes to amend these existing exceptions where required to comply with the Directive, but in general not to introduce new exceptions permitted by the Directive where these are not already part of UK law.

Under the legislative process being used, Statutory Instruments may only cover matters required by European legislation; hence other primary legislation would be needed to introduce optional exceptions into UK law. The Government recently supported a private member's Bill (i.e. one not introduced by the Government), the Copyright (Visually Impaired Persons) Act 2002, that introduces exceptions to copyright for the benefit of visually impaired people. Other such initiatives remain possible within the limits of the Directive.

Article 5.1, unlike the other provisions of Article 5, is mandatory: it requires Member States to provide an exception to the reproduction right for the making of temporary copies of works (other than computer programs and databases) which are transient or incidental to the transmission of those works over networks, or to other lawful uses. Existing UK law has no such exception, and it is proposed to include provisions corresponding to Article 5.1 in the relevant part of existing legislation.

Article 5.2 deals with exceptions limited to the exclusive right to make copies of a work; Article 5.3 deals with exceptions to the exclusive right to copy or publish a work.

Paragraphs 5.2 (a) and (b) permit general exceptions for photocopying or for general copying for private and non-commercial use, subject to fair compensation. There will be no UK implementation. There is a private sector licensing scheme covering much published material, which may be thought to meet the need reflected in these exceptions.

Paragraph 5.2 (c) permits specific copying by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage. These exceptions already exist in UK law, but will be modified where necessary to comply with the limitation on the scope of use.

²¹⁶ <http://www.patent.gov.uk/about/consultations/eccopyright/impact.htm>

Paragraph 5.2(d) permits the making of ephemeral recordings of works by broadcasting organisations for their own broadcasts and the preservation of these recordings in official archives. This reflects existing UK exceptions.

Paragraph 5.2(e) permits reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons. There will be no UK implementation.

Paragraph 5.3(a) permits use for the sole purpose of illustration for teaching or scientific research. This reflects existing UK exceptions.

Paragraph 5.3(b) permits use for the benefit of people with a disability. There will be no immediate UK implementation, but legislation within the scope of the Directive may follow later.

Paragraph 5.3(c) permits use of published articles or broadcasts on current economic, political or religious topics and use of works or other subject-matter in connection with the reporting of current events. There is an existing UK exception for fair dealing with a work (other than a photograph) for the purpose of reporting current events, which is probably narrower than what is permitted by the Directive; there is no proposal to extend the exception.

Paragraph 5.3(d) permits use of quotations for purposes such as criticism or review, which corresponds to an existing UK exception.

Paragraph 5.3(e) permits use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. There are existing UK exceptions for parliamentary and judicial proceedings and for statutory enquiries, and for certain other administrative purposes. There is no general exception for public security. There are no proposals to extend the UK exceptions.

Paragraph 5.3(f) permits use of political speeches as well as extracts of public lectures to the extent justified by the informatory purpose. There is an existing UK exception for the use of a record in any form of spoken words, which may be used for reporting current events or for broadcasting the work spoken, subject to a number of conditions (giving the speaker the right to prohibit in advance the making or use of the record, among other things). The UK exception is somewhat narrower than that permitted. There is no plan to extend it.

Paragraph 5.3(g) permits use during religious celebrations or official celebrations organised by a public authority. There will be no UK implementation.

Paragraph 5.3(h) permits use of works, such as works of architecture or sculpture, made to be located permanently in public places. There is a corresponding UK exception, more specifically expressed as permitting the drawing, photographing, or filming of such works, and broadcasting images of them.

Paragraph 5.3(i) permits incidental inclusion of a work or other subject-matter in other material. There is a more limited UK exception that permits incidental inclusion of a work in an artistic work, sound recording, film, broadcast or cable programme, but this does not permit the deliberate inclusion of a musical work or of words spoken or sung with music. There is no proposal to make the exception more general.

Paragraph 5.3(j) permits use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use. There is a more limited UK exception permitting the copying of a work and the issuing of copies to the public for the purpose of advertising the sale of the work, but this does not extend to exhibitions. There is no proposal to extend the exception.

Paragraph 5.3(k) permits use for the purpose of caricature, parody or pastiche. There will be no UK implementation, but note that not all such works will infringe the original to which they relate. There may be no taking of a substantial part of the original, for example, or the caricature may amount to fair dealing for the purpose of criticism.

Paragraph 5.3(l) permits use in connection with the demonstration or repair of equipment. This exception reflects a small part of an existing UK exception which currently provides that, where broadcasts are seen or heard in public by non-paying audiences, there is no liability to pay royalties to broadcasters or producers of sound recordings or films contained in broadcasts. The UK accepts that it must modify its exception for the purposes of implementing the Directive, but appears to intend to maintain it at least to the extent of its overlap with what is permitted by this paragraph.

Paragraph 5.3(m) permits use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building. This corresponds to an existing UK exception.

Paragraph 5.3(n) permits use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries, educational establishments or museums of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The UK exception for fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study (which is to be revised slightly to limit research to non-commercial purposes) covers most of this exception, although the Directive is not limited to the specific works mentioned in the UK provisions. There is no proposal to extend the UK exception.

Article 5.5 provides that the exceptions and limitations of Article 5 are only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. This reflects the “three step test” found in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) WTO and in Article 10 of the WIPO Copyright Treaty. The UK will apply this test in deciding what exceptions to implement, and will not introduce exceptions which it considers do not satisfy it, but will not incorporate the test itself into UK law.

Technological protection measures

Under section 296 of the Copyright, Designs and Patents Act 1988 the UK has had restrictions in place on circumvention technologies for the last 15 years. That Act goes even further than the Copyright Directive, providing a right of action against anyone who “publishes information intended to enable or assist persons to circumvent that form of copy-protection”.

However, Articles 1 and 9 of the Directive provide that protection for software must be provided under the Software Directive. The draft legislation would therefore retain these restrictions on devices designed to circumvent copy-protection applied to software. It would not restrict the act of circumventing technology, in order to allow reverse-engineering for interoperability purposes as required by the Software Directive.

For other copyright works, Article 6(1) of the Copyright Directive would be implemented by a new section 296ZA, which equates circumvention of “effective technological measures” by a person “knowing, or having reason to believe, that is the effect of what he is doing” to infringement of copyright. No intent to infringe is required. It would provide the same civil rights of action to the party that had issued a protected work and the copyright owner as the latter would have against an infringing party. These rights would also be available to the owners of performance, publication and database rights.

A new section 296ZB transposes Article 6(2). This would create a criminal offence when a person commits one of the following acts:

- (a) makes for sale or hire, or*
- (b) imports otherwise than for his private and domestic use, or*
- (c) in the course of a business--*
 - (i) sells or lets for hire, or*
 - (ii) offers or exposes for sale or hire, or*
 - (iii) advertises for sale or hire, or*

*(iv) possesses, or
(v) distributes, or
(d) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner
any device, product or component which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures.*

This new section would also create an offence if a person “promotes, advertises or markets a service in the course of a business, or otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner, the purpose of which is to enable or facilitate the circumvention of effective technological measures.”

It would be a defence under this section for a person to show that “he did not know, and had no reasonable ground for believing” that products or services “enabled or facilitated the circumvention of effective technological measures.” Note also that non-commercial creation and import for private and domestic use of circumvention devices would be permitted. Non-commercial distribution would be allowed on a small scale if it would not prejudicially affect the copyright owner.

S.296ZC also provides the same civil rights of action against a person committing the acts in s.296ZB to the issuers and owners of protected copyright works as the latter has in the case of infringement.

The definitions of Article 6(3) are included in s.296ZD. A technological measure is defined as “any technology, device or component which is intended, in the normal course of its operation, to protect a copyright work”. A measure is deemed “effective” when use of the work is protected through:

- (a) an access control or protection process such as encryption, scrambling or other transformation of the work, or*
- (b) a copy control mechanism, which achieves the intended protection.*

The draft mechanism to implement Article 6.4 (allowing beneficiaries of specific exceptions to exercise them with a legally-acquired work protected using a technical measure) was one of the most contentious aspects of the government’s proposals. Under section XXX, a beneficiary must first wait an undefined period for voluntary agreements to be concluded by rightsholders. If those are not forthcoming, they may complain to the Secretary of State. She may then issue a direction to the rightsholder that they provide the beneficiary with such a mechanism. If these directions are ignored, the beneficiary has a right of action against the rightsholder for breach of statutory duty.

Beyond this procedure, there are no specific protections for free speech or privacy rights against technological protection measures. However, the UK Human Rights Act 1998 (implementing the European Convention on the Protection of Human Rights and Fundamental Freedoms) will allow courts to read the provisions of the copyright legislation in a way that is consistent with rights of free speech and privacy. If this cannot be done, the court may notify Parliament that the legislation should be changed to provide these rights. The Data Protection Act 1998, which implements the EU Data Protection Directive, will also apply.

There was no specific protection for research activities in the first draft of the legislation. However, the government has indicated that it will look at this issue carefully and may provide such a mechanism in the second draft, which is due “as soon as possible”²¹⁷.

Subsection XXX(9) transposes Article 6 subsection (4)(4) by excluding “copyright works made available by an on-demand service” from this procedure. Performance, publication and database rights are also covered. An “on-demand service” is defined very widely in section 20 as “an

²¹⁷ <http://www.patent.gov.uk/copy/notices/implementation.htm>, dated 18 June 2003.

interactive service for making a work available to the public by electronic transmission in such a way that members of the public may access the work from a place and at a time individually chosen by them.” But it is not clear that this definition (from Part I of the modified Act) would apply to this subsection (intended to be located in Part VII of the Act).

Enforcement and penalties

Copyright infringement is actionable in the civil courts by rightsholders, whose remedies consist of damages for loss caused by an infringement or alternatively recovery of the profit made by the infringer. Infringers may also be restrained by injunction from further infringement, and ordered to destroy or deliver to rightsholders any infringing copies or materials. Disobedience of court orders may be punished by unlimited fines or imprisonment. Those who knowingly circumvent copy protection technology or remove digital rights management information from copyright works are liable as infringers.

Criminal penalties are imposed for commercial or large-scale dealings with infringing copies. The more serious offences can attract sentences of up to ten years’ imprisonment and unlimited fines. The penalties for lesser offences are up to six months’ imprisonment and limited fines.

Criminal penalties are also imposed for commercial or large-scale dealings in devices for circumventing copy-protection technology or the provision of circumvention services: sentences can be up to two years’ imprisonment and unlimited fines.

The national debate

The government consultation over the implementation of the Directive received over 300 responses. We have summarized the responses of a range of groups on different sides of the argument below.

The **Foundation for Information Policy Research** is an independent body that studies the interaction between information technology and society.

FIPR's consultation response²¹⁸ was based around six different areas. It emphasised the relevance of competition policy, and that the implementation should not protect technology protection measures used in non-copyright systems (such as forcing the use of particular ink cartridges or mobile phone batteries). The implementation should fully respect the reverse engineering provisions in the EU Software Directive for both software and file formats. Users should be allowed to restrict the use of their personal information in DRM systems. Open source software must be included in exceptions for “commercially significant” purposes. A clear and broad exemption for security research should be included, and any prosecutions made under anti-circumvention powers should require the approval of the Attorney General, to ensure that wider public policy interests are considered. The definition of “on-demand” service was very wide, and any material available from such a service was exempt from all of the Article 5 exceptions (check incidental/transient copies). Finally, beneficiaries prevented from exercising exceptions by technological protection measures (whether disabled users, libraries or any other group) should have a direct right of action against the rightholder, rather than first have to appeal to the Secretary of State.

The **Campaign for Digital Rights** “campaigns for fair and balanced laws for the information society” and has been the main body campaigning on behalf of the general public. CDR's analysis of the draft UK implementation²¹⁹ makes five main points:

- Cryptography research must be protected, as recital 48 of the Directive states. Research into the effectiveness of security algorithms and systems should not be prevented merely because they might be used in a technological protection mechanism. The Government's draft implementation would have created civil and criminal penalties for circumventing

²¹⁸ <http://www.fipr.org/copyright/FIPR.html>

²¹⁹ <http://ukcdr.org/issues/eucd/ukimpl/>

those mechanisms.

- Music studios, broadcasters and other media organisations routinely need to copy media as part of their business functions (e.g. making copies of songs to create a playlist for a radio station). They should be exempted from anti-circumvention rules, as should the manufacturers or tools they need to perform those circumventing acts.
- The draft implementation forces beneficiaries of exceptions to appeal to the Secretary of State of technological protection measures prevent their use of those exceptions. The Secretary of State may then choose to instruct the rightholder to provide some means of doing so. This Secretary of State could be deluged with such appeals. Instead, frustrated beneficiaries should immediately be able to seek a remedy through the courts.
- Software developers could be put in a precarious position. Developers may need to circumvent technological protection measures in order to reverse-engineer a piece of software or its file formats, which is explicitly allowed by under current UK and European law for interoperability purposes. The implementation must not make such circumvention, or the tools necessary to perform it, illegal.
- Copyright is a limited monopoly; works eventually re-enter the public domain. This will not automatically be the case when a work is protected using technological measures, unless those measures are circumvented. While this may be legal once a work is out of copyright, it may not be possible – particularly if the rightholder has long since gone out of business. Works should therefore be provided in unprotected form to archivists who will be able to make them available to the public once the copyright has expired.

The **Libraries and Archives Copyright Alliance** is a grouping of professional bodies working in these fields, along with visually impaired and educational users. It includes such well-known institutions as the British Library.

LACA feels²²⁰, since the Directive took the wrong approach in protecting technical measures even against the exercise of fair dealing rights, that a good implementation of Article 6(4) is critical. They argue that “creators in every field of endeavour are also users of copyrighted materials. A lack of access to them, where the original author suffers no significant damage, will in turn impede or even obstruct research and the making of further works. It is important therefore that the beneficiaries of the exceptions are not injured by legislation intended to prevent infringement.”

The draft UK implementation did not meet this test. It imposed no duty on the Secretary of State to take timely action or enforce directions given, nor allowed an appeal against their decisions. It also prevented classes of persons affected by a technical measure from taking collective action or benefitting collectively from a Direction. While the Copyright (Visually Impaired Persons) Act provides some exceptions for visually impaired users, a wider exception for other classes of disability is required under Article 5.3(b). LACA suggested that a better implementation would allow users and libraries to circumvent technical measures if the Secretary of State gave directions to a rightholder that were ignored. This would require the legal availability of tools that allowed this circumvention.

LACA is particularly concerned that the UK's draft implementation excludes fair dealing rights from material delivered through an on-demand service, and feels that “electronic delivery as a medium is assigned undue and undeserved importance.” They consider that the article 6.4.4 exclusion should only apply to the on-demand delivery of films and other such broadcasts. Electronic publication of literary works should not come under this category.

LACA suggests that an important provision to introduce into copyright law in future would nullify contractual provisions removing fair dealing rights. This is already the case in Ireland, and has been recently recommended by Australia's Copyright Law Review Committee.

²²⁰ http://www.cilip.org.uk/committees/laca/responses_poc.html

The **Royal National Institute of the Blind** is the UK's largest voluntary agency providing services for visually impaired people and challenging barriers to their full participation in society.

The RNIB's view²²¹ is that "complete and unhindered access to information" is vital to this goal. Its main concern with implementation of the Directive is therefore with article 6.4 – the process by which beneficiaries of exceptions may exercise them when restricted by technical measures.

The RNIB argues that there must be an explicit duty on the Secretary of State to respond to complaints in a fair and considered manner. Directions made in response to complaints should apply to the class of persons affected rather than individuals. There should also be a right of appeal if the Secretary of State does not respond adequately to a complaint.

The Government should actively support the exercise of directions given in response to a complaint. Otherwise the cost of doing so would fall on individual complainants, and encourage rightsholders to ignore the directions. It should also be made clear where actions against noncompliant rightsholders would be taken – the courts, Copyright Tribunal or elsewhere. There should be a deadline set for compliance with directions, as the complainant may need immediate access to a work for study or employment purposes.

The RNIB's greatest concern is with the implementation of the “on-demand service” exemption for exceptions. Such services must be defined narrowly, and should not include materials accessed through the World Wide Web. Disabled persons must have a mechanism by which they can circumvent technical measures impeding equitable access to information on the Web.

The **British Phonographic Industry** is a trade association body with hundreds of members from the UK recording industry. They have four main aims: the fight against piracy; rights negotiation and legal advice; industry promotion; and the provision of key statistics on the industry.

The BPI's arguments²²² are centred on the contribution of the British music industry to the UK economy, and its concerns that digitisation of the music market could reduce this contribution if new controls are not introduced. They argue that the implementation of the Directive must enable the development of new technology and hence online markets, incentivise the record industry to develop its relationship with consumers, protect artists from theft and develop the cultural diversity of Britain's music.

Most important for these requirements are limits on exceptions under Article 5. The BPI suggest that only the compulsory exceptions in the Directive should be implemented; that the temporary copyright exception (5.1) should be implemented verbatim; that all of the 5.2(b) restrictions on exceptions must be implemented, and that existing private use exemptions must not be extended. They also argue that the Berne “three-step test” repeated as Article 5.5 should be explicitly included in UK law to allow the courts to interpret and restrict exemptions based on specific circumstances of their use.

The BPI states that strong protection of technical measures under Articles 6 and 7 is also vital. These are important “to the growth of new e-business” and “enable record companies to create a wide range of listening or copying options for the consumer.” The implementation should broaden existing controls on the provision of devices that circumvent controls or remove rights management information, and even information on how to do so.

Also necessary would be the introduction of a specific new right of “making available” rather than adaptation of existing broadcasting and cable television rights, which contain exceptions such as “time shifting” which the BPI argues are not appropriate for online music services. It claims that without this right, the music business would leave the UK as it would become an entirely uneconomic market.

²²¹ <http://www.rnib.org.uk/campaign/eucopyright.htm>

²²² <http://www.bpi.co.uk/legal/lobbying.html>