

Harmonisation of copyright in the European Union: a view from the UK

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In 1997, the European Council issued a proposal for a 'Directive on the Harmonisation of Copyright and Related Rights in the Information Society' which is designed partly to ratify the provisions of the WIPO treaties and partly to continue the program of harmonisation in member states by trying to make the exceptions to copyright the same across member states.

Since 1988, member states of the European Union (EU) have been used to receiving directives aimed at harmonising the various copyright laws and traditions of our countries. We have already had directives on protecting computer software, extending the term of copyright protection, rental and lending, satellite and cable broadcasting, and protection of databases. Whilst we have no problem with tightening up copyright laws to reflect current technology, we do care that such laws should be balanced with the legitimate interests of society. As it is written at present, the proposed EU directive is biased heavily towards rights holders. It is certainly not equitably balanced.

What is in the copyright directive?

The definition of the right of reproduction now includes all transient and incidental copies. Article 2 of the draft directive states that member states have to provide an exclusive right 'to authorise or prohibit direct or indirect, temporary, or permanent reproduction by any means and in any form, in whole or in part.' This is the normal reproduction right but the inclusion of the word *temporary* means that all copies made by the computer before it is visible on a screen are defined as reproductions. This also includes accepted practices used to speed up delivery, such as caching. However, it is likely that activities such as caching will be exempted. It is interesting and should be noted that this is the only mandatory exception given in the Directive. All the other exceptions are options for member states to take or leave.

Member states are required to provide an exclusive right to authorise or prohibit any communication or making available to the public of their works 'by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them' (Article 3). The offering of a work on a publicly accessible site, such as the Internet is covered by this right. It also covers interactive on-demand transmissions. A display to the public of a

work on a screen will have to be authorised or covered by an exception. The definition of 'public' and conversely, what exactly will be covered by private communication, will be left to member states to define. This new communication right poses a threat to library services as there is no appropriate exception which allows reasonable access for lawful uses. It is not clear whether activities such as browsing and viewing from a computer screen are covered by this right. We do not believe that we should have to be authorised to browse or view. This could mean that users would be paying for reading. It was never intended that copyright protection should extend to reading.

Another new right agreed at WIPO is to protect any technical measure attached to a copyright work against unlawful circumvention. Although, we are not against any device which is primarily designed for piracy purposes, we do not welcome a right which may inhibit or prevent legal uses. It is not clear, for example, whether circumventing for a legitimate use such as an exemption will count as authorised.

The optional exceptions

Article 5 of the draft directive sets out an exhaustive list of permitted exceptions. member states will therefore not be allowed to provide for any exceptions other than those enumerated. This means that not only will exceptions for the digital environment be extremely limited, existing national exceptions covering the analogue environment will also have to be reduced to the listed few. This is in contrast to the WIPO Copyright Treaty 1996, where member states are given permission 'to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention'. We have pointed out several times that in order to ensure that there are no barriers to the internal market, the EU directive which is implementing the WIPO Copyright Treaty must not be more restrictive than international treaties. We believe that the list of exceptions should be flexible and more open and that member states should be allowed to decide what is appropriate according to their tradition. A levy or remuneration condition is attached to practically all of the exceptions. Although most member states of the EU already have such levies, we in the United Kingdom believe that an exception which has to be paid for is not an exception.

There is an exception given from the right of reproduction to allow copying of small amounts on paper *except* for music and *not* for a commercial purpose *and* for fair compensation to be paid to rights-holders.

Libraries which are not run for profit and which are open to the public will be allowed to copy for the purposes of archiving and conservation. This is the only specific exception for libraries. We think academic libraries will be included here as well as public libraries but industrial and commercial libraries are definitely excluded.

There is an exception from Articles 2 and 3, that is, for copying and communicating to the public, for the sole purpose of illustration for teaching or scientific research on condition that the source is indicated, that the research is non-commercial and that fair compensation is paid to rights-holders.

Making a copy for private use using analogue audio-visual technology (off-air recording from the radio or television) is allowed provided fair compensation is paid.

Making a copy using digital audio-visual technology is allowed *only* if there is no reliable or effective means of protection *and* as long as fair compensation is paid. This means that if rights-holders decide to give added protection for their works using technical means, then any legitimate copying under an exception will no longer apply. For example, if libraries are allowed to copy for archiving purposes and the item they wish to copy is protected by a technical device, it is not clear whether a library wishing to copy the item is allowed to circumvent this device in order to carry out the process.

The only good thing about the directive is that copying will be allowed for the benefit of people with disabilities provided the copying is non-commercial. We have welcomed this.

All of these exceptions are subject to the three step test of Article 5.4. This is similar to Article 9.2 of the Berne Convention which all exceptions must comply with anyway. This is having your cake and eating it, too!

Work of EBLIDA and EFPICC: lobbying for fair practices

During the consultation process of the original draft directive, the music industry and the phonographic industry were very successful in persuading MEPs that it was essential to tighten up the digital environment in order to stop Internet piracy of music. A very timely advertisement was placed in the major European newspapers about the need to protect

our creative industries against infringers and pirates. It was signed by 400 music personalities and pop stars and claimed that the music industry was losing billions of pounds because of piracy. This advertisement, plus champagne receptions attended by well-known pop-stars, also helped their cause. Europe's librarians are also trying to lobby the new MEPs. The problem is that our cause is not as sexy as that of the Spice Girls or Jean-Michel Jarre. Our cause is not helped either by the complexities of copyright. Few people really understand it and MEPs find it difficult. They can understand the need to protect the phonographic industry against piracy but they cannot always see that if the internet is too tightly protected, then everyone will suffer.

Europe's library organisations are working closely with other concerned consumer groups to fight for a better European copyright law. The campaign is called EFPICC - the European Fair Practices in Copyright Campaign - which is lobbying to obtain a fairer, more balanced copyright directive. EFPICC is an alliance of European consumer groups, consumer electronics industries, education, library and disability groups to lobby for sufficient level of access and affordable use of copyrighted information in a digital environment. EBLIDA, (Eu-

ropean Bureau of Library And Documentation Associations) represents European librarians on EFPICC. EFPICC members believe that adequate access to digital copyright works would be safeguarded by ensuring that certain fair practices apply to all types of libraries and archival institutions. These fair practices are:

- the viewing, browsing and copying of digital material for private, educational and research purposes in libraries, archives and museums;
- the making of a digital copy for archival and preservation purposes;
- the copying of a limited number of pages on paper of a digital work by librarians for their users;
- the making of a copy on audio, visual or audio-visual recording media made by private individuals for personal use and for non-commercial ends;
- The ability to copy for people with a visual, aural or learning disability.

We believe that these are fair, in line with the three-step test of Berne and the WIPO treaties and are essential if there is to be an equitable information society. For uses over and above an exception to cover

these practices, librarians recognise and accept that these should be licensed and paid for. We are not asking for any favours from rights-holders. We are merely asking for what is fair, which is for the good of society and which is provided for in international conventions.

Progress of the directive

In February, the European Parliament had its first reading of the directive and voted on several amendments to the text. Despite all the consumer lobbying activities across Europe, the vote still favoured rights-holders. In May 1999, an amended proposal was issued by the European Commission. Discussions will take place at the Internal Council meetings later this year. Member states are struggling hard to come to a common position which is not expected now before December 1999. Member states cannot ratify the WIPO treaties until the directive has been agreed so there is some urgency to push it through. Once adopted, member states have two years in which to implement the provisions.

Details of the directive and the fair practice campaign may be found on the Library Association website [<http://www.la-hq.org.uk>] and also on the EBLIDA site [<http://www.eblida.org.nl>]. ■

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