



Why the Copyright Directive is Unimportant, and Possibly Invalid.

Published in [2000] *EIPR* 11, p. 501-502

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‘This is a breakthrough in what is a vitally important dossier’, said Internal Market Commissioner Frits Bolkestein directly after the Council of Ministers finally reached political agreement on the Copyright Directive.^[1] A breakthrough, indeed. The initial proposal of a directive was tabled in December 1997^[2] – light years ago on the Internet time scale. Since then we’ve seen a package of 58 amendments proposed by the European Parliament in first reading^[3], an amended Commission proposal^[4], and huge stacks of ‘non-papers’ and other ‘restricted’ fare discussed in endless secret rounds by the Council Working Group in Brussels.

But ‘a vitally important dossier’? The unprecedented lobbying, the bloodshed, the vilification, the media propaganda, the constant hounding of EC and government officials, certainly suggested it was. But now that the cannons are silent, the smoke has cleared over the battlefield, the dead have been buried, and the surviving lobbyists - the soldiers of fortune of modern-day politics - have moved on to other theatres of war (the forthcoming WIPO Audiovisual Performances Treaty, TRIPs II), it’s time to think again.

Let us recall, that the original aim of the Directive was twofold. First, to bring the laws on copyright and related rights in the European Union in line with the WIPO ‘Internet Treaties’, in order to set the stage for joint ratification of the Treaties by the Member States and the European Community. Hence the Directive’s grandiose title: ‘... on the harmonisation of certain aspects of copyright and related rights in the Information Society’. Note, that in Eurocrat vernacular ‘Information Society’ means the internet. A less ambitious European legislature might have achieved this goal in a matter of months, simply by copying the provisions of the WIPO Treaties into a directive. It would have taken the Member States another eighteen months or so to adapt their national laws to the WIPO standards, and *presto*, the EC and its Member States would have been among the first, not the very last (as it now appears) to ratify the Treaties – say, in Spring 1999. This, in turn, would have immediately triggered the Treaties’ entry into force (upon 30 ratifications), by adding 16 ratifications (or even 29, including EEA countries and aspiring EU members) to the list. Right holders would have benefited from the enhanced protection the Treaties provide ever since.

But no, that would have been too easy. In a move that reflected its ambition to set the copyright norms of the world, the European Commission chose in an early stage not to settle for the level of protection agreed upon at the WIPO level, but to raise the standard. If in Geneva, after some fierce and ugly infighting, no consensus could be reached on a definition of the reproduction

right, the EC would show the world the Europeans could pull it off. If in Geneva international lawmakers, in their wisdom, agreed upon a rather loosely formulated provision obliging countries to 'provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures' (article 11 of the WCT), the EC would carve a precise anti-circumvention rule in stone.

The second, largely unrelated goal of the Directive was to harmonise certain aspects of substantive copyright law across the board - a departure from the Commission's previous policy of piecemeal approximation. This aim was already partly visible in the Commission's Green Paper of July 1995^[5]. The Green Paper identified a number of key issues (some 'digital', some 'analogue') presumably requiring harmonisation: applicable law, exhaustion, the scope of the economic rights, moral rights, administration of rights and technical protection. Eventually, less than half of this legislative agenda was carried over to the Copyright Directive.

Surprisingly, the Directive does deal extensively with an issue mentioned only incidentally in the Green Paper: copyright exemptions, or 'exceptions' as the Commission prefers to call them (*nomen est omen*). In view of the vast differences in purpose, wording and scope of limitations existing at the national level, many of which reflect local cultural traditions or business practices,^[6] one would have expected some more study and reflection before stirring up this hornet's nest. In its quest for creating a 'level playing field' for the European information industries, the Commission apparently believed the time was ripe to remove these remaining bastions of national copyright law and policy.

As any less ambitious person could have foreseen, combining these various projects into a single legislative package has turned out to be a disastrous mistake. The intense pressure from the copyright industries and, particularly, from the United States (where the main right holders of the world reside), to finish the job as quickly as possible, has not allowed the Member States and their parliaments, or even the European Parliament, to adequately reflect upon the many questions put before them. Thus, an array of controversial copyright issues was hammered through the European legislative process in less than three years. Note that the Database Directive, dealing with only a single (admittedly complicated) issue, took six years from start to finish.

The result of this over-ambitious undertaking has been predictable. The Directive is a badly drafted, compromise-ridden, ambiguous piece of legislation. It does not increase 'legal certainty', a goal repeatedly stated in the Directive's Recitals (Recitals 4, 6, 7 and 21), but instead creates new uncertainties by using vague and in places almost unintelligible language. What, for example, to make of article 6.4 (1), a provision that is presumably intended to reconcile the interests of rights owners employing technical protection measures with the interests of users wishing to benefit from copyright limitations?

'Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with article 5.2a, 2c, 2d, 2e, 3a, 3b or 3e the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation, where that beneficiary has legal access to the protected work or other subject matter concerned.'

I have read and reread this text several times, but most of it still eludes me. What 'voluntary measures' does the Directive envisage: technical protection measures that automatically respond

to eligible users? And what kind of ‘agreements between rightholders and other parties’ do the framers of the Directive have in mind: collective understandings between right holders and users? And, if such measures or agreements are not in place (within what timeframe?), which kind of ‘appropriate measures’ are the Member States expected to take? Does the Directive call for voluntary deposit of analogue copies, available for public inspection and reproduction in national libraries? Or are Member States obliged to effectively prohibit the use of technological protection schemes if public access to works is impaired on a serious scale?

The only legal security this type of lawmaking creates, is the certainty of another round of lobbying and infighting at the national level. Eventually, of course, the European Court of Justice, already overworked, will have to finish the job left largely undone by the European legislature.

If the Directive does not produce much legal certainty, it does even less in terms of approximation. This is painfully visible in the *pièce de résistance* of the Directive, article 5 on copyright ‘exceptions’. The Commission’s original aim of limiting the number of exemptions to a bare minimum, enumerated in an exhaustive manner, has backfired dramatically. In the course of the negotiations in the Council Working Group the Member States have managed to maintain most, if not all, of the limitations currently existing in national law. Thus, article 5 now lists no fewer than 20 possible exemptions. An exhaustive list indeed!

What makes the Directive a total failure, in terms of harmonisation, is that the exemptions allowed under article 5 are optional, not mandatory (except for 5.1). Member States are not obliged to implement the entire list, but may pick and choose at will. It is expected most Member States will prefer to keep intact their national laws as much as possible. At best, some countries will add one or two exemptions from the list, now bearing the EC’s seal of approval. So much for approximation!

Of course, the whole idea of drawing up a finite set of limitations was ill-conceived in the first place. The last thing the information industry needs in these dynamic times are rigid rules that are cast in concrete for the years to come. How can a legislature in his right mind even contemplate an exhaustive list of limitations, many of which are drafted in inflexible, technology-specific language, when the Internet produces new business models and novel uses almost each day? Note that the ‘safety valve’ of article 5.3o (‘use in certain cases of minor importance’) is limited to existing exemptions and analogue uses. Now, thanks to the Directive, if some unforeseen use that we all agree should be exempted emerges, we’ll have to wait at least three years, if not much longer, for the Directive to be amended. I’d be surprised if national lawmakers or courts were that patient, or EC law-abiding.

What the Directive does state in unequivocal terms is less than spectacular. The broad reproduction right defined in article 2 is counterbalanced by the (mandatory) temporary copying exemption of article 5.1. Did we really need a European lawmaker to tell us that caching and browsing are allowed without authorisation? I don’t think so; a common sense interpretation of the reproduction right would have done the job as well, if not much better.[\[7\]](#)

The right of communication to the public that Article 3 prescribes is a good thing, but hardly a *novum* in the light of article 8 of the WIPO Treaty. Even less of a surprise is the Community exhaustion rule of article 4, *acquis communautaire* (if still controversial) ever since the Trademark and Computer Programs Directives.

The Directive leaves the most important copyright problems of the digital environment

unresolved. It does not deal with several of the crucial questions raised in the Green Paper: applicable law, administration of rights, and moral rights - a staple hot potato on the Brussels menu. In fact, the Directive does not do much for authors at all. It is primarily geared towards protecting the rights and interests of the 'main players' in the information industry (producers, broadcasters and institutional users), not of the creators that provide the invaluable 'content' that drives the industry. The Directive fails to protect authors or performers against publishers and producers imposing standard-form 'all rights' (buy-out) contracts, a dreadful practice that is rapidly becoming routine in this world of multimedia. Instead, Article 9 and Recital 30 underscore that the Directive does not affect the law of contract.

Article 9 also confirms the Directive's failure to deal with another hot topic on the 'digital agenda', the interface between contract and copyright exemptions. This is particularly surprising in the light of article 6.4. If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard-form licenses. Here, the *acquis communautaire* of the Computer Programs and Database Directives, both providing for mandatory user freedoms, has suddenly become irrelevant.

Since the Directive has little or nothing to offer in terms of legal certainty or harmonisation (or anything else, for that matter), one must question the solidity of its legal basis in the EC Treaty. Over the past decade, we have all too easily accepted the EC's legislative powers in the field of intellectual property. Where do these powers originate? As all previous directives in the field of copyright and neighbouring rights, the Copyright Directive is based on articles 47.2, 55 and 95 (ex articles 57.2, 66 and 100A) of the EC Treaty. These are the same legal foundations that the Tobacco Advertising Directive (Directive 98/43/EC) was built on. In a case brought before the European Court of Justice, Germany has challenged that directive's legal basis and requested its annulment, pursuant to article 230 (ex 173) of the Treaty. On October 5, 2000, the Court delivered its judgment. The Court notes that the Directive does not facilitate the free movement of goods or the freedom of services, and does not remove distortions to competition. In sum, the Directive lacks a proper legal basis, and should be annulled.^[8]

The European Court's decision raises the intriguing prospect of one or more disgruntled Member States challenging the validity of the Copyright Directive.^[9] Wouldn't that be the perfect way of getting rid of this monstrosity? I hereby offer my services to any Member State *pro bono*.