

# Overview of European Legislation for Digital Copyright Protection

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## INTRODUCTION

Digital technologies are becoming more important in business and a potential locomotive for economic growth and trade. The U.S producers and consumers have enjoyed a 'Digital revolution' since 1990's and it is not surprising that they became the largest economy in the information society. Although following developments in information society one step behind the U.S, the challenge for Europe is to clinch the digital age and become the most competitive knowledge-based economy and society is the new goal of the EU . Statistics shows that, in Europe 90% of firms and most of their employees have an Internet connection 60% of those firms have web sites and approximately 20% of the European companies sell and buy over through the Internet .

The Internet penetration in business is very high in Europe, but apart from business and trade there is no doubt that the Internet has a direct effect in everyday activities. "In today's society, Internet access has become a fundamental right for all citizens and responsible governments have a duty to provide it" . This is one side of the medallion and the other side is the government's duty to provide effective and adequate protection and to set aside high protection to authors and creators works. As long as laws guarantee copyright protection, the authors will be stimulated to create new works and circulate them by means of new technologies such as the Internet. In this respect, The European Community started a harmonization program in order to achieve the main objectives of Common Market, that is to say, freedom of movement of goods, persons, services and capital in all areas and also in the field of copyright and related rights.

The first step taken by the European Commission for harmonization was started in 1988 with the Green Paper entitled Copyright and Related Rights and the Challenges of Technology that concerned steps to be carried out to

harmonize aspects of copyright and related rights laws in the EC affected by technology. In this paper, many issues were discussed and an outline provided for rules that need urgent attention. As a result of this, the Commission determined its harmonization policy in the field of copyright and related rights competitiveness of its economy with regard to its global trade partners, c) protection of creative throughout the community. The basic concerns of the Green Paper were; a) elimination of obstacles and divergences at the national level b) setting high levels of protection in relation to copyrights in order to improve the effort or investment from fraud by others who are not members of the community.

In 1995 the Green paper on Copyright and Related Rights in the Information Society was documented as a second step of the Commission in order to cope with the new technological advent and electronic transmission of information and other materials. " In these papers, the commission drew the attention to the need for an EU public sector information policy in the context of the Information society, and the problems raised by the rendering of protecting material into electronic format, rights of access to and commercial exploitation of material on internationally-linked computer databases (as in the Internet) and, in particular, the public interest issues involved in regulating availability of electronically transmitted information and protected material" .

Starting from 1988 harmonization efforts are still in progress. In the field of copyrights and related rights law, several directives were adopted and in addition to those Council Directives, the Alternative Council Resolutions have importance too. The "first generation" rights that have been adopted with council directives in line with harmonization so far are;

- Council Directive on the legal protection of Computer Programs (91/250);

- Council Directive on rental lending right and related rights (92/100);
- Council Directive on Satellite broadcasting and Cable Retransmission (93/83);
- Parliament and Council Directive on Databases (96/9);
- European Parliament and Council Directive on Artist's Resale Right (2001/84).

Finally, the "second generation" rights that is to say the European Parliament Council Directive on Copyright in the Information Society (2001/29) was adopted on May 22, 2001, which is considered as "the true precursor of to a community copyright code".

The Directive consists of important provisions such as the right of reproduction in the digital environment and temporary reproduction; the right of making available to the public particularly on the Internet; limitations and exceptions in the digital environment, technological measures for protection, and rights management information, in order to implement the WIPO Treaties.

## EUROPEAN UNION COPYRIGHT DIRECTIVE

The Information Society or the European Union Copyright Directive (EUCD) is a major step in the development of a European copyright code, as mentioned above, when examined together with the five other directives, which achieved a certain degree of harmonization at the present time. However "the EUCD is more far reaching and marks an important stage in the endeavor to provide solutions to problems posed by technical developments, in particular by adopting provisions to give effect to a number of provisions of the WIPO Treaties 1996"<sup>41</sup>. Therefore, the Directive covers important on-line issues and aims to deal with the copyright implications of the Internet, at the same time it pushes EC member states to adopt legislative action with respect to four rights: the reproduction right, the distribution right, the communication to the public right and protection against the circumvention or abuse of electronic management and protection systems.

This Directive is based on the same principles that were provided in the previous community directives, and unless otherwise specified it is to be without prejudice the earlier EU Directives. However the directive introduces some amendments to the reproduction right in article 2.

## THE RIGHT OF REPRODUCTION

The directive establishes a broad reproduction right because "[t]he single most important copyright right implicated by the transmission and use of works on the Internet is the right of reproduction"<sup>47</sup>. As a consequence of its importance, in order to get rid of divergences in the approach of member states laws concerning electronic and transient copying the directive extends the nature of reproduction right. According to Article 2 of the directive "Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of the copyrighted works. This article also covers non-visible temporary copies of a copyrighted work in the working memory of a computer and also ephemeral copies made during transmission or use of a work in an online context<sup>48</sup>.

However, according to article 5(1) there is an exception to the reproduction right, which facilitates a special defense to online service providers and other intermediaries that innocently cache, host or transmit material that would cause infringement with respect to reproduction right, that is to say, "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and (c) which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2". Design of the computers and networks render necessary the creation of incidental copies of a copyrighted work in order to perform digital processing and information transformation and these copies are not functional independently, in other words they only enable processing of information and they become extinct -unless otherwise they are not overwritten by a new data- when the computer is switched off.

The "three-step test" must be satisfied also for all exceptions of EUCD's however the directive goes further than the three-step test and introduces "economic impact" fact, which suggest that "when considering the application of the Bern Convention, the 'three-step test' in an internet-based or digital context, the court must also conscious of the fact that technology in these fields makes for faithful reproduction and rapid dissemination, accordingly, the scope for economic harm can be greater than in the analogue context. As such, when dealing with a 'new electronic environment' type of case, the court might well regard this as a fourth- step in the analysis".

## **THE RIGHT OF COMMUNICATION TO THE PUBLIC**

The EC Directive adopts a parallel approach with WCT and WPPT in respect to communication to the public. According to article 3 of the directive, with respect to copyrighted works, "Member States shall provide authors with the exclusive right to authorize or prohibit any communication 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". The comments to article 3 define "communication to the public to cover 'any' means or process other than distribution of physical copies, this includes communication by wire or wireless means which clearly encompasses a right of transmission".

All in all, for instance an act of web-posting of a copyrighted work will be considered as communication of the work to the public and from the very nature of article 2, it will grant the right of transmission and access to protected works.

## **THE RIGHT OF DISTRIBUTION**

All national legislations and international treaties and also regional treaties like the EUCD fundamentally accept the right of distribution. This exclusive right of authors has guaranteed by the article 4 of the directive that states, "Member states shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise". As mentioned above, distribution right only covers hard copies and one may argue that transmission of a material from a server site and making of a complete copy of a work in a recipient's computer constitutes distribution. However, the comments to article 4(1) of the EC Directive clarifies that "the expressions 'copies' and 'originals and copies' being subject to the distribution right, refer exclusively to fixed copies that can be put into circulation as tangible objects" thus, although use of the phrase "any form" of distribution might suggest that all online transmissions of copyrighted works would fall within the distribution right of the EC Directive, comments limit the distribution right to "fixed copies" that can be put into circulation as tangible objects .

## **COPY PROTECTION CIRCUMVENTION AND INTERFERENCE WITH RIGHTS MANAGEMENT INFORMATION**

It is a truth that technological improvements both make life harder and easier for authors and right holders. They,

make life easier from a point of view that, new technological tools offer authors and creators the opportunity to finalize their works with a perfect quality and duplicate their works in a very short time. On the other hand, this might turn out to be a disadvantage because reproduction and circulation of copyrighted materials by third people who are not the owners of the protected works was never as easy as today. Thus, technology is a double-edged sword for copyright owners, which has two sides comprising advantages and disadvantages.

However, improvements not always bring risks but also offer so- called new tools like Digital Rights Management such as access control, rights control and digital watermarks .Through this very innovative technologies copyright owners have tried to protect their copyrighted works, however it has not taken too much time to find simple ways to circumvent the technology. Therefore national laws introduce the anti-circumvention provisions, which may provide to criminalize attempts to evade such copyright protection system.

The EC Directive also provided anti-circumvention protection parallel to the WCT article 11 and the WPPT article 18 in order to implement those provisions. Briefly stated, member states are under an obligation to provide adequate legal protection against circumvention of any technical measures and prohibit conduct and the manufacture of distribution of devices that enable to defeat technological copyright protection .

The EC Directive article 7(1) provided "electronic rights management information" that is provided by right holders in order to identify the work , which puts member states under the obligation to prohibit removal or alternation of electronic rights management information or the distribution, broadcast, communication or making available to the public copies of the works.

## **CONCLUDING REMARKS**

The European Union has become more than an alliance of trade based economic community as a consequence of this close relationship of members' harmonization. As a result in order to transpose the WIPO norms in European level copyright directive, which is its main aim, was to overcome the differences undermining the functioning of the single market was introduced in 2001. Now the union embraces its future copyright code with more strengthened norms, which are in compliance with the WIPO norms. However, although the key issues were identified in the Green Paper which were in brief: applicable law, exhaustion, the scope of economic rights, moral rights, administration of rights and technical protection; only half of these key issues were taken in the copyright directive, and the most important copyrights

issues such as applicable law, administration of rights and moral rights were left unresolved . The directive was also criticized because as it is alleged by Prof. Bernt Hugenholtz, chairman of the Intellectual Property Task Force of the Legal Advisory Board of the European Commission that "The Directive is a badly drafted, compromise- ridden, ambiguous piece of legislation.

#### **NOTES:-**

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