

Information society: copyright and related rights

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This is preliminary report on the application of Directive 2001/29/EC. It is limited to assessing how Articles 5, 6 and 8 of the Directive were transposed by the Member States and how they were applied by the national courts.

Exceptions And Limitations:

Rather than relying on exceptions and limitations, national courts have often resorted to a teleological interpretation of the reproduction right in order to exempt certain uses from copyright protection. Courts also used the notion of 'implied consent' of the right holder to reach this result. Out of the 21 exceptions, those that attract most attention (and which are most likely to have the greatest impact in the digital environment) are: the mandatory exception for temporary acts of reproduction; the private copying exception; exceptions for the benefit of libraries, educational establishments, archives and museums; the exception for the purpose of reporting of current events; the limitations for quotation, criticism and review; and the parody exception.

Transient copies: Article 5(1) of the Directive, which complements the directive on electronic commerce, exempts, for example, reproductions on Internet routers, reproductions created during web browsing or copies created in Random Access Memory (RAM) of a computer, copies stored on local caches of computer systems or copies created in proxy servers. Little case law on the application of Article 5(1) of the Directive actually exists though this report does cite the Belgian *Copiepresse* case.

Private copying: With the exception of Ireland and the UK, all Member States implemented the reprography exception under and the private use exception. National provisions, however, are very diverse.

Exceptions for the benefit of libraries: The Directive allows Member States to provide an exception to the reproduction right for certain reproductions made by certain non-profit organisations. All Member States have implemented these provisions. However, national revisions vary.

Reporting of current events: Exceptions that permit the reporting of current events is an exception both to the reproduction right and to the right of communication to the public. Some Member States have adopted a wide definition of entities that constitute the 'press'.

Quotations for criticism or review: Article 5(3)(d) allows quotations "for purposes such as criticism or review". Criticism and review are therefore only examples of possible justifications for quotations. The quotation must be limited to "the extent required by the specific purpose", and in accordance with "fair practice". In the *Copiepresse v. Google* case, the Belgian Court held that quotations must be ancillary to the work incorporating them and used in order to illustrate a given opinion. Thus the *Google.News* service could not rely on the quotations exception to justify displaying the tiles and opening sentences of news articles on its website.

Parodies: Article 5(3)(k) of the Directive exempts uses "for the purposes of caricature, parody or pastiche". The implementation of the parody exception in national laws varies. There is no parody exception under UK law. By contrast, other national laws expressly provide for a parody exception (for example France, Belgium), or cover parodies under the umbrella of a transformative use (Nordic countries) or of a "free use" defence (Germany and Portugal for example). However, the scope of the German "free use" rule appears rather narrow. The regional Court of Hamburg, in its "thumbnails"

decision, held that the reproduction of thumbnails on the Internet did not constitute a "free use" of the original image.

Technological Protection Measures:

To recall, the Directive implements the international obligations pursuant to Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty. The Directive requires Member States to provide for protection against acts of circumvention of technological measures of protection and against dealings in such circumvention devices.

Connection between TPM and copyright: According to the Directive, the protection of TPM complements the protection of copyright. The Directive only requires Member States to protect TPM in respect of works or any subject matter covered by "copyright or any right related to copyright as provided by the law or the sui generis right in databases". TPM applied to protect other subject matter or works in the public domain are thus not protected under the Directive. The protection of TPM under the Directive is therefore distinct from Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access. This directive deals with the unauthorised reception of conditional access services, which may or may not contain intellectual property protected content. The report goes on to consider certain cases relating to this provision and the UK's implementation thereof.

Circumvention devices: Article 11 of the WIPO Copyright Treaty ('WCT') does not include a prohibition on circumvention devices. The Directive, by prohibiting a series of acts concerning circumvention devices, goes beyond the WCT. In the *Heise Online* case, a German Court held that offering circumvention software for download could be prohibited under the provision that covers importing of 'circumvention devices'. The court also held that linking to an offshore website, where the software was made available, constitutes an act of contributory infringement.

Effective TPM: Under Article 6(3), the definition of effective technological measures covers a broad range of technologies. A technological measure is deemed effective if it achieves the protection objective. Most Member States have transposed this definition literally, while Slovakia and Sweden have not transposed this requirement.

Relationship between technological measures and exceptions and limitations: Under the terms of the Directive, the benefit of certain exceptions should be safeguarded by voluntary measures on the part of right holders, including agreements between them and other parties concerned. In the absence of adequate voluntary measures, Article 6(4) requires Member States to ensure the benefit of the exceptions. This provision leaves a large margin of discretion to Member States in selecting *appropriate measures* to ensure the benefit of certain exceptions to users. Member States have favoured a wide range of different solutions which include: (1) no implementation at all (e.g. Austria, Czech Republic, the Netherlands who leave it up to the executive power to act whenever it becomes necessary); (2) the introduction of *mediation or arbitration proceedings* e.g. Finland, Denmark, Estonia, Greece, Hungary); (3) recourse to the courts (e.g. Belgium, Germany, Spain, Ireland); (4) recourse to specific *administrative proceedings* with decisions enforceable by means of penalty payments and fines, in some cases leading to the setting-up of *administrative bodies* (France) . These decisions can be appealed before the courts.

Injunctive Relief Against Intermediaries:

Article 8(3) of the Directive obliges Member States to ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or related rights. In a limited number of Member States (Austria, Greece, Latvia, Belgium), Article 8(3) has been implemented in national legislation. In other Member States, Article 8(3) comes under the scope of existing legislation.

