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**Report to the Council, the European Parliament and the Economic and Social
Committee on the application of Directive 2001/29/EC on the harmonisation of certain
aspects of copyright and related rights in the information society**

1.	The scope of this report.....	3
2.	Exceptions and limitations	3
2.1.	Transient copies (Article 5(1)).....	3
2.2.	Private copying (Article 5(2)(b))	4
2.3.	Exceptions for the benefit of libraries (Articles 5(2)(c) and 5(3)(n))	5
2.4.	Reporting of current events (Article 5(3)(c)).....	6
2.5.	Quotations for criticism or review (Article 5(3)(d))	6
2.6.	Parodies (Article 5(3)(k)).....	6
3.	Technological Protection Measures (TPM)	6
3.1.	Connection between TPM and copyright.....	7
3.2.	Circumvention devices.....	8
3.3.	Effective TPM.....	8
3.4.	Relationship between technological measures and exceptions and limitations	9
4.	Injunctive relief against intermediaries.....	9

1. THE SCOPE OF THIS REPORT

This preliminary report on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society¹ (the “Directive”) shall examine the application of Articles 5, 6 and 8 in the light of the development of the digital market. The report will be limited to assessing how Articles 5, 6 and 8 of the Directive were transposed by the Member States and applied by the national courts.

2. EXCEPTIONS AND LIMITATIONS

Instead of 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 rightholder to reach this result. For example, with respect to hyperlinks (an electronic connection to a file placed on the Internet), the German Supreme Court held that works are not reproduced by a hyperlink². In *NVM c.s. v Zoekallehuizen.nl*³ (interim proceedings), a Dutch court held that because of their substantially reduced size, thumbnails images on a real estate website did not infringe the reproduction right. While some courts deem thumbnails, i.e. reproductions of small images on the Internet, to infringe the exclusive right of reproduction⁴, the Erfurt regional court⁵ held that using thumbnails to establish links would not give rise to copyright liability if the work had been posted on the Internet by the rightholder or with his consent.

Out of the 21 exceptions, those that attract most attention and are likely to have most impact in the digital environment are: the mandatory exception for temporary acts of reproduction under Article 5(1), the private copying exception under Article 5(2)(b) of the Directive, exceptions for the benefit of libraries, educational establishments, archives and museums under Articles 5(2)(c) and 5(3)(n), the exception for the purpose of reporting of current events under Article 5(3)(c), the limitations for quotation, criticism and review under Article 5(3) (d) and the parody exception under Article 5(3)(k).

2.1. Transient copies (Article 5(1))

Article 5(1) of the Directive, which complements the directive on electronic commerce⁶, would exempt, for example⁷, 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. Some

¹ OJ L 167, 22.6.2001, p. 10-19.

² German Federal Supreme Court (BGH), 17 July 2003, I ZR 259/00, GRUR 2003, Vol 11, p. 958 (“Paperboy”).

³ Court Of Arnhem, 16 March 2006 (Ljn Av5236).

⁴ Bielefeld Regional Court, 8 November 2005, JurPC Web-Dok. 106/2006 and Regional Court of Hamburg, 5 September 2003, JurPC Web-Dok 146/2004.

⁵ Erfurt Regional Court, 15 March 2007, 3 O 1108/05 - Bildersuche Suchmaschine Haftung.

⁶ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁷ See the examples mentioned under Recital 33.

academics therefore argue that Article 5(1) is better understood as defining the scope of the reproduction right rather than as providing an exception to copyright⁸.

On the other hand, there is little case law on the application of Article 5(1) of the Directive. For example, in the *Copiepresse*⁹ case, a Belgian court held that the copy of a web-page stored in the memory of Google's servers and the display of a link making the cached copy accessible to the public infringed both the reproduction right and the right of making available to the public. The court did not order Google to remove the cache copies from its search engine, but only ordered that the links to the cache copies be removed from the Google search website. Moreover, the court indicated that the reproduction of articles in its cache copies were an integral part of the technical process of indexing webpages.

2.2. Private copying (Article 5(2)(b))

With the exception of Ireland and the UK¹⁰, all Member States implemented the reprography exception under Article 5(2)(a)¹¹ and the private use exception under Article 5(2)(b). National provisions are very diverse. In Italy, for example, private copying is permitted only in relation to audiovisual works or sound recordings. Finnish law stipulates that the private copy must be made from a legally obtained copy, while in Germany the source should not be manifestly illegal. Finally, "uploading" of works or sound recordings does not fall within the scope of the private copying exception¹².

The Directive does not provide for a right to private copying. In the Belgian *Test Achats* case¹³, the court stated that the private copying exception does not constitute an enforceable right. The same issue was dealt with in a ruling of the French *Cour de Cassation* in the *Mulholland Drive* case¹⁴ brought by the consumer organisation *Que choisir*. The court stated that the private copying rules must be interpreted in the light of the three-step test under Article 9(2) of the Berne Convention. The private copy exception should be set aside if it conflicts with the normal exploitation of a work. The Paris Court of Appeal¹⁵, its previous judgement having been overruled by the *Cour de Cassation*, held that private copying is not a right but a statutory exception.

⁸ IVIR Study, pp.23 and 25.

⁹ *Google v Copiepresse*, Brussels Court of First Instance (TGI), 13th February 2007.

¹⁰ In Ireland and UK, the private use exception is narrowly limited to copies of broadcasts (and of performances in Ireland) made for "time shifting" purposes.

¹¹ Some Member States have expressed concerns because "amateur choirs and bands" cannot benefit from the reprography exception under Article 5(2)(a) as it expressly excludes sheet music.

¹² *Polydor Ltd and others v Brown and others*, High Court of Justice (Ch.D.), 28 November 2005, [2005] EWHC 3191 (Ch.D.). Similarly, in *EMI Sony Universal and others v Eirecom, BT Ireland*, Dublin High Court, 8 July 2005, [2006] ECDR 5, the High Court held that peer-to-peer software allowed infringement of the record producers' making available right with.

¹³ *Test Achats v EMI Recorded Music Belgium et al.*, Brussels Court of Appeal, 9 September 2005, case 2004/AR/1649.

¹⁴ *Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Cour de Cassation, 1st civil section, 28 February 2006, case N° 549, Bull. 2006 I N° 126 p. 115 ("*Mulholland Drive*"), overruling *Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Paris Court of Appeal, 22 April 2005, available at <http://www.juriscom.net/documents/caparis20050422.pdf>. The Court of Appeal found that the application of a copy control mechanism on the DVD limited consumers' rights by preventing them from making a private copy..

¹⁵ *Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Paris Court of Appeal, 4 April 2007, Gaz. Pal. 18/07/2007 N° 199, p. 23.

2.3. Exceptions for the benefit of libraries (Articles 5(2)(c) and 5(3)(n))

Article 5(2)(c) 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 provisions which come under the scope of Article 5(2)(c). However, national provisions vary, for instance regarding the number of copies allowed for preservation or format-shifting purposes.

Unlike the private copying exception or the exception covering reprography, this exception does not apply in respect of all reproductions but is limited to "specific acts of reproduction". Article 5(2)(c) thus stands out as the only exception explicitly referring to the first limb of the "three-step test", as implemented under Article 5(5) of the Directive. Accordingly, and as recital 40 of the Directive points out, this exception should be limited to certain special cases.

The wording of this exception implies that it does not provide libraries or other beneficiaries with a blanket exception from the right of reproduction. Reproductions are only allowed in certain specific cases, such as those necessary for the preservation of works contained in the libraries' catalogues. On the other hand, this exception does not contain rules on issues such as "format-shifting" or the number of copies that can be made. In this respect, the Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation recommends that Member States adopt legislation allowing multiple copying and migration of digital cultural material by public institutions for preservation purposes¹⁶. Article 5(2)(c) must be confined to the reproduction right and does not extend to the making available over the Internet of works held by libraries¹⁷. Article 5(3)(n) provides a narrow exception to the communication to the public and the making available rights for the benefit of certain non-profit making establishments.

As scanning and indexing are arguably outside the scope of the library exception, a copyright subgroup has tackled this issue as part of the Commission's "Digital Libraries" project¹⁸. In these circumstances, publishers believe that they should be asked for authorisation *before* a book is scanned, whereas Google appears to adopt an "opt-out" approach¹⁹. In this respect, Google is currently facing litigation in France²⁰ from authors and publishers²¹.

¹⁶ Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, paragraph 9.

¹⁷ Recital 40.

¹⁸ Communication "i2010:Digital Libraries", Brussels 30.9.05 COM (2005) 465 final, followed by a recommendation on the digitisation and online accessibility of cultural material and digital preservation, OJ 236 of 31.8.06, p. 28.

¹⁹ See the "Frequently Asked Questions Regarding the legal action of the French Publishers Association (SNE) against Google" available at the SNE's web-page.

²⁰ The case was brought before the Paris Tribunal de Grande Instance on 6 June 2006 by the French publisher Groupe La Martinière and is supported by Le Syndicat national de l'édition and the French Authors Association (Société des Gens de Lettres).

²¹ The cases are still pending. The German publisher WBG (Wissenschaftliche Buchgesellschaft), supported by the German Publishers Association, has also filed a petition for preliminary injunction against Google before the Regional Court of Hamburg (Hamburger Landgericht) but the petition was dropped in June 2006 following a promise by Google to withdraw the books of the applicant from the Library programme.

2.4. Reporting of current events (Article 5(3)(c))

The exception allowing 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'. For example, in the Netherlands, "any other medium serving the same purpose" can benefit from the exception²². In *Copiepresse v. Google*²³, the Belgian Court held that the mere grouping of fragments of published articles, due to the lack of any commentary by Google, does not amount to reporting current events.

2.5. Quotations for criticism or review (Article 5(3)(d))

Article 5(3)(d) allows quotations "for purposes such as criticism or review"²⁴. 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* case²⁵, 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 titles and opening sentences of news articles on its website.

2.6. Parodies (Article 5(3)(k))

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. In 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" decision²⁶, held that the reproduction of thumbnails on the Internet did not constitute a "free use" of the original image. The court stated the reduction of an image into a smaller thumbnail was an entirely automatic process that did not reflect any human creativity. In addition, the reduction of an existing image to a "thumbnail" was not undertaken to create a new work but to create a smaller version of an image for the sole purpose of indexing and creating a link to the original.

3. TECHNOLOGICAL PROTECTION MEASURES (TPM)

Article 6 of 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 (Article 6(1)) and against dealings in such circumvention devices (Article 6(2)).

²² See section 15 of the Dutch Copyright Act.

²³ *Google v Copiepresse*, Brussels Court of First Instance (TGI), 13th February 2007.

²⁴ In the French version: "par exemple, à des fins de critique ou de revue".

²⁵ *Google v Copiepresse*, Brussels Court of First Instance (TGI), 13th February 2007.

²⁶ Regional Court of Hamburg, 5 September 2003, JurPC Web-Dok 146/2004.

3.1. 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"²⁷ (Article 6(3)). 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 access²⁸. This directive deals with the unauthorised reception of conditional access services, which may or may not contain intellectual property protected content.

Article 6(3) requires that TPM are applied to restrict acts which are not authorised by the rightholders of the protected subject matter. This is in line with Article 11 of the WIPO Copyright Treaty which requires that TPM be used by rightholders "in connection with their rights" under the WIPO Copyright Treaty or the Berne Convention. The wording "acts not authorised by the rightholder" in Article 6(3) aims to link TPM to the exercise of the exclusive rights mentioned in this paragraph. Therefore, the Directive aims to establish a connection between the technological measure and the exercise of copyright. This implies that Article 6(3) only protects technological measures that restrict acts which come within the scope of the exclusive rights.

Reliance on the mention of "access control" under Article 6 (3) 2nd sentence has fuelled arguments to the effect that the Directive would systematically protect access control measures, thus implying that the exclusive rights provided under the Directive should cover access²⁹. However, the gist of section 6 (3) lies in the first sentence, which links the definition of TPM to the rightholders' normative power to authorise. A TPM must first comply with this definition, and then also be "effective" to benefit from protection. Moreover, it is clear that the mention of "access control" is no more than an example to define an effective TPM. It cannot be relied upon to widen the scope of the legal definition of TPM under Article 6(3) beyond what is in the rightholders' normative power to prohibit.

The UK implementation of the Directive has thus limited protection to TPM designed in the normal course of operation to restrict acts not authorised by the rightholder and restricted by copyright³⁰. Accordingly, to decide whether a TPM qualifies for protection, "it is necessary to determine whether it is designed in the normal course of its operation to prevent unauthorised use of [a] copyright work in a way which would amount to an infringement of copyright"³¹.

In addition, where TPM are used to control after-markets in spare parts of hardware goods, such as printers³² or remote controls for garage doors³³, as in some US cases, protection does

²⁷ Some Member States have extended protection to TPM applied to protect certain neighbouring rights, such as rights in non-copyrightable photographs (Austria and Germany), typographical layouts (UK and Ireland) or transmission by cable (Ireland).

²⁸ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, *OJ L 320, 28.11.1998, p. 54–57*.

²⁹ See IVIR Study, p. 76.

³⁰ UK Copyright Designs and Patent Act 1998, Section 296 ZF, subsections 1 and 3(a).

³¹ *Sony Computer Entertainment v Ball*, High Court of Justice (Ch.D.), June 24 and July 19 2004, [2005] FSR 9 at pp.175-176.

³² In *Lexmark v Static Control Components*, U.S. Court of Appeal for the 6th circuit, 26 October 2004, 387 F.3d 522.

not apply under the Directive. Similarly, TPM used for the sole purpose of segmenting geographical markets, for instance for "regional coding", are only protected insofar as they prevent infringement of the reproduction right, of the making available right or of the distribution right³⁴. Use by an end user of a work purchased from another country does not infringe the distribution right, since the user is not distributing the work to the public in tangible form. In *Sony Computer Entertainment v Ball*³⁵, the Court held that, even if the TPM enabled Sony to separate its worldwide market in three regions and prevent parallel imports³⁶, the TPM also prevented copying of protected works. It was therefore aimed at preventing an act which would amount to an infringement of copyright.

3.2. 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*³⁷ 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.

3.3. 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. In criminal proceedings brought against the suppliers of circumvention software distributed on the Internet, the Helsinki District Court held that the CSS system used on DVDs was ineffective and did not achieve the protection objective³⁸ because circumvention tools were widely available on the Internet (the TPM in question was cracked in 1999 by a Norwegian hacker). The question of whether an available circumvention tool must also be widely used to render the technological measure ineffective remains open, as the Finnish court did not consider whether the available circumvention tool was in fact widely used³⁹.

³³ In *Chamberlain Group v Skylink Techs*, U.S. Court of Appeal for the 6th circuit, 31 August 2004, 381 F.3d 522.

³⁴ See the Australian case of *Kabushiki Kaisha Sony Computer Entertainment v Stevens*, Federal Court of Australia, 26 July 2002, [2002] FCA 906.

³⁵ *Sony Computer Entertainment v Ball*, High Court of Justice (Ch.D.), 24 June and 19 July 2004, [2005] FSR 9. The case concerns both computer software and other copyright works.

³⁶ Sony divides the world into three parts: Japan, the US and PAL countries (Europe and Australia)

³⁷ Munich Regional Court, I, 7 March 2005, 21 O 3220/05, upheld Munich Court of Appeal, 28 July 2005, ZUM 2005/12, p. 896.

³⁸ Helsinki District Court, Case R 07/1004, 25 May 2007, unofficial English translation available at http://www.turre.com/css_helsinki_district_court.pdf.

³⁹ In an advisory opinion of 29 August 2007, the Finnish Copyright Council advised that whether a TPM is effective depends not only on whether a "crack" is possible in the first place but also on whether it is in fact a frequent event. The Council did not decide on this point of fact.

3.4. Relationship between technological measures and exceptions and limitations

Under the Directive, the prohibition on circumvention of TPM suffers no exceptions⁴⁰. Instead, exceptions are considered under Article 6(4). Under Article 6(4), the benefit of certain exceptions should be safeguarded by voluntary measures on the part of rightholders, 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.

The *voluntary measures* considered by rightholders include the supply of a non-protected version of the work or the supply of a decryption key. For example, the German national library negotiated an agreement with the German Federation of the Phonographic Industry and the German Booksellers and Publishers Association that allows to circumvention of TPM on CDs, CD-ROMs, and e-books⁴¹.

The provision of Article 6(4) 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.

4. INJUNCTIVE RELIEF AGAINST INTERMEDIARIES

Article 8(3) of the Directive obliges Member States to ensure that rightholders 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.

This provision applies irrespective of whether the relevant acts come under the exception for acts of temporary copying under Article 5(1) and irrespective of whether they are covered by exceptions from liability under the relevant provisions of the Directive 2000/31/EC on electronic commerce. For Article 8(3) to apply, it suffices that the existence of copyright infringement by a third party is established.

- On 29 June 2007, the President of the Brussels' Tribunal of First Instance ordered SA Scarlet (formerly Tiscali)⁴² to install filtering software to exclude infringing peer-to-peer files.

⁴⁰ Although, arguably, under Article 6(3) that TPM can be circumvented for acts authorised by the rightholder.

⁴¹ http://www.sub.uni-goettingen.de/frankfurtgroup/drms/vereinbarung_engl_jan2005.rtf

⁴² *SABAM v s.a. Scarlet (anciennement Tiscali)*, Brussels Court of First Instance (TGI), 29 June 2007, N° 04/8975/A, available at <http://www.juriscom.net/documents/tpibruxelles20070629.pdf>.

- On 10 February 2006, the Danish Supreme Court⁴³ ordered an Internet Service Provider to cut off the Internet connections of customers who infringe copyright. As a result of the ruling, ISPs are required to act instantly upon notification that one of their customers is using their internet account to infringe copyright.
- On 25 October 2006, the Copenhagen City Court ordered the Internet service provider Tele2 to block its subscribers' access to the allegedly illegal Russian music service AllofMP3.com in a lawsuit initiated by IFPI Denmark on behalf of the Danish recording industry⁴⁴. The online Russian music store was accused of selling music files far below the market price without being granted the necessary licenses from the rightholders.

⁴³ TDC Totallosinger A/S v IFPI Danmark, KODA, Nordic Copyright Bureau, Dansk Musiker Forbund, Dansk Artist Forbund, Danish Supreme Court, 10 February 2006, case N°. 49/2005.

⁴⁴ *IFPI Denmark v Tele2*, City Court of Copenhagen, 25 October 2006, Case N°. F1-15124/2006.