



**STUDY ON THE IMPLEMENTATION AND EFFECT IN
MEMBER STATES' LAWS OF DIRECTIVE 2001/29/EC ON THE
HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND
RELATED RIGHTS IN THE INFORMATION SOCIETY**

Executive Summary of final report

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Executive Summary

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society entered into force on 22 June 2001.¹ The objectives of the Directive were twofold: (1) to adapt legislation on copyright and related rights to reflect technological developments, and (2) to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996. This study, commissioned by the European Commission, examines the application of the Directive in the light of the development of the digital market. Its purpose is to consider how Member States have implemented the Directive into national law and to assist the Commission in evaluating whether the Directive, as currently formulated, remains the appropriate response to the continuing challenges faced by the stakeholders concerned, such as rights holders, commercial users, consumers, educational and scientific users. The impact of the Directive on the development of digital (chiefly online) business models, therefore, is a focal point of this study.

The final report is divided in two parts. Part I, written by the Institute for Information Law of the University of Amsterdam, provides an early assessment of the impact of Directive 2001/29/EC on the development of online business models. Since the Directive has been transposed, in major parts of the European Union, only very recently this assessment can be tentative at best. Part II, written by the Queen Mary Intellectual Property Research Centre of the University of London, offers a comprehensive inventory of the actual implementation of the Directive by the twenty-five Member States of the European Union, as well as a summary of remaining disparities and specific problems that have a detrimental and disharmonising effect throughout the Internal Market.

The aim of the Information Society Directive was to foster growth and innovation of digital content services in the European Union. Part I of this study therefore assesses the impact of the Directive on the development of online business models. This was not an easy task, for a variety of reasons. In the first place, the implementation process has only recently been completed in important Member States, such as Spain and France. Other Member States have only between one and four years of experience with the norms of the Directive. The short time frame between implementation and assessment makes it difficult, if not impossible, to measure the actual impact, if any, of the norms of the Directive on the actual business decisions of market players.

The authors of this study have therefore resorted to a methodology that might predict, rather than actually describe the impact of the Directive. Based on the principal goals of the Directive, as reflected in its legal history and recitals, we have defined a benchmark test consisting of five criteria that is likely to influence market behaviour by digital content providers and users. These five benchmark criteria directly relate to the quality of the legislative framework resulting from the Directive and correspond to the goals that the European legislator has set himself to achieve: (1) consistency with international norms, (2) actual level of harmonisation achieved, (3) legal certainty, (4) sustainability and (5) balance.

Following a general history of the Directive and an overview of current online business models in Chapter one, Chapter two examines the effect of the Directive on the

¹ OJ 2001 L 167 of 22.6.2001, p. 10.

provision of services from the perspective of the rights and limitations on copyright. Chapter three deals with the provisions on the protection of technological protection measures (TPMs) that were newly introduced in national legislation as a result of the implementation of the Directive. Chapter four is devoted to one of the thorniest issues of the entire Information Society Directive, namely the relationship between the application of TPMs and the exercise of limitations on copyright. Finally, Chapter five describes developing contractual practices, and examines the interrelationship between contracts and the limitations on copyright.

Conclusions

Based on the five benchmarks, our assessment of the Directive can be summarised as follows:

1. Consistency with international norms

The Directive offers right holders in the European Union a higher level of protection than is required under the international treaties that bind the Member States. The reproduction right is wider in its definition than it internationally is for authors (in the Berne Convention) and holders of related rights (WPPT, Rome Convention, TRIPS). The making available right conforms to WCT and WPPT norms, albeit that those instruments do not recognize a making available right for broadcasting organisations and producers of first fixations of films.

With regard to limitations, the Directive complies with the three-step test that is the internationally agreed 'limitations' limitation', but goes further than the international conventions by identifying a large number of specific (categories) of exceptions, many of which cannot be found in the international instruments.

The Directive's rules on TPMs, probably the *pièce de résistance* of the entire Directive, deviate from the WIPO Treaties in two important respects. The nexus with copyright infringement that is essential to the WIPO regime has been mostly lost in the course of the adoption of article 6. This gradual drifting away from the copyright paradigm is reflected in the broad scope of the Directive's definition of 'effective technological measure', which includes access control mechanisms. Not only does the European TPM regime go much further than is required by the WIPO Treaties, it is also out of step with corresponding laws of its main trading partners. The 'facilitation' obligation of article 6(4) is a unique, albeit laudable attempt to reconcile the interests of right owners and with those of certain potentially disenfranchised user groups.

2. Actual harmonisation

The standards set by the Directive regarding the rights of reproduction and communication to the public – both essential in the digital environment – have led to a satisfactory level of actual harmonisation of the laws in the Member States. Distinct national concepts and categorizations have remained, but this is to be expected as literal transposition is not required.

By contrast, the provisions on limitations and exceptions have not led to a similar result. Here, actual harmonisation has hardly been achieved, for a number of reasons. In the first place, the provisions of the Directive are mostly phrased in broad and categorical terms, leaving wide discretion to the Member States. Even worse, from a perspective of approximation, is the Directive's failure to come up with a set of mandatory limitations. Member States are left with near-total freedom to pick and choose from the Directive list of optional limitations those that they see fit. The result is a mosaic of exceptions and limitations that vary from Member State to Member State,

which might seriously impede the establishment of cross-border online content services.

The Directive's rules on TPMs have had a modest harmonizing effect at best. Article 6(1) instructs Member States to offer 'adequate legal protection', without indicating the nature of such protection, thereby leaving States a broad spectrum of legislative solutions, varying from civil law to criminal law. Other key concepts in article 6 are highly ambiguous or have remained unarticulated, which has led, not surprisingly, to large variations in implementation by the Member States. For instance, while some Member States have maintained a certain nexus to copyright, as was originally foreseen by the European Commission, others are more faithful to the final article.

Even worse, the particularly opaque rules of article 6(4), which offer the Member States virtually no legislative guidance, have inspired the Member States to establish at the national level an array of different solutions, procedures and even agencies.

3. Legal certainty

The broad definitions of restricted acts given by articles 2 and 3 of the Directive appear to have increased legal certainty for players in the online content industry. The Directive has left little doubt that, in principle, authorization must be sought for any type of digital use of copyright works or other subject matter, including the 'file sharing' over peer-to-peer networks. The right of communication to the public that now includes an exclusive right of 'making available', serves as a powerful enforcement tool in the hands of right holders, both against infringing 'file sharers' and, more importantly, against ISP's.

On the other hand, the combination of a broadly defined reproduction right and an equally broad right of communication to the public causes uncertainty about their interplay, especially when article 5(1) regarding incidental and transient copying is factored in. The overlap of both economic rights gives rise to confusion in the market place, and may result in unjust or inefficient licensing practices. Consultations with stakeholders have revealed that this overlap is not merely an academic problem, but that it has actually led to undue and unjustifiable 'double payment' to different right holders for unitary acts of exploitation, resulting in market distortions.

Article 5(1) is another source of uncertainty. In particular, the article's requirement that a transient copy be without "independent economic significance" makes the line between infringing and non-infringing activities unpredictable.

As to limitations, the lack of harmonised rules directly affects legal certainty of market players offering online services across national borders. A serious consequence of the prevailing uncertainty regarding the scope of limitations in the digital networked environment has been to force users to negotiate the conditions of use of protected works with every single rights holder, for every territory involved. This clearly raises transaction costs.

Regarding TPMs, the vague wording of articles 6(1) and 6(2) of the Directive again leave much to be desired in terms of legal certainty. The wording of Article 6(4) is particularly convoluted and obscure. The provision fails to instruct Member States what 'appropriate measures' should be taken to protect disenfranchised users, or how long they should wait before taking action. Moreover, Member States are left with complete discretion as to the procedures leading up to such measures.

4. Sustainability

The harmonised right of communication to the public, one of the centrepieces of the Directive, has been purposefully defined in abstract technology-neutral terms, making it particularly suitable for future application in an environment of rapid and dynamic technological change. By focussing on the technology of actual copying, the harmonised right of reproduction, by contrast, is much less sustainable. This is certainly the case for

article 5(1), the terms of which clearly appear to have been written with a certain state of technology in mind.

The limitations mentioned in article 5(2) and (3) are mostly phrased in technology-neutral terms. Notable exceptions are the provision on reprography, and the private copying regime that establishes a link to the ‘application or non-application’ of TPMs.² More importantly, the sustainability of the list of limitations is undermined by its exhaustive character. A fixed and finite list of limitations cannot take account of future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework. While an exhaustive list offers more legal security to established rights holders and content providers, it may also hinder the emergence of new services and business models.

The sustainability of the Directive’s TPM regime is also highly questionable. In particular, it raises concerns regarding its compatibility with the two other existing legal regimes that prohibit the business of trafficking in illicit devices: those of the Computer Programs Directive and the Conditional Access Directive. Apart from its opaque wording, the ‘facilitation’ rule of article 6(4) lacks sustainability in that it is not formulated in technology-neutral terms. The rule immediately collapses as soon as content is delivered online and on-demand on agreed contractual terms.

5. Balance

The broad scope of the right of reproduction, which according to article 2 encompasses direct or indirect, temporary or permanent reproduction, by any means or in any form, in whole or in part, gives right holders near-absolute control over acts which in the off-line world were never the right holder’s prerogative. For users and end-users (consumers) the impact of this extensive right seems to go further than the limitation of article 5(1) accommodates.

While the substance and often broad wording of the limitations contained in the Directive may initially suggest a certain balance between the interests of rights holders and those of users, this superficial balance may be seriously undermined not only by the optional character of all but one limitations, leaving Member States discretion to arrive at ‘imbalanced’ legislative solutions, but also by the fact that they are not imperative and thus may be overridden by contract. This is exacerbated by the Directive’s failure to directly correlate the legal protection of TPMs with acts of copyright infringement. Thus the Directive fails to recognise that certain acts of circumvention may be done for entirely legitimate purposes. Moreover, it may serve as an incentive for the deployment of DRM for reasons well beyond the rationales underlying copyright protection, e.g. to protect de facto technical standards. Unfortunately, despite all the good intentions underlying article 6(4), another source of potential imbalance lies in its seemingly haphazard list of sheltered limitations.

Recommendations

Our assessment of the Directive thus leads to the following recommendations to the Community legislature.

1. Economic rights

The relationship between the economic rights conferred on rights owners should be clarified, giving particular attention to the question of the rights’ overlap. Given that the right of communication to the public (including making available) was especially tailored

² Note that the issue of private copying is outside the terms of reference of the present study.

to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of the right which has been advocated by scholars for several years.

Furthermore, the EC legislator should consider revising article 5(1). One way to achieve this is by reshaping the entire regulation on temporary reproductions, including both articles 2 and 5(1) of the Directive, by introducing a purpose-oriented definition of the concept of reproduction. This solution would eliminate the need for an additional limitation such as the current article 5(1). Alternatively, one might preserve the current model of a broadly defined right subject to a broad limitation. In the latter case, however, certain terms would require clarification.

The “no separate economic significance” requirement could be aligned with the “lawful use” criterion of article 5(1)(b). If a specific use of a work is lawful, technical reproductions necessary to enable such use should be deemed as not having independent economic significance (hence copyright relevance). The meaning of “lawful use” would also merit clarification.

2. Limitations

To solve the lack of harmonisation with respect to limitations on copyright and related rights, the EC legislator might follow a two-tiered approach, which would take into account the principles of subsidiarity and proportionality. First, the current ‘optional’ list would need to be replaced by a shorter enumeration of mandatory limitations, reflecting fundamental freedoms, internal market considerations and the rights of European consumers. The second tier would be the adoption of an open norm leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms would not have a noticeable impact on the Internal Market. To this end, the European legislator could consider clarifying that national lawmakers and, where relevant, national courts apply the three-step test in a flexible and forward-looking manner.

3. Technological protection measures

To remedy the lack of legal certainty and harmonisation with respect to the legal protection of TPMs, and to align the European provisions with the EU’s international obligations under the WIPO Treaties, the EC legislator should consider clarifying the legal framework in four respects. First, the prohibition on acts of circumvention should only find application in circumstances where the act of circumvention results in copyright infringement. Second, the relationship between articles 6(1) and 6(2) should be clarified. The prohibition on commercial dealings in devices and services should only apply if the result of such commercial dealings directly leads to acts of circumvention prohibited under article 6(1). Third, and as a corollary to the preceding two recommendations, it should be made clear that the protection provided for under articles 6(1) and 6(2) constitutes an ancillary form of protection rather than an exclusive right of the rights owner. Finally, the legal or physical person who applies the TPM on a work with the consent of the rights owner, i.e. usually the content provider or distributor, should be legally entitled to invoke protection against circumvention.

As to article 6(4), although the principle underlying this provision is certainly worth maintaining, it is in urgent need of simplification and clarification. A revised provision should not distinguish between the types of TPMs for which accommodation must be provided, nor between interactive or non-interactive modes of making a work available. A revised provision should furthermore identify limitations for the exercise of which accommodation must be provided on solid grounds and in an objective manner. A

rational approach would be to give protected status to those limitations that, as our study advises, deserve mandatory status. In other words, limitations that reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, those that have a noticeable impact on the Internal Market or concern the rights of European consumers deserve accommodation, while other “minor reservations” do not.

The determination of the conditions of application and its practical implementation might be entrusted to a European monitoring or observatory body. Further research should be carried out in order to define the possible contours of such a European body, and to examine whether such a body should co-exist with, or rather replace, existing national bodies.

In line with article 95d of the German Copyright Act, a revised article 6 should oblige content providers to disclose the scope and characteristics of the DRM protection they use, so as to properly inform consumers.

4. Contracts

Private parties should be prevented from unilaterally derogating from the EC legislature’s intent, as reflected in statutory rights and limitations. To counteract emerging unfair online practices, the legislature could consider declaring null and void any unilateral contractual clause deviating from those limitations that, as our study advises, deserve mandatory status. Moreover, measures should be taken to promote the development and acceptances of codes of best practices in the area of online copyright contracts, which would warrant a basic set of user freedoms. While these two options would hold back the proliferation of restrictive online standard form contracts, it would nevertheless preserve the parties’ freedom of contract.

In sum, it is fair to conclude that the Directive has at best only partly achieved its main goal of promoting growth and innovation in online content services. As our benchmark test has revealed, the Directive deserves particularly low marks for its (lack of) harmonising effect and its (lack of) legal certainty. While the harmonised right of communication to the public is a model of technology-neutral regulation, the Directive’s convoluted rules on TPM’s have little more to offer to the Member States and its market players than confusion, legal uncertainty and disharmonisation.