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### **The European Council Directive on the harmonisation of certain aspects of Copyright and Related Rights in the Information Society: a brief overview**

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#### ***Abstract:***

*The European Council Directive on the harmonisation of certain aspects of Copyright and Related Rights in the Information Society has been called the most controversial Directive in the history of the European Union. Progress leading up to the adoption of this Directive in April 2001 is given, including the lobbying efforts of library and other concerned consumer groups. Brief details of its most controversial Articles are outlined.*

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#### **Background**

As it states in this Directive, the European Council needed to create a general and flexible legal framework in order to foster the development of the information society in Europe. This requires, among other things, the existence of an internal market for new products and services. Copyright plays an important part in this process in protecting existing works and in stimulating the creation and development of new works. Another of the aims of the EU in introducing this Directive is to continue the programme of harmonisation of all copyright and related rights legislation across the Member States to ensure that competition in the internal market is not distorted.

Over the last ten years as part of this programme of harmonisation, Member States have had to incorporate changes to their copyright laws on computer programs, extending the term of copyright protection, rental and lending rights, satellite and broadcasting rights, and a new sui generis right protecting databases. This latest Directive is intended to continue this programme by harmonising the definition of the reproduction right and the exceptions and limitations to copyright which allow non-infringing uses.

The Directive also serves to implement a number of international obligations following the adoption of the WIPO treaties of 1996 including the communication to the public right and a legal protection against unlawful circumvention of technical protection devices and rights management information.

### **What Parliament said in 1997**

The Copyright Directive has enhanced the position of the rights holders by granting them more rights and protection while at the same time narrowing down the rights of consumers.

*“...the European model of the information society must be driven by democratic, social, cultural and educational concerns and not dominated by economic and technological interest”<sup>1</sup>.*

As can be seen from this statement, the European Parliament did say in 1997 that they recognised the importance of social, cultural democratic and education concerns and that the Information Society must not be dominated by economic and technological interests. However, they appeared to have forgotten what they said. It is very clear, if one studies the text of the Directive, that their priorities lie in the protection of economic interests. Few dispute the fact that such protection is essential. High protection is needed in order to encourage the creation of new products and services –**but** - the pursuit of ideals of freedom of expression; the dissemination of information, ideas and culture are equally essential and should not be disregarded or ignored in the pursuit of commercial interests. There has to be an equitable balance. It was up to librarians and other interested consumer groups to uphold these ideals in the consultation and lobbying process.

### **Directive Progress**

The first version of the text of the Directive was issued in December 1997. It went out for consultation in the following year and over 300 amendments were suggested. The user community did not approve of the original version. It was very unbalanced being heavily weighted towards copyright holders and would have made illegal many existing acts of copying and use – acts which had up till then been considered harmless to copyright holders and which were necessary to maintain the public interest balance.

Despite a strong lobbying campaign, in February 1999, the European Parliament chose to ignore the voice of the consumer and made the text even more restrictive. Our cause was not helped by the all singing, all dancing lobby organised by the music industry on the eve of the vote. Its priority was to tighten up the Internet to prevent the unauthorised copying and sharing of music files. The fact that such tightening up also threatened to put a stranglehold on existing research copying as well, was completely overlooked. The next version of the text issued by the European Commission in May 1999 was therefore even worse than the original.

During the rest of 1999 and the most part of 2000, the text was considered in detail by a working group of Government representatives and a Common Position was agreed. This text, although not ideal, demonstrated that this working group was at least trying to achieve a balance of interests. The text was

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<sup>1</sup> Preamble A to the Parliament's Resolution on the information society, culture and education (Morgan Report A4-0325/96) of 13 March 1997

then considered again by the Legal Affairs Committee of the European Parliament, debated in Parliament and finally adopted in April this year.

### **The rise of the European consumer groups**

Having taken nearly four years to be agreed, this Directive is considered to be the most controversial Directive in the history of the European Union. It is arguably the most lobbied. From the beginning, it was clear that there would be conflict between rights holder representatives and user groups. From the user point of view it was essential to ensure that a reasonable balance was maintained between the need to establish as strong a regime of protection as possible for rights holders in the creative industries, and the wider public interest. Although understandable, rights holders wanted much stronger protection which threatened to upset the balance of copyright. Librarians were concerned that too much control in the hands of those whose interests were purely commercial threatened research and education and access to information and knowledge. The consumer lobby, therefore, had to fight to ensure that the opportunities of cyberspace were available for all.

The European Fair Practices in Copyright Campaign was formed. This was a strategic alliance of library, education, consumer, and disability groups. The aim of EFPICC was to make sure that there were effective exceptions to cover research, education and private copying.

From hitting rock bottom in May 1999, EFPICC lobbied hard for a year with the result that the Common Position text at last appeared to reflect our interests. We could not rest at this stage, though, because the detail of the exceptions was under consideration once more when the Common Position text was debated in the European Parliament. Some rights holder interest groups at the last minute attempted to curtail the exception for libraries by trying to limit any copying by libraries and other publicly accessible institutions to archiving and conservation purposes, added to which they wanted us to pay fair compensation for the privilege! Europe's libraries, spearheaded by EBLIDA, mounted a strong lobby to counter these harmful amendments and fortunately this time the Parliament saw sense and chose not to adopt them.

### **Controversial articles**

Included in the new rights is the Communication to the Public Right which was originally adopted into the WIPO Treaties. *“Member States shall provide authors with the exclusive right to authorise 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.”* A similar right is given to performers phonogram and film producers and broadcasters. This is the right which governs the making available of works on the Internet.

The Directive also contains a precise definition of the Reproduction right (this was not adopted by WIPO) and which includes all temporary copying such as caching. This right is limited in the list of exceptions provided the reproduction has no independent economic significance. This is the only mandatory exception. All the other exceptions and limitations given in the Directive are optional. Member States can pick and choose which ones they want to implement. For librarians and the other consumer lobbyists, this seemed strange that a Directive which aimed to harmonise the exceptions could result in Member States doing their own thing.

### **Library exception**

Member States are permitted to provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this is limited to certain special cases covered by the reproduction right only. So it is

likely that certain libraries will be allowed to continue copying from printed material for certain purposes and this could extend to copying works into digital format but as there is no exception for libraries from the Communication to the Public Right, any on-line delivery of such material would have to be authorised, probably under a licensing scheme. However, for research or private study purposes, on dedicated terminals on the spot in the library, material not subject to any licensing or purchase conditions may be communicated to the public. Thus, if our Government so chooses, we may be able to copy an existing print work and allow our users to access it in the library but we will not be allowed to network it without authorisation.

### **Technical protection systems**

The most controversial article concerns the protection for technical devices against unlawful circumvention. This again is another of the WIPO obligations. If a technical protection device is used to prevent access or use then this may not be circumvented for unlawful purposes. The problem is that lawful uses include nearly all exceptions. This would effectively nullify any exceptions, as permission (and probably payment) would have to be obtained to access and use the protected work. Users were justifiably alarmed at this. The way this has been resolved is a statement saying that governments may intervene if there is no satisfactory agreement reached between rights holders and consumers to ensure that the exception can be carried out. However, there is a sting in the tail in that if there is a contract to use the work then governments are prevented from intervening. To put it mildly, this is likely to cause a few problems!

### **Conclusion**

The Directive will directly affect the copyright laws of all 15 of the European Community Member States and the ten candidate countries from Central and Eastern Europe. These nations will be obliged to change their existing laws. However, it is extremely unlikely that all these laws will be the same as the exceptions and limitations, apart from the one mandatory one, are all optional. Each nation is free to choose which ones they wish to implement from the list according to their priorities. They are unable to add to the list.

We will have to wait and see how each Member State interprets the Directive and implements the provisions. Member States have 18 months in which to implement the Directive into their legislation. This was reduced from 24 months in line with another important and related Directive on E-commerce. European librarians will be trying to ensure that balance of interests continues to be maintained.

Our overall verdict is that it could have been much much worse. We believe we can congratulate ourselves on a successful lobbying campaign. European librarians and other user groups have proved that they have a legitimate stake in the copyright debate by playing a major part in ensuring that Europe will have an inclusive rather than an exclusive Information Society in this 21<sup>st</sup> century.