

Fine-tuning European copyright law to strike a balance between the rights of owners and users

Marcella Favale*

 [Keywords to Follow]

Directive 2001/29 (the EU Copyright Directive) aims to repress copyright infringement in the digital environment through the harmonisation of copyright discipline and the safeguard of technological protection measures (TPMs). It claims that this harmonisation is instrumental to the protection of the exclusive rights of the owners while granting protection to the fundamental rights of the public, such as freedom of information and the circulation of culture. The contribution of this paper is twofold. First, by analysing the Directive's national implementation in the 27 Member States of the European Union, it assesses the extent to which the Directive attained the intended harmonisation and whether this is effective to achieve the balance of rights. Secondly, after the identification of areas of dysfunction, the paper proposes an alternative strategy to reach a harmonisation able to strike a better balance between the rights of owners and users.

Introduction

Directive 2001/29 (hereinafter, the Copyright Directive or the EUCD) claims that its main goal is the harmonisation of copyright protection among Member States to enhance the internal market by allowing an easier circulation of copyright works.¹ Key to this harmonisation strategy is a strong protection of technological protection measures (TPMs), which are the instruments to enforce copyright in the digital environment,² whilst taking into account copyright exceptions to promote “learning and culture”.³ Both the rights of owners and users, therefore, according to the claims of the Directive, should be safeguarded. However, the literature suggests that the EUCD is dysfunctional in achieving a balanced protection of copyright players, mainly because of the unrestrained protection of TPMs and the weak protection of copyright exceptions, especially against TPMs.⁴

* Research Fellow at the University of Nottingham (llxmf3@nottingham.ac.uk) and the University of Sheffield (M.Favale@shef.ac.uk). The author would like to thank Professor Paul Torremans for useful comments and inputs to this article.

¹ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

² Directive 2001/29 recital 47.

³ Directive 2001/29 recital 14.

⁴ S. Dusollier, “Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright” (1999) 21(6) E.I.P.R. 285; S. Dusollier, “Incidences et Réalité d’un Droit d’Access” in *Cahier du CRID no.18* (Bruylant, 2000); S. Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique* (Larcier, 2005); L. Guibault, “The Nature And Scope Of Limitations And Exceptions to Copyright And

This paper shows that the dysfunctions of the EUCD voiced in the literature have important consequences for the implementation of the directive at the national level. A comparative analysis of the implementation of the protection of TPMs and copyright exceptions in the EU Member States demonstrates that: (i) the implementation of the EUCD at the national level tends to maintain the strong protection of TPMs and the ineffective protection of copyright exceptions, thus missing the target of balancing the interests of owners and users; but also that (ii) there exist important differences among countries in the treatment of owners and users of copyright works due to the open-ended or sometimes arbitrary prescriptions of the directive. Thus, not only the EUCD failed to create a balanced protection between copyright owners and users, it also did not achieve its objective of harmonisation.

First, the circumvention of TPM is illegal in all Member States but the national legislators specified very different sanctions against the circumvention of TPMs ranging from jail sentences to damage compensation. This raises problems of credibility about severe personal sanctions inflicted against the perpetration of economic damages. Secondly, almost all copyright exceptions to the exclusive rights of the owner are optional for Member States. Even the enforcement of most important copyright exceptions (grounded on fundamental freedoms) is left to “voluntary measures” to be taken by rightholders. Copyright users are not allowed to circumvent TPMs even when these do not respect copyright exceptions, and rightholders are not obliged to design TPMs that automatically respect copyright exceptions. Finally, TPMs have to comply with a separate list of copyright exceptions,⁵ selected from the exceptions to the exclusive rights: not with *all* of them. This list is mandatory to implement by Member States, but neither the EUCD nor its explanatory memorandum provides the criteria of this selection. The existence of a separate list of exceptions for TPMs is not without consequences: it can convey the idea that TPMs are not mere means to protect the exclusive rights but they new• right to the owner.⁶ This new right, by some defined as “access right”—the right to control

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Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their Adaptation To The Digital Environment”, *E-Copyright Bulletin* (October–December 2003); M. Hart, “The Proposed Directive For Copyright In The Information Society: Nice Rights, Shame About The Exceptions” (1998) 20(5) *E.I.P.R.* 169; P.B. Hugenholtz, “Fierce Creatures Copyright Exceptions: Towards Extinction?” at the IFLA/IMPRIMATUR Conference, October 30–31, 1997, Amsterdam, The Netherlands; K.J. Koelman, “A Hard Nut to Crack: the Protection of Technological Measures” (2000) 22(6) *E.I.P.R.* 272; IViR Study On The Implementation and Effect in Member States’ Laws of Directive 2001/29, Pt 1.

⁵Directive 2001/29 Art.6.4.

⁶On the right of access, see generally: S. Dusollier, “Incidences et Réalité d’un Droit d’Access” in *Cahier du CRID no.18* (Bruylant, 2000); C. Geiger, “Copyright and Free Access to Information: for a Fair Balance of Interests in a Globalized World” (2006) 28(7) *E.I.P.R.* 366; J.C. Ginsburg, “Essay: From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law” (2003) *J. Copyright Soc. USA* 50; W. Grosheide, “Copyright Law from a User’s Perspective: Access Rights for Users” (2001) 23(7) *E.I.P.R.* 321; T. Heide, “Copyright In The EU And U.S.: What ‘Access-Right’?” (2001) *J. Copyright Soc. USA* 48; T. Hoeren, “Access Right as a Postmodern Symbol of Copyright Deconstruction”, *ALAI US* 2001, New York, June 13–17, 2001, available at <http://www.alai-usa.org> [Accessed August 14, 2008]; A. Strowel and F. Tulkens, “Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation and Access” in J. Griffith and U. Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005); G. Westkamp, “Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights In European Copyright Law” (2004) 36(5) *Geo. Wash. Int’l L. Rev* 1057.

access to copyright works—represents an undue power granted to copyright owners by the Directive, which tips the balance of EU copyright protection in favour of the owner.⁷

After identifying the above areas of dysfunction, this paper derives some tentative solutions from the comparative analysis of the implementation of the EUCD at the national level. It suggests that a diversified protection of fundamental and non-fundamental exceptions could contribute to the harmonisation objective of the EUCD and would safeguard the fundamental rights of copyright users, thus bringing the copyright scale to a more even balance. A possible strategy to achieve this goal would entail a strong protection of those copyright exceptions already recognised as fundamental by most Member States. The details of this strategy are illustrated in the conclusions of the paper.

The EUCD 2001 and the harmonisation of European copyright law

In January 1998, after extensive consultations within the institutions of the European Union, largely based on the Green Paper 1995 and its follow-up,⁸ the EU Commission issued a proposal for a “European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society”. The purpose of the proposed Directive was to respond to the challenges presented to the existing legal framework by the “Digital Era”. At the international level, these challenges had already been addressed by the WIPO Copyright Treaty (WCT) 1996 and the WIPO Performances and Phonograms Treaty 1996, which the EUCD was also intended to implement.⁹

Technological developments in the field of digital carriers containing works protected by copyright (e.g. MP3 and similar standards, CDs, DVDs, etc.), and the expansion of the internet, brought an unprecedented wave of copyright infringement, which needed to be addressed by appropriate legislation. Rightholders were already responding to such a threat by implementing technological counter-measures like digital rights management (DRM) systems. But these systems were easily circumvented by skilful users, and therefore needed an extra layer of protection provided by the law. The core of DRM systems are technological protection measures (TPMs): “digital locks” designed to protect copyright works in the digital environment from unauthorised access. Part of the new “digital copyright”¹⁰ law was therefore designed to protect these devices.

However, the European Union in its pursuit of the realisation of a single market cannot neglect the protection of other interests than that of the owner of copyright works. For example, the protection of creativity and innovation, of the research in the open-source field, of fair competition, of freedom of expression, of cultural diversity and of privacy,¹¹

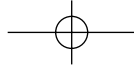
⁷ S. Dusollier, “Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions” in E. Becker *et al.* (eds), *Digital Rights Management. Technological, Economic, Legal and Political Aspects* (Berlin: Springer-Verlag, 2003), pp.462–478.

⁸ Commission Green Paper copyright and related rights in the information society COM(95) 382; Commission communication follow-up to the Green Paper on copyright and related rights in the information society COM(96) 568.

⁹ The Berne Convention does not include provisions on copyright enforcement. The TRIPs do not provide anything explicit on TPMs, but it stipulates rules for copyright enforcement.

¹⁰ “Digital copyright” defines the copyright law adapted to the digital environment.

¹¹ Ian Brown, “Implementing the EU copyright Directive” at <http://www.fjpr.org/copyright/guide/eucd-guide.pdf> [Accessed August 14, 2008], pp.11–13.



are all considered crucial within the EU policy, and therefore users of copyright works need to be allowed, upon certain conditions, to freely access works protected by TPMs. Many stakeholders were therefore interested in the drafting of the EU Copyright Directive: authors, publishers, software producers, internet service providers, music majors, intermediaries, users, and others. In fact, the EU Copyright Directive 2001 is reported to be one of the “most lobbied” directives of all.¹² The EU legislative bodies therefore had to debate intensively before finding an agreement on a text. The remarkable and often inconsistent revisions to the various drafts of the directive are a reflection of these difficulties.¹³

On April 9, 2001 the EU Copyright Directive was adopted. However, with the approval of the final text the difficulties of the EU CD were not over. The implementation process was also interspersed with hurdles. Heated debates took place within national parliaments of Member States in occasion of the implementation of the Directive, often recalling the opposing arguments that had been discussed at the EU level. Only Greece and Denmark met the deadline for the implementation in 2002. Many other Member States needed the spur of the European Court of Justice, which between March and April 2004 opened cases for not implementing the EU CD against France, Luxembourg, Spain, Portugal, Finland, Sweden, the Netherlands, Belgium, and the United Kingdom (about Gibraltar).¹⁴ In the end all EU countries had adopted the Directive in 2006. But despite the formal implementation in the 27 EU Member States, the debate on the EU CD continues, and many doubts are raised by the effectiveness of its harmonisation and the achievement of its objectives.

Implementations of the EU CD in EU Members States

Protection of TPMs

The EU CD of 2001 aims at harmonising copyright legislations of Member States¹⁵ in order to protect and enhance the mechanisms that underlie the internal market.¹⁶ Part of this harmonisation process is the protection of TPMs¹⁷ and copyright exceptions.¹⁸ The EU CD therefore makes clear anti-circumvention provisions and selects a list of copyright exceptions with which TPMs have to comply. However, the protection to owners and users of copyright works provided by Member States implementing the EU CD is unbalanced and uneven across countries. Our analysis focuses on: (a) the sanctions against circumvention of TPMs (non-professional infringement and not in the course of business); (b) the measures to be taken by rightholders to comply with copyright exceptions; (c) the different remedies granted to beneficiaries in case of non-compliance

¹²M. Hart, “The Copyright in The Information Society Directive: An Overview” (2002) 24(2) E.I.P.R. 58.

¹³Amended proposal 2001/29 and explanatory memorandum COM/99/0250 final; COD 97/0359; [1999] OJ C180/6.

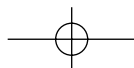
¹⁴Full records are available on the European Court of Justice web site, at <http://www.curia.eu.int/> [Accessed August 14, 2008]. The monitoring for the transposition of the directives is at http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm [Accessed August 14, 2008].

¹⁵Directive 2001/29 recitals 1–7.

¹⁶Directive 2001/29 recital 47; see N. Braun, “The Interface Between Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community” (2003) 25(11) E.I.P.R. 496, 499.

¹⁷Directive 2001/29 recitals 47–53.

¹⁸Directive 2001/29/EC recitals 32–45.



by rightholders. Table 1 gives a synoptic overview of these issues for the 27 Member States of the European Union.

Table 1: The regulation of TPMs in the EU-27

	Sanctions for circumvention of TPM	Owner's obligations for TPMs compliant with exceptions	Remedy for absence of voluntary measures
Austria	Imprisonment up to two years if professional ¹⁹	None	None
Belgium	Fine (100/100,000Fr) ²⁰	Voluntary measures ²¹	Court of Law
Bulgaria	Fine	Nothing	None
Croatia	Civil remedies (Fine if legal entity or business)	Shall make available copyright works to beneficiaries	The competent Minister shall provide means to access
Cyprus ²²	Imprisonment up to 3 years and/or up to £(Cyprus) 30,000	Voluntary measures	None
Czech Republic	None	None	None
Denmark	Fine. Imprisonment up to 12 month if professional. ²³	Voluntary measures	Copyright License Tribunal ²⁴

¹⁹Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte StF: BGBl. Nr. 111/1936 i.d.F. der UrhG-Novelle 2003 s.91 para.2(a).

²⁰Loi transposant en droit belge la Directive européenne 2001/29 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information. *Moniteur Belge*, May 27, 2005, p.24997, Art.80. Recidivisms are punished, in alternative or not, with the same fine and/or a sentence from three months to two years.

²¹Loi transposant en droit belge la Directive européenne 2001/29 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information para.4: "The Technological Protection Measures seen at §1 cannot forbid a legitimate purchaser of works and services to utilize those works and services in conformity with their normal destination" (unofficial translation).

²²The translation of Cyprus legislation is a courtesy by Dr. Foteini Papiri, Lecturer in Law, University of Nottingham.

²³Consolidated Act 164 of March 12, 2003. The Act on Copyright, cf. Consolidated Act 618 of June 27, 2001, as amended by Act 1051 of December 17, 2002 s.75c.

²⁴If the rightholder does not comply with the order within four weeks from the decision of the Tribunal, the user may lawfully circumvent the effective technological measure (Act on Copyright s.75d(1)). But a case cannot be brought before the Tribunal unless the parties have made reasonable attempts to make an arrangement. See Consolidated Act 618 of June 27, 2001, as amended by Act 1051 of December 17, 2002.

Table 1: Continued

	Sanctions for circumvention of TPM	Owner's obligations for TPMs compliant with exceptions	Remedy for absence of voluntary measures
Estonia	Civil remedies (Fine if trade in "pirated copies")	Shall adjust TPMs to allow exceptions	Copyright Committee
Finland	Fine, jail up to 1 year. If with intent fine, 2 years, confiscation. ²⁵	Shall make available copyright works to beneficiaries	Arbitration procedure
France	Fine € 3,750 ²⁶	Voluntary measures	Mediation board
Germany	Imprisonment up to one year or a fine. Imprisonment up to three years or a fine if professional. ²⁷	Voluntary measures (for private copy, he has to allow at least analogue copy)	Court of Law ²⁸
Greece	Imprisonment of one year minimum and a fine of €2,900 min and €15,000 max. ²⁹ Minimum 10 years if professional.	Voluntary measures	Mediators selected from the list drawn up by the Copyright Organisation
Hungary	Civil remedies	None	None
Ireland	Imprisonment up to 5 years and/ or £ 100,000 fine ³⁰ if course of business of prejudice to owner.	Shall make available copyright works to beneficiaries	High Court

²⁵ See V. Oksanen and M. Valimaki at <http://www.fipr.org/copyright/guide/finland.htm> [Accessed August 14, 2008].

²⁶ Loi 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (1) Arts L.335-3-1-1 and L.335-3-2-1 [2006] JO 178/11529 (August 3, 2006). On January 3, 2007 the Ministry of Justice issued a circular with the aim of assisting courts in delivering sentences proportionate to the specific types of infringement. It is made a distinction between circumvention, communication to the public (uploading), downloading. See <http://www.juriscom.net/documents/circulaire-DAVDSI.pdf> [Accessed August 14, 2008].

²⁷ But not if it is done for private use. See German Copyright Act of September 9, 1965, as amended on September 10, 2003 Urheberrechtsgesetz UrhG para.108b.

²⁸ The rightholder faces a fine up to €50,000. German Copyright Act para.111a(1) no.2.

²⁹ In the event the illegal benefit of the infringer is exceedingly high, the minimum penalty of imprisonment and the fine margins are doubled. If it is done professionally, the sentence is minimum 10 years of imprisonment plus a fine of €14,673 up to €58,694. See Law 3057/2002, entitled "Amendment and Completion of Law 2725/99" in *Government's Gazette*, October 10, 2002 (issue 239A).

³⁰ £ 1,500 and/or up to 12 month if summary conviction. European Communities (Copyright and Related Rights) Regulations 2004 (SI 16/2004), amending the Copyright Act 2000 Pt 2 s.140.

Table 1: Continued

	Sanctions for circumvention of TPM	Owner's obligations for TPMs compliant with exceptions	Remedy for absence of voluntary measures
Italy	Imprisonment from 6 months to 3 years plus fine <i>if for profit</i> . ³¹ Fine from €51 to €2,065. Imprisonment for 1 to 3 years if more than 50 copies, or upload on networks, or professional.	Voluntary measures (for private copy, he has to allow at least analogue copy)	Mediation board
Latvia	Civil remedies	Shall make available copyright works to beneficiaries (indirectly inferred)	Court of Law
Lithuania	Civil remedies	Shall provide access means (decoding devices)	Copyright Council ³²
Luxembourg	Fine from €251 to €250,000 ³³	Voluntary measures	Court of Law
Malta	Civil remedies	Voluntary measures	None
Netherlands	Civil remedies	None ³⁴	None
Poland	Civil remedies	None	None
Portugal	Imprisonment for up to 1 year or a fine of up to 100 days	Voluntary measures	Mediation board

³¹ From one to three years of prison, plus fine, if are reproduced more than 50 copies or works are diffused *on networks* for profit (peer to peer is included) or it is an entrepreneurial activity. See Decreto Legislativo 9 Aprile 2003 n.68: Attuazione della direttiva 2001/29 sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione (GU n. 87 del 14-4-2003—Suppl. Ordinario n.61).

³² The proceeding seems to be particularly prompt. The Council issues a written proposal of conciliation; if any of the parties object in writing within one month, the conciliation is considered as approved. The conciliation can be appealed before ordinary courts.

³³ Unless it is done for private use: Copyright, Related rights and Database rights Act of April 18, 2001 (as amended on April 18, 2004) (Memorial A no.61 du 29 avril 2004, pp.942–948).

³⁴ However, the Minister of Justice, according to the Copyright Act, can issue a decree, in case is deemed necessary, to order to rightholders to comply with some fundamental exceptions (disabled, teaching, research, etc.).

Table 1: Continued

	Sanctions for circumvention of TPM	Owner's obligations for TPMs compliant with exceptions	Remedy for absence of voluntary measures
Romania	Unspecified	Shall make available copyright works to beneficiaries	Unspecified
Slovakia	Civil remedies	None	None
Slovenia	Civil remedies (or punitive damages—Fine if professional)	Shall make available copyright works to beneficiaries	None
Spain	Civil remedies	Voluntary measures	Court of Law
Sweden ³⁵	Civil remedies	Shall make available copyright works to beneficiaries	Court of Law
United Kingdom	Only civil remedies. Imprisonment up to 2 years if in the course of business or prejudice to owner. ³⁶	Voluntary measures	Notice of complaint to the Secretary of State

In terms of sanctions against TPM circumvention there appears to be remarkable differences between the old and the new Member States of the European Union. The national laws that implement the EUCD in the EU-15 typically provide for criminal sentences against the circumvention of technological protection measures. While in most cases, sentences are limited to economic sanctions, in some cases, imprisonment is prescribed. Imprisonment can range from six months to one year for non-professional infringement and up to three years for professional infringement. Exceptional is the case of Greece, which stipulates minimum rather than maximum sentences. They are extremely severe: a minimum of one year (and double in grave cases) for non-professional infringement and a minimum of ten years for professional infringement. In the Italian legislation, the wording “if for profit” may give the impression that imprisonment (up to three years) is limited to professional infringement. However, the wording “per profitto” of the original text refers to “every advantage”, not solely to commercial gain.³⁷ This

³⁵ Sweden implemented the Copyright Directive in 2005, but the text of the law is available only in Swedish at <http://www.notisum.se/rnp/sls/lag/19600729.HTM> [Accessed August 14, 2008].

³⁶ Up to three months with summary conviction. See UK Copyright and Related Rights Regulations 2003 (SI 2003/2498) s.107 available at <http://www.opsi.gov.uk/si/si2003/20032498.htm> [Accessed August 14, 2008].

³⁷ The commercial revenue corresponds to the translation “a scopo di lucro”, which was the previous wording of the law. The modification triggered a heated debate; a bill has been presented to return to the old formulation. See Legge 22 aprile 1941 n.633—Protezione del diritto d'autore e di altri diritti connessi al

means that this severe sentence is applicable to occasional infringement as well as professional infringement.³⁸

By contrast, in most new Member States, the national law that implements the EU CD provides only for civil remedies against the circumvention of TPMs while sometimes stipulating criminal sentences for copyright infringement. This suggests that in these countries the circumvention of TPMs itself is not necessarily regarded as copyright infringement. It becomes copyright infringement only whenever TPMs are strictly instrumental to the protection of some of the exclusive rights of the owner. In fact, only some Member States, such as Germany, Luxembourg, Austria, the United Kingdom and Denmark, specify that TPMs have to be implemented *within the scope* of copyright law. The others, on the contrary, only draw on the formulation of the Copyright Directive, which allows rightholders to implement TPMs independently from their relation with the exclusive rights of the owner.³⁹ As a consequence, most national copyright laws now protect every restriction on access or use of a copyright work, whether or not the access/use-control is implemented within the exclusive rights of the owner.

The measures that rightholders have to take to ensure copyright exceptions are also different across countries. According to the wording of the EU CD rightholders shall take “appropriate measures” (in absence of “voluntary measures”⁴⁰) to grant access and use to beneficiaries of exceptions, without specifying what these appropriate measures are meant to be. The national legislations in eleven countries, mostly members of the EU-15, take an even looser approach, by prescribing to rightholders to take only voluntary measures to make copyright exceptions available to their beneficiaries. The legislation in the remaining EU members, either draw on the text of the EU CD, by requiring that rightholders make copyright works available to beneficiaries of copyright exceptions, but without specifying the conduct they have to keep (Modifying TPMs? Providing alternative TPMs-free formats?), or they are completely silent on the point. Two exceptions are represented by Estonia and Lithuania, which expressly requires a technical adaptation of TPMs to the “right of users to benefit from copyright exceptions”.⁴¹ As a result of the lack of specifications on the measures that rightholders have to take in favour of the beneficiaries of copyright exceptions, it is legitimate to presume that most rightholders in Europe are ignoring the provision altogether.

Finally, the provision of remedies in the event that rightholders refuse to comply spontaneously with the law is rather diverse. A few countries, like for example France, Italy,

suo esercizio, amended by the Law-decree March 22, 2004, n.72, combined with the Conversion Law May 21, 2004 n.128 (estratto); GU [OJ] n.119 of May 22, 2004 Arts 171–174 *quinques*.

³⁸In fact, for the professional infringement and for non-professional peer to peer diffusion it is provided for a sentence from one to three years of imprisonment (the former version of the law provided for one to four years). However, the highest criminal court recently ruled that uploading on peer-to-peer is not illegal if there is no financial gain. See Corte di Cassazione, Terza Sezione Penale, Sentenza n.149 del September 1, 2007 at www.diritto-in-rete.com/sentenza.asp?id=331 [Accessed August 14, 2008]. But the infringement at hand took place before the issue of the new law.

³⁹See Corte • di Cassazione, Terza Sezione Penale, Sentenza n.149 del Septmeber 1, 2007 C.2.

⁴⁰Directive 2001/29 Art.6.4.

⁴¹Act of September 22, 2004 (RT I 1999, 54, 580) which came in force October 29, 2004, to amend the Copyright Act of November 11, 1992 (RT2 1992, 49, 615, consolidated text RT I 2000, 16, 109) para.80(4); Lithuanian Copyright Act, Law amending the law on copyright and related rights (IX-1355, March 5, 2003) Art.74.6.

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and Greece, set up specific mediation boards and arbitrators,⁴² whereas many others leave the matter to ordinary courts. Remarkably, many of the new Member States ignore the issue altogether. The solutions implemented by Member States against non-compliance of rightholders involving arbiters and ordinary courts may be criticised, because they involve significant costs which may act as a deterrent for users to exercise their rights. Copyright boards and tribunals, conversely, are not expensive, because they do not require legal assistance, but can be slow.⁴³ A positive—but isolated—example is provided again by Lithuania, which refers its claimants to the Copyright Council for mediation. The Council will issue a solution, and if none of the parties opposes the solution in writing within one month, the latter is considered as accepted. This seems an efficient system, especially if the solution of the Copyright Council is issued expeditiously.

In conclusion, there is no consistency among Member States with regards to the protection of TPMs and, particularly, the beneficiaries of copyright exceptions against TPMs. Almost all Member States outlaw the circumvention of TPMs⁴⁴ and do not provide for a “right to circumvent”.⁴⁵ However, the remedies against circumvention greatly differ from country to country. The great heterogeneity in the sentences for infringement raises questions about their fairness. Some Member States provide for severe criminal sanctions, while others provide for civil remedies only. Moreover, the protection of beneficiaries of copyright exceptions against TPMs differs across countries. More than one-third of EU Member States do not provide for any remedy, while others refer users to courts or arbiters, which are notoriously costly for a private user. The protection of owners and users within the EU CD, thanks to the above provisions on TPMs, appears therefore rather unbalanced in favour of the owners.

A more consistent harmonisation could mandate Member States to adopt civil sanctions only against occasional infringement, and criminal sanctions against professional infringement. Voluntary measures, on the other hand, should be subjected to some form of assessment of their effectiveness to respect the rights of the users. In practice, the current formulation appears more like a general aspiration than a legal requirement, and this is not likely to grant any satisfactory protection to users’ rights.

⁴²In case of failure of the mediation, ordinary courts can be referred to as appeal authorities.

⁴³Like for example the solution of the UK, for which complaints have to be addressed to the Secretary of State. See Ian Brown and Nicholas Bohm, reporting on the UK implementation of the EU CD in “Implementing the European Copyright Directive”, available at <http://www.fipr.org/copyright/guide/> [Accessed August 14, 2008], p.121.

⁴⁴Many non-EU countries protect TPMs as well, because this is imposed by the WIPO treaties. An only exception is represented by Canada. See the general report of Michel Vivant at ALAI 2006 (Barcelona, June 19–20, 2006), p.16.

⁴⁵There are minor exceptions to this principle, such as the possibility to circumvent, in the UK, for purpose of research in cryptography, Copyright Act (amended in 2003) s.269ZA(2). Sweden provides for a right to circumvent in case of few determined fundamental exceptions. Switzerland does not punish who circumvent a measure for a licit purpose and Denmark allows circumvention if access is not granted by the owner after four weeks (general report of Michel Vivant at ALAI 2006 (Barcelona, June 19–20, 2006, p.11). Finland allows circumvention for private copying; see V. Oksanen and M. Välimäki, at <http://www.fipr.org/copyright/guide/finland.htm> [Accessed August 14, 2008]; Lithuania allows circumvention, but only for software exceptions (back-up and decompilation) Art.74.5.

Copyright exceptions in Europe

Also in the field of copyright exceptions the EUCD attempted to reach further harmonisation. A comparative analysis of the implementation of copyright exceptions in national laws shows to what extent the Directive achieved this goal. To this end, we focus on each national implementation of the optional exceptions provided for in Art.5 of the EUCD and the specific exceptions for TPMs stipulated by Art.6.4.

The EUCD in Art.5 provides a detailed list of copyright exceptions. The list is meant to be exhaustive.⁴⁶ Of this list, the first exception is compulsory for Member States to implement, and the other 20 are optional.⁴⁷ The present regulation on copyright exceptions has been extensively criticised by the literature.⁴⁸ Main criticisms regard: (a) the optional nature of the list; and (b) its misguided ambition of being exhaustive.

What follows will demonstrate that the optional nature of the list led Member States to adopt very different solutions. Member States (old Members especially) seem to show a conservative attitude in implementing the directive. Thanks to the almost entirely optional list of copyright exceptions, they appear to have implemented many exceptions that were already present in their national copyright law before the implementation of the EUCD. This is suggested by the remarkable differences in terms of the structure and the wording of the different national legislations, which are more similar to the pre-existing legislation than to the structure and the wording of the EUCD.

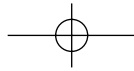
The optional list of exceptions of the EUCD therefore was probably not the most suitable instrument to reach copyright harmonisation. Moreover, the list of the EUCD did not achieve the purpose of being exhaustive either. Some Member States introduced in their legislation exceptions not present in the Art.5 of the EUCD. Slovenia, for example, inserted among its exceptions one for transformative works, which is not mentioned by the EUCD. However, a more consistent implementation of some fundamental copyright exceptions suggests that they could be accepted as compulsory by all EU Member States.⁴⁹ This list should apply to both copyright exclusive rights and technological measures, unless technological reasons make this impossible.

⁴⁶ See the workshop sponsored by WIPO and conducted in 1999 by Professor Sirinelli at <http://www.wipo.org> [Accessed August 14, 2008], document code: WCT-WTTP/IMP/1.

⁴⁷ Directive 2001/29 Art.5.2.

⁴⁸ See T. Heide, "The Approach To Innovation Under The Proposed Copyright Directive: Time For Mandatory Exceptions" (2000) 3 I.P.Q. 215, 223; see also M. Hart, "The Proposed Directive For Copyright In The Information Society: Nice Rights, Shame About The Exceptions" (1998) 20(5) E.I.P.R. 169, commenting on the proposed directive, at 171; CPB Netherlands Bureau for Economic Policy Analysis, "Copyright protection: not more but different", Centraal Planbureau, available at <http://www.cpb.nl/eng/> [Accessed August 14, 2008]; P.B. Hugenholtz, "Fierce Creatures Copyright Exceptions: Towards Extinction?" at the IFLA/IMPRIMATUR Conference, October 30–31, 1997, Amsterdam, The Netherlands; S. Dusollier, "Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions" in E. Becker *et al.* (eds), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (Berlin: Springer-Verlag, 2003), pp.462–478, 473; and L. Guibault, "The Nature And Scope Of Limitations and Exceptions to Copyright And Neighbouring Rights with regard to General Interest Missions for the Transmission Of Knowledge: Prospects for Their Adaptation to The Digital Environment" in *E-Copyright Bulletin* (October–December 2003), pp.39–40.

⁴⁹ For a perspective compulsory nature of copyright exception see T. Heide, "The Approach To Innovation Under The Proposed Copyright Directive: Time For Mandatory Exceptions" (2000) 3 I.P.Q. 215, 229–230.



In principle, the presence in the European Union of different national cultures requires flexible solutions rather than rigid ones.⁵⁰ These solutions would best suit the goal of harmonising the national legislations respecting local diversities. However, from a technological point of view the solution cannot be flexible.⁵¹ Technological solutions need a precise set of instructions, which cannot consider the nuances of a flexible legislation. More realistically, the compulsory list of copyright exceptions would need to be adapted to the material possibilities of the technology in order to be made compulsory also for TPMs.

An essential list of exceptions with a flexible closing clause appears to be the most suitable solution. It would suit to both the harmonisation of copyright exceptions and their compliance by TPMs. Obviously the closing clause⁵² would not be compulsory for TPMs. Beneficiaries claiming exceptions falling within the scope of this clause would have to refer to copyright tribunals, mediators or courts whenever they are not satisfied with the usage rules implemented on a copyright work. The following part of the work attempts to identify this fundamental list of exceptions.

At the outset, it is worth mentioning that the IViR centre of the University of Amsterdam issued a report commissioned by the European Union on the Copyright Directive. The report reaches on many issues the same conclusions of this paper. For example, it also states that a list of compulsory exceptions, made flexible by a closing clause would be advisable. On the choice of the exceptions, the report tentatively indicates a selection grounded of fundamental rights⁵³; and a second selection concerning exceptions that “have a noticeable impact on the Internal Market or concern the rights of European consumers”.⁵⁴ However, finding a list of copyright exceptions was not among the goals of this report; therefore, presumably the list indicated by the researchers is to be considered a general aspiration.

In contrast, this paper adopts a specific approach, detailed below, to select a list of exceptions from the existing ones. The approach is motivated by the goal of identifying a solution readily feasible in the short run; and acceptable by EU Member States. Moreover, Pt 2 of the IViR report includes a comparative study on the implementation of copyright exceptions carried on by Guido Westkamp.⁵⁵ The table below, compiled independently, does not completely coincide with his findings. The differences are caused by the different focus of our respective research. Westkamp’s work aims to report on the exceptions that

⁵⁰ See P.B. Hugenholz, “Why the Copyright Directive is Unimportant, and Possibly Invalid” (2000) 11 E.I.P.R. 501, 502.

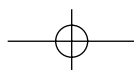
⁵¹ An example of flexible framework for copyright exceptions is the American “fair use” provision. The flexibility of the provision makes technically impossible for TPMs to comply with it. In this respect, Professor Felten acutely stated that making TPMs compliant with fair use is like putting a judge in a microchip. See E. Felten, “A Sceptical View of DRM and Fair Use” in Communications of the ACM (46/4 2003), p.58; see also N. Garnett, “Automated Rights Management Systems And Copyright Limitations And Exceptions”, a report for The WIPO-Standing Committee on Copyright and Related Rights, Fourteenth Session, Geneva, May 1–5, 2006, p.viii.

⁵² For example, the three-step test of the Berne convention could serve as a model for the “wild card” exception.

⁵³ See IViR Report on the Infosoc Directive of 2007 at <http://www.ivir.nl> [Accessed August 14, 2008], p.65.

⁵⁴ See IViR Report on the Infosoc Directive of 2007, p.66.

⁵⁵ See generally the IViR report on the Infosoc Directive of 2007 Pt II, available at <http://www.ivir.nl> [Accessed August 14, 2008].



at every title are protected in national legislations, in order to find gaps and areas in need of a regulatory action. Conversely, the present paper excludes exceptions based on, for example, case law or common law. It takes into account only those exceptions expressly included in copyright legislation. The reason is that we are not looking for what is missing in national legislation, but rather for what is present in them: the specific exceptions that have been transposed from the Copyright Directive. To this purpose, we start from the current national implementation of the EUCD list of copyright exceptions,⁵⁶ and single out the exceptions that are most commonly implemented. Arguably, this will help to identify the exceptions that are perceived by European legislators as most fundamental. Instead of selecting the “best” copyright exceptions on the basis of their grounds on fundamental rights or public interest, this section observes which copyright exceptions have been chosen by the majority of Member States. An examination of the list obtained will reveal that indeed the items most implemented are grounded on fundamental freedoms and the public interest.⁵⁷ The adoption of such exceptions, therefore, would also be consistent with the ultimate rationale of copyright limits: the circulation of culture.

An overview of the current copyright legislations of Member States after the implementation of the EUCD is given by the synoptic table displayed below.⁵⁸ The difficulties encountered during its compilation include the different wording that national legislators adopted referring to each exception. It must be stressed, therefore, that since the work required homogenising the data in our possession, this have come at a price of simplification in some instances. An attempt was made at identifying similarities among exceptions, mostly on the basis of their rationale.

In general and preliminarily, the table below does not include the following issues:

- Fair compensation: for some exceptions, many countries prescribed a “fair compensation” for the author, as provided by the Directive.⁵⁹ Every regulation on fair compensation was disregarded, because not immediately useful for this comparison.
- New *de minimis* exceptions: some Member States added new exceptions to their list, tailored to their specific socio-economic setting, or to the need of the most powerful lobbies.⁶⁰ None of them have been included in the table, because of their marginal relevance.
- Different wordings: with the only exception of Malta, no Member State followed literally the wording of the EUCD. Moreover, although the exceptions in the Directive are quite detailed, some Member States worded them in an even more detailed way. For example, Art.5.2(c) of the EUCD allows limitations of exclusive rights for reproductions made by publicly accessible libraries or similar institutions. Some countries interpreted that in a more restrictive way, allowing,

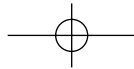
⁵⁶ Directive 2001/29 Art.5.

⁵⁷ For a discussion on the classification see S. Dusollier, Y. Pouillet, and M. Buidens, “Copyright and Access to Information in the Digital Environment”, a study prepared for the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace Infoethics, Paris, July 17, 2000, pp.19–20.

⁵⁸ Table 2.

⁵⁹ Directive 2001/29 Art.5.2(a)(b)(e).

⁶⁰ See P.B. Hugenholtz, “Fierce Creatures Copyright Exceptions: Towards Extinction?” at the IFLA/IMPRIMATUR Conference, October 30–31, 1997, Amsterdam, The Netherlands.



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for example, only one copy.⁶¹ Those nuances have been disregarded, in order to simplify the regulations and allow the comparison. The purpose of the work is not to identify the differences among regulations, but rather to highlight the common points.

The linguistic barrier also presented a hurdle in the analysis, because some countries have not translated their copyright legislation in English or in French. In place of the original text of the law which were not translated and whose language was not known to the researcher, papers written by local scholars in English have been analysed.⁶² Despite the difficulties above mentioned, a common pattern can be identified. The table below shows the findings of this comparison.

Table 2: The copyright exceptions in the EU-15

Exceptions	AU	BE	DE	DK	ES	FI	FR	GR	IE	IT	LU	NL	PT	SE	UK	EU15
5.2a photocopy	X	Xx	X	X		X	X	Xx		Xx	X	X	Xx	X		12/15
5.2b priv.copy	X	X	Xx ⁶³	Xx	Xx	X	Xx	Xx	Xx ⁶⁴	Xx ⁶⁵	Xx	X	Xx	X ⁶⁶	Xx ⁶⁷	15/15
5.2c libraries	X	Xx	X	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	15/15
5.2d ephim/broadc		Xx	X ⁶⁸	Xx	Xx	Xx	Xx		Xx	X	X	X	Xx	Xx	Xx	13/15
5.2e broadc.rep by instit.		Xx	X	Xx	Xx	Xx			Xx	Xx			Xx			8/15

⁶¹ Legge 22 aprile 1941 n.633—Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, amended by the Law-decree March 22, 2004 n.72, combined with the Conversion Law May 21, 2004 n.128 (estratto); GU [OJ] n.119 of May 22, 2004 Art.70(1-2) and Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte StF: BGBl. Nr. 111/1936 i.d.F. der UrhG-Novelle 2003 para.42(6).

⁶² In particular, a study by the Foundation for Information Policy Research, "Implementing the European Copyright Directive" available at <http://www.fipr.org/copyright/guide/> [Accessed August 14, 2008] and the project EuroCopyright.org by the Free University of Amsterdam, available at <http://www.euro-copyrights.org> [Accessed August 14, 2008]. Moreover, also the Romanian law was drawn from a scholarly article at <http://eucd.wizards-of-os.org/index.php/Romania> [Accessed August 14, 2008].

⁶³ Even analogue only. German Copyright Act of September 9, 1965, as amended on September 10, 2003 Urheberrechtsgesetz UrhG s.95b(6).

⁶⁴ For time shifting purposes. European Communities (Copyright and Related Rights) Regulations 2004 (SI 16/2004), amending the Copyright Act 2000 s.101.

⁶⁵ Even analogue only. Legge 22 aprile 1941 n.633—Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, amended by the Law-decree March 22, 2004 n.72, combined with the Conversion Law May 21, 2004 n.128 (estratto); GU [OJ] n.119 of May 22, 2004 Art.71-sexies.

⁶⁶ Not necessarily digital copy. See Art.12 of the Swedish Copyright Act, Government Bill 2004/2005:110, amending Act 1960:729 on Copyright in Literary and Artistic Works of December 30, 1960.

⁶⁷ For time shifting purposes: UK Copyright and Related Rights Regulations 2003 (SI 2003/2498) s.70, available at <http://www.opsi.gov.uk/si/si2003/20032498.htm> [Accessed August 14, 2008].

⁶⁸ Only for archiving purposes. See para.55 of German Copyright Act of September 9, 1965, as amended on September 10, 2003, Urheberrechtsgesetz UrhG.

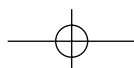


Table 2: continued

Exceptions	AU	BE	DE	DK	ES	FI	FR	GR	IE	IT	LU	NL	PT	SE	UK	EU15
5(3)a teaching/ research	X	Xx	X	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	X	Xx	15/15
5(3)b disabled	X	Xx	X	Xx	X	Xx	Xx	Xx	⁶⁹	Xx	Xx	Xx	Xx	Xx	X	14/15
5(3)c news	X	X	X	X	X	X	Xx	X	⁷⁰	X	X	X	X	X	Xx	14/15
5(3)d quotation/critic.	X	Xx	X	Xx	Xx	X	Xx	X	Xx	Xx	X	X	X	X	Xx	15/15
5(3)e pub security/ administer.	X		X	Xx	Xx	X	X	Xx	Xx	Xx	Xx		Xx	Xx	Xx	13/15
5(3)f speech/ lectures			X	X	X	X	X	X	X	X	X	X	X	X		12/15
5(3)g celebrations				Xx	X			X	X			X			X	6/15
5(3)h architecture/ sculpture	X	X	X	X		X	X	X	X		X	X	X	X	X	13/15
5(3)i incidental			X	X	X	X			Xx			X	X	X	Xx	9/15
5(3)j advertising	X	X	X	X		X	Xx		X			X	X	X		10/15
5(3)k parody		X			X		Xx				X	X				5/15
5(3)l demonstration	X		X						X				X			4/15
5(3)m building/ drawing				X	X	X							X	X		5/15
5(3)n private networking		X		X	X	X				X	X	X	X			8/15
5(3)o others				X								Xx		X		3/15
Three-step		X	X				X			X	X		X			6/15

Key: X= exception for exclusive rights; x= exception for TPM.

⁶⁹ But libraries have to provide special copies. See s.104 European Communities (Copyright and Related Rights) Regulations 2004 (SI 16/2004), amending the Copyright Act 2000.

⁷⁰ News reporters can appeal to criticism and review exception. European Communities (Copyright and Related Rights) Regulations 2004 (SI 16/2004) s.51, amending the Copyright Act 2000.

Table 3: The copyright exceptions in the new Member States

Exceptions	BG	CY	CZ	EE	HU	LT	LV	MT	PL	RO	SK	SI	EU15	New MS	TOT
5.2a photocopy	X	X	X	X	X	Xx	X	Xx	X		X	X	12/15	11/12	23/27
5.2b priv.copy	X	X	X	Xx	X	Xx ⁷¹	X	Xx	X	X	X	X	15/15	12/12	27/27
5.2c libraries	X	X	X	X	X	Xx	Xx	Xx	X	Xx	X	X	15/15	12/12	27/27
5.2d ephim/broadc	X	Xx		Xx	X	Xx	Xx	Xx	X	Xx	X		13/15	10/12	25/27
5.2e broadc.rep by instit.		Xx			X ⁷²			Xx					8/15	3/12	11/27
5(3)a teaching/research	X	X	X	Xx	X	Xx	Xx	Xx	X	Xx	X	X	15/15	12/12	27/27
5(3)b disables	X	Xx	X	Xx	X	Xx	Xx	Xx	X	Xx	X	X	14/15	12/12	26/27
5(3)c news	X	Xx	X	Xx	X	X	Xx	X	X	X	X	X	14/15	12/12	26/27
5(3)d quotation/critic.	X	Xx	X	X	X	X	Xx	X	X	X	X	X ⁷³	15/15	12/12	27/27
5(3)e pub security/administer.	X	Xx	X	Xx	X	Xx	Xx	Xx	X	Xx		X	13/15	11/12	24/27
5(3)f speech/lectures		X	X	X	X		X	X	X	X	X		12/15	9/12	21/27
5(3)g celebrations			X		X	X	X	X	X	X	X		6/15	8/12	14/27
5(3)h architecture/sculpture	X	X	X	Xx		X	X	X	X	X	X	X	13/15	11/12	24/27
5(3)I incidental		X			X	X		X			X		9/15	5/12	14/27
5(3)j advertising			X					X		X	X	X	10/15	5/12	15/27
5(3)k parody						X		X		X		X ⁷⁴	5/15	4/12	9/27

⁷¹ Only one copy. See Art.20.1 of Lithuanian Copyright Law, amending the law on copyright and related rights IX-1355 March 5, 2003.

⁷² Only partial. See Art.38 Hungarian Copyright Act, CII amending the Copyright Act 1999 (Act LXXXVI of 1999, Official Gazette (*Magyar Közlöny*) No.61).

⁷³ More restrictive than the Copyright Directive 2007. Slovenian Copyright Act s.25, amending the Copyright and Related Rights Act (Official Gazette RS No.43/04).

⁷⁴ In fact this exception, a unique case in the EU, is reserved to transformative works, among which parody is included. See Art.53 of Slovenian Copyright Act, amending the Copyright and Related Rights Act (Official Gazette RS No.43/04).

Table 3: Continued

Exceptions	BG	CY	CZ	EE	HU	LT	LV	MT	PL	RO	SK	SI	EU15	New MS	TOT
5(3)l demonstration			X			X		X		X			4/15	4/12	8/27
5(3)m building/drawing			X			X		X	X			X	5/15	5/12	10/27
5(3)n private networking		X				X		X				X	8/15	4/12	12/27
5(3)o others							X				X	X	3/15	3/12	6/27
Three-step								X		X		X	6/15	2/12	8/27

Key: X = exception for exclusive rights; X = exception for TPM.

First, results from this comparison among EU Member States⁷⁵ shows that universally recognised exceptions appear to be those for teaching/research, for libraries and similar institutions, and for quotation/criticism. The exceptions for news reporting and disabled people were also much valued by all Member States.⁷⁶ Also broadly recognised are the exceptions for use from public bodies, like the one for public security/judicial-administrative proceedings and the ephemeral broadcasting by public institutions. Note that the above mentioned exceptions are almost the same of the first draft of the Copyright Directive of 2007. Only the exception for reprographic reproduction, present in the draft of 1997, does not appear widely implemented, possibly because reproduction on paper can easily fall under the exception for private copying or reproduction for libraries.⁷⁷ Finally, note that the above-mentioned exceptions, apart from the one for administrative proceedings, are strongly instrumental to the circulation of culture.

More complex is the case of private copying, which is implemented by every country but in different ways. Some EU members concede to their users only an analogue copy,⁷⁸ like Germany, Greece, Italy, and Sweden. Some others specify the purpose of it (time-shifting),⁷⁹ like the United Kingdom and Ireland. This makes it unclear to what extent an exception for private digital reproduction is valued by Member States. For example, in the United Kingdom civil groups are exerting pressure for the introduction of a proper exception for private copying.⁸⁰ Further, it is interesting to notice that new EU Member States tend to be less strict than the EU-15 on this matter, by allowing private reproduction

⁷⁵ The division in two tables, one for old EU Member States (EU-15) and another for new members is not directly instrumental to this research. It is rather prompted by reasons of layout. However, it reveals interesting insights, which could be of inspiration for further research.

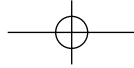
⁷⁶ Ireland provides for alternative formats to be provided to disabled people. This does not seem to suggest an intention to restrict the exceptions for disabled people. See s.104 of European Communities (Copyright and Related Rights) Regulations 2004 (SI 16/2004), amending the Copyright Act 2000.

⁷⁷ Like in • Austria (s.42 subs.6) and Germany (para.53(a)1).

⁷⁸ Germany and Italy.

⁷⁹ Ireland and the UK.

⁸⁰ See the Joint Proposals of LACA/Museums Copyright Group (MCG) to the UK Government for Revisions to the Copyright Designs and Patents Act 1988 and the Response to the Gowers Review of Intellectual Property Call For Evidence (April 2006); see also the Gowers Review, both at http://www.hm-treasury.gov.uk/independent_reviews/gowersreview_index.cfm [Accessed August 14, 2008]. See also the



without further conditions. Only Lithuania, among new Member States appears to be strict on private copying, by conceding to one private reproduction only.

For the purpose of this research it is interesting to note that, essentially, most of the EU Member States recognise the possibility of making personal copies, although with different wordings. However, the relevance of private copying for the circulation of culture is debatable. Private reproduction strictly performed for personal use is certainly based on practical reasons, and does not have any consequence for the circulation of culture. A limited number of copies distributed in the family/friends circle, conversely, could be said to promote the circulation of expressive works, and therefore culture and information in a broad sense. The subject would certainly deserve further investigation, to be carried on by future research.

Often present among legislation is the exception for three-dimensional works. This exception is worded in many different ways in the legislation of Member States, and mostly allows taking pictures of sculptures and buildings. This exception is certainly instrumental for the circulation of culture. Note, however, that it has scarce impact on technological protection measures. The remaining exceptions had a much lower impact on the legislation of EU Member States. They have been implemented in less than half of Member States.⁸¹

Incidentally, it is interesting to notice the unbalance between new EU Member States and the EU-15 in reference to the exceptions for broadcasting by public institutions and for celebrations or public ceremonies. The exception for broadcasting seems more important in the latter, whereas the exception for ceremonies seems to be comparatively more popular in the former.

This overview shows that on the one hand there is a stronghold around few uncontroversial exceptions, which closely correspond to those introduced with the first proposal of the Copyright Directive.⁸² On the other hand, there is a remarkable indifference towards exceptions that were introduced by following amendments to the Directive. Among them, rather disappointing is the implementation of the exception for parody, indicated by some literature⁸³ as an important carrier of freedom of expression, just as news reporting or criticism/quotation. This might however be explained by the fact that parody can fall under other exceptions, like quotation or criticism; or it is protected by freedom of expression.⁸⁴

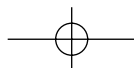
report released by the Institute for Public Policy Research (<http://www.ippr.org.uk/> [Accessed August 14, 2008]), asking for an exception of private copying in the UK, at <http://www.ippr.org.uk/pressreleases/?id=2404> [Accessed August 14, 2008].

⁸¹ With the only exception of Copyright Directive Art.5.3(f)—public speech/lectures, which has been implemented in 21 countries.

⁸² First proposal of the Copyright Directive COM(97) 628 final; 1997/0359/COD; [1998] OJ C108/6.

⁸³ See L. Guibault, "The Nature And Scope Of Limitations And Exceptions to Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their Adaptation To The Digital Environment", *E-Copyright Bulletin* (October–December 2003), pp.9–10; S. Dusollier, "Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions" in Becker *et al.* (eds), *Digital Rights Management*, pp.462–478, 473; see also generally C. Rutz, "Parody: A Missed Opportunity" (2004) 3 I.P.Q. 284. Moreover, Dusollier indicates in parody a potential backdoor for the much awaited exception for transformative works. See her intervention at the 4 Wizard of OS conference, at <http://www.wizards-of-os.org/> [Accessed August 14, 2008].

⁸⁴ This is confirmed by the IViR report Pt 2. In their table the exception for parody is more present, because they consider the exceptions de facto present in the legislation of Member States. See the IViR report Pt 2 at <http://www.ivir.nl/> [Accessed August 14, 2008], p.45.



Summing up, the most implemented exceptions are: personal copy⁸⁵; reproduction by libraries⁸⁶; teaching and research⁸⁷; disables⁸⁸; news reporting⁸⁹; quotation/criticism.⁹⁰ We note that according to the classification of copyright exceptions performed by Bernt Hugenholtz and subsequently drawn on by other literature,⁹¹ *all of them* are justified either by fundamental liberties or by the public interest⁹²; and all of them are directly or indirectly instrumental to the circulation of culture. Also broadly recognised are the exceptions for ephemeral broadcasting, for three-dimensional works, and for public security/administration. These exceptions could therefore be compulsory for all EU Member States. However, they do not have any impact on technological protection measures, therefore TPMs do not need to comply with them.

Exceptions for TPMs

We now turn to the analysis of copyright exceptions that TPMs have to respect. Article 6.4 of the EU CD lists seven exceptions with which TPMs have to comply. This selection has been criticised because it excludes fundamental exceptions grounded on civil liberties.⁹³ Moreover, it is impossible to understand the criterion that the EU legislator used for the selection.⁹⁴

This list has to be implemented by Member States. The comparative analysis above shows that despite the list in Art.6.4 is mandatory, Member States implemented it

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⁸⁵ Copyright Directive • Art.5.2(b) in respect of reproductions on audio, visual or audio-visual recording media made by a natural person for private use and for non-commercial ends.

⁸⁶ Copyright Directive Art.5.2(c) in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage.

⁸⁷ Copyright Directive Art.5.3(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.

⁸⁸ Copyright Directive Art.5.3(b) for uses for the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability.

⁸⁹ Copyright Directive Art.5.3(c) use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose.

⁹⁰ Copyright Directive Art.5.3(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

⁹¹ See generally P.B. Hugenholtz, "The Future of Copyright Limitations" at Infoethic 2000, Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace, Paris, November 13–15, 2000; and L. Guibault, "The Nature And Scope Of Limitations And Exceptions to Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their Adaptation To The Digital Environment", E-Copyright Bulletin (October–December 2003); and S. Dusollier, Y. Pouillet and M. Buidens, "Copyright and Access to Information in the Digital Environment", a study prepared for the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace Infoethics, Paris, July 17, 2000.

⁹² They are, in short, the lions and monkeys of Hugenholtz's zoo. See P.B. Hugenholtz, "Fierce Creatures Copyright Exceptions: Towards Extinction?" at the IFLA/IMPRIMATUR Conference, October 30–31, 1997, Amsterdam, The Netherlands.

⁹³ See Guibault, "The Nature And Scope Of Limitations And Exceptions to Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge", E-Copyright Bulletin, pp.9–10; S. Dusollier, "Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions" in Becker *et al.* (eds), *Digital Rights Management. Technological, Economic, Legal and Political Aspects*, pp.462–478, 473.

⁹⁴ The differentiation is not driven by technological constraint, as it would have been logical.

discontinuously. Some countries, like the United Kingdom,⁹⁵ decided that TPMs are legally obliged to comply with all exceptions, without making a difference between compulsory and non-compulsory exceptions. Some others, like Austria, Bulgaria, Czech Republic, Hungary, Poland, Slovenia, and Slovakia did not envisage any specific obligation for TPMs.⁹⁶ As the table shows, the latter approach seems often adopted by new EU Member States. Other countries, as Germany⁹⁷ and Italy,⁹⁸ selected from the list of copyright exceptions for the exclusive rights of the owner some exceptions for TPMs, apparently following the example of the EUCD.⁹⁹ Nevertheless, every country that singled out specific exceptions for TPMs picked from the list a different selection from that of the Directive; and from that of the other countries. This clearly shows that in matter of exceptions for TPMs the EUCD is far from achieving the homogeneity aimed at.

Arguably, the EUCD made a few arbitrarily chosen exceptions compulsory for TPMs, rather than those universally recognised as most fundamental. This choice was so unconvincing that the Member States decided autonomously which exceptions they wanted to be respected by TPMs. Some selected few exceptions and some other referred TPMs to the list of copyright exceptions with which the exclusive rights of the owner have to comply. Even a compulsory rule, therefore, was clearly inadequate to achieve the harmonising goal of the Directive.¹⁰⁰ It might be argued that the main weakness of the provision is the lack of correspondence between exceptions for TPMs and exceptions for exclusive rights or, alternatively, a convincing justification for this different treatment.

In conclusion, if the list of fundamental exceptions highlighted above, which are already recognised by most EU Member States, were made compulsory by the EUCD, this would give a strong signal towards a distinction between fundamental and less fundamental exceptions; and towards a strong protection of the former. Less fundamental exceptions would not however be left unprotected. They could come together within in a last “wild card” exception, worded in flexible terms, with which TPMs would not be obliged to comply. The fundamental list, conversely, would be compulsory for TPMs in all Member States, unless there were technological constraints.

Conclusion

The analysis above suggests that a balance between the rights of owners and users of copyright works has not been achieved by the EUCD. The goal of harmonisation that in

⁹⁵ UK Copyright and Related Rights Regulations 2003 (SI 2003/2498) s.296ZE, available at <http://www.opsi.gov.uk/si/si2003/20032498.htm> [Accessed August 14, 2008].

⁹⁶ Those two countries adopted the approach “wait and see”. They would take action only in case of problems arising from practice. The same approach is taken by half of the Eastern EU countries.

⁹⁷ German Copyright Act of September 9, 1965, as amended on September 10, 2003, Urheberrechtsgesetz UrhG para.95(b)1.

⁹⁸ Legge 22 aprile 1941 n.633—Protezione del diritto d’autore e di altri diritti connessi al suo esercizio, amended by the Law-decree March 22, 2004 n.72, combined with the Conversion Law May 21, 2004 n.128 (estratto); GU [OJ] n.119 of May 22, 2004 Art.71 *quinquies*.

⁹⁹ Different shortlists seem to depend on different lobbying; See Hugenholtz, “Fierce Creatures Copyright Exceptions: Towards Extinction?” at the IFLA/IMPRIMATUR Conference.

¹⁰⁰ The incongruence of a compulsory norm that recalls an optional one is stressed also by S. Dusollier, “Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions” in Becker *et al.* (eds), *Digital Rights Management*, p.473.

the claims of the Directive was to bring a balanced protection between copyright players is far from being accomplished.

First, due to the open-ended wording of the EUCD (Member States should protect TPMs with “appropriate measures”) TPMs are protected in every country with different sanctions, which range from civil remedies to several years in jail.¹⁰¹ Some EU citizens will therefore suffer severe personal sanctions also for an occasional copyright infringement, which causes only minor economical damages to the owner, while others will pay the owner a proportional compensation. In some countries, therefore, the protection of the owner can be perceived as disproportional. In addition, according to most national copyright laws, rightholders have to adopt either voluntary or unspecified measures in order to have TPMs comply with copyright exceptions.¹⁰² No Member State—except Estonia and Lithuania—obliges the owner to implement TPMs that automatically respect copyright exceptions.¹⁰³ Finally, most national laws do not specify that TPMs are mere means to enforce the exclusive rights of the owner, thus opening the door to inferences on a new “access right”. In sum, the above provisions show an excessive protection of the owners of copyright.

Secondly, the optional list of exceptions of Art.5 of the EUCD protects fundamental exceptions as little as *de minimis* exceptions.¹⁰⁴ They are all hardly enforceable against the exclusive rights of the owner. No “right to circumvent” is envisaged for beneficiaries of copyright exceptions, and rightholders are not bound to produce TPMs that are compliant with them. This state of affairs is particularly concerning in relation to those copyright exceptions that are expression of fundamental rights of the user, like for example freedom of information or expression.

Finally, the mandatory list of exceptions with which TPMs have to comply according to Art.6.4 seems to be based on arbitrary criteria, rather than on technological reasons or on the importance of the exceptions selected. This led many Member States to add further exceptions to the list, or to adopt a different list, thus raising doubts on their actual implementation. Possibly, a selection based on universally recognised rights of the user, would have been more convincing.

In sum, the inefficient harmonisation in particular areas of copyright law produced by flexible or unjustifiable prescriptions of the EUCD, causes a disadvantageous treatment of users of copyright works.

However, this situation is not irreversible.¹⁰⁵ The EU legislator can still add a further layer of protection to a number of selected exceptions that are highly valued within the European Community. A synopsis of the implementation of the Directive in the 27 Member States shows a greater attention to those exceptions that protect fundamental

¹⁰¹ The difference between old and new EU Member States is interesting here. The latter tend to stipulate civil remedies only against the circumvention of TPMs; the former are much stricter, with criminal sentences that can be very severe. In a global market characterised by the absence of geographical boundaries, where users can buy everything from everywhere, such a mixed regulation can only create disruption.

¹⁰² Directive 2001/29 Art.6.1.

¹⁰³ See above under the heading “Implementation of the EUCD in EU Member States”.

¹⁰⁴ For example, the exceptions for public celebrations or for the inclusion in catalogues.

¹⁰⁵ EUCD Art.12 introduced a mechanism of review—every three years—and potential modification of the Directive in case of inefficacies identified by the EU Commission.

liberties or the public interest.¹⁰⁶ These exceptions could be elected as mandatory and protected by all Member States. This distinction would reinforce the harmonization of copyright law and thereby achieve several objectives. First, a compulsory list based on fundamental rights would justify a stronger protection against the owner of copyright works. Rightholders could be more easily induced to allow concrete access allowances (as opposed to the “voluntary measures” currently stipulated by the EU CD) to beneficiaries of fundamental copyright exceptions. These concrete measures could consist, for example, in modifying the design of TPMs in a way to automatically allow selected users to access copyright works.¹⁰⁷ A more balanced protection could also involve an homogenisation of the sanctions against the circumvention of TPMs, which would involve only civil remedies in the case of occasional infringement and criminal sanctions in the case of professional infringement.¹⁰⁸ Moreover, a list of fundamental exceptions should be more easily justifiable as a selection with which TPMs have to comply, thus clearing the field from every inference on a separate “right of access” of the owners that grants them undue extra powers and aggravates the unbalance between owners and users. In conclusion, this solution could take the European Union one step closer to a more efficient harmonisation, capable of protecting the rights at stake with more impartiality and equilibrium.

AQ6

¹⁰⁶ See above under the heading “Copyright exceptions in Europe”.

¹⁰⁷ For the technical details of this solution see M. Favale, “Fair DRM: Can Digital Locks Be Persuaded To Respect Copyright Exceptions?”, forthcoming.

¹⁰⁸ For an in-depth analysis of this issue see Favale, “Real and False Problems of the Digital World”, forthcoming.



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