



Keeping Emulation Environments Portable

FP7-ICT-231954

D2.6 A layman's guide to the KEEP legal studies

| | |
|----------------------------|--|
| Deliverable number | <i>D2.6</i> |
| Nature | <i>Report</i> |
| Dissemination level | <i>PU¹</i> |
| Delivery date | <i>Due : 30 April 2011 Actual : 30 September 2011</i> |
| Status | <i>Final</i> |
| Workpackage number | <i>WP2</i> |
| Lead beneficiary | <i>University of Portsmouth, National Library of the Netherlands</i> |
| Author(s) | <i>David Anderson</i> |



¹ **PU** = Public ; **PP** = Restricted to other programme participants (including the Commission Services) ; **RE** = Restricted to a group specified by the consortium (including the Commission Services) ; **CO** = Confidential, only for members of the consortium (including the Commission Services)

Document history

Revisions

| Version | Date | Author | Changes |
|---------|-------------------|------------------------|---|
| V0.1 | 01 April 2011 | David Anderson | Initial version |
| V0.2 | 12 July 2011 | David Anderson | (1) Rework introductory material. (2) Incorporate feedback received from Malte Berhmann on German Legal System |
| V0.3 | 25 July 2011 | David Anderson | Incorporate feedback received from Annemarie Beunen on the Dutch Legal System |
| V0.4 | 29 July 2011 | David Anderson | Incorporate feedback received from Sophie Sepetjan on the French Legal System |
| V0.5 | 1 August 2011 | David Anderson | (1) Rework introductory material. (2) Rework Executive Summary (3) Rework Recommendations |
| V1.0 | 30 September 2011 | Jeffrey van der Hoeven | Minor mark-up changes. |

Reviews

| Date | Name | Result |
|--------------|------------------|---|
| 14 June 2011 | Malte Berhmann | Feedback provided (Legal System:Germany) |
| 29 June 2011 | Sophie Sepetjan | Feedback provided (Legal System: France) |
| 13 July 2011 | Annemarie Beunen | Feedback provided (Legal System: Netherlands) |

Signature/Approval

| Approved by (signature) | Date |
|-------------------------|------|
| | |

| Accepted by at European Commission (signature) | Date |
|--|------|
| | |

Table of Contents

| | |
|--|-----------|
| Table of Contents | 3 |
| Executive Summary | 5 |
| Overall | 5 |
| On-line Dissemination of Digital Material..... | 5 |
| Legal Deposit Status..... | 5 |
| Multimedia works..... | 5 |
| Technological Measures of Protection (TMP)..... | 6 |
| Observations on the Community framework..... | 6 |
| Reproduction Rights: Information Society Directive..... | 6 |
| Reproduction Rights: Computer Programs Directive | 7 |
| Reproduction Rights: Databases Directive | 7 |
| Overall Conclusions..... | 8 |
| Recommendations | 9 |
| Overall context of the KEEP legal study | 10 |
| European Copyright Law: An Overview | 12 |
| The Purpose of Copyright Law | 12 |
| Legal Context..... | 12 |
| The principle of the supremacy of Community Law | 12 |
| Uniform law and international reciprocal protection. | 13 |
| The Paris Convention for the Protection of Industrial Property 1883 | 13 |
| Berne Convention for the Protection of Literary and Artistic Works (1886)..... | 15 |
| The Berne “three-step test”..... | 18 |
| The Community Framework | 19 |
| The Legal Corpus | 19 |
| Protected Rights | 19 |
| Limitations and exceptions to copyright provided by the “Information Society Directive” 2001/29/ EC..... | 20 |
| Limitations and exceptions to copyright provided by the “Computer Programs Directive” 2009/24/ EC..... | 20 |
| Limitations and exceptions to copyright provided by the “Database Directive” 96/9/ EC..... | 21 |
| Implications of the rules on Technological Measures of Protection | 22 |
| Preliminary findings under the Community Framework | 22 |
| The implementation of Community principles in national laws | 23 |
| Analysis under French Law | 23 |
| How ‘multimedia works’ are treated under French Law | 23 |
| Implementation of the Computer Programs Directive | 23 |



| | |
|--|-----------|
| Implementation of the Database Directive | 23 |
| Implementation of the Information Society Directive..... | 23 |
| The implementation of research, educational and heritage exceptions for works other than computer programs and databases | 24 |
| Legal deposit requirements as applicable to multimedia works | 24 |
| Analysis under German Law..... | 27 |
| Scope | 27 |
| Implementation of the Computer Programs Directive | 27 |
| Implementation of the Database Directive | 28 |
| Implementation of the Information Society Directive with regard to exceptions for reproduction rights and protection of technical measures | 28 |
| multimedia works..... | 29 |
| Analysis under Dutch Law | 33 |
| Scope | 33 |
| Implementation of the Computer Programs Directive | 33 |
| Implementation of the Database Directive | 34 |
| Implementation of the Information Society Directive with regard to exceptions to reproduction rights and protection of technical measures | 35 |
| Compliance of Dutch law exceptions with the Community Framework..... | 37 |
| The impact on KEEP of the legal study conclusions | 39 |

Executive Summary

Overall

Digital preservation activity in the European Union takes place within a complicated and often contradictory legislative landscape. Of most immediate concern to preservationists is the national legislation under which they operate day to day. Different nation states have their own laws and the understanding of key terms that prevails in one country often does not conform to that which holds elsewhere. Over and above national law, stands the European Community framework – which, although meant to be incorporated into member state legislation, is not uniformly or completely implemented across the whole of the EU. Here again there is some disagreement over the interpretation of key terms. Finally, there is non-EU legislation, and international treaties and obligations such as the Paris Convention for the Protection of Industrial Property (1883), and the Berne Convention for the Protection of Literary and Artistic Works (1886), to consider.

The KEEP legal studies threw up two important issues: making copies of digital materials (media transfer) and making these copies available to users. Libraries and archives have no general right of reproduction but may reproduce (or transfer) digital material only in certain specified cases. The exemptions which libraries enjoy are sufficient to permit at least some of the activities necessary for preservation. However the inconsistency between national and Community laws and the lack of clarity on key terms (eg., multimedia works) give rise to confusion at the margins. There is a tendency for national legislation to be both more permissive than Community law, and for it to provide a greater degree of detailed governance. Unfortunately this leads both to inconsistency between member states, and to national regulation which is, in certain key areas, almost certainly incompatible with Community law.

Complex though the legal landscape is, a number of consistent and clear messages have emerged from the investigations carried out both into EC law and the three national jurisdictions.

On-line Dissemination of Digital Material

In line with the general approach to the knowledge economy libraries and others increasingly try to bring information to users rather than requiring users to come to information. It is clear that the current legislative framework on copyright and digital material does not support this approach.

Legal Deposit Status

Community law provides no specific exceptions in respect of Legal Deposit. Consequently, national legislation which grants special exemptions to legal depositories permitting them to engage in preservation activities not open to others is almost certainly at odds with EC law.

Multimedia works

No definition of 'multimedia works' exists either in Community law or in the national jurisdictions examined. There is, however, general agreement on taking a distributive, approach in which each component part of a multimedia work: audio, graphics, software, database, etc., is considered separately. Since multimedia works are not, in general, made available on computer platforms in such a way that individual elements can be removed from the whole, this means that, in practice, multimedia works enjoy, as a whole, the strongest protection under law that is available for any of their constituent parts.

This has a significant impact on the preservation of multimedia works. Libraries (and

others) are placed under a responsibility to perform a detailed assessment for each individual multimedia work they intend to preserve (or transfer from one storage medium to another) to establish the level of legal protection it enjoys. Given the scale on which national legal depositories are required to operate, such an individual assessment is impractical. This places libraries in a difficult position.

Technological Measures of Protection (TMP)

Many works are made available in a form to which technical measures have been applied to prevent or restrict the use that may be made of them. This might take the form of a simple password protection scheme or may involve considerable technical sophistication.

The Information Society Directive (2001/29/EC) recognises the “need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect” . It stipulates that “Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.”² However it also permits Member States to be given the option of “providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives”.

Our investigation has shown that the potential for exemptions is quite limited and does not extend to permitting the creation or use of tools by individuals to bypass TMP:

- In Germany, circumvention of TMP is illegal. Tools designed to circumvent TMP may be destroyed.
- In France, circumvention of TMP is a criminal act in general and it is not possible to bypass TMP on Multimedia works.
- In the Netherlands, legal scope does exist to bypass TMP, but in practice TMP has prevailed over the available ‘exceptions’.

It should be noted that even in the limited situations where TMP may legitimately be circumvented, subsequent use of the transferred or copied material is extremely limited.

Observations on the Community framework

A number of obstacles in the way of transferring ‘multimedia works’ from their original medium (floppy disk etc.,) to a new medium or onto the KEEP emulation platform:

Reproduction Rights: Information Society Directive

The Information Society Directive (also known as the Copyright Directive) provides just one limitation to copyright protection:

- Temporary acts of reproduction which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
 - a transmission in a network between third parties by an intermediary, or
 - a lawful use of a work or other subject-matter to be made, and which have no independent economic significance

The directive permits Member States to make four exceptions or limitations to the right of reproduction which are of direct relevance to KEEP:

² Article 6 [2]

- in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage (Art. 5, 2(c));
- incidental inclusion of a work or other subject-matter in other material (Art. 5, 3(i));
- use in connection with the demonstration or repair of equipment (Art. 5, 3(l));
- use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections (Art. 5, 3(n));

It should be noted:

- that Member States have no power to introduce new limitations not already included in the Directive. This has the unwelcome effect that Member States have no independent ability to keep their legislative frameworks up to date with unforeseen technological developments
- no clear guidance is given on issues such as "format-shifting" (particularly important for migration-based approaches to preservation) or the number of copies that can be made
- with respect to electronic dissemination of materials to users, recital 40 of the Directive states that the exception for libraries should not cover "uses made in the context of online delivery of protected works or other subject matter".

The KEEP legal study concluded that media transfer should primarily be assessed under the Computer Programs Directive and the Database Directive.

Reproduction Rights: Computer Programs Directive

The Computer Programs Directive gives the rights holder the exclusive right to authorize:

- the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction
- the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program
- any form of distribution to the public, including the rental, of the original computer program or of copies thereof

None of the exceptions set out in the Directive expressly serves the purpose of the stakeholders in the KEEP project and the Directive does not provide for an related to legal deposit requirements or for scientific, study or education purposes that would be similar or close to those set out by Article 5.2 (c) and 5.3 (n) of the Information Society Directive.

As a result, reproduction of computer programs carried out by institutions like libraries and museums even when authorized under national laws, is in conflict with the Directive.

Reproduction Rights: Databases Directive

The Databases Directive of 11th March 1996 does however allow to provide limitations of rights in the following cases:

- in the case of reproduction for private purposes of a non-electronic database
- where there is 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



- where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure

It is reasonable to assume that a significant portion of databases that are in the scope of the KEEP project, whether made available on a standalone basis or embedded in a multimedia device, will be protected by copyright.

None of the copyright related exceptions or sui generis rights offered by the Directive are relevant for KEEP. Consequently, the reproduction of a database for purposes originally contemplated in the KEEP project fails to comply with the provisions of the Directive.

Overall Conclusions

Community law does not provide a legal framework appropriate to the project in terms of reproduction rights:

- None of the exceptions set out at the EC level serves fully the original purposes of the KEEP project.
- EC Law does not provide for legal deposit requirements
- EC Law does not provide for scientific, study or education purposes across the full range required for KEEP
- Reproduction of computer programs and databases even when carried out by memory organisations and authorized under national laws, is in conflict with EC Law

Recommendations

Given the complexity of the legal issues involved it is recommended that organisations engaged in digital preservation whether or not they are national legal depositories, should secure the agreement of rights holders before undertaking preservation actions. It would be very help if guidelines or model licenses for contractual arrangements between right holders and users for the implementation of copyright exceptions could be developed at the Community level.

Given the fast-evolving development of delivery technologies, the system of non-mandatory and fixed exceptions currently offered by Community law is not fit for purpose. There needs to be a re-examination of this approach to create greater flexibility and to bring legislation more into line with 21st century requirements.

The scope of the exception for publicly accessible libraries, educational establishments, museums and archives needs to be clarified with respect to:

- Format shifting;
- The number of copies that can be made;
- The nature and legal status of 'multimedia works'
- How the teaching and research exception might be modified to accommodate modern forms of distance learning including the use of works at home for study.

Overall context of the KEEP legal study

During the first year of the KEEP project two legal studies were commissioned to explore the impact of European law on the project's proposed programme of work. Particular emphasis was placed on the legal frameworks in force in the Netherlands, Germany and France. The legal work was sub-contracted to Bird & Bird and was presented to the KEEP consortium in the form of detailed reports. The purpose of the present document is, as far as is possible, to articulate the main conclusions of these reports in layman's terms. Naturally enough, this involves some diminution of legal rigour and, in consequence, the present document should not be regarded as in any sense legally definitive.

The KEEP legal studies were necessarily somewhat narrow in their focus and particular attention was given over to a legal examination of topics identified by the project team as both central to the work KEEP initially proposed to undertake, and as potentially problematic under law.

The KEEP project is concerned in the broadest sense with digital preservation. As the first EC-funded project to concern itself primarily with an emulation-based approach it was recognised from the outset that there was some potential for the project to encounter legal issues which do not arise in other areas of digital preservation. Emulation involves the creation of software which enables one hardware platform (computer) to 'mimic' the behaviour of an entirely different hardware platform. In a preservation context this has enormous potential as it offers the possibility to run software originally designed for a now obsolete computer on the latest hardware. There are, of course, considerable technical challenges which need to be addressed before this potential can be achieved. There are also obvious copyright issues which need to be considered when writing or using software which attempts to reproduce exactly the behavioural characteristics of third party code.

An emulation-based approach to preservation has the advantage of avoiding any need to make alterations to preserved files in order to make them accessible on modern machines. In this respect emulation is very different in character from 'migration'-based preservation techniques which 'convert' old file formats into forms which run on new platforms. The process of file conversion has considerable potential to involve violation of the rights of authors but as emulation-based approaches require no file conversion this is not something which was explicitly considered in KEEP. The primary problem which KEEP sought to address concerns 'media transfer' which is the process of moving computer files from their original storage medium (5.25 in floppy, magnetic tape, etc.) onto a managed storage system within a library context. This is essentially a process of copying software.

The KEEP project initially proposed to create a framework which would agglomerate a number of distinct media transfer tools, with the aim of creating a "one-stop shop" for media transfer within a digital preservation context. It was recognised from the outset that transferring copyrighted material from one medium to another was subject to legal regulation both with respect to what might legitimately be transferred, and what use might permissibly be made of material after transfer had taken place. One aim of the legal studies was to delineate more precisely the legal boundaries. Rights holders very frequently look to protect their rights over digital material by means of encryption, password protection or by other so called "Technical Measures of Protection" (TMP). There are a number of situations in which a library or archive may have a need, or even a legal responsibility, to bypass TMP but cannot agree with the rights holder a means by which this might be achieved. On some occasions the rights holder cannot be identified or has ceased trading or may be unwilling to cooperate. The legal studies therefore sought to clarify the state of the law with respect to bypassing TMP.



The KEEP consortium contains three national libraries each of which has a 'legal deposit' responsibility within its own legislative framework. Another of the topics which the legal studies sought to explore was the extent to which "legal deposit" is recognised at the Community level and the extent to which exercising legal deposit responsibilities might attenuate the operation of the law on copyright.

The stakeholders in the KEEP project were particularly interested in so-called 'complex digital objects', such as multimedia works³ (eg. computer games), and interactive educational software, and therefore wanted to have greater clarity about whether the complexity of the digital objects concerned had any consequences in law. Furthermore, the KEEP project sought legal clarification on any restrictions which might apply to the use of computer files following media transfer. Finally, the project sought clarification about any limitations which the law might place on batch (i.e., large scale) transfer of software, since the national libraries likely to be involved in this activity have vast quantities of software titles which need to be preserved.

³ For the purposes of the legal studies study, the term 'multimedia works' is understood as combining audiovisual, software and, as the case may be, databases elements along with off-the-shelf software programs and databases considered on a standalone basis.

European Copyright Law: An Overview

The Purpose of Copyright Law

Copyright laws have generally attempted to balance ensuring a reward for creativity and investment, and the dissemination of knowledge. The preamble to the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society makes clear that the overriding purpose of harmonising copyright regulation within the EC is to ensure that competition in the internal market is not distorted. This is fully in line both with the Treaty establishing the European Community, and with general notion that the primary purpose of copyright law is to promote knowledge by establishing, for authors and creators, a temporary monopoly over their output thereby permitting them to protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

The rights granted to authors while very extensive are not unrestricted since there is a recognition that creating an absolute monopoly would have the effect of stifling rather than promoting markets. Where the rights of authors are seen as conflicting with a public interest, various exemptions are provided. However, the onus is those who wish to make use of exemptions to copyright protection to demonstrate clearly that they are properly entitled to do so, and that they have complied with any restrictions placed on the use of material reproduced under a copyright exemption. This is, in practice, somewhat difficult to accomplish.

Legal Context

Digital preservation activity in the European Union takes place within a complex and often contradictory legislative landscape. Of most immediate concern to preservationists is the national legislation under which they operate day to day. Different nation states have their own laws and the understanding of key terms that prevails in one country often does not conform to that which holds elsewhere. Over and above national law, stands the European Community framework – which, although meant to be incorporated into member state legislation, is not uniformly or completely implemented across the whole of the EU. Here again there is some disagreement over the interpretation of key terms. Finally, there is non-EU legislation, and international treaties and obligations such as the Paris Convention for the Protection of Industrial Property (1883), and the Berne Convention for the Protection of Literary and Artistic Works (1886), to consider.

The principle of the supremacy of Community Law

In 1964 the European Court of Justice established the principle of supremacy of Community law over national legislation⁴. The purpose of the KEEP legal studies was to come to a view about the legal status of the work proposed to be carried out within the KEEP project. Something of the complexity that this task involves may be understood by carrying out a 'keyword' search at legislation.gov.uk to see how many pieces of UK legislation touch on a given topic.

⁴ Established in Case 6/64, *Costa v. Enel* [1964], Court of Justice of the European Communities

| Keyword | Pieces of legislation |
|------------------------------|-----------------------|
| Copyright | >200 |
| Software | >200 |
| Database | 167 |
| Intellectual Property Rights | 163 |
| Trademark | 74 |

The complexity indicated by the result of this search should make us hesitant in assuming that it is possible, within the context of the KEEP legal studies, to arrive at anything other than the most tentative of conclusions.

Uniform law and international reciprocal protection.

The overwhelming majority of nations are signatories to at least one of various international conventions dealing with Intellectual Property Rights (IPR). A number of these conventions are administered by the World Intellectual Property Organisation (WIPO) under the auspices of the United Nations. According to the World International Property Organization (WIPO), “the need for international protection of intellectual property became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they were afraid their ideas would be stolen and exploited commercially in other countries.” (“WIPO Treaties - General Information”).

The Paris Convention for the Protection of Industrial Property 1883⁵.

The Paris Convention was concluded in 1883, was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and it was amended in 1979. This agreement applies to industrial property in the widest sense, including patents, marks, industrial designs, utility models (a kind of “small patent” provided for by the laws of some countries), trade names (designations under which an industrial or commercial activity is carried on), geographical indications (indications of source and appellations of origin) and the repression of unfair competition. The substantive provisions of the Convention fall into three main categories: national treatment, right of priority, common rules.

(1) Under the provisions on national treatment, the Convention provides that, as regards the protection of industrial property, each contracting State must grant the same protection to nationals of the other contracting States as it grants to its own nationals. Nationals of non-contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a contracting State.

(2) The Convention provides for the right of priority in the case of patents (and utility models, where they exist), marks and industrial designs. This right means that, on the basis of a regular first application filed in one of the contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection in any of the other contracting States; these later applications will then be regarded as if they had been filed on the same day as the first application. In other words, these later applications will have priority (hence the expression “right of priority”) over applications which may

⁵ http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

have been filed during the said period of time by other persons for the same invention, utility model, mark or industrial design. Moreover, these later applications, being based on the first application, will not be affected by any event that may have taken place in the interval, such as any publication of the invention or sale of articles bearing the mark or incorporating the industrial design. One of the great practical advantages of this provision is that, when an applicant desires protection in several countries, he is not required to present all his applications at the same time but has six or 12 months at his disposal to decide in which countries he wishes protection and to organize with due care the steps he must take to secure protection.

(3) The Convention lays down a few common rules which all the contracting States must follow. The most important are the following:

(a) As to Patents: Patents granted in different contracting States for the same invention are independent of each other: the granting of a patent in one contracting State does not oblige the other contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any contracting State on the ground that it has been refused or annulled or has terminated in any other contracting State.

The inventor has the right to be named as such in the patent.

The grant of a patent may not be refused, and a patent may not be invalidated, on the ground that the sale of the patented product, or of a product obtained by means of the patented process, is subject to restrictions or limitations resulting from the domestic law.

Each contracting State that takes legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exclusive rights conferred by a patent may do so only with certain limitations. Thus, a compulsory license (license not granted by the owner of the patent but by a public authority of the State concerned) based on failure to work the patented invention may only be granted pursuant to a request filed after three or four years of failure to work or insufficient working of the patented invention and it must be refused if the patentee gives legitimate reasons to justify his inaction. Furthermore, forfeiture of a patent may not be provided for, except in cases where the grant of a compulsory license would not have been sufficient to prevent the abuse. In the latter case, proceedings for forfeiture of a patent may be instituted, but only after the expiration of two years from the grant of the first compulsory license.

(b) As to Marks: The Paris Convention does not regulate the conditions for the filing and registration of marks which are therefore determined in each contracting State by the domestic law. Consequently, no application for the registration of a mark filed by a national of a contracting State may be refused, nor may a registration be invalidated, on the ground that filing, registration or renewal has not been effected in the country of origin. Once the registration of a mark is obtained in a contracting State, it is independent of its possible registration in any other country, including the country of origin; consequently, the lapse or annulment of the registration of a mark in one contracting State will not affect the validity of registration in other contracting States.

Where a mark has been duly registered in the country of origin, it must, on request, be accepted for filing and protected in its original form in the other contracting States. Nevertheless, registration may be refused in well-defined

cases, such as when the mark would infringe acquired rights of third parties, when it is devoid of distinctive character, when it is contrary to morality or public order, or when it is of such a nature as to be liable to deceive the public.

If, in any contracting State, the use of a registered mark is compulsory, the registration cannot be cancelled until after a reasonable period, and only if the owner cannot justify his inaction.

Each contracting State must refuse registration and prohibit the use of marks which constitute a reproduction, imitation or translation, liable to create confusion, of a mark considered by the competent authority of that State to be well known in that State as being already the mark of a person entitled to the benefits of the Convention and used for identical or similar goods.

Each contracting State must likewise refuse registration and prohibit the use of marks which consist of or contain without authorization, armorial bearings, State emblems and official signs and hallmarks of contracting states, provided they have been communicated through the International Bureau of WIPO. The same provisions apply to armorial bearings, flags, other emblems, abbreviations and names of certain intergovernmental organizations.

Collective marks must be granted protection.

(c) As to Industrial Designs: Industrial designs must be protected in each contracting State, and protection may not be forfeited on the ground that the articles incorporating the design are not manufactured in that State.

(d) As to Trade Names: Protection must be granted to trade names in each contracting State without the obligation of filing or registration.

(e) As to Indications of Source: Measures must be taken by each contracting State against direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer or trader.

(f) As to Unfair Competition: Each contracting State must provide for effective protection against unfair competition.

The Paris Union, established by the Convention, has an Assembly and an Executive Committee. Every State member of the Union which has adhered to at least the administrative and final provisions of the Stockholm Act (1967) is a member of the Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member ex officio.

The establishment of the biennial program and budget of the WIPO Secretariat—as far as the Paris Union is concerned—is the task of its Assembly.

The Convention is open to all States. Instruments of ratification or accession must be deposited with the Director General of WIPO.

Berne Convention for the Protection of Literary and Artistic Works (1886)⁶

The Berne Convention, concluded in 1886, was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at

⁶ http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

Stockholm in 1967 and at Paris in 1971, and was amended in 1979.

The Convention rests on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries which want to make use of them.

The three basic principles are:

- (a) Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals (principle of “national treatment”⁷).
- (b) Such protection must not be conditional upon compliance with any formality (principle of “automatic” protection).
- (c) Such protection is independent of the existence of protection in the country of origin of the work (principle of the “independence” of protection). If, however, a contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

The minimum standards of protection relate to the works and rights to be protected, and the duration of the protection:

- (a) As to works, the protection must include “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” (Article 2(1) of the Convention).
- (b) Subject to certain permitted reservations, limitations or exceptions, the following are among the rights which must be recognized as exclusive rights of authorization:
 - the right to translate,
 - the right to make adaptations and arrangements of the work,
 - the right to perform in public dramatic, dramatico-musical and musical works,
 - the right to recite in public literary works,
 - the right to communicate to the public the performance of such works,
 - the right to broadcast (with the possibility of a contracting State to provide for a mere right to equitable remuneration instead of a right of authorization),
 - the right to make reproductions in any manner or form (with the possibility of a contracting State to permit, in certain special cases, reproduction without authorization provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, and with the possibility of a contracting State to provide, in the case of sound recordings of musical works, for a right to

⁷ Under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), the principles of national treatment, automatic protection and independence of protection also bind those World Trade Organization (WTO) Members which are not party to the Berne Convention. In addition, the TRIPS Agreement imposes an obligation of “most-favoured-nation treatment,” under which advantages accorded by a WTO Member to the nationals of any other country must also be accorded to the nationals of all WTO Members. It is to be noted that the possibility of delayed application of the TRIPS Agreement does not apply to national treatment and most-favoured-obligations.

- equitable remuneration),
- the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work⁸.

The Convention also provides for “moral rights,” that is, the right to claim authorship of the work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author’s honor or reputation.

(c) As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author’s death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author’s identity or if the author discloses his identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public (“release”) or—failing such an event—from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of such a work⁹.

Countries regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations may, for certain works and under certain conditions, depart from these minimum standards of protection with regard to the right of translation and the right of reproduction.

The Berne Union has an Assembly and an Executive Committee. Every country member of the Union which has adhered to at least the administrative and final provisions of the Stockholm Act is a member of the Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member *ex officio*.

The establishment of the biennial program and budget of the WIPO Secretariat—as far as the Berne Union is concerned—is the task of its Assembly.

The Convention is open to all States. Instruments of ratification or accession must be deposited with the Director General of WIPO¹⁰.

⁸ Under the TRIPS Agreement, an exclusive right of rental must be recognized in respect of computer programs and, under certain conditions, audiovisual works.

⁹ Under the TRIPS Agreement, any term of protection which is calculated on a basis other than the life of a natural person, must be at least 50 years from the first authorized publication of the work, or—failing such an event—50 years from the making of the work. However, this rule does not apply to photographic works, or works of applied art.

¹⁰ WTO Members, even if they are not party to the Berne Convention, must comply with the substantive law provisions of the Berne Convention, except that WTO Members not party to the Convention are not bound by the moral rights provisions of the Convention. Least developed countries may until July 1, 2013, delay the application of most of the obligations provided for in the TRIPS Agreement (Article 65). Naturally, States party to the Berne Convention cannot delay the application of their obligations provided for in the Berne Convention.

The Berne “three-step test”

The three-step test, which first appeared in the Berne Convention, is regarded as a cornerstone of international copyright regulation, and imposes on constraints on the possible limitations and exceptions to exclusive rights under national copyright laws.

The three-step test applies to limitations and exceptions to copyright protection and specifies that they will :

- be confined to certain special cases
- not conflict with a normal exploitation of the work
- not unreasonably prejudice the legitimate interests of the rights holder

The Community Framework

Problematically for the KEEP project, the Community Framework does not recognize the notion of multimedia works as a specific type of protected content. As a result, no definition or specific framework related to multimedia works is available under EU law. Reproduction of multimedia works is addressed at the Community level through the various copyright and related rights directives as they apply to the constituent elements of a multimedia work: e.g., software programs, databases, sound, and images. This is a pattern which is replicated in national legislation.

The Legal Corpus

Key Legislation at the Community Level includes:

- Directive 2001/29/ EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (the “Information Society Directive”)
- Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (Codified version replacing the abrogated Directive 91/250/ EEC of 14 May 1991, known as the “Computer Programs Directive”)
- Directive 96/9/EC of 11 March 1996 on the legal protection of databases (the “Database Directive”)
(Collectively referred to as the “Community Framework”)
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art
- Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Protected Rights

The following rights are protected by European Union law:

- right of reproduction for authors, performers, producers of phonograms and films and broadcasting organisations
- right of communication to the public for authors, performers, producers of phonograms and films and broadcasting
- right of distribution for authors and for performers, producers of phonograms and films and broadcasting organisations
- right of fixation for performers and broadcasting right of rental and/or lending for authors, performers, producers of phonograms and films
- right of broadcasting for performers, producers of phonograms and broadcasting organisations
- right of communication to the public by satellite for authors, performers, producers of phonograms and broadcasting organisations
- The rights of reproduction, distribution and rental for authors of computer programs

Limitations and exceptions to copyright provided by the “Information Society Directive” 2001/29/EC

The Information Society Directive (also known as the Copyright Directive) is a highly controversial Directive¹¹ which provides just one limitation to copyright protection:

- Temporary acts of reproduction which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
 - a transmission in a network between third parties by an intermediary, or
 - a lawful use of a work or other subject-matter to be made, and which have no independent economic significance

The directive permits Member States to make provision exceptions or limitations to the right of reproduction and/or communication in some twenty cases. Of these the following four are of direct relevance to KEEP:

- in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage (Art. 5, 2(c));
- incidental inclusion of a work or other subject-matter in other material (Art. 5, 3(i));
- use in connection with the demonstration or repair of equipment (Art. 5, 3(l));
- use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections (Art. 5, 3(n));

In all of these cases, the exceptions and limitations provided are subject to the Berne ‘three-step test’ (Art. 5, 5).

The Directive therefore permits limited rights for memory institutions to make copies for the purpose of preservation, but not for general communication. For reproduction to be permissible it would not have to be permitted under national law, and should not conflict with a normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the rights holder. The Information Society Directive is typically regarded by the academic community as a victory for copyright-owning interests (publishing, film, music and major software companies) over content users' interests.

The list of exceptions outlined in the Directive has achieved a certain degree of harmonization but it should be noted that Member States have no power to introduce new limitations not already included in the Directive. This has the unwelcome effect that Member States have no independent ability to keep their legislative frameworks up to date with unforeseen technological developments.

The KEEP legal study concluded that media transfer should primarily be assessed under the Computer Programs Directive and the Database Directive.

Limitations and exceptions to copyright provided by the “Computer Programs Directive” 2009/24/EC

The Computer Programs Directive gives the rights holder the exclusive right to authorize:

- the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction
- the translation, adaptation, arrangement and any other alteration of a computer

¹¹ For example, see Hugenholtz, Bernt (2000). "Why the Copyright Directive is Unimportant, and Possibly Invalid". *European Intellectual Property Review*: 501.

program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program

- any form of distribution to the public, including the rental, of the original computer program or of copies thereof

However, the legal owner of a program is assumed to have a licence to:

- create any copies necessary to use the program and to alter the program within its intended purpose (e.g. for error correction)
- make a back-up copy for his or her personal use
- decompile the program if this is necessary to ensure its operates with another program or device, but not for any other purpose.

None of the exceptions set out in the Directive expressly serves the purpose of the stakeholders in the KEEP project and the Directive does not provide for an related to legal deposit requirements or for scientific, study or education purposes that would be similar or close to those set out by Article 5.2 (c) and 5.3 (n) of the Information Society Directive.

As a result, reproduction of computer programs carried out by institutions like libraries and museums even when authorized under national laws, is in conflict with the Directive.

Limitations and exceptions to copyright provided by the “Database Directive” 96/9/ EC

The Database Directive harmonizes the treatment of databases under copyright law, and creates a new *sui generis* right for the creators of databases which do not otherwise qualify for copyright protection.

A database is defined as "*a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*" (Article 1).

The overall objective of the Directive is to provide:

- copyright protection for the intellectual creation involved in the selection and arrangement of materials
- *sui generis* protection for an investment (financial and in terms of human resources, effort and energy) in the obtaining, verification or presentation of the contents of a database, whether or not these have an intrinsically innovative nature.

The Database Directive gives the rights holder the exclusive right to authorize:

- temporary or permanent reproduction by any means and in any form, in whole or in part;
- translation, adaptation, arrangement and any other alteration;
- any form of distribution to the public of the database or of copies thereof (subject to the exhaustion of rights)¹².
- any communication, display or performance to the public;
- any reproduction, distribution, communication, display or performance to the public of a translation, adaptation, arrangement or other alteration

Member States are allowed to provide limitations of rights in the following cases:

- in the case of reproduction for private purposes of a non-electronic database

¹² i.e., the first sale in the Community of a copy of the database by the rights holder or with his consent exhaust the right to control resale of that copy within the Community;

- where there is 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
- where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure

It is reasonable to assume that a significant portion of databases that are in the scope of the KEEP project, whether made available on a standalone basis or embedded in a multimedia device, will be protected by copyright. Databases put on the market or otherwise made available to the public on tangible media generally offer more than a simple list or catalogue of items or data and are likely to be eligible to copyright protection under national laws within the EU to the extent the selection and arrangements of the contents thereof as decided by the authors is a key factor to, *inter alia*, their merchantability.

None of the copyright related exceptions or sui generis rights offered by the Directive are relevant for KEEP. Consequently, the reproduction of a database for purposes originally contemplated in the KEEP project fails to comply with the provisions of the Directive.

Implications of the rules on Technological Measures of Protection

Provisions related to technological measures and rights management information originate from the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These state that Members shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures. The WCT and WPPT also mandate the provision of adequate and effective legal remedies against anyone knowingly performing an act that may induce, enable, facilitate or conceal an infringement of any right related to rights management information.

Following the WCT and WPPT, the Information Society Directive adopted a framework for the recognition and protection of TMP. However right holders who use TMP must allow otherwise legal reproduction.

Preliminary findings under the Community Framework

Although the Information Society Directive is stated to be without prejudice to provisions concerning legal deposit requirements (Article 9), neither the Programs Directive nor the Database Directive hand down provisions concerning legal deposit or any similar exceptions.

Accordingly, reproduction of computer programs, databases and multimedia works such as videogames (to the extent they include computer programs or database elements) even for legal deposit purposes is not compliant with the Community Framework.

The overall findings of the KEEP legal study with respect to Community Law are that:

- None of the exceptions set out at the Community level serves adequately the purposes of memory organisations in going about their digital preservation activity.
- Community Law does not provide for legal deposit requirements.
- Community Law does not provide for scientific, study or education purposes across the full range required for memory organisations.
- Reproduction of computer programs and databases even when carried out by memory organisations and authorized under national laws, is in conflict with Community Law

The implementation of Community principles in national laws

Analysis under French Law

How 'multimedia works' are treated under French Law

Early case law supported the view that multimedia work could be regarded as “computer programs”¹³. However, more recent practice within the French legislative framework, and opinion within legal literature regard multimedia works as ‘complex works’. In practice this means that a distributive, fragmented approach is adopted, within which each component part of a multimedia work: audio, graphics, software, database, etc., is considered separately. Since multimedia works are not, in general, made available on computer platforms in such a way that individual elements can be removed from the whole, this means that a multimedia work will effectively enjoy, as a whole, the strongest protection under law that is available for any of its constituent parts.

Taking a legally distributive (or cumulative) approach to multimedia works means that each multimedia work which a library or archive intends to preserve must be considered individually in order to determine the protection that it enjoys under the law, and what exemptions might apply. It is not possible to say in advance that, for example, all the videogames held by a library enjoy the same protection simply because they are all ‘videogames’. As the law protects each element of the multimedia work separately, videogames with music will have a different legal character than those without, and so on. Clearly this makes the task of digital preservationists very much more legally complicated than might otherwise be the case.

Implementation of the Computer Programs Directive

The Computer Programs Directive has been fully transposed in French law and no relevant deviations from the Directive terms need to be reported. It should, however, be noted that no specific provision is made for reproduction for conservation, public consultation or research purposes.

Implementation of the Database Directive

The Database Directive has been fully transposed into French law. As with the transposition of the Computer Programs Directive, no specific provision is made for reproduction for conservation, public consultation or research purposes.

Implementation of the Information Society Directive

Reflecting Articles 5.2 (c) and 5.3 (n) of the Information Society Directive, the DADVSI Act¹⁴ modified both the French Intellectual Property Code (“IPC”)¹⁵ and French Code du Patrimoine (“Code of Patrimony”) to incorporate research, educational and heritage exceptions (2.1.4.1). The DADVSI act failed to create a specific exception permitting ‘legal

¹³ For example, The *Cour de Cassation* (French Supreme Court), on 21 June 2000 (criminal chamber) and on 27 April 2004 (1st civil chamber) ruled that a video game could be globally apprehended as a computer program.

¹⁴ loi n° 2009-961 sur les droits d’auteur et les droits voisins dans la société de l’information » of 1 August 2006

¹⁵ Code de la Propriété intellectuelle

deposit' institutions to circumvent technological measures of protection applied to digital content or media (2.1.4.2). This major lacuna was rectified by the "Creation and Internet Act"¹⁶ which amid some controversy¹⁷ established the HADOPI¹⁸, to control and regulate internet access and encourage compliance with copyright laws. However, because the Information Society Directive does not provide exceptions for software and databases, it remains doubtful whether the French legal deposit regime complies with the Community Framework - at least with respect to multimedia works.

The implementation of research, educational and heritage exceptions for works other than computer programs and databases

The IPC permits publicly accessible libraries, museums or archive services, to reproduce works for conservation purposes, or in order to preserve on-site access to them.

There are, however, a number of important limitations placed on this exemption:

- it does not apply to databases and computer programs
- it relates solely to the reproduction of contents legitimately held by the institutions concerned
- it does not cover widespread communication to the public, on-line sharing of information between researchers or even on-line access by researchers
- finally, the institutions concerned do not seek any economic or commercial advantage¹⁹

Legal deposit requirements as applicable to multimedia works.

Pursuant to Article L. 131-1 and L. 131-2 of the Code of Patrimony, legal deposit covers the collection and the conservation of :

- documents whether printed, graphical, photographic, sonorous, audiovisual, multimedia²⁰ when made available to the public
- computer programs and databases made available to the public on a tangible medium
- signs, signals, writings, images, sounds or messages of any kind, through electronic communication to the public
- the constitution and display of national bibliographies

Depositary organisations with legal deposit responsibilities are:

- Bibliothèque Nationale de France
- Centre National de la Cinématographie
- Institut National de l'Audiovisuel
- The Ministry of the Interior

With respect to legal deposit, and pursuant to Article L. 132-4 of the Code of Patrimony, authors cannot prevent depositary institutions from:

¹⁶ 12 June 2009

¹⁷ See http://en.wikipedia.org/wiki/HADOPI_law

¹⁸ Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet

¹⁹ Article 122-5, 8° IPC corresponding to Article 5.2 (c) of the Information Society Directive

²⁰ Irrespective of their technical means of production, means of publishing, or distribution.

- Allowing on-site access to the deposited works by researchers duly accredited, on individual consultation's device which use is exclusively dedicated to such researchers (Article L. 132-4 para 1).
- Reproducing the deposited works, on any media and by any means, where such reproduction is necessary to the collection, the conservation, and the consultation on site as per conditions specified above (Article L. 132-4 para 2).

The impact of technological measures of protection (TMP)

Consistent with the provisions of the Information Society Directive, right holders are recognised in French law as being entitled to apply technological measures of protection (TMP) in order to protect their rights (Articles L. 331-5 and 331-22 of the IPC).

The DADVSI Act creates specific criminal offences involving the improper circumvention of TMP or alteration of rights management information, which are punishable in the most serious cases six months imprisonment and a fine of up to €30,000 per offence. Less serious cases are punishable by a fine of up to €3,750 per offence.

Computer programs are outside the scope of the TMP regime set out by the DADVSI Act. Therefore, it seems likely that TMP implemented on software (considered on a standalone basis) can be removed by a legitimate user acting within the scope of the exceptions granted by the Software Programs Directive and implemented into French law in 1994. The rationale behind this opinion is that the above legislation does not provide for any protection of TMP when applied to software programs.

However, circumvention of TMP on multimedia works is not legally permissible.

Recent changes to the research, educational and heritage exceptions: the libraries' privilege

Article 21 of the French "Creation and Internet" Act of 12 June 2009 amended Article L. 122-5, 8° of the IPC. Although the new provision adds an exception in favour of libraries, it does not enlarge the scope of the concerned works, multimedia works remain excluded from its scope. Therefore, Article L.122-5, 8° does nothing to help the KEEP project.

The exception now covers "the reproduction of a work and its representation realized for purpose of conservation or in order to preserve the conditions of its access for research or private study by individuals, within the premises of the Establishment and on dedicated devices by libraries, museums or by public archive, provided the said Establishments do not seek for any economic or commercial advantage."

Concluding remarks on French Law

From a French law perspective, limited media transfer of the sort contemplated within KEEP could be seen as enabled by the second paragraph of Article L 132-4 of the Code of Patrimony but not by Article L.122-5, 8° of the IPC. Significant restrictions remain on the use to which reproduced works may be put, as well as to the nature of access which is legally permissible.

Within France, issues related to TMP might arguably be overcome by a combination of two proceedings: the High Authority's intervention for works other than computer programs, and the right to circumvent computer programs' TMP for lawful acts.

However, the validity of the French legal framework as described above is questionable in terms of compliance with the Community Framework that does not seem to allow reproduction of software and databases for purposes of legal deposit requirements or other purposes related to research or education.



No specific exceptions regarding legal deposit, research, education or heritage apply to computer programs or databases and, accordingly, to genuine multimedia works such as video games²¹.

In addition, pursuant to Article 6.4 of the Information Society Directive, the exception of Article 5.2 (c) prevails over the protection of TMP, but the protection of TMP prevails over the exception set fort by Article 5.3 (n). Consequently, French law granting the High Authority the right to ensure the effectiveness of both exceptions is questionable, and French legislation could be deemed to breach Article 6.4 of Information Society Directive relating to TMP.

²¹ See: V.-L. BENABOU, "From the effectiveness of the exception to its confrontation to the technological measures of protection"; *Propr. intell.* 2007, n° 25, p. 431, considering that the exception resulting from the DADVSI Act introduced in the Code of Patrimony does not correspond to any of the cases foreseen in the Information Society Directive

Analysis under German Law

Scope

In Germany, the legal protection of software is primarily managed by the German Copyright Act (*Urheberrechtsgesetz*, "GCA").

General

In line with the Berne Convention, computer programs (including the preparatory material) are treated as literary work, and according to the GCA, only original computer programs are protected under copyright. In practice this means that a computer program needs demonstrably to be an author's "own intellectual creation" in order to qualify for protection. However, it is not necessary to demonstrate a particularly high level of originality - it is sufficient to show merely that the program in question has some non-trivial characteristics.

Section 69 a para. 4 of the GCA provides that, unless explicitly excluded, the provisions relating to literary works shall apply to computer programs.

This is interpreted by some legal scholars so as to also include copyright exceptions, unless the Computer Programs Directive already covers the topic of the exception, and provided that the relevant exception is practically applicable to computer programs²².

Based on the above, except for the private copy exception (which is overridden by the more specific reproduction exception provided in Section 69 d para. 1 of the GCA), the general copyright exceptions of the GCA can be invoked to the extent they are technically applicable to computer programs.

In regard to the KEEP project, the most relevant copyright exception is Section 52 b of the GCA, which relates to the digitalization of copyright protected work in libraries, museums and non-commercial archives. Unfortunately, German scholars have not yet come to a settled view on whether or not it may apply to computer programs.

With respect to a software layer in a multimedia work, as opposed to a software application or operating system, the GCA (Section 52 b) might be applicable, as one could imagine a multimedia work being displayed in a reading terminal. However, in the light of the Information Society Directive (Article 1 No. 2), it is questionable whether this interpretation would be in conformance with the Community Framework.

Implementation of the Computer Programs Directive

The Computer Programs Directive has been fully transposed into German law. Copyright protection for computer programs has been implemented as a set of specific provisions relating only to computer programs, but which are supplemented by the more general provisions of the GCA.

Exception for the enablement of intended purpose

Reflecting Article 5.1 of the Computer Programs Directive, the GCA (Section 69 d para. 1) authorises a licensee of a software program to reproduce the program where this is required to realize the intended use of the program (including error corrections). Amongst German scholars, this provision is interpreted so as to cover porting and emulation activities where

²² Cf. Wandtke/Bullinger/Grützmacher, *Urheberrechtsgesetz*, 3rd edition 2009, § 69d Rn. 74 et seq., Dreier, GRUR 1993, 781 (785).

these are required in order to preserve (no more than) the original and intended use²³. Construed in this way the GCA would appear to permit the transfer of those multimedia works whose original system is outdated and no longer available. However in most cases where transfer is contemplated the original hardware is still available (somewhere), so that transfer to an emulated environment is not strictly necessary from a legal point of view. Therefore it is questionable whether the GCA in fact offers a reliable legal justification for an emulation. Based on the general rule of restrictive interpretation of exceptions from legal principles, such an extensive construction looks unreliable.

Implementation of the Database Directive

The Database Directive has been fully transposed into German law, and no relevant deviations from the Directive terms need to be reported with respect to the issues at stake.

Where a database element of a multimedia work is protected by copyright, its reproduction is permissible without the copyright holder's consent, where it is necessary for the purpose of access to the contents of the database and for its normal use (Section 55 a of the GCA). In addition, and in accordance with Article 6.2 of the Database Directive, the general copyright exceptions are applicable to database works.

With regard to database elements protected by *sui generis* protection, the exceptions provided in Article 9 of the Database Directive have been implemented in Section 87 c of the GCA. As set forth above in relation to the Community Framework, none of these exceptions cover reproduction in libraries or otherwise for archival purposes.

Implementation of the Information Society Directive with regard to exceptions for reproduction rights and protection of technical measures

Legal deposit requirements

According to the Code of the German National Library (Article 16), media works are to be delivered in a 'non limited in time' state and suitable for a long-term archival storage. Thus legal deposits shall be delivered without DRM.

Exceptions from copyright protection under the GCA

- **"Three steps test"**

As a general remark, it should be noted that the German Legislature has not implemented the "three steps test" pursuant to Article 5.5 of the Information Society Directive into the GCA. Rather, the German Legislature has taken the view that the scope of the copyright exceptions themselves is in compliance with the tree steps test, so that there is no need for an additional test where either of the provided exceptions applies.

- **Copyright exception for libraries, museums, public archives**

The most relevant of the copyright exceptions of the GCA with regard to the KEEP project is Section 52b, which implements Article 5.3 (n) and 5.2 (c) of the Information Society Directive and has been introduced only with effect of 1 January 2008. However, the German implementation of these copyright exceptions is more restrictive than under the Information Society Directive, in that it is strictly limited to the scope of each institution's own collection (so-called *Bestandsakzessorietät*).

Section 52b of the GCA permits published, copyright protected works contained in publicly accessible libraries, museums and archives which do not directly or indirectly

²³ Cf. Wandtke/Bullinger/Grützmacher, Urheberrechtsgesetz, 3rd edition 2009, § 69d Rn. 21; Fromm/Nordemann/.Czychowski, Urheberrechtsgesetz, 10th edition 2008, § 69d Rn. 3.

pursue commercial purposes, to be made available for research and private studies. Access to such material is restricted exclusively within the premises of the relevant institution at electronic reading terminals created specifically for this purpose.

Section 52b of the GCA does not expressly mention a right to make the reproductions required in order to digitalise non-digital original works. Nevertheless, as the provision specifically aims at digitalisation scenarios, German scholars have held it to implicitly permit the reproduction measures required for the permitted display²⁴.

Beyond its literal meaning, the term "electronic reading terminal" is interpreted broadly in accordance with Article 5.3 (n) of the Information Society Directive, so as to include all terminals enabling the display of any type of copyright protected works. Based on its reference to "works" (rather than only to specific categories of works) the provision is held to cover the display of all kinds of works, including multimedia works²⁵. It is also applicable to copyright protected database works (as opposed to databases which only enjoy *sui generis* protection).

However, Section 52b of the GCA expressly forbids a specific piece of work being made available at more than one reading terminal simultaneously. Furthermore, the electronic terminals must be located within the premises of the institution whose collection is made available. The provision does not cover any remote internet access or other intranet or internet offering. Rather, users must have to come to the premises of the licence holder of the original work. Taken together these conditions place significant constraints on the 'end use' of duplicated digital material and pose significant problems for the use of networked access solutions in a digital preservation context.

Finally, and in compliance with Article 6.4 of the Information Society Directive, Section 52b of the GCA does not permit the circumvention of technical protection measures²⁶. Where reproduction of a work is prevented by way of technical protection measures, it cannot be made available to the public according to Section 52 b of the GCA. This has a direct impact on Work Package 1 of the KEEP project and places significant constraints on the media transfer tools which can be provided within the context of the Transfer Tools Framework (TTF). The design of the TTF has, naturally, been modified in order to be legally compliant.

multimedia works

The GCA does not provide a specific class of copyright protection for multimedia works but regards interactive software as "complex" works. In practice this means that a distributive, fragmented approach is adopted in which each constituent part: audio, graphics, software, database, etc., is considered separately as long as the creativity level (§ 2 section 2 GCA) has been reached or the requirements of the protection subject of a related law is matched (§§70ff. GCA).

With multimedia (where two or more distinct acts of creation are combined) it is necessary to establish copyright protection by proving that the individual acts of creation combined in the interactive work, qualify in their own right. Each such creative act has a qualification measure of its own. (Dreier/Schulze UrhG, § 2 Rn. 243)

²⁴ Cf. Wandtke/Bullinger /Jani, Urheberrechtsgesetz, 3rd edition 2009, § 52 b side note 19; Heckmann, K&R 2008, 284, 287 (who comes to the same conclusion, although based on a different argumentation).

²⁵ Cf. Wandtke/Bullinger /Jani, Urheberrechtsgesetz, 3rd edition 2009, § 52 b side note 4.

²⁶ Applicable agreements with professional associations like Association of the Phonographic Economy do not seem to concern Multimedia works or software. See Section 5.2 (pp 52)

In general therefore only an individual assessment of a multimedia work can determine the applicable exceptions which might legally permit a transfer of a multimedia work from its original carrier medium to an emulation environment.

Protection of the multimedia work as a whole

German legal opinion and case law have produced a number of suggestions on how multimedia works might be mapped onto the categories of works explicitly protected by the GCA. For example, multimedia has been asserted to involve a unique act of creation enjoying copyright protection if the adaptation, sequence and compilation of the elements show a personal, mental creation of an individual human being.²⁷

Given the explicit non-comprehensiveness of the work categories listed in the GCA, such an approach would be admissible within the overall system of the GCA. Some discussion has taken place concerning the extent to which they multimedia works can be treated as an “unnamed act of creation” in addition to the unclosing catalogue of § 2 UrhG (legal text preceding the catalogue states: “in particular”)²⁸.

However it is generally agreed, that a prior assignment to the known work must have taken place and that this should not be the “digital” layer of programming, but must be on viewer perception²⁹. Thus a genuine copyright protection for multimedia can not be granted³⁰.

Suggestions of this kind have led some scholars assert that the interactive works qualify for copyright protection. However for the majority and, crucially, for jurisprudence, this remains a matter of “de lege ferenda”³¹.

Interactive works as film and computer programs

Where an interactive work meets the general creative requirement, it is possible for it to enjoy similar copyright protection to a film work within the meaning of the GCA (§2 para. 1 No. 6). German courts broadly apply this view and in the German legal system, computer games as perceived by the users on screen are usually protected as film works³². Computer games are deemed to include figurative pictures, stereoscopic images and scene sequences that match a creative level, which easily meets the demands of a copyright protected work. Although players may have an influence on the sequence in which images appear on the screen by virtue of their actions in the game – in effect creating a unique visual artefact each time the game is played - this is not thought of as having any effect on copyright protection.

27 § 2 section 2 GCA (LG München I MMR 2005, 267, 268; Heutz MMR 2005, 567, 569; Loewenheim)

28 Schulze, in: Dreier/Schulze, UrhG, 2004, §2 UrhG Rn. 243 a. E.; Schack, MMR 2001, MMR Jahr 2001 Seite 9, MMR Jahr 2001 Seite 12; Schricker/Loewenheim, § 2 Rn. 76; Bullinger, in: Wandtke/Bullinger, UrhG, 2000, §2 UrhG Rn. 4

29 Wiebke/Funat, MMR 1998, MMR Jahr 1998 Seite 69, MMR Jahr 1998 Seite 70; Loewenheim, GRUR 1996, GRUR Jahr 1996 Seite 831, GRUR Jahr 1996 Seite 832

30 Landgericht Köln vom 15. Juni 2005– 28 O 744/04

31 i.e., That which the law ought to be (as opposed to what the law is)

32 GCA § 69 g Rn. 4 f.; § 95 Rn. 12; Vor §§ 88 ff. Rn. 19; OGH ZUM-RD 2005, 11, 13; BayObLG GRUR 1992, 508; OLG Hamburg GRUR 1990, 127, 128 – Super Mario III; OLG Hamburg ZUM 1996, 687, 688 – Mitstörer; OLG Hamm ZUM 1992, 99 f. – Computerspiele; OLG Köln CR 1992, 150, 151; OLG Hamburg GRUR 1983, 436, 437 – Pokemon; Bayrisches OLG GRUR 1992, 508 f.; Schricker/Loewenheim § 2 Rn. 183; Katzenberger GRUR Int. 1992, 513, 514; Loewenheim/A. Nordemann § 9 Rn. 161; Dreyer/Kotthoff/Meckel/Dreyer § 2 Rn. 247

The reason for this is that the author of the game is deemed to have fully determined in advance all the possible outcomes that a player's actions could produce. Therefore, it is the author of the game and not the player, who provides a creative act³³. The individual pictures of a computer game may enjoy copyright protection as visual arts within the meaning of § 2 section 1 No. 4 GCA. The same applies to the characters included in the game. They are treated in much the same ways as comic-book figures³⁴.

Where the creative value of an Interactive work specifically consists in the combination of different protected works, data or other elements, the interactive work as a whole may qualify as a database work within the meaning of Section 4 of the GCA. Therefore where an Interactive work is not sufficiently creative in order to qualify for copyright protection, it may still enjoy investment-based *sui generis* protection as a database in accordance with the Database Directive (Sections 87a et seq. of the GCA).

Protection of the elements contained in a multimedia work

Regardless of whether or not the multimedia work as such qualifies for copyright protection or *sui generis* protection, some or all of the constituent elements are typically protected independently under the GCA:

- visual arts works
- musical works
- literary works
- computer programs
- databases or performance acts protected under neighbouring rights of artists (e.g. where a multimedia work contains a song or piece of music as performed by an artist).

Typically, in the context of a computer game, the underlying software (game engine) is independently protected as a computer program under § 69a ff GCA, while the visual setting of the game, as well as the characters, are protected as visual arts works, while the music enjoys independent protection. Plainly therefore, anyone intending to preserve a multimedia work such as a computer game, will first have to undertake a complicated and painstaking 'due diligence' process. There is little scope for economy of scale in this activity and each work must be considered on its own individual merits.

Technical Measures of Protection

The GCA prohibits the circumvention of technical measures of protection and enables the author of copyright protected software to claim for the destruction of any unlawfully created or distributed means that have been solely designed to facilitate the removal or circumvention of technical measures.

It should also be borne in mind that copyright exceptions which cover 'computer programs' will not necessarily extend to all the individual elements of a multimedia work so that even if an exception could successfully be claimed for one part of a multimedia work (in this case the program) it may not cover the work as a whole.

³³ OLG Hamm NJW 1991, 2161; OLG Köln GRUR 1992, 312, 313; BayObLG GRUR 1992, 508, 509; Nordemann GRUR 1981, 891, 893; Loewenheim FS Hubmann, 318 ff.; Schricker/Loewenheim § 2 Rn. 183; Loewenheim/A. Nordemann § 9 Rn. 186 f.; Dreyer/Kotthoff/Meckel/Dreyer § 2 Rn. 259; a. A. OLG Frankfurt 1983, 757 f.

³⁴ G. Schulze ZUM 1997, 77, 78; Schricker/Loewenheim § 2 Rn. 184



In practice therefore it looks very unlikely that the 'computer programs' exception in Sections 95a et seq. of the GCA, provides a legal way to bypass technical measures of protection in the case of multimedia works or other similarly complex digital objects.

Analysis under Dutch Law

Scope

In the Netherlands, the protection of software by copyright is regulated in the Dutch Copyright Act ('Auteurswet', hereafter: 'Dutch Copyright Act' or 'DCA'). This law transposes the provisions of Council Directive (91/250/EEC) of 14 May 1991 on the legal protection of computer programs into Chapter VI of the Copyright Act.

All computer programs, including the preparatory material, are subject to the Dutch Copyright Act³⁵.

Dutch case law³⁶ has established that only works having their own, non-derivative, original character and possessing the personal stamp of the author, enjoy copyright protection. The author needs to have made creative choices which are reflected in the work.

Dutch law does not provide for a legal deposit. In consequence, exceptions to exclusive intellectual property rights that apply to multimedia works are central to the activities carried out in the KEEP project. In the absence of an applicable exception, the authorization of the right holders is required to realize the KEEP project.

Dutch law does not provide for a separate or specific legal framework related to the protection of multimedia works. A definition of a genuine 'multimedia work' does not exist. To determine if, and to what extent, multimedia works can be protected under Dutch law, the elements of multimedia works have to be assessed individually. This is exactly similar to the situation with the French and German legislative frameworks.

A genuine multimedia work is likely to be a combination of audiovisual, software and, as the case may be, database elements along with off the shelf software programs and databases considered on a standalone basis³⁷. These elements have to be addressed through the Dutch Copyright Act and related legislation as they apply to each or some of the elements of a multimedia work. Furthermore, different EC Directives apply to each or some of the potential elements of a multimedia work.

Implementation of the Computer Programs Directive

The Dutch legislature sought to fit the protection of computer programs in the traditional system of the Dutch Copyright Act to the greatest extent possible. Nevertheless, the transposition into national law was not intended to deviate from the Computer Programs Directive.³⁸ In consequence, the implementation had two major results. On the one hand, a number of specific new provisions based on the Directive were introduced in Articles 45h to 45n of the Dutch Copyright Act. On the other hand, a number of general provisions of the Dutch Copyright Act also apply to computer programs.

With regard to new provisions, Article 45j of the Dutch Copyright Act is of particular importance in the context of the KEEP project. It is modelled on Article 5.1 of the Computer

³⁵ It is the expression (in any form) of a computer program which is protected. Underlying ideas and principles are not protected by copyright.

³⁶ "een eigen, oorspronkelijk karakter bezit en het persoonlijk stempel van de maker draagt", Supreme Court of the Netherlands ("HR") 4 January 1991, NJ 1991, 608, AMI 1991, p. 177 (Van Dale v Romme)

³⁷ On the qualification of audiovisual elements as films, please refer to Section 5.2 (pp 52)

³⁸ See the explanations given during the legislative process. W.v. 22.531, MvA, p. 12. Cf. J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, pp. 590 and 596.

Programs Directive, and permits the reproduction of a lawfully acquired computer program for the intended purpose. The 'correction of mistakes' also falls under the exception.

In Dutch legal doctrine, Article 45j is understood to cover so-called acts of 'porting' where a computer program is transferred to a new computer configuration.³⁹ However, this view has not been supported in court decisions. For example, in *Bull Netherland N.V. versus Vomar Voordeelmarkt BV*, "Vomar had commissioned a party called Datafocus to convert a software package licensed to it by Bull. Vomar was summoned by Bull to stop the conversion but did not respond. Bull argued that the conduct of Vomar constituted a form of use other than private use, as authorised in the licence agreement between Bull and Vomar, and thus amounted to both a breach of contract and a breach of Bull's copyright in the software. Both arguments were accepted by the President and Vomar was ordered to stop further conversion of the source code and return the software to Bull."⁴⁰

In *Holland International Computer Services Holding B.V. versus Business Automation Systems B.V.* "the defendant, a former employee of the plaintiff decided to market a standard logging file developed by the plaintiff. After investigation by an expert appointed by it, the Court found that even though the programs of plaintiff and defendant were only partially identical those parts which had been found identical were essential to the program. The Court ruled out any possibility that those similarities were coincidental ; therefore an infringement of plaintiff's copyright were found."⁴¹

In cases where the original operation system has become outdated and is no longer maintained by the producer, however, the exception of Article 45j may be understood to cover the transfer of software to a new environment. In this way, the transfer may conceivably be equated with an act of maintenance.⁴² On this interpretation, Article 45j is likely to cover the act of reproduction which takes place when a computer program is taken from an outdated operation system and transferred to a new environment.

In addition, it is clarified in Article 45n of the Dutch Copyright Act that general exceptions to the exclusive rights of copyright holders also apply to computer programs. The provision only excludes private copying exceptions. In subsection 2.3.4, relevant exceptions that become applicable to computer programs on the basis of Article 45n will be discussed in more detail.

Implementation of the Database Directive

The Database Directive has been implemented in the Netherlands by the Implementation Act of July 8, 1999.⁴³ With regard to original databases that can be qualified as literary and artistic works under copyright law, the implementation led to amendments to the Dutch Copyright Act. The specific *sui generis* protection regime for non-original databases that has

³⁹ See D.W.F. Verkade, *Intellectuele eigendom*, in: H. Franken/H.W.K. Kaspersen/A.H. Wild, *Recht en computer*, 4th ed., Deventer: Kluwer 2001, p. 227.

⁴⁰ Oosterbaan D.T.L., & Thole E.P.M., *Software Protection in the Netherlands*, *International Journal of Law and Information Technology* Vol.1 No2. P.201. See also see Pres. Rb. Amsterdam, March 23, 1989, and Hof Amsterdam, June 22, 1989, *Computerrecht* 1989, p. 206 with case comment P. Terporten. Hoge Raad, May 3, 1991, *NJ* 1991, p. 458, and Hof 's-Gravenhage, May 27, 1993, *Computerrecht* 1993, p. 166.

⁴¹ Oosterbaan D.T.L., & Thole E.P.M., *Software Protection in the Netherlands*, *International Journal of Law and Information Technology* Vol.1 No2. pp200-201

⁴² See District Court of The Hague, April 23, 2003, *BIE* 2004, p. 40 with case comment by A.A. Quaadvlieg (*Bridge-boekhoud-software*). Cf. J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, pp. 597-599.

⁴³ See *Wet van 8 juli 1999, houdende aanpassing van de Nederlandse wetgeving aan Richtlijn 96/9/EG*, *Stb.* 1999, p. 303.

been introduced by the Database Directive was implemented in the Netherlands by adopting a new Databases Act (Databankenwet) that entered into force on July 21, 1999.⁴⁴

Both the amendments to the Dutch Copyright Act and the new Databases Act do not contain deviations from the original terms of the Database Directive that could be relevant in the context of the KEEP project.

With regard to database components that enjoy protection under the Dutch Copyright Act, the library exceptions in Articles 16n and 15h of the Act can be applied to carry out the reproduction necessary for the KEEP project (see the following section 2.3.4). As to database components that enjoy sui-generis protection under the Dutch Databases Act, these exceptions are not available. In line with the Database Directive, the Dutch Databases Act does not provide for specific library exceptions.

As pointed out above, however, it can be assumed that the majority of database components in the KEEP project enjoy copyright protection and, accordingly, are subject to Articles 16n and 15h of the Dutch Copyright Act. In the case of components that fall under the Dutch Databases Act, the much shorter term of protection (15 years) is decisive. In case protection has already expired, these components can be reproduced without the authorization of the right owner."

Implementation of the Information Society Directive with regard to exceptions to reproduction rights and protection of technical measures

Copyright

Dutch legislation implementing the Information Society Directive entered into force on September 1, 2004.⁴⁵ With regard to limitations and exceptions, the Dutch legislator followed a liberal approach. In the amended Dutch Copyright Act, most of the exceptions that are permissible under Article 5 of the Directive have been transposed into national law.⁴⁶ Privileges for libraries, museums, and archives have been based on Articles 5.2 (c) and 5.3 (n) of the Directive. They are laid down in Articles 16n and 15h of the Dutch Copyright Act.

Article 16n of the Dutch Copyright Act concerns the reproduction of copyrighted material for preservation purposes. A publicly accessible library or museum, or an archive may reproduce a work in its own collection if this is necessary to restore the copy, or if there is a risk of decay. Moreover, and of particular interest to the KEEP project, reproduction is permissible to keep copyrighted material accessible when the original enabling technology becomes obsolete.

However, it should be noted that Article 16n only exempts acts of reproduction of material which the museum or archive holds in its *own* collection.⁴⁷ Therefore, the exception would not cover the transfer of copyrighted content to a universal platform that is shared with institutions who do not themselves hold a copy of the works concerned. Furthermore, the exception is only applicable if the moral rights of the author are observed. Hence, the reproduction may not lead to changes of the copyrighted content or its distortion, mutilation or other modification. The name of the author must be indicated, and the title of the work may not be altered.

⁴⁴ See J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, p. 607.

⁴⁵ See Wet houdende aanpassing van de Auteurswet 1912, de Wet op de naburige rechten en de Databankenwet ter uitvoering van richtlijn nr. 2001/29/EG of July 6, 2004, Stb. 2004, p. 336.

⁴⁶ See the explanations given with regard to the Dutch implementation legislation, MvT w.v. 28.482, nr. 3, pp. 16-20. Cf. J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, p. 217.

⁴⁷ See J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, p. 285.

In the course of the deliberations concerning the exception, the Dutch Minister of Justice held the view that the exclusion of any direct or indirect economic or commercial advantage following from Article 5.2 (c) of the Information Society Directive, only applied to archives. In the case of libraries and museums, Article 16n would thus be applicable even if the reproduction served commercial purposes.⁴⁸ In fact, the official Dutch text of the Directive is ambiguous in this regard. Against this background, the approach taken by the Minister is supported in leading Dutch commentary literature.⁴⁹ Whether it is in line with the Community Framework and likely to be upheld by the courts, will be discussed in the following subsection.

As indicated above, Article 16n of the Dutch Copyright Act is accompanied by a further exception in favour of libraries, museums and archives. Article 15h of the Dutch Copyright Act exempts the making available of copyrighted content, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of the aforementioned institutions. In line with Article 5.3 (n) of the Information Society Directive, the Dutch provision only applies to copyrighted content contained in the collection of the library, museum or archive availing itself of the exception. Hence, the provision does not cover the making available on a universal platform that is shared with institutions not holding the works concerned. Moreover, the text of the provision clarifies that the exception only applies to closed, internal networks, and not to external networks or online services. Finally, the provision is understood to exempt only use that neither directly nor indirectly serves commercial purposes.⁵⁰

In the absence of any indications to the contrary, it seems safe to assume that the two exceptions laid down in Articles 16n and 15h of the Dutch Copyright Act may be combined.⁵¹ In the framework of the KEEP project, copyrighted material that has been transferred to a universal platform in compliance with Article 16n may thus subsequently be made available in compliance with Article 15h.

Computer programs

As pointed out above, the general exceptions permitted under the Dutch Copyright Act also apply to computer programs by virtue of Article 45n. Only private copying exceptions are excluded. Therefore, Articles 16n and 15h DCA can also be invoked with regard to computer programs.⁵²

The applicability of Article 16n does not add much when considering the broad interpretation that may be given to the specific provision of Article 45j (modeled on Article 5.1 of the Computer Programs Directive) in the Dutch legal system. Article 15h, however, offers the opportunity of making available computer programs via dedicated terminals on the premises of libraries, museums and archives⁵³.

⁴⁸ See J.I. Krikke, *De Auteurswet gewijzigd: Artikel 15h en 16n Aw (bibliotheekprivilege)*, Tijdschrift voor auteurs-, media- en informatierecht 2006, pp. 63-64.

⁴⁹ See D.J.G. Visser in: Ch. Gielen/D.W.F. Verkade (ed.), *Intellectuele eigendom*, 2nd ed., Deventer: Kluwer 2005, p. 45; J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, p. 285.

⁵⁰ See J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, p. 283.

⁵¹ See J.I. Krikke, *De Auteurswet gewijzigd: Artikel 15h en 16n Aw (bibliotheekprivilege)*, Tijdschrift voor auteurs-, media- en informatierecht 2006, p. 64.

⁵² See J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2007, p. 595.

⁵³ However, contractual limitations would apply and prevail over Article 15h (see Section 5.2 p 52).

Technological protection measures

With regard to the interface between copyright exceptions and the protection of technological measures, Article 6.4 of the Information Society Directive stipulates that, in the absence of voluntary measures taken by the right holders and other parties concerned, Member States may take appropriate measures to ensure that users can benefit from the exceptions laid down in Articles 5.2 (a), (c), (d), (e) and 5.3 (a), (b) and (e) of the Directive.

The Dutch legislator followed this approach. According to Article 29a.4 DCA, an administrative obligation can be imposed on right holders to offer users of copyrighted material the opportunity to benefit from the Dutch exceptions that correspond to those enumerated in Article 6.4 of the Information Society Directive. Under this provision, an administrative order may in principle be issued to ensure that Article 16n DCA – the Dutch exception corresponding to Article 5.2 (c) of the Directive – prevails over conflicting technological protection measures. However, such an administrative order has never been adopted. The possibility to strengthen Article 16n DCA, therefore, has not been used. Technological protection measures prevail over the exception instead.

The second Dutch exception for the benefit of libraries, museums and archives – Article 15h – corresponds to Article 5.3 (n) of the Information Society Directive. The latter exception is not among the exceptions listed in Article 6.4 of the Information Society Directive. Therefore, the Community Framework does not leave room for the Dutch legislator to adopt measures that would give the exception a stronger position than the protection of technological measures. Hence, technological protection measures also prevail over this exception⁵⁴.

For the purposes of the KEEP project, it would thus not be permissible under Dutch law to bypass technological protection measures that are applied to copyrighted material in the collections of the institutions involved in the project.

Compliance of Dutch law exceptions with the Community Framework

Doubt has been cast on the compliance of the exceptions laid down in the Dutch Copyright Act with the Community Framework because the three-step test of Article 5.5 of the Directive has not been implemented into national law in the Netherlands.⁵⁵ Dutch courts, however, applied the three-step test already prior to the Copyright Directive.⁵⁶ The adoption and implementation of the Directive even led to more frequent references to the three-step test.⁵⁷

⁵⁴ Except with regard to software programs (See Study for Work Package 2 Section 4)

⁵⁵ See H. Cohen Jehoram, *Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets*, AMI 2005, p. 153.

⁵⁶ In the case 'Zienderogen Kunst', dating back to the year 1990, the Dutch Supreme Court invoked the three-step test of Art. 9(2) of the Berne Convention to support its holding that the quotation of a work may not substantially prejudice the right holder's interest in the exploitation of the work concerned. See Hoge Raad, June 22, 1990, no. 13933, NJ 1991, p. 268 with case comment by J.H. Spoor; *Informatierecht/AMI* 1990, p. 202 with case comment by E.J. Dommering; *AA* 40 (1991), p. 672 with case comment by H. Cohen Jehoram.

⁵⁷ In 2003, the Amsterdam Court of Appeals found that a parody did not harm the normal exploitation of the parodied work because it concerned a different market. See *Gerechtshof Amsterdam*, January 30, 2003, AMI 2003, p. 94 with case comment by K.J. Koelman. In a 2006 decision concerning online advertisements reproducing the so-called 'TRIPP TRAPP chair', the Court of Zwolle-Lelystad referred to the three-step test of Art. 5(5) of the Directive in the context of Art. 23 of the Dutch Copyright Act – a limitation permitting the use of certain artistic works for the purpose of advertising their public exhibition or sale. The Court found that the use in question prejudiced the exploitation interest of the right holder. This was one of the reasons for denying compliance with Art. 23. See *Rechtbank Zwolle-Lelystad*, May 3, 2006, case no. 106031, LJN: AW 6288, AMI 2006, p. 179 with case comment by K.J. Koelman; *Mediaforum* 2006/9 with case comment by B.T. Beuving.

Given the approach taken by the courts, the Dutch legal framework, therefore, can hardly be deemed not to be in line with the Directive.

The application of the three-step test, however, may lead to a more restrictive interpretation of the exceptions laid down in the Dutch Copyright Act. In a ruling of March 2, 2005, the District Court of The Hague, for instance, held that the long-standing Dutch exception for press reviews came into conflict with the three-step test in the digital environment.⁵⁸ In a more recent decision of June 25, 2008, the District Court of The Hague invoked the three-step test to clarify that private copying from an illegal source did not meet the requirements of the three-step test.⁵⁹ This decision was taken even though the detailed regulation of private copying in Art. 16c of the Dutch Copyright Act does not contain any indication to the effect that private copying from an illegal source is to be deemed impermissible. The drafting history of the provision, moreover, reflects the clear intention of the Dutch legislator to exempt private copying irrespective of whether a legal or illegal source is used.⁶⁰

Against this background, Dutch courts are likely to find that, in light of the three-step test, the exception in Article 16n of the Dutch Copyright Act (reproduction in case of disappearing technology) only applies to reproductions non-commercial purposes.

The application of Articles 16n and 15h of the Dutch Copyright Act to computer programs, on the other hand, is generally considered consistent with the Community Framework. Recital 19 of the Computer Programs Directive clarifies that the Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by the Directive.⁶¹ Note that this Recital is a cornerstone of the Dutch implementation. On the basis of this Recital, the Dutch legislator decided that - apart from private copying exceptions - ALL general exceptions in the Dutch Copyright Act, including the exceptions serving library purposes, also apply to computer programs. As the Computer Programs Directive does not specifically deal with user privileges for libraries, museums and archives, it can be held that Articles 16n and 15h of the Dutch Copyright Act do not interfere with the Computer Programs Directive.

⁵⁸ See Rechtbank Den Haag, March 2, 2005, case no. 192880, LJN: AS 8778, *Computerrecht* 2005, p. 143 with case comment by K.J. Koelman

⁵⁹ See Rechtbank Den Haag, June 25, 2008, case no. 246698, LJN BD5690, *AMI* 2008, p. 146 with case comment by C.B. van der Net.

⁶⁰ See the material quoted by the Rechtbank Den Haag, *ibid.*, para. 4.4.1.

⁶¹ See L. Bently, *Commentary on the Computer Programs Directive*, in: Th. Dreier/P.B. Hugenholtz (eds.), *Concise European Copyright Law*, New York: Kluwer Law International 2006, p. 225.

The impact on KEEP of the legal study conclusions

KEEP originally contemplated:

- making a fully-integrated media transfer solution
- creating new transfer tools where necessary
- by-passing Technical Measures of Protection (TMP)
- making emulation and associated services available on-line

Following the legal study the decision was taken

- NOT to develop any new media transfer tools
- to curtail significantly proposed modification to third party media transfer tools.
- NOT to make emulation and associated services available on-line

The restrictions identified in the KEEP legal studies led to a recommendation for a substantial redesign of the KEEP workplan in order to ensure that the project is legally compliant. The detailed changes involved are set out in internal project documents and are not re-stated here.