EUROPEAN PARLIAMENT

2004 *2009*

Committee on Legal Affairs

2008/2121(INI)

14.10.2008

DRAFT REPORT

on the Commission report on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
(2008/2121(INI))

Committee on Legal Affairs

Rapporteur: Manuel Medina Ortega

CONTENTS

Page

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the Commission report on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
(2008/2121(INI))

The European Parliament,

– having regard to Articles 14 and 95 of the EC Treaty,

– having regard to Article 27 of the United Nations Universal Declaration of Human Rights,

– having regard to Article 17, paragraph 2, of the European Union Charter of Fundamental Rights,

– having regard to the Commission report of 30 November 2007 on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (SEC(2007)1556),

– having regard to the Commission Green Paper of 16 July 2008 on copyright in the knowledge economy (COM(2008)0466),

– having regard to 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[1],

– having regard to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights[2] and to the Commission statement on Article 2 of. Directive 2004/48/EC (2005/295/EC),

– having regard to its resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services[3],

– having regard to its resolution of 15 January 2004 on a Community framework for collective management societies in the field of copyright and neighbouring rights[4],

– having regard to the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC),

– having regard to the Commission Communication of 16 April 2004 on the management of copyright and related rights in the internal market (COM(2004)0261),

---

[1] OJ L 167, 22.6.2001, p. 10.
[2] OJ L 195, 2.6.2004, p. 16.
[3] Texts adopted of that date P6_TA(2008)0462.
[4] OJ C 92 E, 16.4.2004, p. 425.

– having regard to Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases[1],

– having regard to Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights[2],

– having regard to its resolution of 27 September 2007 entitled '2010: towards a European digital library'[3],

– having regard to Rule 45 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy and the Committee on the Internal Market and Consumer Protection (A6-0000/2008),

Copyright and the information society

1. Recalls that the adoption of Directive 2001/29/EC was one of the priority objectives laid down by the Lisbon European Council of 23 and 24 March 2000 in the context of the process leading to a competitive, dynamic, knowledge-based economy;

2. Regards the application of that directive in the various Member States and its effects on harmonisation of copyright as satisfactory;

3. Notes that any reform of the directive would be undesirable given that the process of its transposition by the Member States did not end until 2006;

4. Takes the view that Directive 2001/29/EC constitutes a fair balance between the interests of the various players involved;

5. Recalls that Directive 2001/29/EC plays an important role in adapting copyright and neighbouring rights to the information society;

6. Wonders about the reasons for having the Commission Green Paper concentrate almost solely on the world of publishing, forgetting the other cultural industries;

7. Takes the view that protection of copyright, neighbouring rights and intellectual property is an important factor in the European Union's economic competitiveness;

8. Thinks that the creative industry has an essential role to play in the information society;

9. Stresses that protecting copyright and neighbouring rights is one of the necessary conditions for stimulating creativity and innovation, as well as for safeguarding cultural identities;

10. Recalls that the copyright system is the most appropriate system for an economy based on

[1] OJ L 77, 27.3.1996, p. 20.
[2] OJ L 372, 27.12.2006, p. 12.
[3] OJ C 219 E, 28.8.2008, p. 296.

knowledge and skill;

11. Takes the view that enforcement of copyright and neighbouring rights is the best guarantee of the development of a legitimate digital market;

12. Notes that the existence of a plurality of offers of cultural goods and services and the dissemination of these throughout the Union's territory is also dependent upon enforcement and protection of copyright and neighbouring rights*;*

13. Stresses that the dynamism and diversity of the world of European creative arts is one of the foundations of freedom of expression;

14. Recalls that enforcement of copyright constitutes a means of safeguarding diverse national cultures;

15. Points out that rightholders must be able to enjoy protection of copyright and neighbouring rights in the place where these rights are asserted, regardless of national borders and modes of use, throughout their entire period of validity;

16. Recalls that the information society opens up new markets in which protected works may be exploited by means of electronic products and interactive services;

17. Considers it important to guarantee enforcement of authors' moral rights and is concerned at the spread of 'work for hire' contracts which provide for forced surrender of royalties and damage the right of authorship and respect for works;

The regime of exceptions

18. Recalls that, pursuant to Article 5, paragraph 5, of Directive 2001/29/EC, the exceptions provided for by the directive are only applicable in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder ('three-step test' clause);

19. Takes the view that digitisation of works should take account of copyright and neighbouring rights and must not conflict with normal exploitation of the works on the internet, particularly as regards revenue earned by virtue of the right of making available to the public;

20. Takes the view that the approach based on an exhaustive list of non-compulsory exceptions chosen by Directive 2001/29/EC is sufficiently flexible and still valid;

21. Takes the view that the creation of online digital libraries on the basis of large-scale digitisation projects must be carried out entirely in agreement with holders of copyright and neighbouring rights on the basis of voluntarily negotiated agreements;

22. Wishes the exception provided for in Article 5, paragraph 3, point (b), of Directive 2001/29/EC for the benefit of people with disabilities to be applied fully;

23. Invites reflection on the risk to protection of copyright and neighbouring rights represented by the exception to reproduction and communication rights in the context of

applied scientific research in the case of distance learning;

24. Wishes the scientific community and researchers to enter into licence-issuing schemes with publishers in order to improve access to works for purposes of teaching and research;

25. Takes the view that interoperability between online services and the various types of equipment that receive such services must be encouraged with a view to promoting legal supply and developing a competitive online market;

26. Takes the view that works created by users must comply with copyright and neighbouring rights and that there is no need to introduce a new exception for 'works created by users';

Implementation of rights

27. Recalls that the economy of the cultural sector and continuing creative activity are threatened by unauthorised use, which do serious damage to the creative arts sector and technological innovation;

28. Thinks that the fight against piracy must be waged on a number of fronts: education and prevention, development and accessibility of legitimate digital supply, cooperation and legal penalties;

29. Supports the promotion of an environment conducive to legal distribution of, and access to, online creative content;

30. Takes the view that the activity of websites offering downloading of works and services that are protected by copyright and neighbouring rights is illegal, as is peer-to-peer exchange of works or services without the consent of the rightholders;

31. Supports the setting up in the individual Member States of administrative authorities responsible, on instruction from rightholders and using a graduated approach, for the enforcement of copyright on the internet;

32. Approves the action of various national judicial systems against internet sites that illegally disseminate works on line (e.g. 'The Pirate Bay');

33. Wishes the activities of such sites to be suspended by the judicial authorities in the Member States;

34. Calls on the Commission to study the application of Article 8, paragraph 3, of Directive 2001/29/EC and to think about the best ways of combating piracy, particularly on line, in order to help promote and develop a flourishing market in online content;

35. Encourages the use of work identification and recognition technologies with a view to distinguishing more easily between legal and pirated products;

36. Invites reflection on the responsibility of internet access providers in the fight against piracy;

37. Calls for cooperation from internet access providers in preventing and curbing electronic

piracy;

38. Calls for the legal supply of works on the internet to be developed, for example by lowering VAT on digital services;

0

0 0

39. Instructs its President to forward this resolution to the Council and Commission.

EXPLANATORY STATEMENT

I. Copyright and related rights in the information society

Protection of copyright and related rights in the information society forms an important part of the development of economic life in the single market.
Copyright traditionally gives the author two major economic rights: the right of reproduction and the right of making available to the public.
The information society has opened up new markets in which protected works can be exploited through the media of electronic products and interactive services.
In this context, protection of copyright is one of the necessary conditions for stimulating creativity and innovation and promoting different cultural identities.
Copyright is not only an ex-post reward for authors' work, but also a way of encouraging them to create more. This incentive aspect is even more important for producers and distributors.
Rightholders must therefore have the chance to benefit from the protection afforded by copyright and related rights where these rights are established, regardless of national frontiers and modes of use, throughout their entire period of validity.

Piracy in the information society is an obstacle to the exercise of a creative activity which should be financially profitable.
It must be borne in mind that information property has an atypical cost structure in which the bulk of the costs lie in its design and production.

The nature of copyright must not be allowed to change as a result of technological progress

The fight against piracy must take place on a number of fronts: education and prevention, development of accessibility to the legal digital market, cooperation and legal sanctions.

It is now necessary to strike a balance between the legitimate interests of authors and the interests of the public and society, in the light of Article 27 of the United Nations Universal Declaration of Human Rights, which stipulates that: '*(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.*

Directive 2001/29 EC on the harmonisation of certain aspects of copyright and related rights in the information society has a threefold objective:
- to reaffirm the rights of authors and holders of related rights while taking into account the specificities of digital media,
- to define the regime of exceptions to these rights,
- to provide legal protection for the technical measures attached to works and services in order to prevent unauthorised acts by rightholders.

The directive is a logical extension of the 1996 World Intellectual Property Organisation (WIPO) Copyright and Performances and Phonograms Treaties.

The Directive leaves the Member States a great deal of leeway in deciding how it should be transposed, sometimes creating legal uncertainty within individual Member States and disparities between the Member States because of the optional nature of many of the provisions, which leaves the Member States free to adopt 'à la carte' many exceptions to the rights laid down, and because the Member States are given the task, sometimes in vague terms, of implementing legal protection.

II. Basis on which to assess the application of Directive 2001/29 EC

The Commission report on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (SEC 2007/1556) considers the transposition by the Member States and the application by the national judge of Articles 5 (exceptions and limitations), 6 (protection of technological measures and rights management information) and 8 (sanctions and remedies) of the directive.

The arrangements for exceptions, their application and practical transposition

– Article 5 of the directive sets out a compulsory exception (paragraph 1) and optional exceptions to the right of reproduction only (paragraph 2) and the rights of reproduction, communication to the public and making available to the public (paragraph 3), with these optional exceptions also able to be extended to the right of distribution (paragraph 4).
– Paragraph 5 makes all the exceptions to, and limitations of, the various rights set out in the directive subject to the 'triple test' rule: that is to say that they may *'only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder'*. This 'triple test' has its origins in Article 9.2 of the Berne Convention for the Protection of Literary and Artistic Works and Article 10 of the 1996 WIPO Treaties.

Article 5.1 provides for an exception in respect of temporary acts of reproduction which are transient or incidental and form an integral and essential part of a technological process.
Article 2 of the directive sets out the right of reproduction in the broadest possible terms, but in the digital environment reproductions are numerous and often ephemeral. They are nevertheless covered by the exclusive right, which is the reason why reproduction such as that required by certain means of communication is deemed to be an exception, the only compulsory one in the directive (Article 5.1).

With the *Google-Copiepresse* judgment of 13 February 2007, on the other hand, the Belgian judge ruled that a copy of a webpage memorised by the Google server and the existence of a link giving public access to the same webpage contravene the rights of reproduction and communication to the public.

All the Member States except the United Kingdom and Ireland have transposed, in a variety of different ways, the exception in respect of reproductions for private use set out in **Article 5.2.b**. In addition, the Belgian and French courts have ruled that it is not a right that is always applicable (*Test Achats v. EMI,* Brussels Court of Appeal 9/92005 and *Studio Canal v S. Perquin et Union fédérale des consommateurs Que Choisir* Paris Court of Cassation, 28/2/2006).

The exception provided for in **Article 5.2.c** in respect of specific acts of reproduction made by libraries or other bodies which are not for commercial advantage is not unlimited. It is restricted to specific cases such as reproduction that is necessary for the preservation of works contained in library catalogues.
Publishers, for example, think they can give prior authorisation for a book to be scanned, as in the appeal against Google brought on 6 June 2006 before the Paris Court of First Instance by the La Martinière Group and others.

It goes without saying that the phenomenon of works being put on line by digital libraries can be very damaging to copyright holders.

The exception in respect of the press set out in **Article 5.3.c** in order to reflect current developments has been interpreted very broadly by some Member States, but in the *Copiepresse v. Google* judgment the Belgian judge took the view that Google's reproduction without comment of parts of articles was not covered by this exception. The same judgement does not consider the exception in respect of quotations for purposes such as criticism or review provided for in **Article 5.3.d** to be applicable to the Google.News service.

The exception provided for in **Article 5.3.k** in respect of use for the purpose of caricature, parody or pastiche has been transposed in widely differing ways into national legislation: it has not been included by the United Kingdom, for example, and is strictly regulated in Germany in accordance with the case law of the Hamburg Regional Court in its 'thumbnails' decision of 5 September 2003.

Protection of technical measures

Article 6 of the Directive requires the Member States to provide adequate legal protection against the circumvention of any effective technological measures (TPM technological protection measures) and against distribution of devices for such circumvention.
Article 6, paragraph 3, defines 'technical measures' as *'any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC'.*
In the United Kingdom, the 2005 High Court's *Sony Computer Entertainment v Ball* judgment established that, for a technical protection measure (TPM) to be covered by the definition in Article 6.3**,** it must be determined whether it was created specifically for the purpose (*'it is necessary to determine whether it is designed in the normal course of its*

operation to prevent unauthorised use of copyright work in a way which would amount to an infringement of copyright')
German case law, in the *Heise Online* judgment of 2005, established a ban on supplying software for the circumvention of any technical protection measure, even with links to an 'offshore website'.

The concept of an 'effective technical measure' has been transposed by all the Member States except Slovakia and Sweden.

Paragraph **4** of **Article 6** provides that the Member States may take *appropriate measures* – in the absence of voluntary measures taken by rightholders – to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with **Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e)** the means of benefiting from that exception or limitation. The rather broad concept of 'appropriate measures' is applied in different ways in the Member States: there is, for example, no transposition in Austria, the Czech Republic or the Netherlands, while there are mediation and arbitration measures in Finland, Denmark, Estonia, Greece and Hungary and the possibility of legal remedy in Belgium, Germany, Spain and Ireland. France, finally, provides for remedy via the administrative route.

Sanctions and the protection of copyright and related rights holders

Article 8.3 of Directive 2001/29 provides that *'Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right'*. Only Austria, Greece, Lithuania and Belgium have explicitly transposed this provision, which is covered in the other Member States by existing law.

In recent years there have been a number of court actions against internet access providers and host servers.
On 29 June 2007 the Brussels Court of First Instance ordered the firm of Scarlet (formerly Tiscali) to install 'filters' to prevent circumvention of peer-to-peer files. Along similar lines, on 10 February 2006 a Danish judge ordered a server to cut the internet connection of clients who infringed copyright, and on 25 October 2006, also in Denmark, the TELE2 server was ordered to block its clients' access to the Russian site AllofMP3.com, which allowed songs to be downloaded illegally.

One very sensitive area is that of 'peer-to-peer', i.e. the phenomenon of websites and software whereby internet users share, either directly or via a shared site, files containing reproductions of protected works or services without the consent of the rightholders (Napster (centralised), Kazaa (decentralised)).

The activities of websites that are not part of the peer-to-peer phenomenon and which allow downloading of protected works or services without the necessary authorisation are illegal, and no exception can be applied to them.
So the activity of internet users who send files to their peers must be regarded as an illegal act of communication to the public without the possibility of exceptions being applied.

As regards downloading, it is doubtful whether this activity constitutes an act of reproduction that could be covered by the exception relating to private copying (Article 5.2.b) carried out by a natural person for private use for ends that are neither directly nor indirectly commercial, although in this case the issue of whether the origin is legal or illegal must be borne in mind.

On the basis of these considerations, rightholders are currently focusing on reaching agreements with internet access providers. They are proposing that procedures be put in place for the purpose of notifying suspected illegal activity so that access providers can, within an appropriate period, take the necessary measures vis-à-vis internet users and supply full details of the latter with a view to prosecution. But all of this could come into conflict with the principle of protecting personal data.

According to the ECJ 'Telefonica' judgment of 29 January 2008, Community law does not require Member States to divulge these personal data in the context of civil proceedings in order effectively to protect copyright. The Court did, however, raise the question of the need to reconcile the fundamental rights to privacy, on the one hand, and intellectual property protection and effective recourse on the other. The 'Telefonica' judgment confirms the importance of protecting intellectual property rights and in no way prevents internet access providers and other online operators from collaborating with rightholders in the fight against internet piracy.