

## **‘Evaluating directive 2001/29/EC in the light of the digital public domain’**

International Conference on Public Domain in the Digital Age  
Louvain-La-Neuve, Belgium  
June 30<sup>th</sup> and July 1<sup>st</sup> 2008

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### **Abstract**

This paper presents an evaluation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the digital information society. Although the public domain is nowhere explicitly mentioned in the Directive, the overall framework that it creates undeniably affects the way digital works are being used. Particular attention is paid to the provisions of the Directive pertaining to the limitations on copyright and the legal protection of technological protection measures, especially insofar as they affect the activities of libraries, archives and museums.

### **1. Introduction**

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society entered into force on 22 June 2001.<sup>1</sup> The objectives of the Directive were twofold: (1) to adapt legislation on copyright and related rights to reflect technological developments, and (2) to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996.<sup>2</sup> The Directive was one of the centrepieces of the original Lisbon Agenda of 2000. The renewed Lisbon agenda aims at fostering economic prosperity, jobs and growth, in particular by boosting the knowledge-based economy, and by enhancing the quality of Community regulation (‘better regulation’). In doing so, the original Lisbon aim of making the European Union “the most dynamic and competitive knowledge-based economy in the world” by 2010, remains intact. A legislative framework for copyright and related rights in the information society that fosters the growth of the knowledge-based economy in the European Union was therefore seen as a crucial element in any strategy leading towards that goal.

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This paper is partly based on L. Guibault et al., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, report to the European Commission, ETD/2005/IM/D1/91, DG Internal Market, February 2007, [http://www.ivir.nl/publications/guibault/Infosoc\\_report\\_2007.pdf](http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf)

<sup>1</sup> OJ 2001 L 167 of 22.6.2001, p. 10 (hereafter ‘Directive 2001/29/EC’ or ‘Information Society Directive’).

<sup>2</sup> WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) both signed at the WIPO Diplomatic Conference, Geneva, 20 December 1996.

At the same time, the European Commission is an active promoter of the digitisation and online accessibility of cultural material and digital preservation by libraries, archives and museums. In connection with the “i2010 initiative”, the Commission published a Recommendation on the digitisation and online accessibility of cultural material and digital preservation.<sup>3</sup> The objective of this initiative is to develop digitised material from libraries, archives and museums, as well as to give citizens throughout Europe access to its cultural heritage, by making it searchable and usable on the Internet. The achievement of these goals inevitably raises copyright issues. As noted in Recital 10 of the Recommendation, only part of the material held by libraries, archives and museums is in the public domain, while the rest is protected by intellectual property rights.

To what extent do the provisions of the Information Society Directive affect the way digital works are being used? More specifically, do the provisions of the Directive pertaining to the limitations on copyright and the legal protection of technological protection measures, allow libraries, archives and museums to comply with the objectives of the Recommendation on the digitisation and online accessibility of cultural material and digital preservation? In other words, are the goals of the Information Society Directive compatible with those of the Recommendation on digitisation and accessibility of material?

This paper, written in the context of the International Conference on the Digital Public Domain organized by the European Communia project,<sup>4</sup> is further divided in four sections. Section 2 puts Directive 2001/29/EC in the context of the digital public domain, by describing the public domain from a continental European law perspective and the position of libraries, archives, museums and scientific research. Section 3 analyzes the impact that the implementation of the provisions of the Directive dealing with the exceptions and limitations on copyright has on the activities of libraries, archives and museums. The provisions of the Directive on the legal protection of technological protection measures (TPMs) are put to a comparable test in section 4. Section 5 sums up with a number of concluding remarks.

## **2. Directive 2001/29/EC in context**

Before turning in the following sections to the analysis of the impact of the implementation of the provisions of Directive 2001/29/EC on the use of copyright protected works and the activities of libraries, archives and museums, it appears important to put the Directive into context. To this end, the first subsection briefly describes the public domain from a continental European law perspective, while the second subsection gives a portrait of the main interests and concerns of libraries, archives and museums.

### *2.1 Defining the Public Domain*

When trying to map the public domain from a continental European law perspective,<sup>5</sup>

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<sup>3</sup> Commission of the European Communities, Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation O.J.C.E. L 236/28, 31 August 2006.

<sup>4</sup> See: <http://communia-project.eu/conf2008/program>

<sup>5</sup> See: P. Samuelson, “The Challenges of Mapping the Public Domain”, in L. Guibault and P.B.

it must be emphasized that intellectual property regimes are designed to strike a delicate balance between the interests of authors, inventors or other rights holders in the control and exploitation of the fruit of their intellectual labour on the one hand, and society's competing interest in the free flow of ideas, information and commerce on the other hand. To this end, most intellectual property regimes admit a number of inherent limits that are designed to promote the dissemination of new works or inventions and to ensure the preservation of a vigorous public domain. These limits are the definition of protectable subject matter (the idea/expression dichotomy), the criteria for protection (the requirement of originality or substantial investment), the fixed duration of the intellectual property protection, and the exhaustion doctrine.

Apart from the copyright regime's inherent limits, a balance of interest between encouraging the creation and the dissemination of new creations is further achieved through the recognition of limitations on the rights owners' exclusive rights. Limitations on rights are designed either to resolve potential conflicts of interests between rights owners and users from within the intellectual property system or to implement a particular aspect of public policy. Technically, limitations should reflect the legislator's assessment of the need and desirability for society to use a protected subject matter against the impact of such a measure on the economic interests of the rights holders. This weighing process often leads to varying results from one country to the next. Potential conflicts between the interests of rights owners and those of society take place at different levels and have different grounds. Limitations typically protect freedom of expression and the right to privacy;<sup>6</sup> they safeguard free competition, promote the dissemination of knowledge, or respond to symptoms of market failure. Of course, certain limitations may have been adopted on more than one ground and the justifications underlying a particular limitation may change over time.

National laws are generally silent on the subject of the imperative character of copyright limitations. The legislator's silence could be interpreted either way, i.e., as providing arguments for or against the imperative character of limitations on copyright. Generally speaking, limitations on copyright have been adopted as an express recognition by the legislator of the 'legitimate interests' of users. However, whether the limitations embodying such 'legitimate interests' are to be considered imperative or not is likely to depend on a number of factors, including the lawmakers' conception of the overall objectives pursued by the copyright regime. The imperative or default character of the limitations must therefore be determined by examining the legislator's intent, as revealed in the legal commentaries and the jurisprudence.<sup>7</sup>

In view of the small volume of literature available in continental Europe on the subject of the public domain, it is difficult to tell whether the notion of public domain would generally be deemed in Europe as extending also to the user privileges

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Hugenholtz (ed.), *The Future of the Public Domain – Identifying the Commons in Information Law*, The Hague, Kluwer Law International, 2006, pp. 7-25; and S. Choisy, *Le domaine public en droit d'auteur*, Paris, Litec, 2002, p. 53.

<sup>6</sup> P.B. Hugenholtz, 'Fierce Creatures. Copyright Exemptions: Towards Extinction?', keynote speech, IFLA/IMPRIMATUR Conference, *Rights, Limitations and Exceptions: Striking a Proper Balance*, Amsterdam, October 30-31, 1997, p.18; and F. Melichar in G. Schricker (ed.), *Urheberrecht Kommentar*, München, Verlag C.H. Beck, 1999, p. 735.

<sup>7</sup> L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague, London, Boston, Kluwer Law International, 2002, p. 109.

recognised under intellectual property law, as it has been suggested in the American literature.<sup>8</sup> However, even if the statutory user privileges are not to be considered as part of the public domain in the strict sense, the widespread use of technological protection measures in conjunction with contractual restrictions on the exercise of the privileges recognised by copyright law does affect the free flow of information or, as Madison calls it, the ‘open space’.<sup>9</sup>

## 2.2 Libraries, archives and museums

Typical functions of any library are the collection, preservation, archiving, and dissemination of information. The preservation and archiving of copyrighted works often involves the making of reproductions from original works, either because they have been damaged, lost, or stolen.<sup>10</sup> The dissemination of information takes place in a number of ways, either by lending exemplars of works; by permitting the public consultation of works on the premises of the library or the consultation of electronic material at a distance; by allowing patrons to make their own reproductions of works for personal purposes using freely accessible machines (photocopy, microfiches or printer); or finally by transmitting works at the request of individual patrons in the context of a document delivery service or an interlibrary loan service.<sup>11</sup>

Public and research libraries occupy a central role in the supply of information to the public. Either through catalogues, (electronic) databases, compilations of press articles, and other sources, libraries make current social and cultural information available to the public on a non-profit basis. In this context, one can easily understand the libraries' wish to be able to continue to provide the same services in the digital environment as they are providing in the analogue world. With the digitisation of works, several of the libraries' and archives' main activities have given rise to an intensification of use of works by the public, either off- or on-line, on the premises or at a distance. A number of these activities, when carried out in the digital environment, raise some uncertainty under copyright law, the most problematic of which are electronic document delivery services and the digitisation of copyright protected material held in the collections of libraries and archives.

Libraries and archives see in digital technology the ideal means to preserve or restore their collections. The question therefore arises of whether public libraries, archives and other similar institutions should be allowed to make digital reproductions of works and under what circumstances such reproductions could be allowed. Also, can a library or archives make a copy of a digital work in its collection? A library or archives could consider making such a digital reproduction in the case where the original of a work is currently in an obsolete format, where the technology required in

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<sup>8</sup> See: Pamela Samuelson, ‘The Challenges of Mapping the Public Domain’, in L. Guibault and P.B. Hugenholtz (ed.), *The Future of the Public Domain – Identifying the Commons in Information Law*, The Hague, Kluwer Law International, 2006, pp. 7-25.

<sup>9</sup> M.J. Madison, ‘Legal-ware: Contract and Copyright in the Digital Age’, 67 *Fordham Law Review* 1025-1143 (1998), p. 1029.

<sup>10</sup> Instituut voor Informatierecht, *Auteursrechtelijke aspecten van preservatie van elektronische publicaties*, Universiteit van Amsterdam, Februari 1998, IViR Rapporten – 7., p. 1.

<sup>11</sup> J. Krikke, *Het bibliotheekprivilege in de digitale omgeving*, Deventer, Kluwer Law, 2000, p 21; D.J.G. Visser, ‘Naar een multimedia-bestendig auteursrecht’, *ITeR* No.10, Samsom BedrijfsInformatie, Alphen aan den Rijn, 1998, pp. 1-81., p. 45.

order to consult the original is unavailable or where the institution's copy of a work has been stolen or is deteriorating.<sup>12</sup>

Contrary to the making of reproductions of works for the library patrons' personal use, activity which is usually limited to the reproduction of only portions of works, the digitisation of works for preservation or restoration purposes involves the reproduction in digital form of entire works. Recognising the library's and archives' capital role in the preservation of a nation's cultural and historical heritage, the copyright systems of a number of industrialised countries expressly allow the digitisation of certain categories of works, albeit under more or less strict conditions. Most laws are silent however, on the question of whether libraries and archives may convert hardcopies of works into digital copies for purposes of preservation and restoration of their collections. Moreover, even if digitisation is allowed in certain circumstances, the law is not always clear on whether digitisation is permitted only for printed works or also for sound and audiovisual works.

At another level, scientific publishers offer an impressive number of on-line publications, research tools per discipline, access to the full text of works (pay-site), and 'contents alert' services allowing those who register to receive the tables of contents of the journals of their choice by e-mail. Electronic publishing not only makes it possible to consult the articles, whether free of charge or otherwise, but also to track down other sources of knowledge through a document search, links, interactive services, electronic commerce, etc. The Internet and electronic mail increasingly offer the research community opportunities that it did not previously have. Access to information has increased as has access to and discussion with those working in similar areas. One other aspect of digital technology, currently in its infancy but which presents enormous possibilities to the research community, is the use of the Internet to reach individuals as research subjects. In particular, there may be significant research benefits to be gleaned where the group being researched is normally difficult to reach and/or the issues being researched are of a particularly sensitive nature. In addition, just as the tools used by scientific research are changing, so too are the tools of scientific communication.

### **3. Exceptions and Limitations in Directive 2001/29/EC**

With the adoption of the Information Society Directive, the European legislator actually pursued several objectives among which was the creation of a harmonised legal framework that is consistent with international norms that would provide legal certainty to market players, would be sustainable and would preserve a balance between protecting the rights of right holders and the freedoms of users. Whether the legislator has achieved its goal, particularly from the point of view of libraries, archives and museums, is discussed below.

#### *3.1 General remarks*

Besides harmonising the rights of reproduction, communication to the public and

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<sup>12</sup> See: L. Guibault, 'The nature and scope of limitations and exceptions to copyright and neighbouring rights with regard to general interest missions for the transmission of knowledge: prospects for their adaptation to the digital environment', *Copyright Bulletin* December 2003.

distribution, the Directive ended up dealing extensively with an issue that was mentioned only incidentally in the Green Paper: copyright limitations.<sup>13</sup> The European Commission was of the opinion that without adequate harmonization of these exceptions, as well as of the conditions of their application, Member States would continue to apply a large number of rather different limitations and exceptions to these rights and, consequently, apply these rights in different forms. The harmonisation of limitations proved to be a highly controversial issue, which explains in large part the delay experienced not only in the adoption of the Directive itself, but also in its implementation by the Member States. The difficulty of choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States also proved to be a daunting task for the drafters of the Information Society Directive. Between the time when the Proposal for a directive was first introduced in 1997 and the time when the final text was adopted in 2001, the amount of admissible limitations went from seven to twenty.<sup>14</sup>

The regime of limitations established by the Information Society Directive leaves Member States ample discretion to decide if and how they implement the limitations contained in article 5 of the Directive. This latitude not only follows from the fact that all but one of the twenty-three limitations listed in the Directive are optional, but more importantly from the fact that the text of the Directive does not lay down strict rules that Member States are expected to transpose into their legal order. Rather, articles 5(2) to 5(5) of the Directive contain two types of norms: one set of broadly worded limitations, within the boundaries of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations.<sup>15</sup> Moreover instead of simply reproducing the wording of the Directive, most Member States have also chosen to interpret the limitations contained in the Directive according to their own traditions. The outcome is that Member States have implemented the provisions of articles 5(2) to 5(5) of the Directive very differently, selecting only those exceptions that they consider important.

The European legislator's decision to opt for a list of optional limitations is all the more surprising that the possible consequences of a lack of harmonization for the functioning of the Internal Market were already known. The result is that Member States have implemented articles 5(2) and 5(3) very differently, selecting such exceptions as they saw fit, and implementing specific categories in diverse ways. With such a mosaic of limitations throughout the European Community, the aim of harmonisation most likely has not been achieved, and legal uncertainty persists. The fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the European Community, could ultimately constitute a serious impediment to the establishment of cross-border services. Especially for smaller users, the lack of harmonisation of the limitations on copyright is a serious issue. The level of knowledge required for the conclusion of the necessary licensing agreements per territory is too high and costly to

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<sup>13</sup> European Commission, 'Copyright and Related Rights in the Information Society', Green Paper, COM (95) 382 final, Brussels, 19 July 1995, p. 35.

<sup>14</sup> S. Bechtold, "Comment on Directive 2001/29/EC", in T. Dreier P.B. Hugenholtz (ed.), *Concise on European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 373.

<sup>15</sup> M. Senftleben, *Copyright, Limitations and the Three-Step-Test*, The Hague, Kluwer Law International, 2004, Information Law Series No. 13.

make the effort worthwhile. Larger content providers who wish to extend their services across Europe also suffer from the lack of harmonisation, because it raises transaction costs.

### *3.2 Limitations to the benefit of libraries, archives and museums*

Limitations adopted for the benefit of libraries are thus meant to allow these to perform their general tasks and to encourage the dissemination of knowledge and information among members of society at large, in furtherance of the common good. Article 5(2)c) of the Information Society Directive allows Member States to adopt a limitation on the reproduction right 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. As the Explanatory Memorandum to the Directive specifies, the provision does not define those acts of reproduction, which may be exempted by Member States. Moreover, this provision must be read in conjunction with Recital 40 of the Directive, which makes it clear that the European lawmaker intended to restrict the application of this limitation to certain special cases covered by the reproduction right, and not to allow uses made in the context of on-line delivery of protected works or other subject-matter. Regarding acts of electronic delivery, libraries are encouraged to negotiate specific contractual arrangements with rights holders. The making of digital reproductions of works in a library's collection for purposes of preservation however falls clearly within the ambit of this provision, since it makes no distinction between reproductions made in analogue or digital format.<sup>16</sup>

Not all Member States have implemented this optional limitation, and those that did have often chosen different ways to do it, subjecting the act of reproduction to different conditions of application and requirements. Some Member States only allow reproductions to be made in analogue format; others restrict the digitisation to certain types of works, while yet other Member States allow all categories of works to be reproduced in both analogue and digital form.<sup>17</sup> In addition, Member States have identified different beneficiaries of this limitation. Some have simply replicated the wording of article 5(2)b), while others have limited its application to public libraries and archives to the exclusion of educational institutions. The prevailing legal uncertainty regarding the manner in which digitised material may be used and reproduced, is likely to constitute a disincentive to digitisation. This militates especially against cross-border exchange of material, and may discourage cross-border cooperation.<sup>18</sup> However, as already mentioned in the Staff Working Paper of 2004, libraries face another problem by the fact that pursuant to article 1(2) of the Directive, which leaves the provisions of earlier directives unaffected, the limitation of article 5(2)c) of the Information Society Directive does not apply to databases.<sup>19</sup> This may create severe practical obstacles for the daily operations of libraries.

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<sup>16</sup> J. Krikke, *Het bibliotheekprivilege in de digitale omgeving*, Deventer, Kluwer Law, 2000, p. 156.

<sup>17</sup> U. Gasser and S. Ernst, *Best Practice Guide – Implementing the EU Copyright Directive in the Digital Age*, s.l., Open Society Institute, December 2006, p. 16.

<sup>18</sup> See: European Commission, 'i2010: Digital Libraries', SEC (2005) 1194, Brussels, 30 September 2005, p. 9.

<sup>19</sup> Commission Staff Working Paper on the Review of the EC legal Framework in the Field of Copyright and Related Rights SEC(2004) 995, Brussels, 19 July 2004, p. 13.

With respect to the making available of the digital archives, article 5(3)n) of the Directive states that Member States make adopt limitations on the reproduction and the communication to the public rights for ‘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’. Not only is the implementation of this provision, just like the previous one, not mandatory, but even where it has been implemented, its scope remains extremely narrow: a work may only be communicated or made available to individual members of the public, if each patron establishes that the use is for his exclusive research or private study. The works may only be communicated or made available by means of dedicated terminals on the premises of non-commercial establishments, which excludes any access via an extranet or other protected network connection that users can access at a distance. Moreover, this provision only finds application insofar as no purchase or licensing terms provide otherwise, which is in practice rarely the case. As the following remark illustrates, this provision was met with much scepticism within the library community:

“While this is a laudable regulation, it is incomprehensible that this exception is tied to “dedicated terminals on the premises” of named establishments and to the condition that these works are not subject to purchase or licensing terms.”  
(...) The second condition is another example of the lack of balance in the Infosoc Directive. By allowing rights holders to contractually evade any exception, it grants them unlimited exclusive rights in the online realm. This condition prevents public libraries from fulfilling their public task of making published works available to their users without prejudice to their ability to pay their market price”.<sup>20</sup>

In countries that chose to implement it, article 5(3)n) was transposed almost word-for-word in the national legislation. Several Member States have, however, decided not to incorporate this article into their law; the extent to which library patrons are allowed, in these Member States, to consult digital material on the library network is therefore unclear. However, considering the default nature of this provision and the fact that its application is most often overridden by contract, libraries advocate for specific contracts or licenses which, without creating an imbalance, would take account of their specific role in the dissemination of knowledge.

#### **4. Technological Protection Measures in Directive 2001/29/EC**

The emergence of the digital network environment as a commercially viable platform for the distribution of copyright protected content sparked, in the early 1990s, the need on the part of rights holders to increase legal protection in order to safeguard content from unauthorised access and use. At the international level, the call for the recognition of legal protection for TPMs became particularly vibrant during the last phase of the negotiations leading to the adoption of the WIPO Internet Treaties in December 1996.<sup>21</sup> Indeed, in the preamble to the WIPO Copyright Treaties (WCT),

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<sup>20</sup> Privatkopie.net & Aktionsbuendnis Urheberrecht & FIF, Response to Consultation on Staff Working Paper 2004, p. 8.

<sup>21</sup> S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights*, Oxford, Oxford

the Contracting Parties said to recognise “the need to introduce new international rules (...) in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments”. This Treaty, together with the WIPO Performers and Phonograms Treaty (WPPT), introduced a new form of protection to the benefit of rights holders by establishing, for the first time in an international copyright instrument, that technological measures used by authors and related right holders to protect their works or related subject matter enjoy independent protection.<sup>22</sup>

#### 4.1 General remarks

Article 6 on the legal protection of TPMs turned out to be one of the most intricate and controversial provisions of the entire Information Society Directive. Its complexity is also reflected at the national level. In this context, the question arises whether the provision offers sufficient legal certainty to allow users to know what they can and cannot do with respect to a protected work. Although the legal protection of TPMs does not confer, as such, an exclusive right on the rights holder, article 6 of the Information Society Directive deserves attention for two main reasons: first, because this article constitutes the main adjustment to Europe’s copyright framework as a result of the implementation of its international obligation under the WIPO Internet Treaties; and second, because the use of TPMs – and their legal protection – is seen as one of the main components to the establishment of digital rights management systems (DRMs).<sup>23</sup>

According to article 6(1) of the Information Society Directive, Member States must “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”. In other words, this provision requires that Member States prohibit acts of circumvention of TPMs by any person who knows or should have reasonable grounds to know that she is committing an act of circumvention. As a complement to the protection afforded under article 6(1) of the Directive, article 6(2) provides for a prohibition on the supply of any product or service which primarily enables or facilitates the circumvention of TPMs or, a prohibition on acts preparatory to actual circumvention. According to article 6(2) of the Information Society Directive, Member States must provide:

- “adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
- (a) are promoted, advertised or marketed for the purpose of circumvention of,
- or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose

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University Press, 2006, p. 976.

<sup>22</sup> U. Gasser, “Legal Framework and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model”, *Fordham Intell. Prop. Media & Ent. L.J.* 2006/17, pp. 39-113, p. 45.

<sup>23</sup> J.P. Cunard, K. Hill, and C. Barlas, *Current Developments In The Field Of Digital Rights Management*, WIPO, Geneva, 2004, SCCR/10/2 Rev., p. 39.

of enabling or facilitating the circumvention of,  
any effective technological measures.”

In addition, the expression ‘technological measures’ as defined under article 6(3) of the Directive means 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 right holder of any copyright or any right related to copyright. This formulation differs from article 11 of the WCT, which protects technological protection measures only to the extent that they restrict acts that are not authorised by the authors *or permitted by law*. Must one infer from this that the European legislator did not intend to allow the circumvention of a technological protection measure solely for the purpose of exercising a limitation on copyright?<sup>24</sup>

Be that as it may, there is broad consensus that the use of TPMs should take account of the users’ interest in exercising certain limitations on copyright and related rights. Accordingly, article 6(4) of the Information Society Directive prescribes affirmative action by the rights owners, including by means of agreements between them and other parties concerned, or in its absence, by the Member States, to ensure that users benefit from certain limitations with respect to works protected by TPMs, to the extent necessary to benefit from these limitations and where that beneficiaries have legal access to the protected work concerned. This provision is extremely complex, vague and prone to interpretation. As a result, lawmakers in the twenty-seven Member States have once again used their imagination to interpret the provision and come up with their own solutions, which they hope meets the requirements of article 6(4) of the Directive.

Not all limitations appearing in the list of article 5 of the Directive are covered by this measure, but only a selection of the limitations included in articles 5(2) and 5(3) are subjected to the obligation of the rights holder to provide users with the means to exercise them.<sup>25</sup> Among these limitations are acts of reproduction by publicly accessible libraries, educational establishments or museums, or by archives (art. 5(2)c)) as well as use for the sole purpose of illustration for teaching or scientific research (art. 5(3)a)). Rights holders and Member States alike are obliged to provide the means to exercise these – otherwise optional – limitations on copyright and related rights only insofar as these have indeed been transposed in the national order. The list of limitations that are subject to the obligation therefore risks being even shorter in reality, since for example, the limitation on reproductions of broadcasts made by social institutions pursuing non-commercial purposes has not been implemented in a number of countries.

However, according to the fourth paragraph of article 6(4) of the Directive, “the provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”. The last sentence of Recital 53 specifies that “non-interactive forms

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<sup>24</sup> S. Bechtold, “Comment on Directive 2001/29/EC”, in T. Dreier P.B. Hugenholtz (ed.), *Concise on European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 393.

<sup>25</sup> A. Lucas and P. Sirinelli, “Chroniques – Droit d’auteur et droits voisins”, *Propriétés intellectuelles* 2006/20, pp. 297-316, p. 322.

of online use should remain subject to those provisions”. What constitutes a non-interactive transmission is unclear. According to one commentator, “only live webcasting, web radio and similar transmissions where the user cannot choose the time of the transmission qualify for non-interactive transmissions”.<sup>26</sup> This means that the exclusion actually extends to any work offered “on-demand”, covering any work transmitted over the Internet, as long as the user is able to choose and initialize that transmission. In view of the fact that most works offered on-demand through DRM systems rely on the conclusion of contracts and the application of TPMs, the scope of this provision is potentially very broad.

In the absence of any clear guideline in the Directive on how to accommodate the exercise of limitations on copyright, it is safe to say that no real harmonisation has been achieved regarding the implementation of article 6(4) of the Information Society Directive in the European Union. The implementation of this provision at the national level has led to an array of different solutions and procedures. In some Member States, only individual beneficiaries may claim the application of the limitation, while in other countries, interest groups and other third parties also have the right to do so. In yet other Member States, administrative bodies may be entitled to force rights holders to make the necessary means available to beneficiaries of limitations. Some Member States have adopted the ‘wait and see’ approach, and done nothing to implement the provision.

### *3.2 TPMs and libraries, archives and museums*

When reading the text of article 6(4), it is clear that the negotiation of agreements between rights owners and parties concerned is the European legislature’s preferred method to achieve its objective. As Dusollier points out, the way to contractual negotiations is only realistic when users are easily identifiable, like libraries and archives, broadcasting organisations, social institutions, educational institutions, groups of disabled persons and public entities. However, this is not necessarily the case for all users who may invoke the right to benefit from a limitation pursuant to article 6(4).<sup>27</sup>

This voluntary path is actually being pursued in various Member States, with varying results. For example, the Motion Pictures Association has entered into negotiations with the British Film Institute (BFI) regarding the right to make archival copies of films.<sup>28</sup> In January 2005, the German National Library has reached an agreement with the German Federation of the Phonographic Industry and the German Booksellers and Publishers Association on the circumvention of such TPM as access and copy controls on CDs, CD-ROMs, and e-books. According to the press release, the German National Library has obtained a “license to copy” technologically protected digital content for its “own archiving, for scientific purposes of users, for collections for

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<sup>26</sup> S. Bechtold, “Comment on Directive 2001/29/EC”, in T. Dreier P.B. Hugenholtz (ed.), *Concise on European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 394.

<sup>27</sup> S. Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique: droits et exceptions à la lumière des dispositifs de verrouillage des œuvres*, Brussels, Larcier, 2005, p. 175.

<sup>28</sup> Motion Pictures Associations, MPA Response to the UK All Party Parliamentary Internet Group (APIG) Inquiry into Digital Rights Management (DRM), Brussels, 13 January 2006, available at: [http://www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management/apig-drm-written-evidence/MPA\\_APIG\\_DRM\\_Sub\\_Final\\_13012006.pdf](http://www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management/apig-drm-written-evidence/MPA_APIG_DRM_Sub_Final_13012006.pdf)

schools or educational purposes, for instruction and research as well as of works that are out of print.” To avoid abuses, the library “will check user’s interest” for a copy of the technologically protected content. Further, the copies, which are subject to a fee, “will as far as possible be personalized by a digital watermark.”<sup>29</sup>

Until recently, libraries were able to offer digital articles as unprotected downloads that could be obtained by anyone who registered with the institution. But the deployment of DRM may become more restrictive in the near future, because major scientific publishers may want to increase the control over their products and possibly charge for individual access. The supply of a key to decrypt protected content is not considered a viable option, since for a single library subscribing to 2,000 electronic journals and periodicals, removing DRM from every single article would be too complicated in practice and impossible to manage with the available organisational resources. This would be aggravated by the multitude of different DRM systems on the market, which prevent a single approach to circumvention. Moreover, the lack of clarity with regard to the limitations on copyright leads to a multitude of different individual initiatives from the sides of rights holders, libraries, and publishers. This contradicts the value proposition of digital libraries, i.e. to make knowledge broadly and easily available over the Internet. The British Library notes that the great majority of agreements relating to electronic licences also undermined exceptions provided for in UK and international copyright law.<sup>30</sup>

The deployment of DRM systems as envisaged by the Information Society Directive not only presupposes the application of technological protection measures to protected works, but it also entails the use of contractual agreements spelling out the acts that users are permitted to accomplish with respect to the licensed material. The digital network's interactive nature has created the perfect preconditions for the development of a contractual culture. Through the application of technical access and copy control mechanisms, rights owners are capable of effectively subjecting the use of any work made available in the digital environment to a set of particular conditions of use.<sup>31</sup> While the Information Society Directive contains extensive provisions on the protection of TPMs and rights management information, it fails to deal with the use of contracts in the context of DRM systems or otherwise. At most, the Directive contains a few statements encouraging parties to conclude contracts for certain uses of protected material. Since neither the Directive nor the relevant international instruments on copyright and related rights, such as the WCT and the WPPT, prescribe any rules on the subject, the specific regulation of licensing contracts has been left to the Member States. Thus, the contractual framework generally remains voluntary and market-driven, knowing that the principle of freedom of contract constitutes a cornerstone of European contract law.

In effect, the licence terms often act in conjunction with technological measures as a substitute to the system of exclusive rights and limitations established by traditional

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<sup>29</sup> See: <http://blogs.law.harvard.edu/ugasser/2005/01/26/german-national-library-license-to-circumvent-drm/>

<sup>30</sup> *Gowers Review of Intellectual Property*, London, HM Treasury, December 2006, p. 73.

<sup>31</sup> P.B. Hugenoltz, ‘Copyright, Contract and Code: What Will Remain of the Public Domain?’, *Brooklyn Journal of International Law* 2000/26, pp. 77-90, p. 79; P. Goldstein, ‘Copyright and its Substitutes’, *Wisconsin Law Review* 1997, pp. 865-871, p. 867.

copyright law.<sup>32</sup> A quick survey of the current licensing practices carried out by European website operators indicates that information providers increasingly tend to restrict or even to prohibit certain uses with respect to the content made available via the Internet, in a manner that goes far beyond the bounds of copyright law.<sup>33</sup> Often, the wording of a click-wrap licence will seem to imply that the restriction on use of the website's content also extends to the elements of such content that are in principle part of the public domain, because they lack originality or because they are no longer protected by any intellectual property right. Other common terms of use that can be found on the Internet prohibit the making of 'any reproduction [of the content] for any purpose whatsoever', clause which purports to restrict the use of protected as well as non-protected material posted on the website.<sup>34</sup>

#### 4. Concluding Remarks

This paper examined to what extent the provisions of the Information Society Directive affect the way digital works are being used. More particularly, the paper considered whether the implementation of the provisions of the Directive pertaining to the limitations on copyright and the legal protection of technological protection measures, allows libraries, archives and museums to comply with the objectives of the Recommendation on the digitisation and online accessibility of cultural material and digital preservation.

The analysis of the provisions of Directive 2001/29/EC inevitably leads to the following general observation: these provisions fail to contribute to the establishment of a clear framework for either rights owners or users, particularly as far as limitations on copyright and the legal protection of technological protection measures are concerned. The non-uniform implementation of the provisions of the Directive in the Member States gives rise to a mosaic of different rules applicable to a single situation across the European Community, which forms the main source of legal uncertainty. As a result, the lack of harmonisation may constitute a serious impediment to the establishment of cross-border online services and fails to offer a consistent approach with respect to the recognition of user interests, among which are those of libraries, archives, museums and scientists.

The transposition of article 5(2)c) of the Directive, permitting specific acts of reproduction by publicly accessible libraries and similar institutions, provides a good illustration of the prevailing uncertainty. In some Member States, the limitation applies to libraries and archives who may make reproductions of all types of works

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<sup>32</sup> J. de Werra, "Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions: A Comparative Analysis Between U.S. Law and European Law", 25 *Colum. J.L. & Arts* 239, 251 (2003); H. Schack, "Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use", *University of Illinois Journal of Law, Technology and Policy* 2002/2002, pp. 321-332., p. 329.

<sup>33</sup> L. Guibault et al., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, report to the European Commission, ETD/2005/IM/D1/91, DG Internal Market, February 2007, pp. 141 et seq. [http://www.ivir.nl/publications/guibault/Infosoc\\_report\\_2007.pdf](http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf)

<sup>34</sup> L. Guibault, 'Wrapping Information in contract – How does it affect the Public Domain?', in L. Guibault and P.B. Hugenholtz (ed.), *The Future of the Public Domain – Identifying the Commons in Information Law*, The Hague, Kluwer Law International, 2006, pp. 87-104.

for purposes of preservation or restoration of their collection. In other Member States, this very limitation is restricted either to certain categories of works or to specific institutions. Finally, in a number of Member States, this limitation has not been implemented at all. Legal uncertainty inevitably arises from this mixture of applicable rules.

The provisions concerning the legal protection of TPMs do not fare any better. The Directive's rules on TPMs have had a modest harmonizing effect at best. The vague wording of articles 6(1) and 6(2) of the Directive again leave much to be desired in terms of legal certainty. The wording of Article 6(4) is particularly convoluted and obscure. The provision fails to instruct Member States what 'appropriate measures' should be taken to protect disenfranchised users, or how long they should wait before taking action. Moreover, Member States are left with complete discretion as to the procedures leading up to such measures. Pursuant to article 6(4) paragraph 4, however, these 'appropriate measures' are no longer applicable any time that a work is made available to the public via interactive services on agreed contractual terms. The distinctions in treatment between the different limitations and between works that are made available interactively or not, distinctions for which no convincing justification has been put forward, will inevitably affect the provision's balanced character to the detriment of the users.

The assessment of the boundary between infringing and non-infringing conduct, remains therefore highly uncertain and unpredictable. One consequence of the prevailing uncertainty regarding the scope of limitations in the digital networked environment has been to force users to negotiate the conditions of use of protected works with every single rights holder, for every territory involved. In an online cross-border setting, this can be a very cumbersome endeavour, indeed. Moreover, legal uncertainty is no solid ground for negotiations, for it inevitably leaves the outcome to the strongest party. Even in the absence of any relevant case law examining the legality of mass-market licences that prevent the use of public domain information or that purport to restrict the exercise of user privileges normally conferred under copyright law, there is reason to believe that such licences would be invalidated only in very exceptional circumstances. As a result, the widespread use of on-line licences may end up posing a threat to the copyright policy objectives and the integrity of the public domain, insofar as they may contribute to displace democratically established public ordering assumptions.

All in all, the regime of limitations and technological protection measures established by the Information Society Directive does not appear to offer the necessary legal certainty to support the deployment of a cross-border European library project as advocated in the Recommendation on the digitisation and online accessibility of cultural material and digital preservation. It is fair to conclude that the goals of the Information Society Directive are not compatible with those of the Recommendation on digitisation and accessibility of material.