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The EU Copyright Directive as Compared to US Copyright Law and its Implication for Libraries

MARCO MARANDOLA*

This article aims at analyzing the relations and differences between the United States of America Copyright Law and the European Union Directive 2001/29/CE and how they affect the management of protected work in the libraries.

The European Directive on Copyright (2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society) had a huge impact on all the national copyright law of its 25 member States. The Directive introduced in the European Union few novelty elements:

- A definition of communication to the public right;
- A definition of reproduction right;
- A list of exceptions or limitations to the reproduction right;
- Technological measures.¹

In my opinion those issues are relevant to our discussion today:

1) Exceptions for libraries and users

(Art 107-108 American Copyright Act - Art. 5.2 Directive) Lending [IFLA Position] People with a disability

- 2) Technical measures (DMCA 1201 and other Law Texts Art. 6 Directive)
- 3) "Orphan works" Duration of Protection
- 4) Patriot act Antiterrorism laws in Europe

^{*} This article is an extract from the presentation of Prof. Marandola to IALL's 24th Annual Course on International Law Librarianship at IUE Fiesole, 5th September 2005. The author is a consultant on intellectual property rights and electronic licensing for libraries and other public institutions. He is a Professor at the University of Verona on copyright law and acts as an expert for the negotiation of electronic licenses. Professor Marandola has published extensively on copyright issues in specialized journals and in books and is the director of a number of websites.

¹ See Appendix 1 at the end of this article.

1) Exceptions for libraries and users (Art 107-108 American Copyright Act - Art. 5.2 Directive)

A very different approach on exceptions in favour of libraries' services and personal use is provided in the American and in the European National copyright laws. The 2001 Directive listed a number of exceptions that Member States may implement.² In my opinion the most relevant exceptions (and differences between the American and the European libraries) are:

- Lending (Directive 92/100/CE)
- Document reproduction for people with a disability (Directive 2001/29/CE)

-The Public Lending carried out from American Libraries is free, and is not necessary payment or authorization. But more and more the issue is in discussion. In Canada, for Example has been reached an agreement between the Libraries Associations and the Publishers Association to introduce a payment for the PLR.

In Europe the Directive 92/100 introduced an exclusive right in favor of rightholders to authorize the Public Lending by Libraries. Several Sates have provided a right to remuneration. Some other States have decided for several exceptions to such a new right, that caused an intervention of the European Commission that opened an infringement proceeding against Belgium (that has already been condemned) and Italy, Spain, Portugal, France, Luxembourg and Ireland). The other European Countries have decided to recognize the right to authorize the Public Lending right by Public Libraries, and generally provide a remunerative right in favor of the rightholders.³ The European decision to recognize such a right created opposition from some library associations (for example FESABID in Spain).⁴ The result is the IFLA Position on Public Lending Right.⁵

- Document Reproduction for People with disabilities

² See Appendix 2 at the end of this article.

³ For a specific study on this issue I suggest *El derecho de prestamo en España Suramerica y Union Europea*, Derecho de autors .l. 2005.

⁴ During the IFLA General Assembly in Buenos Aires August in 2004 I proposed an IFLA declaration against the possibility of the spread of such a new right around the world.

⁵ http://www.ifla.org/III/clm/p1/PublicLendingRigh.htm

European Directive 2001/29 introduced the following exception that was not provided in several Sates in Europe:

- **5.3.** Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

Today this issue is at the center of the discussion. The IFLA CLM in the last meeting in Oslo (Sweden) stressed the importance of the issue.⁶ The exception was implemented in all the national copyright laws in the 25 European Union countries. Today we can notice a great expansion of libraries' services to disabled people thanks to such an exception. A similar exception is provided in American Copyright law in article 121.⁷

⁶ Please note that a protected work can be reproduced on several formats, such as Braille, audio records, and electronic.

 $^{^{7}}$ § 121. Limitations on exclusive rights: reproduction for blind or other people with disabilities 67

⁽a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

⁽b)(1) Copies or phonorecords to which this section applies shall —

⁽A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

⁽B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

⁽C) include a copyright notice identifying the copyright owner and the date of the original publication.

⁽²⁾ The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

⁽c) For purposes of this section, the term —

^{(1) &}quot;authorized entity" means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

^{(2) &}quot;blind or other persons with disabilities" means individuals who are eligible or who may qualify in accordance with the Act entitled "An Act to provide books for

2) Technical measures

The American DMCA states that many valuable activities based on the "fair use" doctrine (including reverse engineering, security testing, and privacy protection and encryption research) will not constitute illegal "anticircumvention."⁸ The European Directive 2001 does not clearly provide such

the adult blind", approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487) to receive books and other publications produced in specialized formats; and

(3) "specialized formats" means braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.

8 - DMCA Section 1201 Anti-Circumvention Rule Making (ALA and other association position) DMCA and Libraries

The following summarizes the key sections of the DMCA that relate to libraries. For more in-depth analysis of the DMCA and its impact on libraries:

Title I: New Prohibitions On Circumvention Of Protection Technologies:

Prohibits the "circumvention" of any effective "technological protection measure" (e.g., a password or form of encryption) used by a copyright holder to restrict access to its material

Prohibits the manufacture of any device, or the offering of any service, primarily designed to defeat an effective "technological protection measure"

Defers the effective date of these prohibitions for two years and 18 months, respectively

Requires that the Librarian of Congress issue a three-year waiver from the anticircumvention prohibition when there is evidence that the new law adversely affects or may adversely affect "fair use" and other non-infringing uses of any class of work

Expressly states that many valuable activities based on the "fair use" doctrine (including reverse engineering, security testing, privacy protection and encryption research) will not constitute illegal "anti-circumvention"

Makes no change to the "fair use" doctrine or to other information user privileges and rights

Title II: Limitations On Online Service Provider Liability

Exempts any OSP or carrier of digital information (including libraries) from copyright liability because of the content of a transmission made by a user of the provider's or carrier's system (e.g., the user of a library computer system)

Establishes a mechanism for a provider to avoid copyright infringement liability due to the storage of infringing information on an OSP's own computer system, or the use of "information location tools" and hyperlinks, if the provider acts "expeditiously to remove or disable access to" infringing material identified in a formal notice by the copyright holder

Title IV: Digital Preservation

definition. Some Countries, such as Portugal, have introduced at national level this limit while in other Countries, like France, the Judges are questioning if the technical measures may prevent "legal copies."

To conclude this comparative analysis I would like to point out two critical issues in American and European copyright law:

3) "Orphan works" - Duration of Protection

In the USA the discussion has just begun, but it is interesting to note the presentation of the issue:

The Copyright Office is examining issues raised by "orphan works," i.e., copyrighted works whose owners are difficult or even impossible to locate. Concerns have been raised that the uncertainty surrounding

This section updates the current preservation provision of the Copyright Act (Sec. 108) to:

expressly permit authorized institutions to make up to three, digital preservation copies of an eligible copyrighted work

electronically "loan" those copies to other qualifying institutions permit preservation, including by digital means, when the existing format in which the work has been stored becomes obsolete

⁹ - Tecnological measures Art.6 Directive

- 1. 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.
- 3. For the purposes of this Directive, the expression "technological measures" 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 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. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts, or from making such works available to the public.¹⁰

In Europe, this discussion has not yet begun, but in the revision of the Berne Convention, the issue has already been raised.

4) Patriot act – Antiterrorism laws in Europe

This issue is very important, but not directly related to copyright law.

In the USA and in several Countries in Europe, new laws are under discussion that will permit access to some information recorded in the library records (for example the borrowing records of some books), or individuals' access to the Internet. In America the Anti terrorism law has already tried to affect the libraries work, but the ALA and other libraries association has been very effective. In Europe, this issue is still nascent, and European library associations are not well aware of it yet.

Conclusion

The American and European copyright laws that are relevant to the management of the information and protected work are still quite different. There are new cases and growing problems shared by Europe and the United States, even more so than the differences that exist between the American "fair use" practice against the "exception and limitation" of the most European continental author right law. In America, anti terrorism laws have already had an effect on librarians' work, but the ALA and other library associations have been very effective in challenging these laws.

In Europe, this issue is just starting and libraries association are not well aware yet. The problem of the "orphan work" is just being raised in the United States, but it is remote from any discussion in Europe. Public Lending Rights is a concept that is now well-established over almost all of Europe (except those countries that decided to go in a proceeding in front of the European Court), but is presently far from being an accepted notion in the USA.

I'm afraid that if this new right is recognized in Europe – one which is not even explicitly recognized in the Berne Convention – it could one day

¹⁰ See, www.copyright.gov.

affect even the libraries in the United States. This is why I personally welcome the IFLA position on PLR. In Europe, between all the exceptions provided in the 2001/29, the one in favour of people with disabilities is, in my opinion, the one that is having a stronger and wider impact. I thank IALL for the attention to those issues, issues that IALL can contribute to inform and discuss.

APPENDIX 1

OTHER REFERRED LAWS AND TREATIES (Extract)

EUROPEAN DIRECTIVE

- Reproduction right

Article 2 specifies the acts of reproduction covered by exclusive rights, comprising direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

for authors, of the original and copies of their works,

for performers, of fixations of their performances,

for phonogram producers, of their phonograms,

for the producers of the first fixations of films, in respect of the original and copies of their films,

for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

- Right of communication

Article 3 states that authors have an exclusive right to authorise or prohibit any communication to the public of the originals and copies of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The same applies as regards the making available to the public of subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them:

for performers, of fixations of their performances,

for phonogram producers, of their phonograms,

for the producers of the first fixation of films, in respect of the original and copies of their films,

for broadcasting organisations, of fixations of their broadcasts - regardless of the method of transmission.

- Technological measures Art.6 Directive

- 1. 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.
- 3. For the purposes of this Directive, the expression "technological measures" 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 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. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

AMERICAN COPYRIGHT LAW

17 USC Sec. 106 - Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the

individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

First factor: The character of the use

- Libraries implement e-reserves systems in support of non-profit education.

Second factor: The nature of the work to be used

- E-reserve systems include text materials, both factual and creative.
- They also serve the interests of faculty and students who study music, film, art, and images.
- Librarians take the character of the materials into consideration in the overall balancing of interests.

Third factor: The amount used

- Librarians consider the relationship of the amount used to the whole of the copyright owner's work.
- Because the amount that a faculty member assigns depends on many factors, such as relevance to the teaching objective and the overall amount of material assigned, librarians may also consider whether the amount, even the entire work, is appropriate to support the lesson or make the point.

Fourth factor: The effect of the use on the market for or value of the work

- Many libraries limit e-reserves access to students within the institution or within a particular class or classes. Many use technology to restrict and/or block access to help ensure that only registered students access the content.
- Libraries generally terminate student access at the end of a relevant term (semester, quarter, or year) or after the student has completed the course.
- Many e-reserves systems include core and supplemental materials. Limiting e-reserves solely to supplemental readings is not necessary since potential harm to the market is considered regardless of the status of the material.
- Libraries may determine that if the first three factors show that a use is clearly fair, the fourth factor does not weigh as heavily.

108. Limitations on exclusive rights: Reproduction by libraries and archives³⁹

- (a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if
 - (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
 - (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

- (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.
- (b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if
 - (1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and
 - (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.
- (c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete. if
 - (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
 - (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

- (d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if
 - (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
 - (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.
- (e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if
 - (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
 - (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section —

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

- (2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;
- (3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or
- (4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections
- (g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee
 - (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
 - (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.
- (h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the

basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

- (2) No reproduction, distribution, display, or performance is authorized under this subsection if
 - (A) the work is subject to normal commercial exploitation;
 - (B) a copy or phonorecord of the work can be obtained at a reasonable price; or
 - (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.
- (3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.
- (i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

Duration of the protection

- Works Originally Created On or After January 1, 1978

A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation, and is ordinarily given a term enduring for the author's life, plus an additional 50 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 50 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in

Copyright Office records), the duration of copyright will be 75 years from publication or 100 years from creation, whichever is shorter.

- Works Originally Created Before January 1, 1978, But Not Published or

Registered by That Date

Works that were created but not published or registered for copyright before January

1, 1978, have been automatically brought under the statute and are now given Federal

copyright protection. The duration of copyright in these works will generally be computed in

the same way as for works created on or after January 1, 1978: the life-plus-50 or

75/100-year terms will apply to them as well. The law provides that in no case will the term

of copyright for works in this category expire before December 31, 2002, and for works

published on or before December 31, 2002, the term of copyright will not expire before

December 31, 2027.

Works Originally Created and Published or Registered Before January 1,

1978

Under the law in effect before 1978, copyright was secured either on the date a work

was published or on the date of registration if the work was registered in unpublished form.

In either case, the copyright endured for a first term of 28 years from the date it was

secured. During the last (28th) year of the first term, the copyright was eligible for renewal.

The current copyright law has extended the renewal term from 28 to 47 years for copyrights

that were subsisting on January 1, 1978, making these works eligible for a total term of

protection of 75 years.

- DMCA Section 1201 Anti-Circumvention Rule Making (ALA and other association position) DMCA and Libraries

The following summarizes the key sections of the DMCA that relate to libraries. For more in-depth analysis of the DMCA and its impact on libraries:

Title I: New Prohibitions On Circumvention Of Protection Technologies:

Prohibits the "circumvention" of any effective "technological protection measure" (e.g., a password or form of encryption) used by a copyright holder to restrict access to its material

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Defers the effective date of these prohibitions for two years and 18 months, respectively

Requires that the Librarian of Congress issue a three-year waiver from the anti-circumvention prohibition when there is evidence that the new law adversely affects or may adversely affect "fair use" and other non-infringing uses of any class of work

Expressly states that many valuable activities based on the "fair use" doctrine (including reverse engineering, security testing, privacy protection and encryption research) will not constitute illegal "anticircumvention"

Makes no change to the "fair use" doctrine or to other information user privileges and rights

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Establishes a mechanism for a provider to avoid copyright infringement liability due to the storage of infringing information on an OSP's own computer system, or the use of "information location tools" and hyperlinks, if the provider acts "expeditiously to remove or disable access to" infringing material identified in a formal notice by the copyright holder

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This section updates the current preservation provision of the Copyright Act (Sec. 108) to:

expressly permit authorized institutions to make up to three, digital preservation copies of an eligible copyrighted work

electronically "loan" those copies to other qualifying institutions permit preservation, including by digital means, when the existing format in which the work has been stored becomes obsolete

BERNE CONVENTION

(1) The three basic principles are the following:

- (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")
- (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 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 work.

- 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.

Basic Rights – Guarantees certain minimum rights to authors without regard to inter-governmental relations:

- The right to authorize the reproduction of his work.
- The right to authorize the translation of his work.
- The right to authorize adaptations or other alterations to his work.
- The right to authorize the public performance or communication to the public of his work.

ART:11 BERNE

- 1. Right of public performance and of communication to the public of a performance;
- (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
- (i) the public performance of their works, including such public performance by any means or process;
- (ii) any communication to the public of the performance of their works.

APPENDIX 2

List of exceptions (art.5.2 and 3 Directive)

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other

process having similar effects, with the exception of sheet music, provided that the right-holders receive fair compensation;

- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right-holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) 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;
- (d) in respect of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.
 - 3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
 - (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
 - (b) **uses, for the benefit of people with a disability**, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
 - (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the

- source, including the author's name, is indicated, unless this turns out to be impossible;
- (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
- (g) use during religious celebrations or official celebrations organised by a public authority;
- (h) **use of works**, such as works of architecture or sculpture, made **to be located permanently in public places**;
- (i) **incidental inclusion** of a work or other subject-matter in other material:
- (j) use for the purpose of **advertising the public exhibition or sale of artistic works**, to the extent necessary to promote the event, excluding any other commercial use;
- (k) use for the purpose of caricature, parody or pastiche;
- (l) use in connection with the **demonstration or repair of equipment**;
- (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- (n) 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;
- (o) **use in certain other cases of minor importance** where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the

Community, without prejudice to the other exceptions and limitations contained in this Article.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall 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.