

User freedoms in electronic copyright

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My paper today will focus on European copyright law and more specifically on user freedoms in electronic copyright. Firstly, I will explain what is meant by copyright. Secondly, I will inform you about the new developments in international copyright law and the way it will affect digital library activities. Thirdly, I will inform you about the activities of the European Copyright User Platform.

What do we mean by copyright?

Copyright is concerned with the rights of authors, composers, artists and other creators in their works. Copyright law grants them the right for a limited period of time, to authorise or prohibit certain uses of their works by others. Most of the materials available in libraries consist of works protected by copyright law. This means that certain kind of uses of those works in libraries must not be made without the authorisation from the authors. What are 'those works'? Copyright protects 'literary and artistic works' this includes novels, short stories, scientific writings or manuals, and musical works, works of graphic and plastic arts, films, documentaries, but also computer programs and databases.

The rights provided by copyright are two fold: economic rights and moral rights. The main aim of copyright is to provide a stimulus for creativity. This means that the law has to make sure that the author will have an economic return on his creation and that he can protect his creation from being violated in one way or the other. The economic rights include the right to copy or otherwise reproduce the work. They also include the right to translate the work, to transform, to perform it in public or broadcast it.

For the right of reproduction, most EU copyright legislations contain exceptions for users to copy freely a part of a work or a complete work for private, research or/and educational purposes. With these provisions the governments have tried to balance the interests of the users of copyright material and the creators of this material.

The moral rights generally include the right of paternity, which is the authors right to claim authorship of his work, for instance by having his or her name mentioned in connection with it. The other moral right is the right of integrity, which includes the right to object to changes being made to the work.

All these rights are exclusive rights, which means that the owner is the only one allowed to give authorisation for the use of his work. The owner can be the author or the publisher. The rights last for the author's life plus 70 years (was 50 years) after his death. Economic rights can be transferred or licensed, however moral rights are considered to be inalienable.

Protection by law

Copyright is provided for in national laws. Those laws give protection within the national territory. Since 1886 international protection was provided for with the adoption of the Berne

Convention for the Protection of Literary and Artistic Works. More than 100 countries signed this Convention and are bound by it.

The administration of the Berne Convention is done by the United Nations specialist agency, the World Intellectual Property Organization (WIPO), in Geneva. The Berne Convention provides for a minimum level of copyright protection to be implemented in the national laws by the countries member to the Convention. The governments were given the freedom to regulate for certain issues and they were also allowed to regulate more than was provided by the Berne Convention. This resulted in a variety of different copyright legislations among the members of the Berne Convention.

European Directives

All members of the European Union are members of the Berne Convention. The European Commissions has tried in the last seven years to harmonise the European copyright environment, especially in respect of the new media and information technology. They have changes the international copyright landscape considerably. It allows enormous amounts of material to be stored and endlessly reproduced, without quality loss.

The considerable economic interests at stake and the lobbying power of the copyright industries have had an influence on the development of national and international copyright law and on library activities. This can be seen from the recent EU Directives and the newly adopted WIPO Copyright Treaty 1996.

The following Directives were adopted by the EU institutions between 1991 - 1996:

- Directive on computer software ('91)
- Directive on lending and rental rights ('92)
- Directive on the duration of copyright protection ('93)
- Directive on the protection of personal data ('95)
- Directive on the legal protection of databases ('96)

These Directives have given the industry more and more protection over access to electronic information. The significance of these Directives is that they have to be implemented into your national copyright law. It is, usually, no longer possible to change their content at a local level once the Directive has been adopted by the EU Council of Ministers.

Activities that could cause copyright infringements

To give a concrete example, I would like to show you a list of activities performed by the library or their users that could infringe electronic copyright:

- * copying by library users
- * copying for users and inter-library loan
- * copying for internal use
- * copying of sound and images
- * performance to the public of a video or CD
- * lending to the public
- * copying electronic information
- * creating an electronic collection and electronic document delivery

The Berne Convention in Art. 9 (1) and (2) only allows the member states to provide for exceptions for copying as long as the activity can pass the 'three step test'. Art. 9 (1) and (2) read as follows:

Article 9 (1) Berne Convention

“ Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner and form.”

Article 9 (2) Berne Convention

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.”

Art. 9 Berne Convention functioned well for the paper environment, but does this article also apply to the digital environment? Do the words 'in any manner and form' in Art. 9 (1) includes material in digital format? If they do, that means that there is room for exceptions for the use of digital material as long as it passes the three step test of Art. 9 (2) Berne Convention.

At present many librarians wish to digitise the material they have in the library and create an electronic collection. One step further, they wish to make this collection accessible to remote users and/or set up an electronic document delivery service. Here is where most problems with the copyright owners in the electronic environment start. Due to the economic interests involved in electronic document delivery services, most publishers claim that these services are in direct competition with the “normal exploitation” of the work as laid down in Art. 9 (2) of the Berne Convention.

As long as an activity is not in conflict with the normal exploitation of a work, a user is allowed to make a copy of the work without asking for permission and without paying royalties. The electronic environment has changed the content of the normal exploitation of a work concept. A lot of the larger publishing houses have started to set up electronic document delivery services themselves. This means that the setting up of an electronic document delivery services for journal articles by publishers, has become a part of the normal exploitation of a work. Most publishers claim that every electronic document delivery service conducted by libraries is in conflict with the normal exploitation of the work.

New Developments

On 20 December 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were adopted by representatives of 157 nations. Due to a constructive lobby of the international library community these Treaties are less harmful for the future of access of information than the draft proposals. In this paper I will limit myself to the WIPO Copyright Treaty.

The starting point of the discussions were the proposals drafted by Mr Jukka Liedes, the Chairman of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms.

During the WIPO Diplomatic Conference the library lobby focused specifically on the proposed Articles 7 (Right of Reproduction), 10 (Right of Communication) and 12 (Limitations and Exceptions) of Document 4 of the Basic Proposals of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works. During the WIPO Diplomatic Conference many

changes to these articles were proposed, especially to Article 7.

The library lobby resulted in some significant changes in the WIPO Copyright Treaty.

I. Changes in the Preamble of the Treaty.

The following statement was included in the Preamble of the Treaty:

“the Contracting Parties, recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”

II. Deletion of Article 7 - Right of Reproduction.

The draft proposal read as follows:

“(1) The exclusive right accorded to authors of literary and artistic works in Article 9 (1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner and form.

(2) Subject to the provision of Article 9 (2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.”

This article, as mentioned before, was the most heavily discussed article during the WIPO Diplomatic Conference. One of the consequences of this article is to make even technical copies in a network protected by copyright. During the Conference many amendments to this article were proposed. The most favourable was proposed by the Norwegian delegation. They proposed that the temporary reproduction made for the sole purpose of making a work perceptible, or which are of a purely transient or incidental character as part of a technical process, does not as such constitute a reproduction within the meaning of Article 9 (1) of the Berne Convention.

In the end Article 7 was deleted and replaced by the following Statement included in Article 1.4 of the WIPO Copyright Treaty:

“The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form.

It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”

The library community was particularly satisfied with the first part of the Statement. The issue of debate between the library community and the publishing industry before the adoption of this Treaty was the viability of the exceptions under copyright for private, educational and research purposes in a digital environment. The new WIPO Copyright Treaty gives ground to extent the so called ‘user rights’ to digital material.

III. Article 10 - Right of Communication was adopted with amendments and an Agreed Statement.

This article did not get the discussion it deserved. The government representatives were convinced that the article concerning the limitations and exceptions (see Article 12) would take care of the library fears for the provisions in this article. The Right of Communication is covered in the WIPO Copyright Treaty in the new Article 8. It reads as follows:

“Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication, to the public of their works, by wire and wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

The following agreed statement was adopted to take away the fears of the telecom companies that their services would come under this Right of Communication:

“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).”

IV. Article 12 - Limitations and Exceptions was adopted with amendments and an Agreed Statement.

This article is crucial for libraries. Besides Article 7, most of our efforts went into lobbying for a sufficient provision on the limitations and exceptions for users under (electronic) copyright. The new Article 10 of the WIPO Copyright Treaty contains the limitations and exceptions. It allows for the applicability of the old limitations and exceptions under copyright in the digital environment, taking into account the three step test of Article 9 (2) of the Berne Convention. Moreover, it also allows for the creation of new exceptions and limitations that are appropriate in the digital network environment. Article 10 reads as follows:

“(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

The Agreed Statement reads as follows:

“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment

limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10 (2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

New European draft Copyright Directive

The European Commission presented on 10 December 1997 a proposal for a new Directive which is based on the Green Paper on Copyright in the Information Society of 19 July 1995 (Com (95) 382 final) and its Follow-up of 20 November 1996 (Com (96) 568 final). The issues covered by the draft Directive are:

- * Reproduction right
- * Communication to the public right
- * Legal protection of the integrity of technical identification and protection schemes
- * Distribution right

These are some of the issues discussed during the WIPO Diplomatic Conference. The library lobby was able to rely on strong support from countries from outside the EU at the WIPO Conference. With the impending discussions on the new draft Directive, the library community now has to prepare itself for the far harder task in convincing the EU member states of the importance of preserving access to information in the digital environment. The exceptions are given in Art. 5 of the new draft Directive and are very restrictive. EBLIDA has drafted a Position Paper on behalf of its members. The paper 'Save Future Access to Information Now!' can be found at the EBLIDA web-site at: <http://www.kaapeli.fi/~eblida/position.htm>.

European Copyright User Platform

The European Copyright User Platform (ECUP) was set up in 1994 to define which electronic library services should still be allowed without infringing copyright in a digital environment and which activities are in direct competition with publishers activities. The follow-up ECUP+ project is a Concerted Action also funded by the European Commission, DGXIII/E-4, and supported by the European Bureau of Library, Information and Documentation Associations (EBLIDA).

The objectives of the European Copyright User Platform are:

- to make librarians/information professionals aware of copyright
- to identify the copyright problems in electronic services
- to define the user rights in electronic copyright
- to discuss these issues with copyright owners
- to draw up model Heads of Agreement for site-licenses for the use of electronic publications
- to establish a focal point for questions on copyright and information on EU legislative developments

The European Copyright User Platform consists of the members of EBLIDA, who represent over 95.000 libraries in Europe. A Steering Group was set up to advise the project. The members of the Steering Group consist of librarians from national, university, public and corporate libraries and representatives from IFLA and LIBER. They are:

Mr Robbert Fisher, European Commission, Luxembourg
Ms Emanuella Giavarra, EBLIDA
Prof Elmar Mittler, LIBER
Mrs Sandy Norman, IFLA
Ms Isabelle Broutard, INIST, France
Mr Heikki Poroila, Vantaa City Library, Finland
Mrs Elspeth Scott, Glaxo Wellcome, UK
Mr Josep Sort, Universitat Pompeu Fabra, Spain
Mr Frode Bakken, observer from Norway

The Steering Group started with drafting the ECUP Position Paper on User Rights in Electronic Publications. The point of departure for this document are the services libraries should be able to provide to their users in respect of:

1. electronic publications available from the publisher
2. publications not available from the publisher in electronic format, but digitised by the library

The ECUP Position is based on Article 9 (2) of the Berne Convention. The Steering Group tried to redefine the existing user rights which apply in the analogue environment for the digital environment. The words "normal exploitation of a work" in Article 9 (2) of the Berne Convention has been interpreted as permitting a library service which does not compete with a similar service or product obtainable from the publisher. If this is the case, the user rights under copyright must apply. But, for instance, if a library wants to digitise material which is already obtainable in electronic form from the publishers, this activity conflicts with the normal exploitation of the work. It also applies in the case where the library delivers to a remote user an article which the user could have obtained directly from the publisher. Being in conflict with the normal exploitation of a work should not imply that libraries cannot provide the service. It simply means that the library has to pay royalties to the copyright owners for the material sent to the users.

The Steering Group divided the library community in four types of libraries, formulated different user groups and connected them to certain activities which should be allowed, licensed or provided on a pay-per-use basis. The ECUP Position has been set-out in two matrices. The definitions for the various user groups and the explanation of the activities can be found in the ECUP Position Paper which can be downloaded at <http://www.kaapeli.fi/ebldata/ecup>.

Besides the ECUP Position Paper, four different Heads of Agreement for site-licences for the use of electronic publications were drafted. These were drafted to assist librarians of national, university, public and corporate libraries in their negotiation with publishers. Heads of Agreement were chosen, because a single model contract could not be used in every EU country due to the differences in national laws. Heads of Agreement, however, set out the core legal provisions which can be applied in every country. Additional clauses can be added to meet the national laws and requirements.

Electronic journals, for instance, are mainly available from the publisher under a site-licence agreement. In a digital environment the librarian will buy access to an electronic journal instead of

owning it. After the licence has expired usually the CD-Rom disks have to be returned and access to the issues you had a licence for is not possible anymore, unless you continue the licence. The question of perpetual access is a vital issue for libraries, especially if access to the electronic journal is only allowed via the server of the publisher. Clauses for perpetual access have to be negotiated with the publisher. A licence is an invitation to negotiate. I would like to focus on two other items in the Heads of Agreement, namely full rights/indemnity and choice of law.

Publishers and authors disagree about who owns the electronic rights in a publication that was once published on paper. It is of the utmost importance that libraries negotiate with the publisher a clause in which the publisher warrants the library that he has full rights and authority to grant the licence and that he indemnifies the library against any claim from other persons who claim to own the electronic rights in the material that is licensed. Which could lead to the library paying twice for the same material. The choice of law is of relevance when something goes wrong. The library should negotiate the licence under the law that they feel most comfortable with and choose a court to resolve disputes that is near them.

On 24th September 1996, the draft ECUP Position on User Rights in Electronic Publications, two assisting matrices and the four different Heads of Agreement for site-licences for the use of electronic publications were for the third time presented to a gathering of 30 representatives of authors' organisations, publishing houses and trade associations, collecting societies and subscription agents.

The atmosphere at the meeting was frosty. At previous meetings, which were organised with the different sectors individually, the atmosphere was much better and there was more willingness to try to understand the different positions. The representatives did not want to discuss the content of the ECUP Position Paper, because they could not agree to the principles underlining the Position Paper. The principles, which were unacceptable to the representatives of the rights owners organisations and collecting societies, read as follows:

Guiding principle

The user has the right to have access to copyrighted material and to make a copy for private use and research or educational purposes. It is the duty of the library to provide access to copyrighted material and the library should have the possibility to do so without infringing the principle of the 'normal exploitation of a work' (Article 9 (2) BC).

In an electronic environment this means that:

Without infringing copyright, the public has a right to expect

- * to read or view publicly marketed copyrighted material, on-site or remotely;
- * to copy a limited number of pages electronically or on paper for private use and research or educational purposes.

Without infringing copyright, libraries should be able

- * to use electronic technologies to preserve copyrighted materials in their collections;
- * to provide on-site access to electronic copyrighted material;
- * to provide off-site access to registered users;

- * to provide on-site copies of copyrighted material in electronic form or in paper form.

Users and libraries have a right to expect

- * that government publications and public domain material in electronic format is available without copyright restrictions;
- * that the digitisation of public domain material can be performed without copyright restrictions;
- * that the terms of the licences for copyrighted materials are reasonable and do not restrict the principles laid down in the national copyright laws concerning the lawful activities by libraries and users;
- * that copyright control systems are able to differentiate between legitimate and illegitimate usage;
- * that the licensors put a licensing system in place which will enable the library to manage its collection of licences efficiently.

Rights owners can expect

- * that libraries will strive to ensure:
 - the implementation of legal and technical safeguards to comply with contractual limitations;
 - the notification to rights owners of infringements by users, although they cannot be held responsible for the intentions of the end-users once they have acquired the information;
 - that their users are informed about the copyright restrictions in electronic information.

The representatives of the library community did not expect that these general principles would cause such big problems. However, the meeting ended positively, it was suggested to set up an ECUP testbed in order to test the presumptions laid down in the ECUP Position, the assisting two matrices and the four different Heads of Agreement for site-licences in real life environments. At the moment the ECUP Steering Group is exploring the possibilities for such a project.

During the first half of 1997, 15 workshops will be held throughout the European Union and Norway to inform librarians on electronic copyright and to consult them on the ECUP Position Paper on User Rights in Electronic Publications. It is the aim of the ECUP Steering Group to establish or nominate in each EU country, national ECUP Committees to give feedback to the ECUP activities, discuss the copyright issues and developments in their countries and to prepare national recommendations concerning the user rights in electronic copyright towards their governments.

To assist the dissemination of information, ECUP has set up a Copyright Focal Point on the Internet. It provides the following services:

- * European discussion list on copyright issues (ecup-list)

- * help desk for copyright questions
- * “one stop shop” for documents on European copyright developments. The URL of the Web-site is: <http://www.kaapeli.fi/eblida/ecup>. The archive of the discussion list can be found there as well.

The ECUP Concerted Action will come to an end on 15 January 1999.

More information on the ECUP project can be found at: <http://www.kaapeli.fi/eblida/ecup>. Should you be interested in discussing copyright issues with European colleagues, please join the ecup-list. You can join by sending an email to majordomo@kaapeli.fi and write the following message: subscribe ecup-list. I hope that we will meet each other by email again.

Thank you.