



Copyright and Human Rights

Group of Specialists on Human Rights
in the Information Society (MC-S-IS)

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Background and context

In 2005 the participating ministers in the 7th European Ministerial Conference on Mass Media Policy adopted inter alia a Resolution on human rights in the information society in which they declared that they were

“Convinced [...] that the effective protection of copyright and neighbouring rights is an important factor for the development of the media and new communication services in the Information Society.

At their 985th meeting the Ministers’ Deputies of the Council of Europe took note of the terms of reference of the Group of Specialists on Human Rights in the Information Society (MC-S-IS) in which the Group is tasked with

“Report[ing] on emerging issues and trends in respect of, on the one hand, the protection of intellectual property rights and the use of technical protection measures in the context of the development of new communication and information services (and the Internet) and, on the other hand, the fundamental right to freedom of expression and free flow of information, access to knowledge and education, the promoting of research and scientific development and the protection and promotion of the diversity of cultural expressions and artistic creation and, if appropriate, make concrete proposals for further action in this area.”

In response, this report has been prepared for discussion in the MC-S-IS in order to examine, discuss and better understand the new trends relating to the protection of copyright and related rights and the fundamental right to freedom of expression and information¹ in the context of the new communication and information services.

The protection of copyright and related rights is a key factor in the promotion of literary, musical and artistic creativity, the enrichment of national

cultural heritage and the dissemination of cultural and information products to the general public. Such protection offers essential incentives for the creation of new valuable works and for the investment into production and distribution of cultural and information goods. In this context, the Council of Europe has adopted a number of standard-setting instruments underlining the importance of an appropriate system of economic and moral rights to right holders, the establishment of an adequate framework for the exercise of these rights and the provision of efficient mechanisms for their enforcement in practice.²

Freedom of expression is one of the cornerstones of any democratic society; it enhances social progress and ensures individual self-fulfilment.³ The individual’s freedom of expression and the public’s fundamental right to information are guaranteed in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) which includes the right to hold opinions as well as to receive and impart information and ideas without interference by public authority and regardless of frontiers.

In this connection, the balance between the rights of creators and other rights holders and those of the public as users is essential. Provisions limiting the scope and duration of creators’ and other rights holders’ exclusive rights are built into copyright law thereby contributing to maintaining freedom of expression and free flow of information within society.⁴ There is therefore no fundamental conflict between protection of copyright and related rights and the fundamental

right to freedom of expression and information.

On the other hand, it is acknowledged in both doctrine⁵ and case-law⁶ that protection of copyright and related rights in certain cases may involve restrictions to freedom of expression and information. Assuming that every copyrighted work consists of “information and ideas”, a potential impact on freedom of expression may occur as a result of the exercise by a rights-holder of exclusive rights, granted under copyright law, to authorise or prohibit the use of the work. Although application of copyright law may have an effect on freedom of expression it should be noted that, according to Article 10 (2) of the European Convention on Human Rights, the exercise of freedom of expression and information “may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the rights of others”. The “rights of others” have been held both in doctrine and case-law to include a wide range of subjective rights and interests, including the rights protected under copyright law.⁷ In addition, the right to property, including intellectual property, is protected under Article 1 of Protocol No. 1 to the European Convention on Human Rights.⁸

Consequently, neither protection of copyright and related rights nor freedom of expression and information can be seen in isolation; it is necessary to consider them together.

1. The mandate for the Group is not only to take account of freedom of expression and information but also of “access to knowledge, and education, the promoting of research and scientific development and the protection and promotion of the diversity of cultural expressions and artistic creation”. For sake of legibility the shorter term “freedom of expression and information” will be used in the following and be understood as covering also those other concerns unless something else is specifically stated.

2. See Appendix 1, page 16, containing extracts from existing Council of Europe standards and instruments in the area of protection of copyright and related rights.

3. *Roemen and Schmidt v. Luxembourg*, judgment of the European Court of Human Rights, 25 February 2003, Application No. 51772/99, paragraph 46.

4. For more details, see the extracts from international and European law on copyright and related rights in Appendix 2, page 19.

5. E.W. Ploman and L. Clark Hamilton, *Copyright. Intellectual Property in the Information Age*, London 1980, p. 39; M. Löffler, “Das Grundrecht auf Informationsfreiheit als Schranke des Urheberrechts”, [1980] *Neue Juristische Wochenschrift* 201; H. Cohen Jehoram, “Freedom of expression in copyright and media law”, [1983] *GRUR Int.* 385; id., “Freedom of expression in copyright law”, [1984] *EIPR* 3.

6. *Groppera Radio AG and others v. Switzerland*, judgment of the European Court of Human Rights of 28 March 1990.

7. *Chappell*, judgment of the European Court of Human Rights of 24 February 1989.

8. *Anheuser-Busch Inc. v. Portugal*, judgment of the European Court of Human Rights of 11 October 2005.

The importance of considering this relationship between copyright and freedom of expression has become even more relevant in light of the developments of the information society. The increase in possibilities to create, view, use and re-use copyrighted materials online has led to copyright evolving from a legal field only relevant to creators, publishers and a few users to becoming an important area of law for everyone who actively participates in the information society. Moreover, the development of new technologies has made it easy to make identical and high quality copies of creative works protected by copyright law while the Internet has allowed for easy, massive and rapid exchanges and circulation of such material thereby making copyright and related rights much more difficult to enforce. These and other developments have in turn led to the emergence of new issues and trends of both a legal (e.g. adjustments of laws on copyright and

related rights to the new environment), technological (e.g. the development and application of technical protection measures and digital rights management systems) and societal (e.g. the development of new models for content sharing such as Creative Commons licences or open source software) nature.

The aim of this report is to describe some of these emerging issues and trends in the information society while having regard to the need both to ensure an adequate level of protection for right-holders and the fundamental right to freedom of expression and information.

Note on the scope and structure of the report

Although important issues of freedom of expression and information may also arise when applying industrial property rights, such as trademarks or patents, in the digital environment, the scope of this report is limited to

emerging issues and trends regarding protection of copyright and related rights. It was felt during the preparation of the report within the MC-S-IS that the most important of the emerging issues are those related to the application of copyright and that a restricted scope would allow for a more focused report.

Similarly, the report is mainly focused on those issues and trends that concern the interface or relationship between protection of copyright and related rights and freedom of expression and information. It does not intend to provide an analysis of what measures are needed to combat online piracy. Yet this is a very important subject and the Council of Europe has already produced a number of standard-setting instruments in this area.⁹

9. See the extracts from existing Council of Europe standards in Appendix 1, page 17.

Emerging issues and trends

The report contains an analysis of emerging issues and trends concerning:

- » Exceptions and limitations to copyright in the digital environment
- » Use and impact of digital rights management systems
- » User-generated content
- » Emerging models for dissemination and sharing of content

The final part of the report contains some proposals for possible Council of Europe action in these areas.

Exceptions and limitations to copyright in the digital environment

The international and regional copyright policy-making has been mainly focused from the inception on ensuring a strong protection over creative productions through the grant of exclusive rights to rights-holders. The qualified grant of proprietary rights over the fruits of creative endeavour

and intellectual enterprise is meant to promote the public interest. This has been done with the idea that this protection would foster the future production of creative works.

However, the dimension of public interest extends to a second component, which is to ensure an optimum access to creative works and to stimulate a wide dissemination of knowledge and creativity. Limitations and exceptions (exemptions) are the mechanisms aimed at securing this access, thereby becoming key factors in achieving a balance between rights-holders' interests and public interest under copyright systems.

Freedom of expression and information, including the freedom to hold opinions and to receive and impart information and ideas, is an underlying concern in a number of **existing copyright exemptions** to:¹⁰

- » Reproduce works for private use.
- » Quote¹¹ works or public addresses of critical, polemical, educational, sci-

entific or informational character for the purposes of criticism, news reporting.

» Reproduce, make available, or broadcast political speeches and other public addresses.

» Reproduce news reports, miscellaneous reports or articles concerning current economic, political or religious topics that have appeared in a daily or weekly newspaper or weekly or other periodical or works of the same nature

10. Lucie 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", *e-copyright bulletin*, UNESCO, 2003, p. 6.

11. The right to quote is the most important exemption adopted to protect user's freedom of expression. Indeed, it is the only mandatory exemption provided by the Berne Convention (Article 10: "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries")

that have been broadcast in a radio or television programme.

» Record, show or announce a literary, scientific or artistic work in public in a photographic, film, radio or television report, provided this is necessary in order to give a proper account of the current affairs that are the subject of the report.

» Reproduce works for the purposes of parody.¹²

A number of exceptions are aimed at encouraging dissemination of knowledge and information among members of society at large.¹³

» Exceptions adopted in favour of libraries, archives and museums to encourage the dissemination of knowledge and information among society.

» Exceptions adopted in favour of educational and research institutions to disseminate new and existing knowledge.

» Exceptions adopted in favour of people with disabilities to enable equal access to knowledge and information for people with special needs.

These exemptions contribute to governments' information policies and enhance democracy. Taking into account that information is increasingly available only on the Internet, it is important that existing exemptions remain applicable also in the digital environment.

Given that limitations and exceptions represent major collective interests and fundamental freedoms, mainly the promotion of free flow of information and dissemination of knowledge, technical developments should not bear on such exemptions. Protecting and, where necessary, adapting limitations and exceptions to the digital en-

12. The European Court of Human Rights has repeatedly stated that Article 10 of the European Convention on Human Rights is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. (Source: *Sunday Times*, European Court of Human Rights, 26 April 1979).

13. Lucie 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*, UNESCO, 2003, p. 10.

vironment are key factors to preserve the inherent balance within the copyright system.

On the basis of fundamental freedom, **new exemptions**, which are consistent with greater expectations of access to knowledge and dissemination of information in the digital environment, may be envisaged in accordance with international law.¹⁴ Additionally, in one decision a court¹⁵ has recognised a new exception in view of a situation in which the exercise of exclusive rights may otherwise have jeopardized the balance between copyright and freedom of expression and information.

In the context of the importance of exemptions to achieve balance, the duration of copyright has become a key issue. In recent years, the entry of copyright material into the public domain has been limited by successive extensions of the copyright term, thereby preventing users from freely using content for any purpose.¹⁶ With copyright enjoying such longer durations, the operation of exceptions becomes more important than ever.

While there has been successful international harmonisation of copyright protection over the last 20 years, this has not been matched by a parallel harmonisation of limitations and exceptions that serve the public interest.¹⁷ This has made the notion of

14. Article 10 and article 16 of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, respectively, permit members to devise new exceptions and limitations appropriate for the digital environment provided that the three-step test is respected. See provisions in Appendix 2, page 19.

15. In a ruling on 23 February 1999 the Regional Court of Paris recognised the user's right to an exemption unprovided for by copyright law on the basis of the public's right to information as laid down in Article 10 of the European Convention on Human Rights. In this case (*Fabris v. France2*), a TV programme had shown paintings by Utrillo for the purpose of reviewing an exhibition of his works, but had in consequence infringed the exclusive rights of the artist's successor in title. In this instance, while no exception to copyright – according to French law – justified such a reproduction of the pictures, the court gave priority to the public's right to information under Article 10 of the European Convention on Human Rights.

16. The European Commission proposed on 16 July 2008 to extend the term of protection for recorded performances and the record itself from 50 to 95 years.

"public interest" a matter of national policy.¹⁸

Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (EU Copyright Directive) establishes a catalogue of optional exceptions (except the mandatory exception for acts of temporary reproduction) that, in addition to the three-step test, may help states to reassess their national needs and priorities in terms of copyright exemptions.¹⁹

During the process of national transposition many states have added exceptions from the list, however, none of them has seen fit to implement all the limitations and exceptions permitted under the directive. European Union member states do not all have exactly the same sensitivities about exceptions to consider.²⁰ This causes legal uncertainty to the detriment of commercial providers of cross-border services, such as online music stores, and cultural institutions, such as libraries, archives and broadcasters, offering content across European borders.²¹

In view of this situation, some scholars argue that a multilateral solution (i.e.: an international instrument recognising mandatory minimum limitations and exceptions to Copyright Law) is necessary.²² Developing an international instrument on exemptions that are based on fundamental rights and freedoms (i.e. within the Council of Europe²³), could contribute to finding balanced solutions that take account

17. The Berne Convention contains a non-exhaustive list of non-mandatory exceptions – except the mandatory exception to copyright owners' exclusive rights, permitting quotation of copyrighted works in accordance with "fair practice" – and permits signatories to set limitations on the scope of copyright protection. The Berne Convention also allows signatories to create additional uncompensated exceptions to rights holders' reproduction right if they meet the so-called three step test. See provisions in Appendix 2, page 19. See also Hugenholtz and Okediji: *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, 2008, p. 5. The Rome Convention has brought forth no harmonisation of limitations on related rights. It establishes a non exhaustive list of limitations applicable to performing artists, phonogram producers and broadcasting organisations. See provisions in Appendix 2, page 19. The TRIPS agreement and the Internet do not add any specific limitation but they extend the rule of the three-steps test to all rights recognised by these treaties. See provisions in Appendix 2, page 19.

of the interests of rights-holders as well as users of copyrighted material.

It should be noted that in the 2008 European Commission Green Paper on Copyright in the Knowledge Economy, which deals, among other topics, with specific issues concerning exemptions that are most relevant for the dissemination of knowledge, the Commission is examining and reflecting on whether these limitations and exceptions should evolve in the digital environment.²⁴

In March 2008, some developing countries proposed that WIPO adopt a work plan to analyse copyright exemptions in order to agree on minimum mandatory limitations and exceptions, in particular with regard to educational activities, the disabled, libraries and archives, which would lead to a better balance between the interests of rights-holders and the public interest.²⁵

Possible areas for further action

States have an important role to play in deciding what, in the digital environment, is a fair and reasonable balance between the necessary and justified rights of authors, performers and producers, and the public interests of freedom of expression and information.

► Considering that limitations and exceptions are key mechanisms of access providing freedom of expres-

sion and information and strongly contribute to the dissemination of knowledge and encourage creativity, states could be reminded of the importance of these limitations and exceptions in the digital environment and they could be encouraged to consider strengthening these in their legislation in order to maintain the right balance within the system of copyright protection in the information society.

► States could be encouraged to assess and consider introducing, maintaining, strengthening and adapting to the digital environment those exemptions aimed at:

- protecting freedom of expression and the promotion of the free flow of information such as exceptions made for public speeches, quotations, media usage, reporting of current events and for the purpose of parody,
- encouraging dissemination of knowledge and information, such as exceptions made for educational and research institutions, public libraries, museums and archives, and in favour of people with disabilities.

► States could be encouraged to review their legislations in order to assess and consider the benefits of introducing new exemptions which, in the framework of the digital environment, are necessary to ensure the ex-

ercise of fundamental freedoms, especially freedom of expression and information, which includes the freedom to hold opinions and to receive and impart information and ideas.

Standard-setting work which defines limitations and exceptions in terms of positive rights or user freedoms in the digital environment could contribute to development and promotion of a European human rights based approach and to greater coherence between the legal systems of European states.

Use and impact of digital rights management (DRM)

General impact of DRM

The digital networked environment has allowed users the possibility to easily reproduce works in countless perfect copies and communicate them to thousands of other users. At the same time, the introduction of Digital Rights Management systems (DRM) is supposed to allow rights-owners to determine the terms of use of their works.²⁶ However, the excessive use of DRM has met with only limited acceptance by users and has incited a movement within the user community to develop means to circumvent these systems.

DRM is the term used to describe electronic systems which control and manage the access to and use of digital content. They enable rights-holders to determine in detail which consumers can access which content under what conditions. Some examples of use of DRM are copy-protected CDs or DVDs, online services where one can download songs, videos or electronic books, DVDs that can be played only in certain countries, pay-

18. What is the public interest in one country is not necessarily the same in another (e.g. some countries like Luxembourg or France have adopted a very limited set of limitations while others like United Kingdom have assumed extensive provisions). See further Lucie 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", *e-copyright bulletin*, UNESCO, 2003.

19. Article 5 of the Copyright Directive provides an exhaustive enumeration of non-mandatory (except the mandatory exception for temporary reproductions) copyright exemptions relating to: photographic reproduction of copyright material; private use; cultural/educational institution copying; ephemeral recordings for broadcasting purposes; reproductions of broadcasts for "social institutions"; illustration for teaching or scientific research; the benefit of people with a disability; reporting the news or current affairs; criticism or review; public security; use of political speeches; use during religious celebrations; public art or architecture; the incidental inclusion of a work in other material.

20. For example, while in the United Kingdom there is no exception relating to caricature, parody or pastiche, in other European states these concerns are regarded as important and integral to freedom of expression. On the contrary, it seems that in the United Kingdom there is more concern about exceptions for the library and academic communities than in some other European states.

21. L. Guibault, G. Westkamp, T. Rieber-Mohn, 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*.

22. P. Bern Hugenholtz and Ruth Okediji. *Conceiving an International Instrument on Limitations and exceptions to Copyright*. 2008, pp. 27-34.

23. The Council of Europe has already elaborated several instruments that express its human rights mandate in special norms concerning media. For example, the article 9 of the European Convention on Transfrontier Television asks Contracting States to introduce "a right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission."

24. Green Paper "Copyright in the knowledge Economy", Commission of the European Communities, 2008.

25. This plan is based on an earlier proposal submitted by Chile in 2005, which addressed the disparity in the scope and depth of limitations and exceptions among countries, and its potential negative impact on making available to the public of protected material (http://www.wipo.int/pressroom/en/articles/2008/article_0013.html)

26. Lucie 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", p. 31.

per-view TV or video-on-demand. DRM systems have achieved a degree of sophistication that permits not only the technological prevention of certain acts, but also enables use in a specific manner or to a certain extent.²⁷ No matter how sophisticated these DRM systems, up to now, none of them has proved to be unable to be cracked by at least some users.

DRM systems are intended to benefit rights-holders such as music publishers and film companies since these techniques should protect digital content from unauthorised access and use thereby contributing to protecting the entertainment industry against commercial piracy.²⁸ At the same time, DRM systems may allow content to be provided to users in circumstances where making the content available online would not otherwise be possible.²⁹

Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty are the first provisions (also known as “anti-circumvention provisions”) protecting technological measures in the framework of copyright law.³⁰ It should be noted that protection is provided only against circumvention of a technological measure, which restricts an act not permitted by the law.

Similarly, Article 6 of the EU Copyright Directive provides protection against the circumvention of any effective “technological measures”. The directive provides that, in the absence of voluntary measures taken by rights-holders, member states must take appropriate measures to ensure that

27. For example, a single personal copy can be technologically enabled, but making further copies from that copy can be prevented. The use of a digital file can be technologically enabled for a limited period of time; transmission of a certain file to specific terminals and devices can be enabled while preventing distribution to others.

28. In its Recommendation No. R (2001) 7 on Measures to Protect Copyright and Neighbouring Rights and Combat Piracy, especially in the Digital Environment, the Council of Europe’s Committee of Ministers encourages the use of technological protection measures.

29. A content provider may only have the necessary licences to make a copyright-protected work available online within a limited geographical territory. DRM allows the provider to restrict the making available of the work to users with an IP address within the licensed territory.

rights-holders make available the means of benefiting from a certain number of limitations and exceptions, to the extent necessary to benefit from these exemptions and where that beneficiary has legal access to the protected work or subject-matter concerned. As a result, European Union governments are allowed to intervene, in the absence of voluntary agreements between rights-owners and users, to enable a beneficiary of an exemption to benefit from it, but are not allowed to intervene if a contract exists. The purpose of this provision is to foster the conclusion of contractual/licensing agreements between copyright owners and users.

These online contracts may not always be considered fair to users since most of them are in the form of “take-it-or-leave-it” licences, where users only have the choice of accepting or refusing the terms of the licence presented to them on the Internet. Furthermore, users may be required to pay for the use of a work that can be accessed cost free (as a result of copyright exemptions) in the analogue world.

Main concerns with DRM focus on how users can lawfully enforce exceptions and limitations if a DRM is in place. What users can or cannot do with the file is specified in the licence and is not always in line with the legal privileges available under copyright law. DRM systems allow the rights-owner to determine access to and use of content regardless of whether the copyright terms have expired, never existed or the user is entitled to benefit from an exception to copyright. DRM can thus be applied in a way which may conflict with legitimate users’ privileges and fundamental freedoms, especially free flow of information and access to

30. In order to ensure that rights holders can effectively use technology to protect their rights and to license their works online, the provisions tackle the problem of “hacking” and obliges the Contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights under these Treaties or the Berne/Rome Conventions and that restrict acts, in respect of their works, performances or phonograms which are not authorised by the owners concerned or permitted by law.

knowledge.³¹ The reluctance of a broad user community to accept the DRM systems as offered by the industry has – as can be seen in the recent development in the online distribution of music – shown that, irrespective of the legal situation, these systems have had difficulties in being accepted in the market.

This legal dichotomy between copyright exemptions and DRM could theoretically be reduced through technological means, by introducing into DRM systems the specifications that describe limitations and exceptions. In this way, DRM systems could incorporate concerns related to both intellectual property rights and consumer privileges.³² However, no viable way to do this in practice has been found yet.

Possible areas for further action

While in the analogue world rights-holders have exclusive rights pursuant to copyright legislation, in the digital age DRM systems, supported by anti-circumvention legislation, could provide an additional means to control how works are used. In the past, piracy and other misuses have been tolerated in view of the fact that this activity could not effectively be policed. DRM systems – if applied appropriately and not circumvented – could offer a potential instrument to alter this situation. On the other hand, DRM systems could enable those who control them to block access to content and thus might not always respect the limitations and exceptions to copyright law. A significant proportion of the user community fears that this might

31. In Denmark, an arbitration procedure has been established to help consumers who want to make certain legitimate uses but are prevented from doing so by a DRM system. Portuguese copyright law explicitly states that DRM may not obstruct fair use. Rights holders in Portugal should take voluntary measures to guarantee this, but consumers can also appeal to an arbitration board. (Source: “Consumer’s guide to DRM” INDICARE, p.8.)

32. Examples of this approach, including initiatives such as the Digital Media Project, aim at reflecting the balance inherent to the copyright system, which functions by taking into consideration both exclusive rights and the public interest in accessing those works under certain circumstances in the public interest. (Source: http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_www_82580.doc, p.6.)

threaten the right to access knowledge, and alter rights-holders' and users' relative positions and has up to now not been willing to accept existing DRM systems.

On this basis, states could be encouraged to:

- ▶▶ Assess the effect of DRM on users' ability to legitimately access and use copyrighted works and other protected material online;
- ▶▶ Raise rights-holders' awareness of the importance of access to knowledge and education and step up efforts to ensure that right owners respect limitations and exceptions provided by copyright law when implementing DRM systems;
- ▶▶ Consider reviewing their legislation to ensure that licensing agreements complement while not replacing or altering the balancing within copyright legislation.

This report now focuses on those copyright exemptions whose effective implementation is most strongly affected by application of DRM:

- ▶▶ The private copying exception
- ▶▶ Exceptions for disabled people
- ▶▶ Exceptions for libraries

The private copying exception

Digital technology has led to a considerable increase both in the number and quality of private copies, thereby causing prejudice to rights-owners. Unlike analogue media, DRM is intended to make control over the digital reproduction of works possible.

Limitations for private copying can be found in most copyright laws. Reproduction for private copy is also included in the list of non-mandatory exemptions provided by the European Union Copyright Directive,³³ however it is subject to conditions. Firstly, it does not prevent rights-holders from limiting the number of possible copies, and, secondly, it can not be enforced against works using DRM which have been made available to the public within the framework of an on-demand service on the basis of contractual agreements.

In cases where a private copying exception is contemplated by national legislation, users must seek agreements with rights-holders in order to be able to benefit from this. If negotiations fail, the next step would be to initiate proceedings and let a third party (arbitration body or court) decide.

So far court rulings have prompted different positions in cases where users have tried to defend the right to make copies for private use. While some courts have dismissed users' complaints maintaining that copyright exceptions are not enforceable rights but privileges,³⁴ others have ruled that the right to exercise such privileges should be protected, concluding that it is the task of the DRM provider to make sure that private copying remains possible.³⁵

One of the most challenging issues is the relationship between DRM and copyright levies in the digital environment. Most European states provide for levies on recording devices and/or media.

The rationale for copyright levies is that, given the impossibility of controlling every individual act of copying, the only way to compensate rights-holders for those unauthorised copying activities is to tax recording devices and blank media used for copying purposes. In theory, DRM should control every individual use of a copyrighted work and its remunera-

33. See recital 52 and Article 6 (4) (2) of the directive. When implementing an exception or limitation for private copying in accordance with Article 5 (2) (b), member states should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rights-holders, including agreements between rights-holders and other parties concerned, as well as measures taken by member states, do not prevent rights-holders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5 (2) (b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5 (5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

tion through individual licensing schemes. Accordingly, some suggest that copyright levies are not justified anymore in a digital environment. Another problem with levies is that blank digital media such as CD-ROMs or DVD-ROMs can be used for purposes other than reproducing copyrighted material.

The European Union Copyright Directive foresees the gradual abandonment of levy systems. Article 5 (2) (b) provides that for the time DRM and levies co-exist "the application or non-application of technological measures" has to be considered when calculating "fair compensation" for acts of private copying. The directive addresses the problem that consumers may be double charged for the content they buy: first, when paying levies, then, when paying rights-holders for the authorisation to make a private copy.³⁶ Furthermore, consumers may end up being charged levies for material they cannot use to make copies due to DRM protection. This may inadvertently create incentives for the user to download materials illegally in order to avoid being double charged.

The alternative of reducing or phasing out existing levies imposed on digital devices and replacing them by direct payment systems raises other questions such as which kind of remunerations will exist for works that are not protected by DRM and for reproductions made from radio or television programmes. There is also concern whether DRM systems are sufficiently

34. Tribunal Bruxelles 2004: Tribunal de première instance de Bruxelles, L'ASBL Association Belge de Consommateurs TestAchats/SE EMI Recorded Music Belgium, Sony Music Entertainment (Belgium), SA Universal Music, SA Bertelsmann Music Group Belgium, SA IFPI Belgium, arrêt du 25 mai 2004, No. 2004/46/A du rôle de réfères.

35. France is one of the European countries where public debate about DRM and private copying is particularly intense. French case-law has been through different phases: from a "non-right to private copying" ("Mullholland Drive" case) over explicit invitations to the legislator to address the matter, up to a ban on DRM, which restricts private copying altogether.

36. For example, if one consumer downloads his favourite film on a VoD service and burns the copy on a DVD-ROM, the purchase might be double taxed: firstly, through the price of purchase; and secondly, through a copyright levy if the DVD-ROM is charged with such a levy.

flexible and developed today to replace the existing levy schemes.

Possible areas for further action

On this basis:

» States could assess the public interest value of introducing the private copying exception into their legislation and of making it effective vis-à-vis DRM systems.

» States could consider taking measures to ensure that double payments (payments on the basis of a levy and payments on the basis of a licensed use) are avoided.

» In general, states could consider that they – when reviewing copyright legislation – develop and implement remuneration and copyright protection systems which are perceived by their citizens as appropriate and user friendly and which thus do not create incentives to their citizens to act illegally.

Accessibility for people with disabilities

It is estimated that there are over 53 million people with a disability throughout Europe.³⁷ Full and equitable access to information is essential to the social inclusion of people with disabilities and if they are to compete on equal terms in education and employment.

Perception is one of the main pre-conditions for accessibility of content: a deaf person will need a visual representation of information presented via sound; a blind or partially sighted person will need to hear or feel (via Braille or tactile graphics) an equivalent of visual information; people with mobility impairments will need to use as little movement as possible and to have as much time as needed when operating web interfaces.³⁸

37. Source: European Association of Service Providers for Persons with Disabilities www.easpd.eu

38. Helberger, Natali (ed.); Dufft Nicole; Gompel, Stef; Kerényi, Kristóf; Krings, Bettina; Lambers, Rik; Orwat, Carsten; Riehm, Ulrich: *Digital rights management and consumer acceptability. A multi-disciplinary discussion of consumer concerns and expectations. State-of-the-art report*, Amsterdam, December 2004, p. 32

One of the main concerns is the accessibility of content in a suitable format or the ability to manipulate content in order to make it accessible and compatible with the needs of users with disabilities.

Legislation can and does provide for exceptions or limitations for the benefit of the disabled.³⁹ However, the use of DRM in practice can make these provisions unworkable because DRM systems are designed to prevent digital content from being stored in standard formats, which could be accessed by assistive technologies in a standard way. As currently designed, DRM prevents manipulation of digital content and may thereby adversely affect those users (e.g. the disabled) who rely on accessibility features.⁴⁰

Article 10 of European Convention on Human Rights provides that the right to freedom of expression includes the freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers. If perception is a pre-condition to accessibility and for receiving information, it could be argued that states have a positive obligation to ensure that users with disabilities are protected from any unjustified technical barriers preventing their perception of licensed material.

Some experts are⁴¹ proposing solutions to effectively implement copyright exceptions for the disabled vis-à-vis DRM systems. One proposal includes the establishment of trusted third parties (TTP)⁴² that could identify the disabled users, guarantee their

39. Article 5 of the European Union Copyright Directive allows member states to introduce a limitation on the right of reproduction and the right to communicate a work to the public with respect to 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.

40. For example, while e-book readers may have the facility to reproduce synthetic speech, the rights holder can apply a level of security which prevents this from working. A person with sight loss can thus buy a book but find herself unable to read it.

41. Cf. the proposals of Dominic Knopf, a researcher at the Institute of Information Law, University of Karlsruhe (http://www.indicare.org/tiki-read_article.php?articleId=87).

status to the content provider as well as control the use of the material and trace possible infringements.⁴³ However, such proposals are problematic in terms of possible violation of privacy rights of users that would need to benefit from these exceptions.

Possible areas for further action

Digital technologies have the potential to offer many benefits for people with sensory or mobility impairments. However, DRM can prevent those benefits from being realised by blocking the use of assistive technologies employed by people with disabilities. It is necessary that the ability to restrict acts in respect of works and other subject matter protected by copyright law, take account of the rights of the disabled to access the same information and material as their fellow citizens.

On this basis:

» States could be encouraged to consider introducing measures to prevent that DRM systems hinder the use of assistive technologies employed by disabled.

» States could promote and develop strategies in order to make information accessible and perceptible to different groups of users with disabilities. These strategies should include the possibility of unlocking technological controls in cases where disabled persons would otherwise be unable to access information.

» States could consider encouraging measures to remove restrictions on certain formats or technologies, to enable perception of copyright-protected works.

42. Helberger, Natali (ed.); Dufft, Nicole; Groenenboom, Margreet; Kerényi, Kristóf; Orwat, Carsten; Riehm, Ulrich: *Digital rights management and consumer acceptability. A multi-disciplinary discussion of consumer concerns and expectations. State-of-the-art report – First supplement*, Amsterdam May 2005, p. 7.

43. An example of this co-operation between rights-holders and the disabled can be found in France. BrailleNet has established contracts with more than 80 publishers. The server Héliène contains both literary and school books in French and publishers who have contracted with BrailleNet provide the files. Only organisations representing blind and partially sighted that have been certified get an authorisation for a secured access to source files.

Libraries' concerns

Libraries⁴⁴ foster global access to information and knowledge. Their aims are to serve public interest by giving open access (through catalogues, electronic databases, compilations of press articles, etc.) to all members of a society to intellectual works and to preserve the intellectual memory of society for future generations. The free flow of information is essential to their mission.

Since ICTs (e.g. digitisation) has provided libraries with more opportunities to access content, they should theoretically be able to give new and better services in the digital environment than they are providing in the analogue world.

The distribution of copies is increasingly subject to DRM systems.⁴⁵ In order to avoid the public illegally sharing content, rights-holders are using DRM to control how their digital material, such as digital books or journals, can be used.

Although DRM systems are regarded as means to better define and manage the usages of patrons, their implementation may, on the one hand, affect libraries when performing their traditional activities, especially lending and preservation, and, on the other hand, hinder legitimate uses granted by copyright exemptions in national legislations.

Library lending is fundamental for education and culture; furthermore, lending assists in the marketing of commercially packaged information and encourage sales.⁴⁶ Therefore, contractual or technical barriers on lending of digital materials may have a negative impact on rights-holders as well as the libraries themselves.

DRM systems may affect the libraries' ability to archive and preserve digitally formatted items when they have to be

transferred to other formats to be kept in perpetuity. Works affected by DRM systems may therefore not be safe for future generations if libraries do not have the possibility to unlock the DRM-protected material.

Restrictions imposed by DRM may prevent legitimate access since the products of libraries are not in all cases copyright-protected content (e.g. government documents or content explicitly dedicated to the public domain falling under a Creative Commons licence, or published open access). This is also relevant for publications out of copyright since DRM does not cease to exist upon expiry of the copyright term, so content in public domain may remain locked away even when no rights subsist.

The European Union Copyright Directive provides for the possibility of concluding agreements between associations to enable libraries to use works protected by DRM for non-economic purposes. Some European states have taken advantage of this possibility by adopting initiatives⁴⁷ which facilitate the continuation of the activities that libraries are accustomed to performing relating to printed publications, thereby protecting the interests of both rights-holders and users and balancing copyright protection with access to knowledge. Some commentators argue that the option to negotiate special agreements with rights-holders to obtain DRM-free material or permission to use such material in certain cases may not be a feasible option for under-resourced libraries or for libraries in disadvantaged communities and that this may play a part in perpetuating the lack of educational opportunities in such communities.⁴⁸

Possible areas for further action

Technology has opened a wide spectrum of opportunities for libraries to

better serve their customers, but the implementation of DRM systems may restrict libraries' ability to fulfil their duties. In the digital environment, libraries should continue to enjoy the widest possible privileges to strengthen their role and capacity to serve as knowledge custodians and the primary access point for knowledge to the public.

On this basis, states could be encouraged to:

- » Consider to take measures to ensure that the library exception includes the privileges to unlock technological controls to facilitate the digital reproductions for library patrons for purposes of:
 - private study or research,
 - the digital reproduction for purposes of preservation,
 - the digital reproduction to replace damaged or lost copies.

Such privileges, however, should not prejudice the right for legitimate remuneration of creators.

- » Promote measures to encourage fair access to materials for all users to ensure that access to knowledge will not be dependant on individuals' capacity to pay.

User-generated content

It is estimated that there are more than 382 million Internet users in Europe. This represents almost 48% of the European population.⁴⁹ The Internet is becoming an increasingly important part of the daily lives of many European citizens as the reliance of internet technologies and services improves the possibilities to communicate, be informed, access knowledge, conduct commercial transactions and be entertained.⁵⁰

The creation of content and communication by individual users has been multiplied by a generalisation of Internet usage and an exponential increase in ICT tools such as website technol-

44. The Berne Convention does not provide any specific limitation concerning libraries, archives or museums. By contrast, the EU Copyright Directive Article 5 (2) (c) allows member states to adopt a limitation with respect to acts of reproduction made by libraries for non-commercial purposes.

45. The British Library has predicted that by 2020, 90% of newly published material will be available digitally. Only a mere 10% of new publications will be available exclusively in print.

46. <http://www.ifla.org/III/clm/p1/PublicLendingRigh.htm>.

47. In 2005 the German National Library (Deutsche Bibliothek) signed an agreement with the German Phonographic Industry and the German Booksellers and Publishers Association to legally unlock copy protection mechanisms on CDs, videos, software and e-books for preservation purposes.

48. <http://www.ifla.org/III/clm/p1/lp.htm>.

49. Source: Internet World Stats. Statistic updated for March, 31, 2008.

50. Cf. Recommendation CM/Rec (2007) 16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet.

ogy permitting the upload of user-generated content (UGC). Websites consisting mainly of UGC have become very popular in recent years allowing users to share material (video clips, written documents, images or music) which is often protected work, online.⁵¹

Currently, social networking websites offering services that provide the possibility to create personal websites and the freedom to upload any kind of information or other protected work, as well as offering free access to and exchange of information by allowing users to upload videos such as personal videos, music videos, film extracts, news extracts, etc., have become extremely popular and are having a significant share of the youth market thereby allowing millions of Internet users to become online creators, communicators and publishers.

UGC provides users with information and knowledge. Open platforms based on UGC can be enriching political and societal debates, fostering diversity of opinion, free flow of information and freedom of expression.

Most UGC activity is undertaken without the expectation of a remuneration or profit. Motivating factors include connecting with friends, achieving notoriety and self-expression. Many users are not aware of their respective rights as creators and responsibilities as users of copyrighted material.

Users can create new original UGC works or can create works from pre-existing protected content (i.e. derivative UGC works). According to copyright law, creators of content have to respect the exclusive rights of other content producers. Thus, copyright infringement issues may arise when users create derivative content without right holders authorisation or where the use is not permitted by the respective jurisdiction's exceptions and limitations. Depending on the country in question, derivative UGC works either need to be licensed (by agreement with the rights-holder or

by means of automated permissions) or to fall within the scope of an exception.

Copyright owners have sought to hold the UGC platforms directly or indirectly liable for copyright infringement. There has been a surge in legal actions taken by rights-holders against websites like YouTube and MySpace for violation of copyright. Likewise, alternatives to legal actions have also been taken such as distribution deals between major media companies and UGC platforms.⁵²

There have been proposals for the introduction of an exception for derivative UGC works. For example, the Gowers review in the United Kingdom suggests amending applicable European Union copyright law to allow for an exception for creative, transformative or derivative work, within the parameters of the Berne three-step test.⁵³ This issue has also been addressed by the European Commission in the Green Paper on Copyright in the Knowledge Economy⁵⁴ as one of the key issues to be debated in the context of the dissemination of knowledge in the digital age.

The development and importance of blogs and other technical opportunities of the digital networks for the exercise of freedom of expression, the free flow of information and wider democratic participation is also note-

52. For example, Warner Music Group signed a distribution deal with YouTube authorising YouTube the right to make available protected work owned by Warner. Universal Music also threatened to sue YouTube before agreeing to a distribution deal whereby YouTube agreed to pay a small licensing fee for the material and share associated advertising revenues. Other Web companies involved in signing similar deals with major media companies include Google, Yahoo and Microsoft MSN. Warner also agreed a deal with Snocap (a new service created by Napster to distribute music online) to sell music through MySpace. As an alternative to the large record companies, the German authors' society, GEMA, signed a deal with YouTube.de, allowing the website's community to use titles represented by this large collecting society.

53. Gowers Review of Intellectual Property, p. 68.

54. http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf. The Commission notices however, that "before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rights holders of the original works".

worthy. In 2008 the Council of Europe launched a dedicated channel on YouTube to make its audiovisual material more widely available to the public⁵⁵ as a means for the Council of Europe to better explain its aims and actions on issues, which concern citizens across Europe. Blogs and community based platforms, which offer users to share, publish and (re)use content are therefore increasingly important for reasons of transparency and democracy.⁵⁶

Possible areas for further action

User-created content is new models which foster creativity, personal expression and free speech.

On this basis, states could be encouraged to:

▶▶ Promote, in co-operation with non-state actors and the media, facilities for creating and exchanging user-generated content while respecting the limits laid down by copyright legislation.

▶▶ Review their legislations and consider taking measures to allow creative and transformative use of original works in specific circumstances for non-commercial purposes while respecting the interests of rights-holders.

States could encourage the development and use of blogs and other community based platforms as means of disseminating content, fostering public debate and encouraging democratic participation.

Besides a proper and effective enforcement of copyright law, it is essential to avoid copyright infringements by raising awareness that commercial piracy is not acceptable and by underlining the values connected with protection of copyright.

On this basis states could be encouraged to:

▶▶ Promote, together with the industry and other key actors such as educators, idols, etc., through the mass

55. <http://www.youtube.com/user/CouncilofEurope>.

56. For example, YouTube is currently co-sponsoring a debate among the Democratic American presidential candidates that will allow (younger) citizens to ask questions and dialogue with politicians via YouTube.

51. This new generation of a heavily user-participation-based Internet is widely referred to as Web 2.0. Cf. http://en.wikipedia.org/wiki/Web_2.0.

media, as well as alternative channels, educational and informative campaigns explaining the values related to copyright.

» Provide appropriate resources for schools and young people to promote the understanding of the importance of copyright and the value of creativity.

Emerging models for content dissemination and sharing

The Internet and new communication services and technologies multiply the importance of rights, freedoms and values for the global society. Everyone's right to freedom of expression includes a right to seek and to share information and ideas. The right to freedom of expression and the free flow of information can be understood also as the right to access information⁵⁷ or access knowledge.⁵⁸

Calls by civil society, especially those involved in the World Summit on the Information Society (WSIS) and, more recently, the follow-up being given to it (i.e. Internet Governance Forums and the Tunis Agenda for the Information Society action lines) that access to knowledge should be linked to the fundamental principles of justice, freedom and economic development and that (access to) information empowers individuals/users, have gathered momentum.⁵⁹

In this context, the idea of **Open Access (OA)** is a model which has tried to find a way forward for scientific progress while respecting the rules of copyright law. Open Access is free, immediate, permanent, full-text, online access, for any user, web-wide, to digital scientific and scholarly material.⁶⁰ The idea behind this approach is

that knowledge (works) which is funded by the public should also be freely available to the public. The OA model makes use of the freedoms provided by copyright law since the law gives the copyright holder the right to make access open or restricted. By this, access is granted and information shared, which are relevant to the formation of scientific and social opinion and finally to the common scientific, educational and social progress of a community.

A significant example on how the sharing of works, the access to and parting of information can be of valuable profit to the information society is the model of Free and **Open Source Software**. A well-known example of this is the Open Source operating system Linux or GNU/Linux which is based on the GNU project initiated by Richard Stallman and the operating system kernel project initiated and led by Linus Torvalds. Much of this system is published under the terms of the "General Public Licence" (GPL), which is designed to guarantee that every user has access to the source code of the program, and has the right to improve the program and to redistribute the modified version under the GPL. In this way, the entire system is developed mainly by its users. This method helps to make programs better performing, and to keep them free of software defects. This has led to the creation of a robust and commercially successful operating system, which is used by governments, educational projects, businesses and home users.

Another example for the promotion of free expression and open culture are

60. Peter Suber, *Open Access Overview*, also cf. http://en.wikipedia.org/wiki/Open_access; the definition of "Open Access" by the Budapest Open Access Initiative is: "By 'open access' to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited." (Source: <http://www.soros.org/openaccess>)

the so called **Creative Commons Licences**, provided by the international non-profit organisation, Creative Commons. These licences stand for an innovative and flexible approach to dealing with intellectual property rights by offering a range of choices to the author who can decide what uses of his work he wants to allow to the public. The Creative Commons mechanism, officially launched in 2001, enables copyright holders to grant some of their rights to the public while retaining others, through a variety of licensing and contract schemes, which may include dedication to the public domain or open content licensing terms. The Creative Commons approach has been adopted by a significant body of users.⁶¹ Up to 1 July 2008 around 130 million works in total have been published under a Creative Commons Licence.

Both these projects respect copyright law in a way which is compatible with the digital environment. This goal is reached by the creation of licences (i.e. copyright contracts), which allow creators and users to decide what rules should apply to the use of their works within the system of copyright.

The development of **digital libraries** is another example of the momentum towards greater access to knowledge and education favourable to research and scientific development and the protection and promotion of the diversity of cultural expressions and artistic creation. A digital library is a library in which collections are stored in digital formats (as opposed to print, microfilm, or other media) and accessible by computers. Digital libraries offer many advantages for users (no physical boundaries, facilitated researches, cheaper costs, round the clock availability).

Possible areas for further action

The owners of copyright in a protected work may use the work as they wish, and may prevent others from using it without their authorisation, or may also abandon the exercise of the

61. The BBC is using this approach for making its extensive archives available to the public. <http://creativearchive.bbc.co.uk/index.html>.

rights, wholly or partially. Copyright owners may post protected material on the Internet and leave it free for anybody to use, or may restrict the abandonment to non-commercial use. Alternative models can exist within the current copyright system, using the rights provided for the dissemination or exploitation of creations or innovations.

The expansion of free software and other open licences, such as Creative Commons, suggests the need to identify, study and consider the different licensing options co-existing within the copyright system.

On this basis:

» States could explore the potential of different licensing systems while acknowledging that both open and closed source models are legitimate

means for promoting dissemination and use of copyright-protected material.

» States could consider taking steps to facilitate, apply and encourage new licensing models.

» States could encourage the development and use of digital libraries as means of disseminating content while furthering access to knowledge and education.

Conclusions and proposed next steps

As part of its mandate, the MC-S-IS has been asked to, if appropriate, make concrete proposals for further action in the area.

As has been shown in the preceding part of the report, the digital environment has led to significant changes in the way copyright-protected works are created, disseminated and used. These developments have created new challenges in ensuring an appropriate level of protection and enforcement of copyright while at the same time respecting and promoting users' rights to freedom of expression and information.

Central to the changes in the digital environment are the increased opportunities for users to exercise their rights to freedom of expression and information and, on the other hand, the challenges to the exercise of these rights caused by certain technological developments. In this respect, it should be noted that the issues and challenges identified in this report are predominately linked to factors that are external to the copyright system as such, in particular the impact of emerging commercial or societal practices, such as the use of DRM systems, user-generated content websites or new models for content dissemination. Indeed, the copyright system contains an inherent balance between the protection of rights-holders and freedom of expression and information, a balance that should be maintained in the digital environment.

On the basis of the possible areas for further action identified in this report,

and in order to maintain and strengthen the inherent balance in the copyright system, it is proposed that, as a concrete next step, a standard-setting instrument is elaborated on measures to promote users' rights and their empowerment when creating, disseminating and using digital content. A standard-setting instrument (e.g. a recommendation addressed to member states) could identify possible measures to be taken by states as well as non-state actors, in order to strengthen users' ability to exercise their rights to freedom of expression and information.

The value-added of a Council of Europe response would be to assist member states in fulfilling their duties under, in particular, Article 10 of the European Convention on Human Rights⁶² as well as helping non-state actors in finding balanced solutions to emerging issues on a human rights basis.⁶³ The focus should be on those issues where a clear human rights impact can be demonstrated.

62. Having regard to Article 10 of the European Convention on Human Rights, states have an important role to play in creating an enabling environment that encourage finding solutions to emerging challenges and in providing a legal framework that strike a reasonable balance between protection of the interests of rights-holders and the legitimate expectations of the general public of accessing information, knowledge, etc.

63. Non-state actors, such as rights-holders, intermediaries or websites for user-generated content, have an important role to play in developing innovative solutions, raising awareness among users and designing technology and online services in a way that ensures respect for both copyright and freedom of expression and information.

A new standard-setting instrument would build on the efforts already made by the Council of Europe in the area. This not only includes the existing standard-setting instruments on protecting copyright and combating piracy in the digital environment but also the more recent information society standards, such as the Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet⁶⁴, that underline the need to promote openness and free circulation of information on the Internet.

Further action should respect the limits laid down in international and European copyright law. The existing international and European framework is sufficiently flexible to allow member states to develop common solutions to emerging issues having regard both to the need to protect rights under copyright law and the fundamental rights to freedom of expression and information.

The basic principle guiding any further action should be that the rights, freedoms and duties of both authors and users that apply in the offline world continue to be applied in the online environment⁶⁵ thereby main-

64. In Recommendation CM/Rec (2007) 16 member states are encouraged to facilitate, where appropriate, the re-use of existing digital content resources in order to create future content or services in a way that is compatible with respect for intellectual property rights.

65. See Principle 1 of the 2001 Declaration on freedom of communication on the Internet: "Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery".

taining the inherent balance in the copyright system.

The aim should be to ensure that the potential of new technologies are used to promote freedom of expression and

information, access to knowledge and education, research and scientific development, diversity of cultural expressions and artistic creation while acknowledging the cultural, moral and

economic importance of copyright and related rights and esteeming the work of those who create works of the mind.

Appendices

Appendix 1. Extracts from international human rights law and existing Council of Europe standards related to copyright and related rights

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948.

Article 17 of the Declaration reads as follows:

“Everyone has the right to own property alone as well as in association with others” and “No one shall be arbitrarily deprived of his property”.

Article 19 of the Declaration reads as follows:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 26, paragraph 1, of the Declaration reads as follows:

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

Article 27, paragraph 1, of the Declaration reads as follows:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

Article 27, paragraph 2, of the Declaration reads as follows:

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

Article 29, paragraph 2, of the Declaration reads as follows:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Convention on the Protection and Promotion of the Diversity of Cultural Expressions

On 20 October 2005, during the UNESCO General Conference, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted.

The Convention underlines the importance of protecting freedom of expression, information and communication in order to promote cultural diversity (Article 2, point 1). In Article 4, point 3, the Convention defines “cultural expressions” as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content” and further on encourages parties to “recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions” (Article 7, point 2).

Article 2, point 1 (Principle of respect for human rights and fundamental freedoms) expresses the need to balance freedom of expression and other rights such as IPR. Indeed, the Convention refers to the UDHR in which the right to intellectual property is established by saying that these rights should not be infringed. The Convention reads as follows:

“Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.”

Furthermore, the Convention, in its preamble recognizes “the importance of intellectual property rights in sustaining those involved in cultural creativity”.

Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”)

Article 10 of the Convention reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁶⁶

Article 1 of Protocol No. 1, added in 1952, reads as follows:

"[...] No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest [...]"

The right to freedom of expression and the free flow of information can be understood also as the right to access to access information⁶⁷ or even access to knowledge.⁶⁸

The European Court of Human Rights has not yet considered a case where IPR and freedom of expression are competing. However, the Court did state in *Karataş v. Turkey*⁶⁹ that those who create, interpret, broadcast or expose a work of art contribute to the exchange of ideas and opinions necessary in a democratic society.

In the past, the (former) European Commission of Human Rights gave prominence to the importance of IPR (over freedom of expression).⁷⁰

In 1976 the case of *De Geillustreerde Pers NV v. the Netherlands* dealt with the Dutch public broadcasters' monopoly on copyrighted radio and television program listings which the broadcaster refused to license. The broadcaster was accused of restricting the freedom to impart information in a way that was unnecessary in a democratic society and collided with Article 10 of the European Convention on Human Rights. The Commission disagreed and considered that "the freedom under Article 10 to impart information [...] is only granted to the person or body who produces, provides or organises it". This decision came under heavy critic as the Commission suggested that freedom of information and expression is not restricted as long as the free flow of information to the public in general is not impeded and that the necessary information could be obtained elsewhere.

In 1997 the case of *France 2 v. France* concerned a television news programme broadcast by French television channel France 2 where, during a television news broadcast, the camera focused several times for a total duration of 49 seconds on a fresco by painter Edouard Vuillard. The visual arts collecting society SPADEM asked for and was awarded compensation claiming that the statutory right to quote being impossible to invoke here because the entire work was shown during the broadcast.

The French Court of Cassation decided to give priority to copyright. France 2 then filed a complaint before the European Commission of Human Rights stating that the French Court had not respected their right to freedom of expression. The Commission declared that copyright can restrict freedom of expression as long as it is in conformity with Article 10 paragraph 2 (the restriction must be prescribed by law, protect the rights of others, and proportional to the interests at stake). The Commission decided not to give priority to freedom of expression in this case and said that the proportionality test was positive if the SPADEM's claim was reduced to a matter of unpaid royalties.

Council of Europe standards

It is interesting to note that for those Council of Europe member states signing and ratifying the 1954 European Cultural Convention they are encouraged to facilitate the movement and exchange of persons as well as of objects of cultural value. Indeed, Article 4 of the European Cultural Convention reads "Each Contracting Party shall, insofar as may be possible, facilitate the movement and exchange of persons as well as of objects of cultural value so that Articles 2 and 3 may be implemented" (adopted on 19 December 1954).

Since 1988 the Council of Europe has examined freedom of expression and information with regard to IPR holders and has adopted recommendations:

▶ In Recommendation No. R (88) 2 of the Committee of Ministers to member states on measures to combat piracy in the field of copyright and neighbouring rights it is recommended that "States should ensure that authors, performers, producers and broadcasters possess adequate rights in respect of their works, contributions and performances to defend their economic interests against piracy".

▶ In Recommendation No. R (90) 11 on principles relating to copyright law questions in the field of reprography, member states recognised that exceptions to copyright should exist to make possible the use of protected work by the public but this was in the specific field of reprography. Nevertheless, states have been invited to "limit exceptions" to IPR.

▶ In Recommendation No. R (94) 3 on the promotion of education and awareness in the area of copyright and neighbouring rights concerning creativity the member states stressed the need for education and awareness in the area of copyright and neighbouring rights concerning creativity and "the unlawful nature of activities which undermine those rights, in particular piracy and unauthorised reprography".

▶ In Recommendation No. R (95) 1 on measures against sound and audiovisual piracy, a similar stance was

66. Article 10 of the European Convention on Human Rights signed in Rome on the 4th of November 1950.

67. See the case of *Sdružení Jihočeské Matky v. the Czech Republic* from 10 July 2006.

68. Access to knowledge is defined as the open access to knowledge and knowledge tools for the broadest number of people.

69. *Karataş v. Turkey*, 9 July 1999.

70. For a deeper analysis cf. Hugenholtz, *Copyright and freedom of expression in Europe*.

taken by the member states. “the governments of member states should step up their action against sound and audiovisual piracy”. In point 12 of its explanatory memorandum it is stated that “sound and audiovisual piracy causes, either directly or indirectly, serious harm”.

» In the Declaration on a European policy for new information technologies adopted on 7 May 1999, European Ministers responsible for mass media declared the need “to ensure the effective protection of the rights-holders whose works are disseminated on the new information and communication services”.

» In Recommendation No. R (2001) 7 on measures to protect copyright and neighbouring rights and combat piracy, the member states recommended to develop “technological measures which protect copyright and neighbouring rights”.

» In the Declaration on freedom of communication on the Internet adopted on 28 May 2003, the Committee of Ministers underlines that “freedom of expression and the free circulation of information on the Internet needs to be reaffirmed” and “the need to balance freedom of expression and information with other legitimate rights and interests, in accordance with Article 10, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

» In its 2005 Declaration on human rights and the rule of law in the Information Society, the member states re-assert that “freedom of expression, information and communication should be respected in a digital as well as in a non-digital environment, and should not be subject to restrictions other than those provided for in Article 10 of the European Convention on Human Rights.”

» Resolution No. 3 of the 7th European Ministerial Conference on Mass Media Policy, entitled “Integration and diversity: the new frontiers of European media and communications policy” goes one step further. Indeed, (MCM (2005) 005) states: “Convinced also that the effective protection of copyright and neighbouring rights is

an important factor for the development of the media and new communication services in the Information Society.” (Point 10). Point 18 of the relating action plan urges to “monitor the impact of the development of new communication and information services on the protection of copyright and neighbouring rights, so as to take any initiative which might prove necessary to secure this protection, while ensuring a wide circulation of works and other protected material.”

» Recommendation No. R (85) 8 on the conservation of the European film heritage, recommends to member states to “make the European Film heritage better known by giving archives the necessary means for acquiring and making available to the public within the limits of copyright laws, European films of high artistic quality and historical and culture value”.

» Recommendation No. R (86) 3 on the promotion of audiovisual production in Europe recommends member states to “take appropriate steps to ensure that the systems for remunerating authors and other rights-holders promote audiovisual creativity”.

» Recommendation No. R (87) 7 on film distribution in Europe recommends member states to “reinforce methods of combating audiovisual piracy”.

» Recommendation No. R (88) 1 on sound and audiovisual private copying states that in case of conflict with the normal exploitation of works or unreasonable prejudice to the legitimate interests of the rights-owners, member states should seek solutions “with a view to providing appropriate remuneration to rights-owners [...]”.

» Recommendation No. R (88) 2 of the Committee of Ministers on measures to combat piracy in the field of copyright and neighbouring rights recommends that “States should ensure that authors, performers, producers and broadcasters possess adequate rights in respect of their works, contributions and performances to defend their economic interests against piracy”.

» Recommendation No. R (90) 11 on principles relating to copyright law

questions in the field of reprography stresses the need to “safeguard properly the interests of copyright owners faced with rapid technological developments, in particular the widespread use of photocopying and analogous reproduction procedures (reprography)”.

» The 1994 Declaration on neighbouring rights emphasises “the need for fair and equitable economic and other conditions for the use of performances included in phonograms or audio-visual works”.

» Recommendation No. R (94) 3 on the promotion of education and awareness in the area of copyright and neighbouring rights concerning creativity stresses the need for education and awareness in the area of copyright and neighbouring rights concerning creativity and “the unlawful nature of activities which undermine those rights, in particular piracy and unauthorised reprography”.

» Recommendation No. R (95) 1 on measures against sound and audiovisual piracy states that “the governments of member states should step up their action against sound and audiovisual piracy”.⁷¹

» the 1999 Declaration on a European policy for new information technologies declares the need “to ensure the effective protection of the rights-holders whose works are disseminated on the new information and communication services”.

» The 1999 Declaration on the exploitation of protected radio and television productions held in the archives of broadcasting organisations states that “copyright and neighbouring rights are essential ownership rights providing the owners with the exclusive right to decide upon the use of their property and/or right to remuneration”.

» Recommendation No. R (2001) 7 on measures to protect copyright and neighbouring rights and combat piracy recommends to develop “tech-

71. In point 12 of its explanatory memorandum it is stressed that “sound and audiovisual piracy causes, either directly or indirectly, serious harm”.

nological measures which protect copyright and neighbouring rights”.

» The 2001 Convention on Cyber-crime states that “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system”.⁷² Moreover, it is agreed that “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system”.

» Recommendation No. R (2002) 7 on measures to enhance the protection of the neighbouring rights and broadcasting organisations reaffirms the significance of the protection of copyright and neighbouring rights as an incentive for literary and artistic creation and production and recommends that “Member states should provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures which are used by broadcasting organisations in connection

with the exercise of their neighbouring rights and which restrict acts in respect of their broadcasts which are not authorised by the broadcasting organisations concerned or permitted by law.

» The 2005 Declaration on human rights and the rule of law in the Information Society, adopted on 13 May 2005, declares that “Innovation and creativity would be discouraged and investment diminished without effective means of enforcing intellectual property rights”.

» Resolution No. 3 of the 7th European Ministerial Conference on Mass Media Policy entitled “Integration and diversity: the new frontiers of European media and communications policy” goes one step further with the participating ministers stating that they are “Convinced also that the effective protection of copyright and neighbouring rights is an important factor for the development of the media and new communication services in the Information Society”.

» Recommendation CM/Rec (2007) 11 on promoting freedom of expression and information in the new information and communication environment encourages the private sector and member states to develop common standards and strategies regarding the creation of interactive content and its distribution between users “while respecting the legitimate interests of rights-holders to protect their intellectual property rights”

» Recommendation CM/Rec (2007) 16 on measures to promote the public service value of the Internet states that member states should promote freedom of communication and creation on the internet facilitating re-users resources in order to create future content or services “in a way that is compatible with respect for intellectual property rights”. In point V it is stated that member states “should engage in international legal co-operation as a means of developing and strengthening security on the Internet and observance of international law by [...] combating piracy in the field of copyright and neighbouring rights”.

Appendix 2. Extracts from international and European copyright law

The Berne Convention for the Protection of Literary and Artistic Works

Article 2. Protected Works: 1. “Literary and artistic works”; 3. Derivative works; 4. Official texts; 5. Collections; 8. News

(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in

72. Point 1 of article 10 of the Convention on Cybercrime.

each of the works forming part of such collections.

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Article 2bis. Possible Limitation of Protection of Certain Works: 1. Certain speeches; 2. Certain uses of lectures and addresses

(1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis(1) of this Convention, when such use is justified by the informative purpose.

Article 9. Right of Reproduction: 2. Possible exceptions

(2) 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 interests of the author.

Article 10. Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles

and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 10bis. Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informative purpose, be reproduced and made available to the public.

Article 11bis. Broadcasting and Related Rights: 2. Compulsory licences; 3. Recording; ephemeral recordings

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

Article 14bis. Special Provisions Concerning Cinematographic Works: 2. Limitation of certain rights of certain contributors;

(2) (b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Article 15. Permitted Exceptions: 1. Specific Limitations; 2. Equivalents with copyright

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

The Agreement on trade-related aspects of intellectual property rights

Article 9. Relation to the Berne Convention

Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

Article 13. Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to

certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

The WIPO Copyright Treaty

Article 1. Relation to the Berne Convention

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention

Article 10. Limitations and Exceptions

(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.

Article 11. Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

The WIPO Performances and Phonograms Treaty

Article 16. Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms

as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty, to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

Article 18. Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Article 5. Exceptions and limitations

►► Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

►► Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(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 rights-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 rights-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 organisations 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 rights-holders receive fair compensation.

» 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.

» Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

» 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 right-holders.

Article 6. Obligations as to technological measures

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.

Member States shall 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 of enabling or facilitating the circumvention of, any effective technological measures.

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 rights-holders 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 rights-holders through applica-

tion 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.

Notwithstanding the legal protection provided for in paragraph 1, and in the absence of voluntary measures taken by rights-holders, including agreements between rights-holders and other parties concerned, Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5 (2) (a), (2) (c), (2) (d), (2) (e), (3) (a), (3) (b) or (3) (e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

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 rights-

holders 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 rights-holders from adopting adequate measures regarding the number of reproductions in accordance with these provisions. The technological measures applied voluntarily by rights-holders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1. 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. When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

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