AN OVERVIEW OF THE EU INFORMATION SOCIETY DIRECTIVE

By Peter K. Yu

Introduction

After years of drafting and redrafting, the European Union finally adopted the European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (the EU Information Society Directive) in May 2001. This directive seeks to harmonize European copyright laws in preparation for the European Union's ratification of the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Adopted in 1996, the WIPO Internet treaties seek to upgrade international intellectual property protection provided under the Berne Convention for the Protection of Literary and Artistic Works; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; and the Agreement Involving Trade-Related Aspects of Intellectual Property Rights (TRIPs). As of this writing, both treaties lack the requisite 30 ratifications or accessions and therefore have not entered into effect.

When the EU Information Society Directive was first conceived, it was a very ambitious attempt to revamp copyright laws throughout the European Union in light of the challenges posed by the Internet, new communications technologies and the growth of e-commerce. In the end, the EU legislature succumbed to severe pressure from the copyright and communications industries, and the resulting directive became mediocre and had very limited impact on existing copyright laws.

Nonetheless, the directive clarifies European copyright laws in several areas, in particular those concerning the Internet and new communications technologies. The Directive requires the 15 member states of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom) to enact implementing legislation by December 2002.

An Exhaustive List of Optional Exceptions

The EU Information Society Directive includes a detailed and exhaustive list of exceptions to the reproduction right and the right of public communication. Thus, EU member states will not be able to create exceptions other than those included in the list.

Although the list is exhaustive, all the exceptions are optional. Member states therefore can pick and choose at will only those exceptions they need or find expedient. Because most member states would tend to change their laws as little as possible, the EU Information Society Directive may leave intact the copyright laws of most EU member states.

To balance the needs of the copyright holders who place works on the Internet and those of the Internet service providers and telecommunications operators who transmit and carry the copyright-protected materials, the EU Information Society Directive includes a mandatory exception for the reproduction of technical copies. To qualify for this exception, the reproduction activity must be transient or incidental by nature and must constitute an essential

part of a technological process. In addition, the sole purpose of the reproduction activity must be to enable transmission in a third-party network or to facilitate the lawful use of a copyrighted work that has no significant economic impact on the copyright holder. By allowing for this exception, the directive enables the World Wide Web to operate effectively while promoting a competitive and dynamic knowledge-based economy in the European Union.

In addition, the EU Information Society Directive includes a grandfather clause that allows member states to continue to apply existing exceptions in "cases of minor importance" that only involve analogue uses and do not affect the free circulation of goods and services within the European Community.

To provide guidelines for member states to establish exceptions, the directive adopts the three-part test used in evaluating permissible exceptions under TRIPs and the WIPO Internet treaties. Specifically, the directive provides that exceptions "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

Legal Protection of Anti-Copying Devices and Rights-Management Systems

The protection of anti-copying devices and rights-management systems was one of the main reasons for the creation of the WIPO Internet treaties. Digitization not only brings about new risks for copyright holders, but it also provides the means to institute access control, identification and anti-copying devices, which allow copyright holders to administer and control the exploitation of copyrighted works.

In 1998, the U.S. Congress enacted the Digital Millennium Copyright Act (DMCA), which prohibits the circumvention of anti-copying devices and rights-management systems. Since the enactment of the DMCA, commentators have widely criticized the statute. Shortly after the U.S. Copyright Office released its report on the effects of the DMCA, more than 50 intellectual property scholars expressed disappointment over the report and urged Congress to conduct its own study. As of this writing, the constitutionality of the anti-circumvention provisions of the DMCA was challenged in federal courts.

Like the DMCA, the EU Information Society Directive require member states to implement legislation that protects against the circumvention of anti-copying protection and against the manufacture, importation and distribution of devices designed to circumvent such protection. Member states also are required to protect against the removal or alteration of electronic rights-management information and the distribution, importation, broadcasting or communication of any works whose electronic rights-management information has been removed or altered without authority.

Notwithstanding this protection, the EU Information Society Directive includes exceptions for publicly accessible libraries, educational establishments, museums, archives, broadcasting organizations, noncommercial social organizations (such as hospitals and prisons). The directive also makes exceptions for uses that benefit the disabled, for public security purposes and for performance or reporting of administrative, parliamentary or judicial proceedings.

Fair Compensation and Community Exhaustion

The EU Information Society Directive requires member states to provide for fair compensation in reprography by photographic, photocopying or similar techniques, in reproduction for private use and noncommercial purposes and in reproduction of broadcasts made by a limited number of social institutions (such as hospitals or prisons).

Member states are given flexibility over the interpretation of this provision. They can decide, in accordance with their own legal traditions and practices, whether compensation will be awarded in the form of payment obligations (such as levies on copy shops and on sales of blank tapes and equipment). They also can decide on their treatment of time-shifting practices, that is, private copies made off the air from radio or television for the purpose of viewing or listening to the broadcast at a later and more convenient time.

As of this writing, most EU member states levy taxes on blank recording media and equipment to provide fair compensation to composers and authors whose works have been copied without authorization. Nevertheless, Ireland, Luxembourg and the United Kingdom did not adopt a similar levy system. In fact, the United Kingdom strongly opposes that system on the basis that the system contradicts the established British legal tradition and business practices. Given the significant division within the European Union, it is uncertain as to whether the EU Information Society Directive would lead to EU-wide taxes on blank recording media and equipment.

Finally, the EU Information Society Directive limits exhaustion to the European Community, as compared to the international community. Once a copyrighted work is marketed and distributed in any EU member state by or with the consent of the copyright holder, other member states cannot restrict the distribution of the copyrighted work in their territories. Nonetheless, each member state is free to protect against parallel imports from non-EU countries by restricting the distribution of copyrighted works in their territories.

Conclusion

Since its establishment, the European Union has been very aggressive in setting global norms concerning the protection of intellectual property rights. So far, the European Union has promulgated directives on the legal protection of computer programs, rental and lending rights, satellite broadcasting and cable retransmission, term of copyright protection and database protection.

Unlike the above directives, the EU Information Society Directive may have very limited success in setting global copyright norms. Indeed, all the rights stipulated in the directive already exist in national copyright laws. Even worse, all the exceptions included in the directive are optional, and the importance of these exceptions has been heavily diluted by the large number of exceptions included in the directive—five exceptions to the reproduction right and 15 exceptions to the right of public communication.

Thus, one might wonder whether the directive would have been better had it been less ambitious. At least, the directive would enter into force earlier and therefore would allow for the sooner ratification of the WIPO Internet treaties and stronger protection of copyright holders at an earlier date.

Moreover, the EU Information Society Directive, which was ridden with compromises made to the copyright and communications industries, fails to address many important problems concerning copyright in the digital environment, such as applicable law, administration of rights and moral rights. The directive also fails to resolve significant differences between various EU member states and to harmonize copyright laws within the European Union. Given the weaknesses of the directive, perhaps—as suggested by Professor Bernt Hugenholtz, a law professor at the University of Amsterdam—the European Court of Justice "will have to finish the job left largely undone by the European legislature."

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