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The Efforts of the European Union to Harmonise Copyright and the Impact on Freedom of Information

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The efforts of the European Union to harmonise copyright have been caused by two factors: 1) the need to adjust copyright to digital technology, and 2) the creation of an internal market for free trade in capital, goods and labour within the European member states. These efforts have resulted in directives on rental and lending rights, on harmonising the term of protection, and on legal protection of databases. These directives, although they strengthen authors' rights, should not worry librarians particularly. On the political agenda now is a *Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (dec. 1997).* This proposal attempts to set new standards for authors' rights to control the use of their works in respect to reproduction, communication to the public by electronic means, and distribution of hard copies. The proposed rules concerning authors' rights to control distribution of hard copies will, in practice, prevent free trade with copyrighted works. Researchers may not have free access to relevant published information and ethnic minorities may be discriminated against. If the authors' right to control any communication to the public of their works by electronic means is not balanced with rules of legal deposit and public access (on the library premises), libraries and archives will face serious legal difficulties in preserving electronic cultural heritage. The general public in Europe and those from around the world who seek to know the cultural heritage shall have suffered a serious setback in the freedom to access published information.

Introduction

The changes in copyright legislation reflect the transition of the Industrial Society into an Information Society. In the Industrial Society the main products are goods, i.e. physical objects. Goods are traded and moved around. There are, however, physical limits as to what you can do with them. One of the limits is, that a published book will forever remain available to the public unless all existing copies perish, and this is not likely to happen in countries with legal deposit of printed works. This is due to the simple fact that copies of the book have been spread – sold to whoever wanted to buy them, and once sold, the book is available, and in the public domain. This fact has been reflected in copyright law. The author has the exclusive right to decide whether a literary work he has produced is to be published or not. But when a book has once been published, the authors legal right to control the distribution has been "consummated" or "exhausted".

In the Information Society the main products or "goods" are immaterial pieces of "information", i.e. literary and artistic works, usually existing also in digital form. A work in digital form is not fixed in the same way as a printed text is. It may be moved via network to any desired place within seconds and at no cost or effort at all, and you may without any effort produce as many copies as you like. The fixation to the medium has become irrelevant. The work can be regarded as a free floating and truly immaterial object.

Instead of publishing a book, you may now choose to publish the same contents electronically in a database accessible via Internet. If you regret

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it you may at any time unload it from the database. You may also choose to give access only to certain people and not to others. You remain at any time in control of whom – if anyone – shall have access to the work.

The difference between what you can do with a physical object and what you can do with an immaterial object is reflected in the copyright rules concerning authors rights. According to the WIPO Copyright Treaty, [1] the authors' right to control the communication to the public of their works is *not* consummated or exhausted. This means that, in principle, every time one wants to access a work published electronically in a database, one needs the author's permission.

This example highlights what is at stake in the new copyright regimen that is developing on top of the digital technology. It is a the question of

- whether the general public in the digital information society shall have freedom of access to published information.
- whether libraries and archives shall have the right to preserve the cultural heritage of digitally published works, and
- whether historical research on the basis of original and undistorted sources can, in the future, be guaranteed.

Below is described the efforts of the European Union to harmonise copyright legislation, and the impact this may have on these questions.

The Internal Market

The European Union started originally as a European Economic Community. The objective was to establish a free internal market for capital, goods and labour within the member states. One aim of the EEC was to stimulate the European information industries in an attempt to counter U.S. dominance. A strong copyright protection was seen as a necessary means to achieve this goal. Cultural policy was originally excluded from the EEC treaties, so copyright was seen only from an economic point of view. The objects of copyright, the literary and artistic works, the "information products", were regarded as tradable commodities.

This starting point has deeply influenced the development of copyright thinking within the Community, and it has not significantly changed since. The reason for this is that the member states do not share the same cultural and democratic values concerning the citizens' right to access information. They share some values concerning freedom of speech, but only Sweden has a strong and longstanding legal tradition of protecting citizens' rights to information.

Democratic countries provide legal protection of citizens' freedom of expression, but when it comes to the question of *access* to information, it is more a question of lofty ideals than real politics. The concept of freedom of information is often expressed in the official information policy in relations to libraries, and these ideals certainly form an important part of the professional ethics of librarians. But this does not mean that outside the library community there are shared standards specifying citizens right to information. This has serious implications on the development of copyright in the digital age. When there are no shared cultural or democratic values concerning the citizens' right to be informed, there is nothing to counterbalance the interests of authors.

The only quasi-legal basis to support citizens' rights to information is the Declaration on Human Rights (Article 19):

> 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.

But this is not a strong basis when it comes to fighting the economic interests of the information industries. Only indirectly through legal deposit of printed works the citizens' access to the printed part of the cultural heritage have been secured.

The Directives

After these introductory remarks, we look at the copyright directives that directly relate to the operations of libraries and the question of freedom of information. Of special interest to libraries are three important directives, and one proposal for a directive.

- The Directive on rental and lending rights (1992) [2]
- The Directive harmonising the term of protection (1993) [3]
- The Directive on legal protection of databases (1996) [4]
- Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (1997) [5]

Initially, however, it will provide a useful framework for understanding if I include a few words on the decision-making bodies within the European Union:

- The European Commission functions as a kind of European government. It has the right to propose new legislation, directives, and is the executive body.
- The European Council represents the national governments of the member states. All decisions have to be accepted by the European Council.
- The Parliament has only limited power, but in certain types of cases, e.g. copyright issues, the European Council has to take account of the views of the Parliament and, if they disagree, compromise solutions have to be found.

On both national level and European level the library associations try to influence the political process. The views of the European libraries are put forward by the libraries' lobby organisation, EBLIDA, European Bureau of Library, Information and Documentation Associations (for more information, consult the URL: http://www.eblida.org/). The Nordic library organisations are deeply involved in EBLIDA.

The Directive on Rental and Lending Rights

The Lending Directive specifies the terms for public lending. Traditionally in copyright the so-called "distribution right" is "consummated" when the book is put for sale. The reason, as mentioned above, is obvious: when the books are sold, the author can in fact no longer exert control over them. The novelty of the Lending Directive is Article 1(4) stating that the authors' right to control distribution in the form of rental or lending of copies of their works, is not consummated when the work is sold or otherwise distributed.

This might have been the end of public libraries, if article 1(4) were not counterbalanced by article 5(1) stating, that member states may restrict authors' rights to control public lending, provided authors are remunerated. Member states are, however, free to set up different remuneration schemes, and they might exempt certain types of libraries from the obligation to remunerate. Usually this exemption clause it applied to university and research libraries. So the result is that within the European Union authors have a right to be remunerated for the public lending of their books. How this right may be exerted in practice is another matter.

The Directive harmonising the term of protection

Within the Community member states had different rules relating to the terms of protection. These obviously needed to be harmonised. The main rule now is that literary and artistic works are protected during the lifetime and 70 years after the death of the author. Some authors' associations protested against the extension of the period of protection, arguing that this would favour descendants of authors rather than the living ones. The implicit but realistic premise is that there is in every country a lump sum for remuneration purposes to be divided among the rights holders, and the more they are to share, the less everybody gets.

The Directive on Legal Protection of Databases

Databases are important products of the information industry. Often databases contain unprotected information, collected and sorted according to certain principles. Traditionally databases like directories, bibliographies, etc. were published in the form of printed books. Therefore it was of no importance if information contained in the book was unprotected and available to the public via other sources. If someone wanted to take advantage of how the information was collected and presented in the directory, they had to buy it.

When databases are published electronically, the situation differs, as the user may copy the whole or a part of the database. As the information contained in the database is often unprotected, no considerations of copyright need to delay the user's endeavours. When the database is only available online, the vendor might control the use by specifying the terms of use in a contract with the prospective user. In this case the user is bound by the contract. The real problem arises, when databases are distributed as CD-ROM products. Many countries do not accept one-sided declarative "agreements" you are supposed to accept when you break some seal, and then database vendors stand unprotected.

If database production is to be stimulated, database producers need to have their investments protected. To achieve this the European

Commission was inspired by Nordic copyright legislation. Since 1961 databases have been protected in the Nordic countries, and these rules were more or less copied in the Directive. What is protected is the compilation and sorting of the data, not the data *per se*. The duration of protection of the database is 15 years after the production or a substantial update.

This Directive stirred a lot of controversy within the European library community, and when the European Commission tried to have it incorporated in the WIPO Copyright Treaty of December 1996, the library associations became active opponents. The result at the WIPO conference was that the proposal for protection of databases was postponed. It was again discussed at the meeting of the WIPO Standing Committee in Geneva May 1999 and also at the November meeting, but there seems to be no serious interest outside Europe to adopt a treaty on this issue. Third world countries are very sceptical, and the U.S. seems now more inclined to settle the matter within the framework of trade agreements.

The main argument against the Directive was that it creates a new protection of otherwise unprotected data. This argument rests on a misunderstanding. It is not the data that are protected, but the collection of the data. If the data are publicly available everybody is free to collect and compile them in their own database. The Database Directive does not prevent that. It also seems difficult to argue, that one should be free to profit from the "sweat of the brow" of others by copying any amount of data from a database and making them available in competition with the original producer who made the investment of collecting and compiling them. A serious problem, however, may arise if the database producer has an exclusive right to collect and distribute the data. This may happen when the institution or firm, who generates the data, gives or sells them to one database producer only.

In the first draft of the Directive there was an article specifying that if a database producer would unduly exploit a monopoly situation compulsory licensing might be enforced. This was later deleted, probably because there are other rules to secure free competition and cope with firms who abuse a dominant position.

The Directive contains one novelty of great interest to libraries: Article 15 specifies, that contractual agreements which extend the database producers rights beyond the rights granted in the Directive are null and void. A rule like this ought to be standard in all copyright law. User privileges granted by law should be minimum standards and not to be overruled by contracts. This might be the best weapon against information vendors trying to abuse a dominant position. In non-European countries there is still no protection of databases, and producers and libraries are left to define their relations by contractual agreements.

The proposal for a directive on the harmonisation of certain aspects of copyright and related rights in the information society[6]

The main elements of this proposal the European Commission tried to get into the WIPO Copyright Treaty at the Diplomatic conference in December 1996. Four articles are of special interest to libraries:

Article 2: Reproduction right

Article 3: Right of communication to the public

Article 4: Distribution right

Article 5: Exceptions to the restricted acts

The rights specified for authors of intellectual and artistic works do normally also apply to related rights, i.e. the rights of performers, producers of phonograms and films and broadcasting organisations. But in order not to complicate matters I will disregard related rights here, as they are usually of no special importance to libraries.

Article 2: Reproduction right

This article states that Member states shall provide for the exclusive right for authors to authorise or prohibit direct or indirect, temporary or permanent reproduction of their works by any means and in any form, in whole or in part. The European Commission tried to have this article accepted as part of the WIPO Copyright Treaty. However the telecommunications companies and the library associations lobbied heavily against it. The telecommunication companies claimed that cache copies would be prohibited, and the whole functionality of the Internet would be severely impaired. They were also afraid to incur liabili-

ties in case signals passed some country with no exceptions for cache copies. The library associations argued that prohibition of temporary reproduction would prevent any browsing and viewing of protected material on the Internet.

The proposal was finally rejected at the WIPO Conference. It has now emerged in the form of a Directive. However, the obligatory exceptions as specified in article 5(1), seem to be intended to cope with the problems mentioned by the telecommunication companies and the library associations. Whether the wording meets the concerns of the library associations is still to be seen.

The exception of article 5(1), however, is the only obligatory exception to the authors right to authorise any kind of reproduction. Other exceptions to the reproduction right are optional, and whether they are to be implemented is decided at the national level. One obvious consequence of this is that copyright will not be harmonised to any great extent within the Union. The library associations have argued that the optional exceptions should be obligatory and minimum exceptions allowing member states to extend user privileges even beyond that.

The exceptions to the reproduction rights have changed quite substantially since the first version of the proposal, and they are still subject to intense negotiations. For libraries the important limitations to the authors exclusive right to control reproduction are now the following cases:

- reproductions on paper or any similar medium, with the exception of musical works in published form,
- reproductions on audio, visual or audio-visual analogue and digital recording media made by a natural person for private and strictly personal use and for non-commercial ends
- reproduction made for archiving or conservation purposes by … libraries and archives and other teaching, educational or cultural establishments;

The proposal by the European Commission that reproduction of sheet music shall be forbidden came out of the blue, and appeared for the first time in the Amended Proposal. It demonstrates the influence of the music industry on the Commission. It is, however, doubtful that it will be accepted in the final version. If it does, it will present libraries, researchers and musicians with a problem, although minor, provided libraries may make safety reproductions of rare items to be used for lending purposes. In Denmark libraries are not allowed to make reproductions for private purposes of music, and this is how we solve the ensuing problem. It is not wonderful but it works.

It is very important that reproduction on digital recording media continue to be allowed. In Denmark it is forbidden, which is quite a nuisance for everybody and especially for the libraries. It hardly prevents illegal private copying, but it forces libraries to vast lots of paper on printouts instead of letting patrons make copies on diskettes. It is interesting to note that even representatives of rights holders' organisations expect the ban on digital reproduction to be lifted.

Libraries should not be restricted to making reproductions only for "archiving or conservation purposes". It is important that libraries are not barred from utilising new technological developments e.g. new inter library loan technology.

There is general proviso that the exceptions of the reproduction rights presuppose that rights holders are remunerated. This may result in additional costs for libraries depending on how the remuneration schemes will be construed in member states.

Considering the development on this issue since the first version of the proposal, we need not worry too much about the reproduction rights. The political process is still ongoing, and many countries still think the proposal is too restrictive. The serious problems start with article 3.

Article 3: The right of communication to the public

In the introduction, this article was used to illustrate the development of the concept of "publishing" depending on the technology used. Article 3 states that

- Member states shall provide authors with the exclusive right to authorise or prohibit any communication to the public of originals and copies of their works …
- The rights shall not be exhausted by any act of communication to the public … including their being made available to the public.

A paragraph of similar content was proposed for the WIPO Copyright Treaty, and was accepted. The consequence is that all signatories of the

WIPO Copyright Treaty are now obliged to implement this article in their national law when they ratify the treaty.

The consequences of this article have to be seen in connection with the exceptions to it. These are stated in article 5(3). Member states may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

a) use for the sole purpose of illustration for teaching or scientific research …
b) uses for the benefit of people with a disability …
c) use of excerpts in connection with the reporting of current events …
d) quotations for purposes such as criticism or review,
e) use for the purposes of public security or to ensure the proper performance or reporting of an administrative, parliamentary or judicial procedure.

These exceptions seem to cover most needs of research and university libraries. Provided one actually owns a copy of the work in question, one may give access to it for the purpose of teaching or scientific research, and that should cover most cases. However, many libraries have made the move from "collections" to "connections". Instead of actually acquiring an electronic copy of the work and installing it on ones own server, one only subscribes to a gateway via an Internet address. This has obvious advantages, but it puts libraries and their patrons at the mercy of the suppliers and authors. Many libraries try to manage this problem by having the supplier to guarantee "eternal access", but such guarantees are thin air. In the first place because the supplier may not be able to fulfil his obligations: he may go broke. Secondly the author may enforce his communication to the public right, and withdraw his work.

It is reasonable to expect that if there is a commercial interest, the work will be made available. But use of a work may become so sparse, that it does not pay the cost of making it available. Another even more serious possibility is that the author, after a couple of years, no longer wants to be associated with his work. He may regard it a youthful aberration, a work whose contents or quality does not meet his present standards. If the work is published in a printed book, there is nothing he can do about it. But when it is published electronically in a database, it may be removed just as easily. The consequences for historical research are obvious.

The other serious problem arising out of this article is that these exceptions only apply in the special cases mentioned. All exceptions are to be measured by Article 5(4): *"The exceptions and limitations provided for … shall only be applied to certain specific cases …"* And not everybody can be a special case.

This means, that the average citizen has no right to get access and become informed. Only persons, who can claim to be teaching or engaged in scientific research, who are disabled, who are reporting current events or in need of quotations for purposes such as criticism or review, may get access.

So far it has been an undisputed citizens' right to have the possibility to access any printed work. This is a consequence of the technique used for distribution, and is supported by legal deposit. Published printed works are available to the general public in legal deposit libraries.

The distribution of works in digital form via networks radically changes this situation. The publisher may simply stop distributing the work in not making it available any longer, or the author may order him to do so. The consequences are that

- the general public shall have suffered a serious backlash in the freedom to access published information
- libraries and archives shall face great legal difficulties (not to mention economic and technical) in preserving the electronic cultural heritage
- historical research on the basis of original and undistorted electronic sources can not be guaranteed in the future.

To prevent this authors' communication to the public right must be balanced with rules of legal deposit and public access to deposited works on the library premises.

Article 4: Distribution right

The rules concerning distribution rights are different in the EU member states, and they must be harmonised. Otherwise there can be no Internal Market for copyrighted works.

Some member states have "national consumption" and others have "universal consumption" of distribution rights.

- National consumption means that the authors' right to control distribution is only exhausted in a particular country, if copies of his work with his consent are sold or otherwise distributed in that country. His right to control distribution in other countries is unaffected.
- Universal or international consumption means, that the authors' right to control distribution is exhausted all over the world after the first sale or distribution with the authors consent no matter in which country the sale or distribution has taken place.

Small-language countries like the Nordic countries have traditionally been in favour of universal consumption and large-language countries have traditionally favoured national consumption. The reason becomes obvious if one thinks in terms of publishers' interests. English, French or Spanish publishers clearly have an interest in dividing up the world market into separate countries. This gives them the opportunity of setting the price of their products according to the populations ability and willingness to pay. If this kind of division of the world market shall be possible national or regional consumption of distribution rights is necessary in order to prevent parallel import from countries where the price is lower.

Publishers from small-language countries like Denmark do not care about the world market, as the only market for Danish books is Denmark. On the other hand, having to rely heavily on foreign literature for research and higher education, small-language countries have a clear interest in being able to import books from wherever they are best and cheapest.

The European Commission opts for regional consumption. This means that if a book is published in any member state of the Community the distribution rights will be exhausted for the whole Community, but not for other countries. This is quite logical, as national consumption within the Internal Market of the Community is a contradiction in terms. The European Commission, however, could also have chosen universal or international consumption, and thereby furthered free trade of information products, books and other copyrighted works. The proposal of the European Commission gives publishers a very strong position, and prevents consumers from neutralising unreasonable prices by parallel import. The interests of the consumers are disregarded.

One should note that strictly speaking the proposed article does not hinder free trade with copyrighted works. The wording does not prevent anybody from importing copyrighted works. It only states that

> the distribution right shall not be exhausted within the Community … except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

This means that the author's distribution right in the Community is *not* exhausted if the work is *not* sold inside the community with the author's consent. This again means, that booksellers and libraries may import books from countries outside the European Union, but they may not distribute them further, i.e. sell them or lend them to patrons, without the author's consent.

The Danish representatives have argued strongly against this proposal. Research and university libraries import books from all over the world and it is in practice impossible to get authors permission to lend out the books. They have therefore insisted that, as a minimum, libraries must keep the lending rights as specified in the *Rental- and Lending Directive*.

This will, however, not solve the problem for booksellers and small libraries depending on a local bookseller for their supply, as booksellers are not allowed, without the permission of the author, to sell books that are not published in the one of the member states of the European Union.

There are also within the European Union many ethnic minorities who will be affected by this. Books and other culture products from their original homelands are seldom also published in EU member states, but must be imported directly from the country of origin. In these countries publishing is not organised in a manner that makes it possible to acquire the author's consent. Booksellers, music and video shops may therefore have difficulties in legally supplying these types of customers. This seems hardly to be in keeping with the Declaration on Human Rights.

In sum: The proposed rule on authors' distribution rights will *de facto,* if not *de jure,* hinder free trade with copyrighted works. As a result researchers may not have free access to relevant published information and ethnic minorities may be discriminated against. Strangely enough, the

library associations have not shown any interest in these problems.

Conclusion

The European Union has during the last decade launched several directives and proposals in an attempt to cope with the copyright problems caused by the transition to digital technology, and the creation of the Internal Market. The result has been a considerable strengthening of authors' rights with respect to

- remuneration for public lending
- prolongation of the term of protection
- legal protection of databases

And, if the proposed directive is accepted, also with respect to

- right to remuneration for reproductions
- communications to the public rights
- distribution rights

In the political process since the proposal for the WIPO Copyright Treaty in 1996 and the first proposal the new Directive in December 1997, library associations have, quite successfully, concentrated their efforts on the reproductions rights. The debate and lobbying is still going on, and we may even hope for further improvements.

However, the communications about the public rights and the distribution rights have not got the attention they deserve. This may result in the acceptance of rules that will end in seriously impairing citizens *"freedom to seek, receive and impart information and ideas through any media and regardless of frontiers"*. In order to prevent this, it is vital that the authors' communication to the public right is balanced with rules of legal deposit and public access to deposited works on the library premises.

Notes

1. WIPO Copyright Treaty, December 20, 1996.
   The World Intellectual Property Organization (WIPO) is a United Nations organization with headquarters in Geneva, Switzerland. WIPO's objective is the promotion of the protection of intellectual property, and the administration of international treaties dealing with intellectual property, most notably the *Berne Convention* and the *Rome Convention.*
   A WIPO conference in Geneva adopted the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* on December 20, 1996. Before becoming binding law the treaties have to be ratified by the member states. It is not mandatory for WIPO member states to ratify the treaties; however, the most important Contracting Parties are expected to do so. The European Union has started the ratification process of the two treaties.
   At the WTO (World Trade Organization) conference in Seattle, 1999, the European Union proposed that the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* are included in a new WTO Treaty.
2. Council Directive 92/100/EEC of November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. (Official Journal L 346, 27/221992 p. 0061 – 0066)
3. Council Directive 93/98/EEC of 29 October harmonizing the term of protection of copyright and certain related rights. (Official Journal L290, 24/11/1993 p. 0009 – 0013)
4. Directive 96/9/EC of the European parliament and of the Council of 11 March 1996 on the legal protection af databases (Official Journal L 077, 27/03/1996 p. 0020 – 0028)
5. Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (COD97359 – COM(97)0628 – C40079/98)
6. The source for the discussion of this proposal is the "Amended proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society 97/0359/ COD".