



EBLIDA's ten minutes comments to the proposed Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society

**Hearing at European Parliament,
Consumer Forum Intergroup,
16 July 1998**

On behalf of EBLIDA, the European Bureau of Library, Information and Documentation Associations that represents 95.000 libraries all over Europe I wish to thank you for the invitation to speak to you today. At the outset, I would like to emphasise that libraries strongly support intellectual property protection. They firmly believe that the economic and moral interests of creators must remain adequately protected in the new digital environment. However, the adaptation of European copyright law to the digital age must also aim at keeping the balance between the exclusive rights of rightholders and the public interest, which includes the need for access to information and knowledge to all by providing for adequate exceptions.

However, the new [draft Directive](#) would destroy the balance in copyright that is kept in the analogue world. The draft Directive would severely hamper the European Union's attempt at connecting schools and libraries to the information networks to guarantee access for all. It would also hamper the European Union's attempt at promoting lifelong learning as a basis of the information society. EBLIDA is therefore very grateful to Mr Whitehead for taking the initiative to organise this meeting to receive further information on the shortcomings of the draft Directive, as the European Parliament is able to address the major problems of the Directive. I will stress four problems in particular:

First, the proposed Directive takes a permissive approach towards Member States - they *may* provide for exceptions - but does not aim at also harmonising the exceptions to the exclusive rightholders' rights on a Europe-wide basis. It would leave all exceptions that are listed (except for one) purely as options to the Member States. Exceptions would be entirely unharmonised and without guarantee that they will be translated into national law to ensure that exclusive rights are still balanced by some exceptions in the public interest. In addition, the proposed Directive would not allow Member States to provide for any exceptions other than those few explicitly listed in the Directive. Member States could therefore not, as permitted in the WIPO Copyright Treaty, "carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention".⁽¹⁾ EBLIDA shares these concerns with other European associations representing European consumers; disabled persons; education and the consumer electronics industry, and therefore actively supports the [European Fair Practices in Copyright Campaign \(EFPICC\)](#).

Second, the draft Directive would reduce the *existing* national provisions for legal exceptions regarding the copying for specific purposes to only two, namely the "illustration for teaching and scientific research". This is too narrow. Existing *fair practices*⁽²⁾ in copying information for non-commercial private use, learning or research have nothing to do with commercial piracy. Fair practices comply with the three-step-test of the Berne Convention. We are *not* talking about each and every private copying done at home, nor about each and every copying for research or learning purposes but only about the copying that is done according to fair practice rules. Examples include the making of one archival copy in a library to ensure that a work can be stored for future generations, or the copying of a limited number of pages of a complete work in a library for own research use, or the personal compilation of single tracks from CDs that you have paid for for private use in your car.

There is no reason why recognised "important values of society like research, learning and access to information"⁽³⁾ should be abolished as we are entering the information society. Each year, libraries in Europe provide a range of services to millions of researchers, students and members of the public. These services are performed in conformity with the national copyright laws. The ease with which electronic information can be manipulated is causing a fear which libraries share with rightholders. However, this should not lead to an overly restricted use of

electronic information by users and information professionals. It should not be forgotten that libraries provide an uniquely controllable environment through which publishers can make their products available to the public at large. (4)

Third, the proposed Directive would make any circumvention of anti-copying and rights management systems unlawful, even for people with very legitimate, non-infringing motives. The machine could simply block every attempt to access information, and nobody would even get to the point of seeing that information let alone copy it for a specific purpose that would be excepted from copyright. A library that is locked today will re-open its doors tomorrow and welcome back its users to borrow library materials. Technical measures will block access to information forever and will in fact create a technical monopoly to completely control all access to information. Exceptions in the public interest are given by *government* to balance them against the interest of rightholders. There is hardly a good basis for users to *negotiate* exceptions with rightholders that wish of course to gain complete technological control over access to works.

With the new Directive the library user could be forced to pay-per-view for digital information that he or she would get now free of charge in the library. Libraries will pay via a license for the right to make digital information available for their normal users, like they are paying now for books and journals which they also buy to make them available for their users. Library users should not have to ask every time for rightholders' authorisation if they wish to use digital information offered in a library, and fair practice copying should be possible. The mission of a library to collect, organise and maintain materials for future generations and to provide access to information to everybody regardless of his or her financial means must not be undermined.

Fourth, there is no provision in the new Directive that would ensure that contract law cannot override copyright law as is in the Database Directive(5). Why is that so important? The aim of securing monopoly rights for all content is also the driving force behind the rightholder's intention to replace all legal copyright exceptions with negotiated license agreements. Digital works are *not sold and bought* but *access and use* is regulated by a license. A license (or contract) is a means of providing use of a piece of property without giving up the ownership. The relationship between owner and user are driven entirely by contract law with complete freedom of negotiation, and not by copyright law. The owner is free to ask whatever price and set whatever conditions on use the market will bear. This is fine for two partners of equal power.

However, rightholders and users do not have equal power, as rightholders have exclusive rights, i.e. monopoly rights under copyright for their works. Copyright exceptions were introduced in first place to balance this monopoly to safeguard access to information in the public interest without having to ask every single time for permission, and to be able to copy a reasonable amount of a work that would not be in conflict with the normal exploitation of that work. It is therefore essential that copyright exceptions are kept in the digital world as they ensure that licences can be agreed between a rightholder with **almost** exclusive rights and a user being able to rely on **at least a few** fair practice exceptions that are guaranteed by law. All license agreements should then automatically include these fair practice exceptions. If this was not the case, every individual consumer would be left alone facing mass market licences for on-line information that dictate the terms of use which could be as restricted as " No copies whatsoever may be made by any means in any circumstances". Will then consumer protection law be able to regulate the terms of use of copyrighted material set out in mass market licenses?

The European Parliament can and should address these problems:

First, the Directive needs a **minimum mandatory** list of exceptions which takes account of the different legal traditions in the Member States by offering them the option of including, in addition, other exceptions to copyright which are traditionally authorised under national law and comply with the Berne Convention. In this way, a minimum level of harmonisation of fair practice exceptions would be ensured.

Second, the Directive needs a revised article 5.3 that permits Member States to provide for exceptions to copy for education, learning, research and private purposes which is justified by the fair practice. Again, these exceptions have always to be in line with the Berne Convention, and do certainly not legitimate each and every copying that could be done for these purposes. Cloning (i.e. multiple back to back copying) would not be a fair practice and should be unlawful. But it is absurd to request that therefore **all** types of digital copying should be unlawful.

Third, the Directive needs a revised text for technological measures. This should be based on Article 11 of the WIPO Copyright Treaty(6). The circumvention of technical measures must be allowed for activities authorised by the copyright owners or permitted by law. It should only be unlawful to create a device with the clear intention to facilitate circumvention for purposes of infringement. The same applies to individuals, who should only be punished if they intentionally circumvent copyright protection systems for purposes of infringement. Furthermore the privacy of citizens must be safeguarded when using technical systems and much more thoughts have to be given to this important issue.

Fourth, the Directive needs mandatory exceptions and a new article similar to Article 15 of the Database Directive that ensures that any contractual provisions contrary to these exceptions shall be null and void. Mandatory exceptions could then not be ignored in contract or license agreements. It is essential that there are statutory provisions made for exceptions that are applicable in all countries of the European Union to allow access to information held in copyright works without having to always ask for permission and to allow fair copying for private, educational and research purposes that cannot be wiped off by contracts.

In closing, I want to emphasise that EBLIDA has been and is willing to contribute to the work of identifying balanced legislative solutions. What we cannot support is legislation that would regard access to information as simply a piece of merchandise, a buy-and-sell item rather than a civic right. Libraries urge the European Parliament to ensure that the draft Directive is amended in such a way that citizens can fully benefit from the Information Society and that democratic values are preserved, in the spirit of the European Parliament's Morgan-Report: "Whereas the European model of the information society must be driven by democratic, social, cultural and educational concerns and not dominated by economic and technological interest" (7).

Thank you for the opportunity to bring our concerns to this meeting. I will be happy to respond to any questions you may have.

Barbara Schleihagen
Director EBLIDA
16 July 1998

Footnotes

1. Agreed statement concerning Article 10 of [WIPO](#) Copyright Treaty
2. The wording "Fair practices" is derived from the Berne Convention (Paris Text of 1971), Article 10 (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 utilisation, 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 utilisation is compatible with fair practice."
3. [WIPO](#) Copyright Treaty 1996, Preamble
4. [ECUP Position on User Rights in Electronic Publications](#). September 1996.
5. [Database Directive](#), Article 15
6. 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

restricts acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.

7. Preamble A to the [Parliament's Resolution on the information society, culture and education \(Morgan Report A4-0325/96\)](#) of 13 March 1997

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