THE EU DIRECTIVE
ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY –

IMPLEMENTATION IN THE MEMBER STATES

On 9 April 2001, the Council of Ministers adopted the Directive, and it was published shortly thereafter in the Official Journal (see http://europa.eu.int/comm/internal_market/de/intprop/news/index.htm), after which member states are officially required to implement the Directive in national law within 18 months, in this case prior to 1 January 2003.
One consequence of this will be that the EU and its member states will be able to ratify the 1996 WIPO treaties, known as the "Internet Treaties": WIPO Copyright Treaty / WCT and WIPO Performances and Phonograms Treaty / WPPT.

Commissioner Frits Bolkestein, Internal Market, called the Directive "the most important measure ever to be adopted by Europe in the copyright field". Earlier Directives concerning, for instance, rental and lending rights or the extension of the period of protection have dealt with the harmonisation of specific and well-defined issues. The present "Info Directive" has a more far-reaching objective: to adapt copyright to the digital age. The focus of the Directive is on the protection of on-line delivery through the Internet of protected works, such as writers' texts.

IN BRIEF

1. The Directive harmonises:

- the author's exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction of his work (**Article 2**),
- the author's exclusive right to authorise or prohibit any communication to the public of his work, including the making available to the public of works on demand (**Article 3**) and
- the author's exclusive right to authorise or prohibit any form of distribution of his work to the public by sale or otherwise, in respect of the original of the work or of copies thereof (**Article 4**).

2. One obligatory exception from the protection of the author's reproduction right is introduced for service providers, telecommunications operators, etc., allowing for temporary acts of reproduction that are an integral and essential part of a technological process and which have no independent economic significance.
The sole purpose of such reproduction shall be to enable
- transmission over a network between third parties by an intermediary or
- a lawful use of a work to be made.

3. All other exceptions or limitations are optional, and are described in **Article 5** (see below).

4. Legal protection of anti-copying devices and rights management systems is introduced **(Articles 6 and 7).**

5. It is a matter of great concern that the moral rights of authors remain outside the scope of the Directive, as is clearly stated in **preamble point 19** of the Directive. However, the right to have one's name indicated as author is expressly underlined in certain provisions in **Article 5**. The conclusion is that moral rights do not otherwise have to be taken into consideration, except as already determined by the provisions of the Berne Convention for the Protection of Literary and Artistic Works.

> *The gap between internationally applicable rules concerning moral rights, on the one hand, and economic rights, on the other, is thus further widened. In the future, the possibility of invoking sanctions for violation of moral rights is still only to be determined in national law.*

ARTICLE 5 -
OPTIONAL EXCEPTIONS OR LIMITATIONS TO THE RIGHTS OF THE AUTHOR

GENERAL OBSERVATIONS

As usual, regulations stipulating exceptions or limitations to the rights of the author tend to be the most interesting aspect for an organisation like the European Writers Congress to examine. When dealing with the facts of Article 5. certain things need to be borne in mind.

1.

All the exceptions/limitations listed in Article 5 - except the one mentioned above - are optional, and the national legislator cannot go beyond this exhaustive list.

> *However, the legislator may, in principle, decide (with the support of good arguments from the literary and artistic professionals)* not *to introduce optional restrictions to the rights of the writer under Article 5.*

The concept of "fair compensation" is new in the Directive, and is regarded as less precise and less adequately linked to the actual use being made of an author's work than the existing concept of "equitable remuneration".

Fair compensation applies to three exceptions:
- private copying
- reprography (photocopying) and
- broadcasts reproduced for (later) viewing or listening, for instance in hospitals.

> *A right to compensation/remuneration can, of course, also be introduced at the national level, and linked to other exceptions.* ***Preamble point 36*** *states that "the Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation".*
> *And there is no need to introduce a fair compensation regulation where there are already stronger national rules in favour of rightsholders.*

2.

As indicated above, some points in the preamble to the Directive give good arguments and provide hope for a writer-friendly national implementation process.

- **Preamble point 9** states that "any harmonisation of copyright /.../ must take as a basis a high level of protection, since such rights are crucial to intellectual creation".
- **Preamble point 10** states: "If authors /.../ are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work /.../".
- **Preamble point 12**: /.../ "Article 151 of the Treaty requires the Community to take cultural aspects into account in its actions."
- For the Nordic countries, it is of special concern that their legal backup for centralised licensing agreements concerning photocopying in the form of extended collective licences can continue (**preamble point 18**).

SOME IMPORTANT SPECIFIC ISSUES

1. Private use (Article 5.2 b)

Article 5.2 b says that exceptions/limitations to the author's reproduction rights may be provided "... 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 rightholders receive fair compensation...".

> *For most countries this regulation means that the national law must be made more stringent.*

"Any medium" refers, above all, to various digital media. In the future, a “natural person” is to have the right to produce copies for private use on any medium. The group of users who may be subsumed under the concept of private use by an individual person should be limited to the private uses of the natural person him- or herself, including family members and close friends.

There will no longer be a legal opportunity to have others carry out the copying to which the natural person has the right. The need for such copying as authorised by the private use regulation must be neither directly nor indirectly commercial.

> *For authors it is often more accurate to state that private use reproduction must be neither systematic nor professional.*

2. Fair compensation for private use copying (Article 5.2 b)

Most EU member states already have regulations, i.e. copyright based schemes for compensation for private use, with the emphasis on the music sector. Examples include levies on/compensation linked to copy shops and sale of blank tapes and equipment. The Directive opens up a more general approach to compensation for private copying, giving authors of texts of different kinds new opportunities to receive compensation.

> *The implementation should at least result in compensation to literary authors for private copying of texts done from any analogue or digital medium to any digital medium.*

The different legal traditions and practices in the various countries will give rise to different solutions. The task of administering a compensation scheme must be given to the national collecting society best suited to protect and promote the interests of writers and translators. Since this right to compensation for private copying of texts is a new *sui generis* right, a literary author can not have transferred it at the point in time when it is being introduced.

> *It would be appropriate to consider whether this new right to compensation might be formulated at the national level in line with Article 4 of the rental and lending directive, in other words as an unwaivable right to fair compensation, which may only be asserted through a collecting society.*

3. Fair compensation for reproductions on paper through photographic technique (Article 5.2 a)

According to **Article 5.2 a**, exceptions/limitations to the author's reproduction right may be provided "... 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 rightholders receive fair compensation".

Most EU member states have already established copyright based centralised licensing agreements with economic and other contractual conditions regulating the conditions for institutions and organisations to make photocopies of published works for their specified needs, most often in the educational sector.

The Directive must be seen as establishing a minimum level of regulation in this field through the establishment of a right to fair compensation. However, the existing agreements are often mainly limited to the educational sector. In this respect, the Directive opens up a much broader concept of centralised licensing agreements in the photocopying field, i.e.:

> *The fair compensation obligation is not limited to the educational sector.*
> *It could, for example, as well be used as a basis for national legislation promoting centralised licensing agreements concerning photocopying for internal information at institutions and business.*

It should be observed that **Article 5.3 a** allows for limitations of the author's rights concerning reproduction and communication to the public when the use is made "... for the sole purpose of illustration for teaching or scientific research..." and for non-commercial purposes. In **preamble point 42**, distance learning is expressly subsumed under the provision. Thus, and without the right to fair compensation, the Directive contains a special provision regarding distribution.

> *It would be reasonable to link this use to the conditions of a licensing agreement under the provisions of Article **5.2 a**.*

4. Publicly accessible libraries, educational establishments and museums on the one hand and archives on the other (Article 5.2 c and Article 5.3 n) - intermediary vs. preservation purpose: Fair compensation must be argued for intermediary services

According to **Article 5.2 c**, exception/limitation may be placed on the right of reproduction "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives". There must be no profit-making purpose (although it is possible that profits may accrue), and no right to fair compensation is prescribed.

In addition, all institutions covered by **Article 5.2 c** may (according to **Article 5.3 n**) circulate the texts contained in their collections "... 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...". This use shall be on site, and no right to fair compensation is prescribed.

According to **preamble point 40**, an exception/limitation should not cover uses made in the context of on-line delivery of protected works, such as texts. On the one hand, we have on-site-delivery made on-line after digitisation of the existing collections of the institution – and here the making of a digital copy of the analogue text must have taken place. On the other hand, we have the future delivery on-line of texts purchased through licensing agreements with different media producers with whom authors collaborate.

> *It is clear that there must be different regulations for archives on the one hand and for publicly accessible libraries, educational establishments and museums on the other.*

For an archive, the preservation of documents is the core of its activities, and for exactly that kind of activity more far-reaching limitations to the rights of the author may be tolerated.

For the publicly accessible library, educational institution or museum, on the other hand, the intermediary purpose is the predominant one. These institutions have a need to systematically and/or professionally make copies of protected works, for instance texts.

It can also be stated that the institutions mentioned in the Directive may, as part of their activities, have as an objective either to preserve or to circulate information in a way that cannot justify the institutions as such making use of a limitation in the reproduction right of the author.

The kind of digitisation of a text in order to make it available on site that may be deemed, in this context, to meet preservation purposes, is digitisation carried out for reasons of security. The digitisation of a text in order to meet the needs, for example of interlibrary lending, definitely cannot be subsumed under preservation or security purposes.

> *Limitations to the author's reproduction rights for specified – security and preservation – purposes are reasonable.*
> *Intermediary, including circulation purposes, on the other hand, involve use of the text of a kind for which fair compensation/remuneration must be argued, because this is reasonable and valid.*

The institutional forms in which single copies must be made appear to exclude the possibility that the right to compensation/remuneration could be referred to the provisions of the Directive regarding compensation/remuneration for private copying. This kind of copying is systematic and professional, and can only be carried out with the active participation of the institution in question – which means that it is not carried out by a "natural person" in accordance with the prerequisites of Article 5.2.b (see above).

For the Board of the EWC

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