TMPDF

TRADE MARKS, PATENTS & DESIGNS FEDERATION

Advancing Industry's View On Intellectual Property Since 1920

Review of the EC legal framework in the field of copyright and related rights

COMMISSION STAFF WORKING PAPER SEC(2004) 995

Comments of the Trade Marks Patents and Designs Federation

The Trade Marks Patents and Designs Federation (TMPDF) represents the intellectual property interests of many British-based industrial companies, both large and small. [A list of members is attached.]

Its members are interested in the copyright field as originators of protected works, including software, as developers and manufacturers of the equipment needed to make the Information Society a reality for the consumer, as service providers and as users of copyright materials supplied by others.

The TMPDF welcomes the general approach of the Commission Staff Working Paper, which foreshadows at most a fine tuning of the existing instruments in the copyright field.

The most recent instrument, the Copyright Directive (the Directive on the harmonisation of certain aspects of copyright and related rights in the information society), is a horizontal instrument that harmonises many, though not all, aspects of copyright across the whole field. The earlier instruments applied to specific classes of subject-matter. It is to be expected that they will have special provisions that apply to their class of subject-matter but not to works in general - after all, if there were no issues specific to those classes of subject-matter there would have been no need for the instrument in the first place. Therefore we would propose the following as a first principle **Where an issue has been debated in the course of adopting an instrument applying to a specific class of works and a solution has been arrived at, that solution should prevail over any more general solution adopted in a more horizontal instrument unless the original solution has been shown in the meantime to be clearly defective**

On the other hand, as technology develops, new issues arise. They may be addressed for the first time in a later, more general, instrument without having been considered in an earlier, more specific, instrument In those circumstances we need to consider how the solution adopted in the later directive should apply to the subject-matter of the earlier. We would propose a second principle. **If the reasons that led to the adoption of the more general solution also apply to the specific subject matter its treatment should be brought into alignment with that applied in the more general case**.

In applying these principles we look at the specific types of subject-matter that would be affected.

Software

As is only too well understood, there was intense debate on the principles that should apply to the copyright protection of computer programs. The final solution, as adopted in the Software Directive (the Directive on the legal protection of computer programs), was a complex balance of rights and exceptions that applied to computer programs and took into account their special characteristics, for instance as works that control the operation of a computer, and the public policy objectives needed to ensure interoperability of computer programs. The balance also extended to the interaction between technical protection and the exceptions.

The end result was accepted by all players in the debate and it is vital that the package adopted should be preserved, even though it may in places differ from the solution of the Copyright Directive. This is a prime example of circumstances where our first principle must apply. Indeed, the Copyright Directive itself embeds that approach (see for instance Recital 50). We are pleased to see that the paper itself takes the same position.

Applying that principle,

1. The exclusive rights (restricted acts) set out in the Software Directive, and in particular Article 4, must be preserved.

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2. The existing exceptions of Articles 5 and 6 of the Software Directive should not be varied. We know of no reasons to suggest that networks offer any special problems that would require changing the exception of Article 6 on decompilation (as alluded to in Section 2.1.3.1 of the paper)

3. The scope of Article 7, on technical protection, should not be altered, since it is part of the balance underlying the Software Directive. It permits circumvention for the purposes of carrying out acts that are permitted under the exceptions, especially decompilation to the extent needed for interoperability. The solution of the Copyright Directive on technical protection (Article 6 of the Copyright Directive) was chosen to meet the particular problems that have arisen in the digital age for humanly-perceivable works such as films and sound recordings. In contrast to the Software Directive, it imposes a ban on all circumvention, even for the purpose of making a copy that is lawful under the exceptions. It then balances the stringency of that approach with a safeguard under Article 6.4 which is entirely untested and subject to considerable differences of approach even in those member states that have fulfilled their obligation to implement the Copyright Directive. The solution of the Software Directive is clear and certain and is tailored to the requirements of software. No evidence has been adduced to show it is unsatisfactory It is much to be preferred for that class of work.

   We agree with the analysis in Section of the paper showing that it is compatible with the WIPO Copyright Treaty. At an international level, it is noteworthy that in the US the Digital Millennium Copyright Act also accepts that software is a special case and provides an exception for computer programs from its general ban on the circumvention of technical protection measures. The exception permits circumvention for the purpose of reverse engineering of a computer programs in order to achieve interoperability subject to conditions very similar to those that apply in Europe (its new Section 1201(f)).

On the other hand, there are two areas where the second principle we refer to above should come into play.

1. None of the exclusive rights set out for computer programs in Article 4 of the Software Directive correspond to the communication-to-the-public right of Article 3 of the Copyright Directive.[1] And whilst it is true that communication, especially in the form of making available by putting on a web-site, will normally involve making a reproduction that is accessible to control by the copyright owner, it does not follow that the consequences of infringement of the reproduction right are the same as the consequences of infringement of the communication right, which will involve considerations of the copies that may be made as a result, for instance by downloading from a web-site, and the damages that flow from those copies.

   Issues such as downloading have come into prominence with the arrival of the Internet as a pervasive technology affecting the way works in digital form can be made available They were not considered at the time of the adoption of the Software Directive, which therefore fails to address the issue clearly. We believe that computer programs should have the advantage of a clear exclusive right corresponding to the scope of Article 3 of the Copyright Directive, which (for instance in its making-available right) is more developed than any that can be depended on to flow from an application of the more general principles of the Berne Convention, which in any event would depend on national and possibly disharmonious implementations.

2. Article 5.1 of the Copyright Directive extends an exception to certain technically necessary temporary copies. It has two limbs. That of paragraph (b) relates to copies made during lawful use. It is a topic fully dealt with by Article 5.1 of the Software Directive, which should not be disturbed to change the way it deals with this point.

   But the other limb, that of paragraph (a), relates to the transmission of works in a network between third parties and applies to intermediary service providers. This was not a topic considered at all during adoption of the Software Directive[2]. The factors involved do not in any way relate to the special

[1] It is probably true that computer programs are subject to a communication right, but because they are literary works and Berne requires it. Contrary to what is suggested in Section 2.2.1.2 of the paper, we are far from convinced that the reference in Article 4(c) of the Software Directive to "any" form of distribution can be relied on to encompass the same acts as are covered by communication to the public within the sense of Article 3 of the Copyright Directive. If it could, the presence of Article 3 of the Copyright Directive would be tautologous, since Article 4 of the Copyright Directive also covers "any" form of distribution. We think it is at least as likely that the distribution right in both instruments refers to distribution of tangible copies, as explained for the Copyright Directive in Recital 28.

[2] We do not share the confidence of the paper (Section 2.1.3.2) that, if the intermediary could be considered a "lawful acquirer", transmission over a network to a third party would necessarily be held to be "necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose", as is required to bring it within Article 5.1 of the Copyright Directive.

characteristics of a computer program: to the intermediary, what passes across his network is purely a sequence of bits of no inherent significance. The category of work transmitted is entirely irrelevant in this context, and, indeed, unknown. There is no logical reason to treat computer programs in any different way from other works on this point and we think they should also benefit from an exception equivalent to Article 5.1(a) of the Copyright Directive[3]

That is not to say that the best way to implement the changes referred to in the last two points is necessarily by amending the Software Directive. The better course may be to leave that instrument as it is but amend the Copyright Directive to make it clear that Article 3 and Article 5.1(a) apply to computer programs as they do to other classes of work.

We do not entirely follow what the paper has in mind with respect to amendment of the definition of the reproduction right. We would certainly agree that no wholesale amendment of Article 4(a) of the Software Directive should be undertaken, if that is what is meant by Section 2.1.1 of the paper. On the other hand, some amendment seems intended. If it were to be simply the addition of the phrase "direct or indirect" as a qualification for what is a reproduction within the copyright owner's exclusive right we would have no objection in principle, but it is so clearly the current law for all classes of work that we wonder if it would be worth the effort in practice[4] The Software Directive should not be amended unless it clearly fails, and we do not think it does in this area. Similarly, there should be no question of changing the definition of computer program, as indeed the paper rightly concludes (Section 2.1.1).

Databases

We think the points made by the paper are sensible and should be supported.

Sound recordings

The paper points out that suggestions have been made that the term of protection for phonograms should be extended from 50 years to 95 years from publication, to match the extended term granted in the US to recent recordings. We agree with the conclusion of the paper that such an extension would not be justified. The term of protection is part of the balance between interested parties, which in this field includes not just the producers of the sound recording and the public but also the manufacturers of the technology used to handle the recordings. This Federation numbers the later amongst its members, and they would be affected because a change in the term of protection would undoubtedly be argued to impact the question of fair compensation for private copying, which in turn would exacerbate the current problems with levies as applied in some member states.

Issues outside the acquis

We agree with the conclusions reached in Section 3 of the paper on issues outside the current acquis.

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[3] Whilst it is clear from the discussion in Section 2.1.3.2 of the paper that this is the scope of the exception contemplated, it is rather unfortunate that the Conclusion in Section 4 is worded in such a way as to make it appear that the exception would encompass both parts of Article 5. As we have discussed, it must not apply to the lawful-use exception.

[4] It has always been a requirement of UK law, applying to computer programs as to any other class of work - see Section 17(3)(b) of the Copyright, Designs and Patents Act 1988.

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