

THE FRENCH BILL ON COPYRIGHT AND RELATED RIGHTS: AN AMBIGUOUS MODEL

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In principle the Bill aims to adapt legislation on copyright and related rights to technological developments within the context of the information society.

The objective is to transpose at national level European Parliament and Council Directive 2001/29/EC on the harmonisation of copyright and related rights, taking into account the main international obligations deriving from the treaties adopted in December 1996 within the framework of the World Intellectual Property Organisation (WIPO). It is based on a TRIP model which implies that Europe is establishing a regulatory regime analogous to the 1998 US Digital Millennium Copyright Act (DMCA) (I).

However this approach was strongly challenged by various groups who are in favour of a common model regulation. This resulted in a parliamentary battle which unexpectedly led to a temporary victory of the opponents of the Bill.

As the French Parliament is resuming discussion of the Bill, one wonders if there is some hope for the adoption of a balanced legislation.

In a wider perspective, it can be argued that the development of the information society is gradually leading to the weakening of copyright and related rights (II).

I – An impossible and ambiguous task: protecting the interests of all actors of the information society

There is no doubt that the technological revolution related to the information society has provided major economical and cultural opportunities. But data flows within digital networks and associated products and services have also exacerbated conflicts in “real society”, in particular about the impact of the global market on cultural activities.

While acknowledging the great diversity of interests involved, the Bill attempts to find a balanced position acceptable to all stakeholders (A). But it is not sure that the two aspects of the new proposed legislation can really work together (B).

A – Giving satisfaction to the diversity of interests concerned

The concept of copyright was originally established to protect both the interest of the general public, which benefitted from the progress of science and the enrichment of cultural heritage, and the interests of authors by giving them, for a limited period of time, an exclusive right on their works, thereby enabling them to earn a living.

With the advent of the information society, these respective interests have slightly changed. Private interests also include the interests of the cultural industries, including investors, and the interests of those who assist authors and as such benefit from related rights. Public interest has evolved insofar as the public has become a worldwide community of consumers.

A more economic approach has replaced the romantic origins of copyright. Therefore the French Bill transposing the European Directive tries to encourage the new dynamics of copyright by reinforcing the exclusivity of copy protection rights afforded to the rightsholder, on the one hand, and by creating new facilities for users on the other hand.

1) Reinforcing the exclusive right to control distribution

Technical measures play a major part in the effective protection of copyright regarding the dissemination of protected works on the Internet and other media. However, as illegal activities might be carried out in order to make possible or facilitate the circumvention of technical protections, the Directive and the Bill propose to provide legal protection to technical copy-protection measures that effectively restrict acts not authorised by the holders of any copyright, related rights or the *sui generis* right in databases.

In this respect, chapter 3 of the Bill transposes article 6 and 7 of the Directive concerning the protection of technological measures and rights-management information.

Articles 6 and 7 of the Bill define the technological measures using the definition and criteria of article 6.3 of the Directive and facilitate the interoperability of such measures while article 10 defines the information concerning copyright and related rights.

Articles 11 to 15 assimilate to counterfeiting the circumvention of technical copy protection measures or the making available of means to do so, with the only exception for research in the field of cryptography.

2) Creating new freedom spaces for the public

While acknowledging the necessity to reinforce the legal protection of copyright and related rights, the Bill also provides new opportunities for free access to the public, the new information technologies being considered as a means to facilitate the sharing of knowledge.

Contrary to the WIPO treaty, the 2001 European Directive proposes to establish *“a fair balance of rights and interests between... the different categories of rightsholders and users of protected subject-matter”* (Preamble, para. 31). *“The existing exceptions and limitations to the rights as set out by the Member states have therefore to be defined more harmoniously”*.

Paradoxically, this led the Directive *“to provide for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public”* (para. 32), a much more extensive list than the enumeration contained in the French code of intellectual property. Initially the French Bill did only provide for two new exceptions.

The first one concerns the mandatory exception in article 5.1 of the Directive regarding *“temporary acts of reproduction ... which are transient or incidental and an integral and essential part of technological process and whose sole purpose is to enable:*

a) a transmission in a network between third parties by an intermediary, or

b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance”.

The second one concerns the possibility established in article 5.3 b of the Directive authorising *“uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”*.

Will this careful approach adopted the French Bill, which does not use all the possibilities of expanding exceptions, prevail in the final legislation?

This is one of the main issues raised by the Bill: how is it possible to improve the protection of copyright while allowing new exceptions for users?

B – An illusory solution?

According to the preamble of the Directive, *“the degree of...harmonisation (of national legislations regarding exceptions) should be based on their impact on the smooth functioning of the internal market”*. The articulation between the new protected exceptions and their potential effects on the internal market is therefore very complex. It relies on the effects that the exceptions may have on the legitimate interests of rightsholders and on the normal exploitation of the works. This subtle balanced solution between opposed interests may lead in practice to a fragile and illusory solution.

1) The safeguard of the exceptions

This is the point raised by article 6.4 of the Directive which states that *“notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightsholders, including agreement between rightsholders and other parties concerned, Member states shall take appropriate measures to ensure that rightsholders make available to the beneficiary of an exception or limitation in accordance with article 5.2.a, 2c,2d,2e, 3a,3b,3e the means of benefiting from that exception or limitation...”*. This provision is transposed in articles 8 and 9 of the French Bill with two particularities.

While article 9 establishes an independent authority in charge of deciding litigant cases brought by rightsholders or beneficiaries of exceptions, article 8 transforms the nature of the exception for private copying. It does not only safeguard this exception but gives it a legal basis which makes it a true right for the beneficiaries.

2) The limits of the exception for private copying

a) Under article 5.2 a, b and e of the Directive, Member States have a duty to establish a regime of fair compensation to cover the prejudice derived from applying the exceptions. In other cases, such

compensation is allowed although not mandatory.

The extent to which this regime will constitute a real limit to the exceptions depends on the nature and amount of compensation, as will become apparent when discuss the global licence issue.

b) Another way of limiting those exceptions is to apply the so-called '3 steps test' referred to in article 5.5 of the Directive. This consists in examining each exception in the light of the following 3 criteria: i) is it a special case mentioned by the Directive?, ii) does the exception violate the normal exploitation of the work and iii) does it cause unjustified damage to the legitimate interests of the rightsholders?

In the Directive, this 3-step test is used as a reference to guide Member states in transposing the European instrument into domestic legislation but it may also be used by national judges to control and limit the possibility of using exceptions.

Indeed French judges did use the 3-step test regarding the exception for private copying and they globally considered that private copying did not infringe the normal exploitation of the work or the legitimate interests of the rightsholders. They even ruled that technical copy protection measures on a DVD bought for private use were illegal.

However, on 28 February, 2006 – a few days before Parliament resumed the discussion on the Bill on 7 March, 2006 – the French Supreme Court, the *Cour de cassation*, overruled the decisions of the lower judges. In its ruling, the Supreme Court recalls that the exception for private copying as defined in the French intellectual property code should be interpreted in the light of Directive 2001/29/CE together with article 9.2 of the Berne Convention which states that such an exception is only permitted "*in exceptional cases which do not conflict with a normal exploitation of the work or other subject-matter or do not unreasonably prejudice the legitimate interests of the rightsholder*".

Contrary to the Court of Appeal which ruled that a private copy was not *per se* a violation of the normal exploitation of the DVD, the Supreme Court found that "*the violation of the normal exploitation, which excludes the possibility of making private copies, should be appreciated in regard with the inherent risks related to the new numerical environment in due respect of the copyright and the economical importance of the DVD exploitation for the cinematographic production*".

After this decision, the debate over the regime of compensation which the Directive imposed as a counterpart of the exceptions for rightsholders has become even more heated, leading to one of those huge public controversies on fundamental values and culture which the French so like to engage in.

II – The controversy as a symbol of the transformation of the regime of copyright and related rights

As many intellectual property specialists may point out, the attempt to strengthen copyright and related rights in the information society might paradoxically result in a loss of effectiveness and even of substance of copyright.

Globally, the social perception of copyright has changed. While it was born as a symbol of the protection due to artistic creation, copyright is affected today by the same syndrome as other intellectual and industrial property rights such as patents.

Because new industrial and financial stakeholders now play an important role in the economics of cultural goods and services, copyright and related rights are viewed by the public and also by some artists as a new monopoly which prevents many from having access to culture and knowledge.

Although the Directive and the French Bill attempt to safeguard old exceptions to copyright and even to provide for new ones, the trend which developed in the general public regarding the information society is very similar to the rebellion that occurred against the European regulation on GMOs. This loss of social legitimacy could not only lessen the effectiveness of copyright but also lead to a change in the nature and content of the right itself.

A – Uncertainty about the effectiveness of copyright and related rights in the information society

Peer-to-peer (P2P) exchanges are the focal point of the sociological battle which opposes the cultural industry and a significant group of rightsholders to private users, a group of artists and software publishers. But after intense lobbying of politicians by both sides, French MPs found themselves unexpectedly divided on the issue, which resulted in a rebellion against the Bill introduced by the government in accordance with the European Directive.

After Parliament voted in favour of the global licence in December 2005, the government decided to suspend the discussion of the Bill in order to come back with new proposals which still make P2P illegal but reduce the regime of penal sanctions imposed on offenders.

1) Counterfeiting or global licence?

The downloading of copyright-protected works is made possible by using software techniques. Without the authorisation of the rightsholder, it is however an act of counterfeiting even when this is done for private use.

It has however been difficult for rightsholders to obtain effective protection of their rights.

It is legally and technically difficult to fight directly against music and film access providers while introducing protection devices in digital goods may be uncertain and unpopular.

It is finally highly risky and politically incorrect to sue private Internet users for whom the French Data Protection Authority (CNIL) opposed (18 October, 2005) the possibility to trace them back.

The original Bill presented to Parliament in November 2003 did not made any distinction regarding potential offenders of technical measures of protection. Articles 11 to 15 assimilated to counterfeiting the act of circumventing technical measures of protection, even when the means used to do so would have a limited commercial aim or a limited use other than the circumvention itself. Downloading music for private use would have been liable to a sentence of up to 3 years' imprisonment and to a maximum fine of 300,000 euros.

Trying to give an economic solution to what was perceived as an economic issue, the French Parliament rejected the government's Bill, adopting instead the private proposal put forward by a member of Parliament, with the support of members from both sides of the house, of an optional global license system. This means that for a small subscription fee Internet users would have full

access to films and music, while downloading would no longer be considered as an act of counterfeiting.

2) A less effective Bill

After all parties agreed on the need for further reflection while lobbies were actively supporting or opposing the idea of the global licence, the government proposed to modify the Bill in order to allow Parliament to resume discussion on March 7, 2006. P2P will remain illegal but downloading users will be encouraged to move to paying music or cinema platforms.

The only major governmental compromise on that point is the new regime of penal sanctions.

a) A sophisticated regime of penal sanctions

The government's new proposal clearly distinguishes between occasional users and those who produce software.

A single downloading will be punishable with a small fine (38 euros) while a higher fine will sanction the exchange with an other user.

Finally professional software producers may face up to one year's imprisonment.

b) The new governmental proposal also reinforces the exception for private copying, in allowing up to 5 copies, and facilitating technical interoperability to allow the reading by all types of material.

Consequently, thus modified, the Bill will appear less effective. It may consider as an impossible quest for a balanced regulation aiming at protecting the interests of all parties concerned. Indeed, it brings complete change to the nature and meaning of copyright.

B – A substantial change in the nature of copyright?

1) The European approach

The European approach to the "Information Society" in the field of copyright clearly relies on the development of a compensation regime for rightsholders when exceptions are applying. To set up this regime the Directive suggests criterions that are based on such economic prejudice as may result from the exception. Paragraph 35 of the Preamble of the Directive precisely states that *"when evaluating the (particular) circumstances (of each case), a valuable criterion would be the possible harm to the rightsholders resulting from the act in question. In case rightsholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightsholder would be minimal, no obligation for payment may arise."*

The wording of the European approach gives legitimacy to the exceptions and the philosophy of the Directive as the French Bill may be understood as meaning : 'you may prejudice the rightsholders as far as they receive adequate compensation for the use of their protected works'.

Furthermore, because it allows Member States to provide compensation in other cases (para. 36 of the Preamble) and includes an exhaustive enumeration of exceptions and limitations to the reproduction right and to the right of communication to the public, the Directive encourages Member States to extend such exceptions when transposing the Directive.

In this particular area, the French Bill is very careful as it introduces only one possible exception – for disabled people. But in complaining about this restricted view, which did not include exceptions for educational and scientific purposes nor for public institutions such as libraries and archives, the National Council of University Presidents (CNPU) and the National Association of Directors of University Libraries could find some direct support in the wording of the Directive itself.

2) Comparing for a better understanding

The compensation system is not new. It was introduced in French domestic law in 1985 when the exception for private copying appeared too costly for rightsholders. It was then perceived by rightsholders as a progress in the effective protection of their rights.

However, in the case of P2P, the proposed introduction of a compensation system would mean getting rid of copyright, for the reasons mentioned above, and replacing it by a right to be compensated.

Although we can agree that the economic interests of rightsholders have their importance, the nature and substance of copyright is (was?) different. In principle, copyright gives rightsholders the possibility to keep control on the protected works. This would disappear with the right of compensation, turning copyright into a purely economic right.

Such a transformation of copyright is indeed the ransom of its success. The author or creator of a work has ceased to be the key player in the global system of intellectual property.

