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GOOGLE PRINT

« Fair use » ou abus des droits d'auteurs?

PRINT

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Introduction

Lorsque le moteur de recherche Google a annoncé qu'il voulait rendre accessible de millions de livres gratuitement, tout le monde était enthousiaste, même s'il ne savait pas ce que cela voulait dire précisément.

Le projet *Google Print* comprend en effet deux programmes : Le premier, *Google Print Publisher* (GPP), lancé en octobre 2004, et le deuxième *Google Print Library* (GPL), lancé en décembre 2004. Concernant le premier, Google propose de mettre en ligne des ouvrages et de les rendre disponibles pour la recherche après avoir reçu la permission des éditeurs ou des auteurs. Les éditeurs ont conçu ce projet positivement grâce au système de l' « opting-in » qui permet aux éditeurs de contrôler la publication, car ce système consiste à donner une autorisation préalable avant la mise en ligne. Le GPL qui suivait peu de temps après a contredit par contre tous les principes élaborés lors de GPP.

Pour réaliser *Google Print Library*, qui consiste en la numérisation d'ouvrages publiés, l'entreprise a négocié un partenariat avec cinq bibliothèques anglo-saxonnes. Leur soutien pour ce projet n'a pas été surprenant si on observe de près les conditions offertes par Google : Google prend tous les coûts considérables émanés du scan/de la numérisation en charge et met à leur disposition des copies entières des ouvrages.

Ce qui était extraordinaire, c'est le fait que Google se permettait de publier GPL avant de consulter les éditeurs en avance. Ce projet représente une nouvelle situation par rapport aux programmes de numérisation existants jusqu'ici.

D'abord Google a élaboré un projet d'une ampleur encore jamais atteinte. L'ensemble des fonds des cinq bibliothèques comporte 15 millions d'ouvrages.

D'ailleurs l'interprétation des textes juridiques aussi bien américains qu'européens concernant les droits de l'auteur, n'est pas claire. Les détenteurs des droits de l'auteur proclament que ce projet représente une violation de leurs droits. Mais Google se défend en affirmant que GPL est couvert par l'exception juridique du fair use. Le fair use autorise aux États-Unis la consultation de documents sans autorisation préalable dans un certain nombre de situations précises. Les éditeurs comprennent ainsi GPL comme une tentative pour contourner les droits d'auteurs et c'est pourquoi ils ont déposé une plainte.

D'abord on va aborder les textes juridiques américains et européens pour voir si les argumentations apportées par les différentes parties peuvent être soutenues juridiquement et s'il existe d'autres argumentations utilisables par les différentes parties, pour après confronter les arguments des parties et les différentes réactions lors d'un débat.

Le droit Américain

Le texte juridique concerné

§ 107 · Limites de droits exclusives: Fair use¹

Nonobstant les provisions des sections 106 et 106A, l'usage équitable [fair use] de matériel protégé par le droit d'auteur, y compris la reproduction en copies ou enregistrements ou tout autre moyen spécifié par cette section, pour toutes fins, comme critiques, commentaires, informations, éducation (y compris plusieurs copies par classe), ou recherche, n'est pas une contravention du droit d'auteur.

Pour déterminer si l'usage d'une œuvre peut être considéré comme « fair use », les facteurs suivants devront être pris en compte—

- (1) la fin et le caractère de l'usage, y compris si l'usage est de nature commerciale ou pour des fins éducatives et à but non lucratif;
- (2) la nature de l'œuvre protégé par le droit d'auteur;
- (3) la quantité et la substantialité de la partie utilisée par rapport à l'ensemble de l'œuvre protégé par le droit d'auteur;
- (4) l'effet de l'usage sur le marché potentiel ou la valeur de l'œuvre protégé par le droit d'auteur.

Le fait qu'une œuvre n'ait pas été publiée n'empêche pas en soi de qualifier un usage de « fair use » si cet usage est fait en prenant en compte les facteurs ci-dessus.

Interprétation des textes

Sous le droit d'auteur américain, le propriétaire des droits d'un livre a le droit exclusif de contrôler si d'autres personnes peuvent distribuer, présenter ou faire des copies du livre. Ces droits s'étendent également sur toutes les parties du livre.

Ils existent cependant plusieurs exceptions à cette règle. La plus connue est celle du « faire use » (français : « usage équitable »). Cet exception permet à une personne qui veut copier, distribuer ou présenter des extraits d'un livre, de le faire sans obtenir la permission du détenteur du droit d'auteur, si elle peut prouver deux choses. Premièrement, la personne doit

¹ cf. l'annexe pour le texte original en anglais

déterminer que l'usage est uniquement destiné à des fins de critique, commentaire, information, éducation ou recherche. Deuxièmement, elle doit montrer que l'utilisation est valable sous l'exception « fair use » en vérifiant les 4 facteurs spécifiques.

Comment définir l'utilisation équitable ?

Google défend son droit de gérer le projet « Google Print Library » en affirmant que ses activités sont sous l'exception du « fair use ». L'analyse du « faire use » sera très difficile suite à l'énorme quantité et variété de livre et auteurs concernés. Il n'y a jamais eu un cas concernant le « faire use » qui était appliqué sur autant d'ouvrages par autant d'auteurs et éditeurs qui étaient copiés par une seule personne ou entreprise. Ce fait pourrait éventuellement déjà suffire pour dénier la prétention de Google.

Google prétend que bien qu'ils copient des livres entiers, ces copies sont autorisées en vertu du « faire use », parce que seulement quelques extraits des livres sont disponibles sur Internet et les copies ne sont que des copies intermédiaires. Keith Kupferschmid² cite « Kelly vs. Arriba Soft Corp », un cas jugé en 2003, pour la proposition que de telles copies intermédiaires soient permises sous l'exception du « fair use ». Dans le cas « Kelly », le défendeur, « Arriba Soft Corp. », détenait un moteur de recherche visuel qui récupérait des images miniatures de photos qui étaient déjà disponible sur Internet. En cliquant sur une miniature, l'utilisateur pouvait consulter la version complète, qui était directement importée depuis le site du demandeur. Le tribunal a finalement conclu que l'utilisation des images constituait une exception « fair use » parce que le motif de « Arriba » était uniquement l'indexation de ces images.

Tandis que Google veut argumenter que ses motifs sont entièrement altruistes et éducatifs, il ne faut pas oublier qu'il s'agit d'une entreprise qui veut faire du profit. 98% du chiffre d'affaire de Google est généré par la publicité et il est évident que leur revenu augmentera avec ce nouveau projet. L'argument éducatif (le moteur de recherche aidera à trouver des livres sur divers thèmes) est souvent utilisé dans des cas similaires mais il reste douteux s'il sera pris en compte devant le tribunal.

Google pourrait aussi éventuellement argumenter que le copiage est de manière « transformatif », un autre facteur sous lequel le « fair use » peut être applicable. Un usage est considéré « transformatif » quand il s'agit d'un usage de nature différente ou différente à

² <http://www.infotoday.com/IT/dec05/Kupferschmid.shtml>

l'usage initiale de l'œuvre. En revanche les tribunaux américains ont jugé uniformément, que le transfert d'une œuvre d'un média à l'autre ne constitue pas en soi un usage « transformatif ».

De plus il faut vérifier si les livres sont plutôt de nature factuelle ou fictive. Une œuvre créative ou expressive a beaucoup moins de chance d'être considérée sous l'exception du « fair use » qu'un atlas par exemple. L'application de ce facteur n'est pas tout à fait clair puisque Google copiera des milliers de livres factuels et fictifs et il serait pratiquement impossible de traiter chaque livre séparément.

La quantité et substantialité de la partie utilisé/copié par rapport à intégralité de l'œuvre joue également un rôle important. Dans notre cas Google copie beaucoup de livres et non seulement des parties, mais tout. Un autre problème se pose : le fait que Google garde ces copies (et éventuellement encore plusieurs copies) dans sa base de données est en principe une contravention au droit d'auteur.

Bien que Google affirme que les utilisateurs ne verront qu'une partie (ils appellent ces parties des « snippets ») et pas l'intégralité du livre, ce fait ne suffit pas pour qualifier le copiage comme usage « intermédiaire ». Le fait que des copies complètes de livres soient retenues en permanence et ne soient pas supprimées après l'usage, disqualifie normalement d'office cet argument.

Finalement on vérifie si une exception en vertu du « fair use » aurait des effets négatifs sur le marché du livre. En plus, on analyse quelles seraient les conséquences pour le marché si l'utilisation devenait répandue. Ce critère a souvent le plus d'influence sur la décision d'un tribunal.

Le marché du « licencing », c'est-à-dire le marché de l'attribution des droits d'auteurs, de telles œuvres aux « aggregators³ », c'est-à-dire les sites qui rassemblent de l'information trouvée partout sur la toile pour la réutiliser ou la revendre, a un grand potentiel et Google a sûrement remarqué que le marché de l'information est en pleine croissance suite à la demande des utilisateurs d'avoir plus d'informations, plus rapidement et plus facilement.

³ A content aggregator is an individual or organization that gathers Web content (and/or sometimes applications) from different online sources for reuse or resale. Définition disponible sur le site Internet suivant : http://searchwebservices.techtarget.com/sDefinition/0,,sid26_gci815047,00.html

Google essaie de devenir un leader sur le marché de l'information et a opté pour une approche qui pourrait avoir des conséquences significatives. Tandis que d'autres « aggregators » signent des contrats avec les détenteurs des droits pour indexer leur contenu, et les rémunèrent substantiellement, Google ne fait ni l'un ni l'autre.

Si Google réussit à justifier le copiage sous l'exception du « fair use », cela changera complètement la perception du droit d'auteur. Non seulement Google, mais n'importe quelle entité pourrait commencer à copier des livres pour les rendre accessible sur Internet. Ainsi, les droits d'auteurs ou d'éditeurs cesseront d'exister dans le monde virtuel de l'Internet.

Le droit Européen

Le texte juridique concerné

Directive 2001/29/EC du Parlement Européen et du Conseil⁴

du 22 mai 2001, sur harmonisation de certains aspects du droit d'auteur et autres droits correspondants dans la société d'information.

Interprétation des textes

Il y a qu'une seule bibliothèque non américaine qui participe au projet de Google : la « Bodleian Library » à Oxford. En revanche, la bibliothèque britannique a limité le programme de numérisation de sa collection d'ouvrages aux livres qui sont hors du droit d'auteurs. On voit directement que la position en Europe est différente.

Etant donné que le « Copyright Directive of 2001 » exige un minimum de protection des droits d'auteurs et bien qu'il existe de nombreuses différences entre les différents Etats-membres de l'Union européenne, il est intéressant de ce concentrer sur une analyse générale du projet GPL (Google Print Library) ici en Europe.

Il est évident que le processus de numérisation enfreindra le droit exclusif de reproduction sous Art.2 et que l'inclusion des textes dans le site de Google enfreindra le droit exclusif de communication sous Art.3. Mais finalement le débat se tournera, comme aux Etats-Unis, autour des exceptions au « fair use ». Celles-ci sont fournies aux Etats-membres

⁴ cf. l'annexe pour la directive 2001/29/EC (en anglais)

comme des exceptions permises, qui finalement peuvent varier d'un pays à l'autre mais n'iront jamais au-delà du domaine d'application prévu par la directive.

Les clauses relevant du « fair use », qui sont spécifiquement relatives à la reproduction dans le cadre du projet Google Print, sont fixées dans l'Art.5(2)⁵ :

« (a) ...sur papier ou tout media comparable, affecté par l'usage de toute sorte de technique photographique..., dans la mesure où les détenteurs des droits reçoivent une rémunération équitable;

(b) ...sur tout support fait par une personne naturelle pour l'usage privé et pour des fins qui ne sont ni directement ni indirectement commerciales, à condition que les détenteurs reçoivent une rémunération équitable;

(c) ...certains actes de reproduction faits par des bibliothèques publiques, établissements éducatifs ou musées, ou par archives, qui ne sont pas directement ou indirectement pour l'avantage économique ou commercial ».

Dans son projet Google n'a pas prévu de rémunérer les détenteurs des droits d'auteurs, alors dans sa forme actuelle sera impraticable en Europe suite à (a) ou (b).

La section (c) énonce que le copiage doit être « spécifique » (ce qui exclura la numérisation en masses) et cela serait étonnant si Google n'en tirait pas le moindre profit (publicité etc.).

D'autres exceptions qui concernent la reproduction de matériel mais aussi sa communication, sont cités dans l'Art.5(3)⁶ de la directive :

« (a) usage uniquement pour illustration de cours ou recherches scientifiques... jusqu'au point justifié par le but non commercial qui est à atteindre ».

Si Google pouvait obtenir les critères de recherche des utilisateurs, la provision en vertu du « fair use » pourrait éventuellement couvrir l'inclusion de textes protégés par le droit

⁵ cf. l'annexe pour la directive 2001/29/EC (en anglais)

⁶ cf. l'annexe pour la directive 2001/29/EC (en anglais)

d'auteur dans les résultats de recherche. En revanche, il ne pourrait pas être utilisé en relation avec la numérisation initiale, où on ne peut pas vérifier la pertinence académique du texte.

« (n) usage par communication ou mis à disposition, dans un but de recherche ou d'étude privé, aux membres individuels du public par des terminaux publics sur les prémisses de [bibliothèques publiques etc] d'ouvrages et autres objets qui ne sont pas soumis aux conditions d'achat ou de licence qui sont contenu dans leurs collections ».

Il est évident que Google Print ne sera pas limité aux terminaux publics de bibliothèques publique (si c'était le cas, cela pourrait être utilisé pas Google comme argument), mais accessible depuis n'importe quel ordinateur avec un accès Internet.

« (o) usage dans certains autres cas d'importance mineur ou exceptions ou limitations existent déjà sous le droit national, dans la mesure où ils ne concernent que des usages analogues... »

Dans le cas de Google on peut constater qu'il ne s'agit pas d'un usage « analogue ». Le fait de copier des milliers de livres pour créer un moteur de recherche qui affichera ensuite des textes protégé par le droit d'auteur relatifs aux mots-clés utilisés, ne qualifie évidemment pas comme usage « analogue ».

On ne peut donc qu'émettre de sérieuses réserves quant à l'applicabilité du « fair use » au projet de Google. En tous cas, l'Art.5(5)⁷ prévoit que les exceptions au « fair use » en (1), (2), (3) et (4) soient uniquement applicables « ...dans certains cas spéciaux qui ne contredisent pas l'exploitation habituelle de l'œuvre ou d'autres sujets et n'altèrent pas les intérêts légitime du détenteur du droit d'auteur ». Vu le but de « Google Print », il sera très difficile pour Google de justifier son projet devant les cours en Europe simplement avec le principe du « fair use ».

⁷ cf. l'annexe pour la directive 2001/29/EC (en anglais)

Le débat

Les principaux éléments du débat en Europe

La question de la domination de Google

Le projet de *Google Print*, en raison de son étendu (15 millions de livres soit 4.5 milliards de pages numérisées) est révolutionnaire et porteur d'espoir, cependant, les pays européens s'opposent à la forme que prend ce projet.

En effet, plusieurs problèmes se posent. Tout d'abord, l'Union européenne refuse de laisser à *Google Print* le monopole dans la transmission de l'information, et ce, dans un souci de respect de l'objectivité.

D'autre part, *Google Print* désire numériser les ouvrages qui se trouvent dans cinq grandes universités du monde anglo-saxon ; ainsi, on peut craindre une domination de la pensée anglo-saxonne supplantant dans le même temps les autres formes de pensée. L'exception culturelle ardemment défendue par l'Europe serait donc contournée et remise en cause.

Enfin, *Google Print* prétend défendre l'idée du *multilinguisme* or tous les livres numérisés le sont en anglais, d'où un certain hégémonisme

Cependant, il convient de nuancer cet argument souvent avancé de domination américaine. En effet, le projet de Google ne vise pas seulement à numériser les œuvres anglo-saxonnes, mais également les œuvres étrangères. En effet, les cinq libraires partenaires de Google au Etats-Unis ne permettent pas à elles seules d'atteindre l'objectif de numériser 15 millions d'œuvres. Google devra donc nécessairement numériser d'autres œuvres.

Et comme il paraît logique que Google va chercher à numériser les œuvres susceptibles d'attirer des visiteurs, il y a de fortes chances que la majorité des œuvres de la culture européenne dont les droits d'auteurs ont expiré (de Dante à Baudelaire, de Cervantès à Dostoïevski, de Pascal à Kierkegaard) soient numérisés dans leur version originale.⁸

L'*opting-out* n'est pas envisageable en Europe

Comme nous l'avons vu, Google numérise pour le moment les ouvrages, sans se soucier des droits d'auteurs, ni d'un éventuel avis contraire de certains auteurs ou éditeurs. Google propose simplement à ceux qui sont détenteurs des droits d'un ouvrage qui ne veulent pas que

⁸ <http://www.iht.com/articles/2005/04/28/opinion/edbuhler.php>

celui-ci soit numérisé de le signaler à Google, qui affirme le retirer de l'accès au public. C'est ce qu'on appelle la clause d'*opting-out*, par opposition à *opting-in* qui consiste à donner son autorisation préalable à la mise en ligne. Ce système, qui est accepté aux Etats-Unis dans certains contextes - l'envoi de courriers électroniques publicitaires notamment - n'est pas accepté en Europe.

Le débat est plus virulent aux Etats-Unis et différent dans sa nature.

Google semble proposer un projet bénéfique pour tous

Tout d'abord, le projet Google Print permet de **faire connaître tous les livres**, même ceux qui n'ont pas beaucoup de chance de se faire éditer. Ainsi, en promouvant tous les livres, Google Print est un moyen de donner sa chance à n'importe quel auteur, même les moins connus. En effet, selon Nielsen Bookscan, qui recense les ventes des principales librairies américaines, seulement 2% des 1,2 millions de titres d'ouvrages vendus en 2004 ont été vendus à plus de 5000 exemplaires. Du point de vue de l'intérêt que représente ce projet, il convient de prendre conscience que Google a pour ambition de **facilité l'accès à la connaissance, à la culture et à notre passé**. Les livres seront toujours présents dans les bibliothèques comme ils l'ont toujours été. Et donc, même si Google vient à faire faillite, on ne perd aucun patrimoine culturel

De plus, la numérisation des plus anciens titres des éditeurs permet d'étudier leur marché et de **décider d'une réimpression**. En effet, quand un éditeur donne un livre à numériser, Google permet le suivi du nombre de personnes qui consultent les pages de cet ouvrage et cliquent sur les liens « Acheter ce livre ». Ainsi le service Recherche Google Livres peut donner un aperçu en grandeur réelle de la popularité de l'ouvrage concerné. Google propose donc une opportunité d'augmenter la vente d'exemplaires des éditeurs, et propose même une participation aux recettes de la publicité contextuelle pour les éditeurs.

Par conséquent, on peut dire que Google rend service, à la fois aux consommateurs en leur facilitant l'accès au savoir, et aux auteurs en leur permettant à tous d'être lu et reconnu pour leur talent, mais aussi aux éditeurs qui peuvent décider de la réimpression de certaines œuvres, en analysant la popularité de consultation des anciens ouvrages.

Cependant le débat sur les droits d'auteurs fait rage

Selon Google, la numérisation respecte la loi sur les droits d'auteurs :

« L'utilisation que Google fait des livres est pleinement en accord avec la notion d'usage loyal prévu par la loi sur le droit d'auteur et avec tous les principes qui sous-tendent cette loi. La loi sur le droit d'auteur, en effet, a toujours eu comme objectif de protéger la capacité des auteurs à poursuivre leur œuvre et des éditeurs à commercialiser cette œuvre »⁹.

Toutefois, ce n'est pas l'avis de nombreux auteurs américains et bien évidemment des cinq éditeurs et de *The Authors Guild* qui ont entamé une action en justice à l'encontre du géant américain. Selon eux, Google ne respecte même pas le droit élémentaire des auteurs dans la mesure où il ne leur a nullement demandé leur avis, Google profite donc du travail des auteurs et des éditeurs et se fait des millions de dollars sur le travail et le talent des auteurs.

Il est également affirmé à l'encontre de la société américaine qu'elle transforme la loi à son avantage en osant affirmer que c'est aux auteurs et aux éditeurs de préciser quelles œuvres ils veulent voire numériser et non l'inverse. Or, si l'on s'en tient à cet argument, qui dénature d'ailleurs totalement les lois qui protègent les propriétés intellectuelles, n'importe qui peut copier à son aise une œuvre tant que l'ayant droit ne s'est pas manifesté, c'est d'ailleurs ce que soutient Adam Rothberg, vice président de *Simon et Schuster*.

Le problème de la copie des livres et de l'attitude de Google

Google soutient qu'en facilitant l'accès aux livres, à leur achat ou à leur emprunt auprès de bibliothèques, le service Recherche Google Livres contribue à accroître la motivation des auteurs à écrire et des éditeurs à vendre ces ouvrages. Pour parvenir à ce but, Google a besoin de copier les livres, mais ces copies sont (selon Google) autorisées par la loi sur le droit d'auteur. C'est un des points principaux du débat. En effet, il n'est pas évident juridiquement que Google ait le droit de numériser en intégralité des œuvres, même si le but est de n'en diffuser que de courts extraits. Cela rejoint le problème concernant le *fair use* que nous avons largement abordé précédemment. Il est en effet impossible de vérifier si effectivement Google numérise les œuvres au nom du *fair use* étant donné la variété d'œuvres et d'auteurs qui sont en jeu. (cf. les conditions du *fair use*)

⁹ http://books.google.fr/intl/fr/googlebooks/publisher_library.html

Ce qui pose aussi beaucoup problème est que Google n'essaye même pas de discuter avec les éditeurs et les auteurs afin de trouver un compromis. Google maintient pour le moment son projet, sans se soucier de personne. C'est précisément cette attitude arrogante qui gêne de nombreux auteurs, éditeurs et associations américaines.

En effet, certaines organisations sont pour le principe d'une numérisation des œuvres, mais dans le respect des droits d'auteur. Ainsi, *The Software & Information Industry Association* (SIIA) est fondamentalement pour le projet *Google Print*, cependant la SIIA ne comprends pas pourquoi Google se borne à continuer de numériser les œuvres contre l'avis des éditeurs et des auteurs.

La sécurité des copies des œuvres est mise en question

Outre le fait que personne se sache combien Google va faire de copie des œuvres numérisées (à priori il y en aurait au moins trois : la copie scannée, la copie numérique, et la copie de sauvegarde) c'est la question de la sécurité des œuvres numérisées qui est posée. Google ne paraît pas en mesure de garantir de manière infaillible la protection des ouvrages contre le piratage. En effet, l'été dernier Google a dû interrompre son service de recherche de vidéos car le film *Matrix* a été téléchargé intégralement suite au piratage du site...

Le caractère monopoliste de l'initiative de Google

Google a pris une initiative unilatérale. Ses concurrents, et notamment Yahoo, s'opposent à Google Print car Google à terme risque d'avoir le monopole dans ce domaine. C'est pour cette raison que Yahoo est aussi en train de mettre sur pieds un projet de bibliothèque numérique. Mais le véritable problème souvent avancé de la prise en charge de la numérisation par une société privée pose la question de la pérennité à long terme des copies numériques.

Conclusion

Afin de défendre son projet, Google print Library, face à ses détracteurs, Google prétend respecter et appliquer le principe du fair use. L'entreprise affirme en effet que les fins de son projet sont uniquement éducatives et totalement désintéressées, notamment d'un point de vue commercial.

Cependant, la forme du projet en raison de son étendu, 15 millions d'ouvrages scannés et les publicités, donc les profits qu'il engendrera rendent cet argument totalement inapplicable. Pis encore, l'entreprise californienne s'oppose tout simplement à la quasi-totalité des lois américaines et européennes relatives à la protection de la propriété intellectuelle.

Il n'est donc pas insensé d'éprouver le plus grand pessimisme quant aux chances de succès de Google dans cette affaire qui l'oppose tout de même à deux puissantes organisations américaines.

Précisons toutefois que tout espoir n'est pas perdu pour l'entreprise californienne. En effet, les textes relatifs à la protection des droits d'auteurs que les ayants-droits Américains scandent et la diversité culturelle que défend avec ardeur l'Europe ne semblent en réalité n'être qu'un paravent qui dissimule des enjeux beaucoup plus sérieux ; et qui sont essentiellement d'ordre économique.

D'une part, les auteurs et éditeurs américains craignent que le projet de Google ne vienne sérieusement entamer leurs revenus, ils exigent donc avant tout une rémunération de leur travail, peu importe les ambitions de Google, aussi nobles soient-elles. D'autre part, les pays européens craignent que Google ne prenne une avancée qui leur sera difficile de combler par la suite et que le groupe ait le monopole de l'information, certes, mais surtout des revenus de l'information.

Ainsi, aux Etats-Unis, le groupe ne pourra éviter l'abandon de son projet que s'il accepte de négocier plus sérieusement avec les ayants-droits et les professionnels du livre, ce qui est faisable. Cependant, la tâche sera beaucoup plus ardue en Europe, où le débat est non seulement économique mais également politique, comme le prouvent les réactions très vives de certains chefs d'Etats européens. C'est donc en Europe que le débat, qui est aujourd'hui modéré, risque de devenir le plus virulent.

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Déclaration sur l'honneur

Nous soussignés Natalie DOMAIN, Christian HEIDORN, Mohamed TABI, Jean-Sébastien FODE déclarons sur l'honneur que ce travail a été effectué par nos soins et que tout emprunt ou citation est clairement identifié.

Nos propos n'engagent que nous et en aucune façon l'ESCP-EAP.

Fait à Paris, le 16 janvier 2006

Signatures :

Natalie DOMAIN

Christian HEIDORN

Mohamed TABI

Jean-Sébastien FODE

Annexe

US Code > Title 17 > Chapter 1 > §107

§ 107 · Limitations on exclusive rights: Fair use¹

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

1. The Visual Artists Rights Act of 1990 amended section 107 by adding the reference to section 106A. Pub. L. No. 101-650, 104 Stat. 5089, 5132. In 1992, section 107 was also amended to add the last sentence. Pub. L. No. 102-492, 106 Stat. 3145.

**DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 22 May 2001**

on the harmonisation of certain aspects of copyright and related rights in the information society

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.
- (2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, *inter alia*, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.
- (3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.
- (4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of

European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

- (5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

- (6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

- (7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

⁽¹⁾ OJ C 108, 7.4.1998, p. 6 and OJ C 180, 25.6.1999, p. 6.

⁽²⁾ OJ C 407, 28.12.1998, p. 30.

⁽³⁾ Opinion of the European Parliament of 10 February 1999 (OJ C 150, 28.5.1999, p. 171), Council Common Position of 28 September 2000 (OJ C 344, 1.12.2000, p. 1) and Decision of the European Parliament of 14 February 2001 (not yet published in the Official Journal). Council Decision of 9 April 2001.

- (8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

- (9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.
- (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.
- (11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.
- (12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.
- (13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.
- (14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.
- (15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the 'WIPO Copyright Treaty' and the 'WIPO Performances and Phonograms Treaty', dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called 'digital agenda', and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.
- (16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce')⁽¹⁾, which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant *inter alia* to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.
- (17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.
- (18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.
- (19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.
- (20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC⁽²⁾, 92/100/EEC⁽³⁾, 93/83/EEC⁽⁴⁾, 93/98/EEC⁽⁵⁾ and 96/9/EC⁽⁶⁾, and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

⁽¹⁾ OJ L 178, 17.7.2000, p. 1.

⁽²⁾ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.

⁽³⁾ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.

⁽⁴⁾ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

⁽⁵⁾ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).

⁽⁶⁾ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

- (21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.
- (22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.
- (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.
- (24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.
- (25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.
- (26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.
- (27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.
- (28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.
- (29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.
- (30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.
- (31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.
- (32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.
- (33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place,

- including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.
- (34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.
- (35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders 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 rightholder would be minimal, no obligation for payment may arise.
- (36) 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.
- (37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.
- (38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audiovisual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.
- (39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.
- (40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.
- (41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.
- (42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.
- (43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.
- (44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

- (45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.
- (46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.
- (47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the *sui generis* right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.
- (48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the *sui generis* right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.
- (49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.
- (50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.
- (51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.
- (52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.
- (53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

- (54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.
- (55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia* their authorisation when putting works or other subject-matter on networks.
- (56) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.
- (57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data ⁽¹⁾.
- (58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.
- (59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.
- (60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.
- (61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.
2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:
 - (a) the legal protection of computer programs;
 - (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
 - (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
 - (d) the term of protection of copyright and certain related rights;
 - (e) the legal protection of databases.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

CHAPTER II

RIGHTS AND EXCEPTIONS*Article 2***Reproduction right**

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

*Article 3***Right of communication to the public of works and right of making available to the public other subject-matter**

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

*Article 4***Distribution right**

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, 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.

*Article 5***Exceptions and limitations**

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a 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, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) 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;
- (b) 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 which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (b) 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;

- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
- (g) use during religious celebrations or official celebrations organised by a public authority;
- (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
- (i) incidental inclusion of a work or other subject-matter in other material;
- (j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
- (k) use for the purpose of caricature, parody or pastiche;
- (l) use in connection with the demonstration or repair of equipment;
- (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- (n) use 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 of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
- (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or

limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III

PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.

3. For the purposes of this Directive, the expression 'technological measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed 'effective' where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d),

(2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

- (a) the removal or alteration of any electronic rights-management information;
- (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression 'rights-management information' means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV

COMMON PROVISIONS

Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Article 9

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10

Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11

Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

(a) Article 7 shall be deleted;

(b) Article 10(3) shall be replaced by the following:

'3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following:

'2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*) the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew.

(*) OJ L 167, 22.6.2001, p. 10.'

Article 12

Final provisions

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, *inter alia*, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 15

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 22 May 2001.

For the European Parliament

The President

N. FONTAINE

For the Council

The President

M. WINBERG