

Summary of the presentation of Leonardo Cervera Navas at the International Seminar “Copyright Creating Access”.

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(Acknowledgments)

I think that everybody in the room will agree with the assertion contained in the title of this panel session, that is, that there is a need to strike a balance between authors' rights and other rights and interests in place such as the rights to information, education or culture.

The problem is, of course, that it is usually the case that what is considered as a right balance for some copyright holders is contested as a wrong balance for users or consumers and vice-versa.

This is for example what the volunteers of the Project Gutenberg told to the Commission one year ago:

“A crucial problem when drafting new copyright legislation, is that more restrictive copyrights provide clearly visible benefits to a relatively small group of people (authors and publishers) at a much less obvious cost to a large group of people (consumers, the public at large), which may be many times the possible benefits to publishers, and thus, if we look at the economy as a whole, results in a net loss. Unfortunately, the lobby for changes in copyright has mostly been unbalanced in favour of rights holders”.

On exactly the same Commission paper, the Creators' Right Alliance (a UK alliance of authors associations) said the following to the European Commission:

“We would like to see increased intellectual property protection for originators including (but not exclusively) journalists, composers, writers, authors, photographers, film & TV directors and illustrators, and new mechanisms to facilitate the proper licensing of copyright material under European law”.

I have picked up just two examples of reactions to the staff working paper of the European Commission on the review of the European Community Legal Framework in the field of Copyright and Related Rights, a document adopted in July 2004, where the Commission announced that it intended to review whether any inconsistencies in the definition or on rules on exceptions and limitations between the different Directives *“have a harmful impact on the fair balance of rights and other interests, including those of users and consumers”.*

The Commission's staff working document reviewed the provisions of the early copyright Directives alongside each other and compared them with the standards set by the Information Society Directive, in other words, the most recent standards resulting from the WIPO Copyright Treaties.

The comparison between the exceptions contained in the old Directives and the exceptions contained in the new 2001 Directive is no doubt very interesting. However, the staff working document spoke against a sort of automatic application of the exceptions and limitations of the new Directive to the rest of the copyright acquis: as each of the previous Directives were designed to meet the specificities of the subject matter in question and were the result of difficult negotiations and compromises that we should preserve. Therefore, the European Commission advocated for a prudent case by case analysis supported by most stakeholders.

It is well-known that Article 5.2 of the Information Society Directive contains an exhaustive list of non-mandatory exceptions and limitations. This means that Member States of the European Union may decide not to implement some of these exceptions but they are absolutely prevented from adding new exceptions which cannot be found on this list.

I propose that we review together briefly one of the proposals contained in this staff working document as far as exceptions and limitations are concerned and the reactions gathered from the stakeholders.

This example reflects very well in my view, the sort of forces which are pulling in different directions and the difficulties that regulators face to strike a balance regarded as right by the whole society.

One of the exceptions tackled by the Commission's document is the derogation from the public lending right that Member States may implement as provided for in Article 5 of the Rental and Lending Right Directive.

The Information Society Directive makes it clear that the derogation from the public lending right does not extend to the digital environment. However, as acknowledged by the Commission's paper: "*both the media market and the role of libraries are undergoing profound changes, as new services are being introduced with the help of digital technology*". The reactions of stakeholders to these Commission's remarks are very interesting.

Some stakeholders which are beneficiaries of derogations of the exclusive public lending right (see for example la Mediatheque in Belgium or Discotheeke in Amsterdam) called for a review of the current legislation to allow digital public lending.

Most copyright holders, on the contrary, said that there were substantial differences between traditional lending and digital lending and took the view that allowing these practices would be too detrimental for them.

The recommendation from the Commission was that although there were no pressing reasons for tabling amendments to the legislation, there were indeed very good reasons for a closed review.

Recent developments such as the massive digitisation plans announced by Google and the reactions from publishers and European librarians (see for example the projects for a European Digital Library) are very interesting at this regard.

This example I have just mentioned, as contained in a Commission's document which has been broadly commented by the European copyright community recently, demonstrates that as rightly indicated by the title of this panel session, there is a search of a balance in Europe and many other countries of the world.

The European Commission has recently launched two studies to be carried out by an external and independent contractor: one, more specific, on the implementation of the Information Society Directive by the Member States, and another one, more general, on the review of the copyright acquis.

The search of a balance is in the core of both studies which are due by the second half of 2006. Of course, any proposals by the Commission will be accompanied by serious impact assessments and broad consultations with all interested circles.

Therefore, I invite you to follow these developments and participate actively, I congratulate the organisers of this seminar for putting forward these reflections and I thank you all for your kind attention.