A DELICATE BALANCE UPSET:
A PRELIMINARY SURVEY OF EXCEPTIONS AND LIMITATION IN
U.S. AND EUROPEAN UNION DIGITAL COPYRIGHT LAWS

by

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Introduction

What we call copyright in the Anglo-American legal tradition and author’s and related rights in civil law systems grew out of the technological and information revolution caused by the introduction of the printing press in Europe. Over the centuries, copyright and author’s rights law developed, in part, to provide economic incentives to owners by granting them the legal right to control publication, copying, and distribution of their work. However, these exclusive rights have been circumscribed by exceptions and limitations protecting private use of the work and certain other uses, such as those for education or research. Both common law and civil law protection are circumscribed to differing extents by a fundamental policy that neither the rightholder nor the public should be able to appropriate all of the benefits of the work. Rather, the rightholder’s exclusive rights need to be balanced against the public’s interest in uses such as research, news reporting, and parody. Intellectual property protection has required a balance so that authors and publishers maintain enough control and protection so that there is an economic incentive to create and disseminate while circumscribing control to the extent that society as a whole can benefit from the creation.

The World Intellectual Property Organization (WIPO), the United National body responsible for overseeing the development of intellectual property laws uses this as the justification for protecting copyright:

Copyright and its related rights are essential to human creativity, by giving creators incentives in the form of recognition and fair economic rewards. Under this system of rights, the creators are assured that their works can be disseminated without fear of unauthorized copying or piracy. This in turn helps increase access to and enhances the enjoyment of culture, knowledge, and entertainment all over the world.

Recently, the balance between the exclusive rights of authors and creators and the public’s use of protected works has been upset. Copyright law is facing a crisis in the wake of the technological and information of our digital age in which millions have access to copyrighted works and the technology to copy and distribute those works without the permission of the owners. Two related phenomena have worked to shift the traditional balance between creator’s rights and public access and use. The first phenomenon is the creation and increased use of information in a digital form. Digital works are fundamentally different from traditional copyrighted works. Digitalized works, whether sound recordings or digital books to be read on a computer, require that an electronic copy be made in order to access or use the work even if that copy is only temporary. This process is deeply imbedded in the way computers work. The second phenomenon is the growth of computer networks and the creation of the World Wide Web and the Internet. Using digital information on the Internet also requires that a copy be made so that it may be displayed on a user’s screen. In order to access information, it must be reproduced. Thus, using digital media is much different from using “traditional” media wherein an individual is not required to make a copy of a book each time she opens it to read or reread a page. This necessity of reproducing a work to use it is problematic in a copyright system. Since the beginnings of modern copyright law, the ability to control copying has been one of the owner’s primary rights.

Private use of copyrighted materials in the digital age has become an issue of tremendous controversy, as well. In an purely analog world, copyright owners do not control private uses or private performances of their works. For instance, the owner of the lyrics to a popular song cannot prevent you from singing his song in the shower. Once an artist has sold you her painting, she can exert no control over how many people view her work hanging on a wall in a private living room. And, a copyright holder has no power to prevent an individual from repeatedly loaning a novel to friends or a sculpture to a national museum. However, in a digital environment, private use or otherwise legal sharing a copyrighted work is not possible without violating an owner’s exclusive right to copy the work. This has created controversy as well as challenges in national and international laws. The legal issue is further complicated because a significant portion of the otherwise law abiding Internet using population doesn’t support copyright in this environment. Indeed, the World Wide Web has been characterized as “at once one of the world’s largest libraries and surely the world’s largest copying machine.”
This paper provides an overview of recent changes in international and national copyright law resulting from the advent of digital technology and the Internet. These developments have thrust copyright into a position of international prominence because of the incredible access to copyrighted materials these technologies afford to millions of people worldwide. The paper begins by examining the roots and common elements of copyright in the common law world and author rights in the civil law tradition. It presents the international response to what has been called the “digital dilemma” by reviewing key provisions of the 1996 WIPO Copyright Treaty [WIPO Copyright Treaty]. It then examines features of U.S. and European Union implementations of the WIPO Copyright Treaty and compares key provisions of the U.S. Digital Millennium Copyright Act [DMCA] and the European Union Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society [Copyright Directive]. In conclusion, it addresses some of the issues concerning the balance between copyright rightholder’s rights and those of the public.

1. Brief History and Overview of Common Law and Civil Law Traditions

All intellectual property laws, including copyright, are the products of national legislation and vary somewhat from one nation to the next. However, over the last hundred years, nation states have increasingly aimed to harmonize their intellectual property laws, in part because exclusively protecting domestic or national works or inventions is counterproductive. Treaties requiring nations to harmonize intellectual property laws allow “information products” to more easily move across national borders.

The fundamental principles of copyright and author rights laws trace their existence to the era following the introduction of the printing press in Western Europe. Prior to this technological innovation, procuring a copy of a manuscript was accomplished only through the tedious process of copying a manuscript by hand. The printing press revolutionized the process with a procedure that allowed accurate copies of both text and illustrations to be quickly produced and widely disseminated. This revolutionized the information world by making mass distribution of books possible. The printing press also led to the development of the new trades of printing, publishing, and book selling: businesses which wanted to ensure they would be able to recoup their investment in equipment, supplies, and labor. Printers, publishers, and booksellers began seeking and receiving protection for their exclusive right to print and distribute a particular work. The protection originally was granted in the form of a privilege from state authorities. These systems of privileges contained the basic features recognizable in modern copyright systems, including granting the beneficiary the exclusive right to reproduce and distribute the work for a limited term as well as a mechanism for enforcing those rights. By the seventeenth and eighteenth centuries, two different traditions emerged. In England, the tradition of copyright developed and grew into the Anglo-American, or common law tradition. On the continent of Europe, an author centered approach that is now embedded in the civil law tradition developed. Although these traditions share common features in the modern world, there exist essential conceptual differences between them which have impacted the development of protections in the digital environment.

The Anglo-American tradition of copyright law is followed in Great Britain and its former colonies, including the United States and members of the British Commonwealth. This approach emphasizes the economic role of copyright. The “copyright” developed in the context of the printing guilds. When an author sold a book to a printer, the author gave up rights to publication. Once the title was entered into the printer’s ledger, other members of the guild respected the copyright so that the printer who owned the copyright was the only one who could legitimately publish the book. Under the Anglo-American system, copyright is treated as a form of property. Once an individual or corporate author has created the property, it can be subject to commercial exploitation in the manner similar to other forms of property. The first copyright statute, The Statute of Anne, stated the purpose of copyright law as “for the encouragement of leaning and for securing property of copies of books to the rightful owners thereof.” Copyright served the dual purpose of serving the public good by encouraging learning and the private good by giving authors the sole right of publication for a period of years. It protected authors, or the publishers to whom the authors sold their works, against unauthorized acts of publication. The Anglo-American approach is built on the principle that protecting copyright provides an economic incentive to create, and by making products based on creativity financially worthwhile, the interests of the public are served. This tradition has allowed broader exceptions and limitations to the rights of authors for the benefit of the public than has the civil law tradition.

Countries on the European continent and former colonies in Latin America, Africa, and Asia base their laws on a tradition of author’s rights and related rights. Under this tradition, protection stems from the personality rights of the individual creator, hence the rights are “author’s rights” and the law “author law.” This approach is rooted in protecting the individual interest of the author as expressed in the work and extends beyond economic interest to “moral rights,” including the right to have the integrity of the work preserved. Of course, author’s rights and neighboring rights have characteristics of property and the law protects economic content, but there is an added personal dimension to the rights.
And, the personal and moral rights of authors often take priority over the rights of the public. Therefore, the limitations and exceptions may not be as extensive as those in an Anglo-American system.

2. The WIPO Copyright Treaty

The mission of the World Intellectual Property Organization is encouraging creative activity and promoting intellectual property protection throughout the world. WIPO characterizes the impact of the technological revolution on the relevance of intellectual property and on the nature of the intellectual property system as one of the biggest challenges it has faced since its establishment. In response to digital technological developments and the Internet, WIPO concluded two treaties in 1996. The WIPO Copyright Treaty applies to literary and artistic works, including computer programs and databases. The WIPO Performances and Phonograms Treaty protects rights related to copyright. These two treaties update and supplement previous WIPO treaties, including the Berne Convention. The 1996 treaties clarify interpretation of existing rules and introduce new international rules for a digital environment by requiring Contracting Parties to enact national legislation implementing the changes. This paper focuses on the WIPO Copyright Treaty, which establishes norms concerning applying copyright law in the digital environment and clarifies issues concerning certain rights that had been problematic.

A. Distribution, Reproduction and Communication

The Copyright Treaty establishes a right of distribution that includes an exclusive right to control public communication of a work. Article 6(1) provides:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

The Agreed Statement concerning Article 6 provides:

As used in these Articles, the expression “copies” and “original copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

This right extends only to “tangible objects,” like CDs, books, and DVDs, and this distribution right doesn’t seem to extend to works disseminated by electronic means. However, the right to control reproduction does extend into both the analogue and digital environment. The Agreed Statement concerning Article 1(4) makes clear that:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Convention.

In addition, Article 8 provides for a right of communication to the public:

Without prejudice to the provisions of Articles 11(1)(ii), 11 bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them.

Article 8 clarifies that authors of all categories of works protected under the Berne Convention, enjoy the exclusive right to control any communication to the public, including the making available to the public of their works in such a way that members of the public might access these works from a place and at a time individually chosen by them. This article makes it clear that the Berne Convention recognizes the right of communication to the public and that the right includes making protected material available to the public in “on demand” services. As J.A.L. Sterling points out, this “on demand” right in Article 8 is the major accomplishment of the WIPO Copyright Treaty: “for the first time in international law, authors are given specific rights concerning use of their works in Internet and similar services.”
B. Anti-circumvention of Technological Protection Measures

In a digital world, copyrighted owners often protect their works with some kind of technology to prevent unauthorized access to or copying of the work. Technological measures are a relatively new way for copyright owners to control their works. There are two types: (1) access control measures, such as encryption, preventing unauthorized access to the work;57 and (2) copy control measures preventing unauthorized copying of the work.58 As the Napster59 case so clearly demonstrated, copyright cannot be protected on the Internet without technological measures. But, technology alone may be insufficient to protect copyright since technology develops faster than the law and technology is certainly not infallible in its protection with legions of hackers poised to crack the system. The WIPO Copyright Treaty recognizes that since copyright owners will increasingly rely on these kinds of technological measures to protect their rights, that circumvention of these protections should be prohibited.60 Article 11 contains obligations Contracting Parties must implement into national legislation:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.61

Although Article 11 requires contracting states to protect against circumvention of technological measures, it doesn’t detail how this should be achieved in national legislation.62 Furthermore it seems to focus on conduct facilitating infringement, rather than on devices facilitating circumvention.63 Therefore, a Contracting Party is left to determine how best to achieve the anti-circumvention result.

C. Limitations and exceptions

Copyright and author right’s laws contain limitations or exceptions to the exclusive rights of copyright holders. This results from the public interest in using works for certain purposes and maintains the balance between owner’s rights and the public good. Most countries recognize limitations or exceptions allowing the public to use works without gaining permission and without paying remuneration for teaching, research, and private copying.64 The WIPO Copyright Treaty recognizes these differences in national law and grants Contracting Parties the latitude to provide limitations or exceptions in national legislation.65 Article 10(1) requires that these limitations and exceptions be allowed in “certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”66 The Agreed Statement clarifies that Contracting Parties may extend exceptions and limitations acceptable under the Berne Convention into the digital network environment and to devise new exceptions and limitations appropriate in the digital environment.67 This allows Contracting Parties sufficient flexibility to keep existing limitations and exceptions while creating new limitations and exceptions for a digital world.68

3. The U.S. Response: The Digital Millennium Copyright Act

The United States implemented the WIPO Copyright Treaty on October 28, 1998 with the Digital Millennium Copyright Act (DMCA).69 Although U.S. cases had already recognized the right of authors to control digital reproductions and transmissions of their works,70 Congress enacted this complex law that adds a new chapter 12 to Title 17 of the U.S. code and institutes major changes in U.S. copyright law to address a digital and networked environment.71

A. Anti-circumvention of Technological Measures & Anti-Trafficking

The DMCA makes it illegal to either circumvent certain technological protections or to traffic in circumvention technology. § 1201(a)(1)(A) of the DMCA tracks the purpose of Article 11 of the WIPO Copyright Treaty by prohibiting unauthorized access to a protected work by circumventing technological measures put into place by the copyright owner to control access to the work.72 § 1201(a)(1)(A) provides:

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.73

However, although circumventing access control devices is proscribed, there is no prohibition in the DMCA on circumventing copy control devices.74 The DMCA defines what it means to “circumvent a technological measure” as:
… to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."  

The DMCA goes beyond the requirements of the WIPO Copyright Treaty by providing:

A technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

In addition to prohibiting circumvention of access control devices, the DMCA prohibits trafficking in two kinds of circumvention technology: access control devices and services and copy control devices and services.

§ 1201(a)(2) prohibits manufacturing or trafficking in technology to circumvent access control devices and provides:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or a part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

§ 1201(b)(1) prohibits manufacturing or trafficking in technology to circumvent copy control devices and provides:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or a part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;
(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work protected under this title in a work or a portion thereof; or
(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

Although the statutory language and the tests are similar, these sections provide two distinct causes of action. If an individual manufactures a device designed to get around a technological fence imposed by an owner, that manufacturer is liable under § 1201(a)(2). If an individual designs and distributes a program that will crack a program that protects a DVD from being copied, that individual will be liable under § 1201(b)(1).

To summarize, the DMCA prohibits circumventing or trafficking in devices or services designed to prohibit access to protected materials. A violation may occur under § 1201(a)(2) for trafficking in an access circumvention technology, whether access is accomplished or not. The DMCA also prohibits trafficking in copy control devices or services, but contains no ban on circumventing copy control devices or technology. Violation of § 1201 leads to both civil and criminal liability. In addition to providing for actual damages, civil remedies include statutory damages that a complaining party may elect or that may be imposed “as the court considers just” and a possibility of treble damages for repeated violations. Criminal penalties for those who repeatedly violate “willfully and for the purpose of commercial advantage or private financial gain” may be imprisoned for 10 years and fined $1 million.

B. Limitations and Exceptions

On the surface, the DMCA recognizes the balance between protecting owner’s rights to foster creativity with allowing certain uses in the public interest. In this way, it implements Article 10(1) of the WIPO Copyright Treaty by providing for exceptions to the prohibitions on circumvention and trafficking. It does so by providing a complex system of exceptions detailed in §1201(d) – (k). Some provide exceptions for anti-circumvention of access control. Others excuse
trafficking in access control technology and/or trafficking in rights control technology. All of the exceptions contain additional, often detailed criteria that must be met before the exception applies. Exhibit A summarizes the exceptions and to which provisions of the DMCA they apply.

Exhibit A

<table>
<thead>
<tr>
<th>DMCA §</th>
<th>Summary</th>
<th>§ 1201(a)(1) Circumvention of Access Control</th>
<th>§ 1201(a)(2) Trafficking in Access Control</th>
<th>§ 1201(b) Trafficking in Right Control</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1201(d)</td>
<td>Nonprofit libraries, archives, and educational institutions</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§ 1201(e)</td>
<td>Law enforcement, intelligence and other government activities</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>§ 1201(f)</td>
<td>Reverse engineering of computer programs to identify and analyze elements necessary to achieve interoperability with other programs</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>§ 1201(g)</td>
<td>Encryption research</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§ 1201(h)</td>
<td>If it is a technology, product, service or device that has as its sole purpose preventing access of minors to materials on the Internet</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>§ 1201(i)</td>
<td>In certain circumstances to protect personally identifying information, such as when the technological measure is capable of collecting and disseminating certain information</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§ 1201(j)</td>
<td>Security testing</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§ 1201(k)</td>
<td>Analog Devices &amp; Certain Technological Measures</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In addition to the enumerated exceptions for circumventing access control, the DMCA granted rule-making authority to Librarian of Congress.87 Two narrow classes of copyrighted works identified by the Librarian of Congress are exempt from the anti-circumvention prohibition of § 1201(a)(1):

1. Compilations consisting of lists of websites blocked by filtering software applications; and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.88

These exceptions are in effect at least until October 28, 2003, the beginning of the next rulemaking period.89

Although there is a system of exceptions, in reality, those exceptions may be difficult or impossible to exercise. For example, circumvention of an access control device is a per se violation of the DMCA and only very narrow and specific exemptions exist90 which may be difficult to apply.91 Furthermore, the DMCA contains a “fundamental defect.”92 If a person qualifies for one of the narrow exceptions to anti-circumvention of an access control technology, that person still may be denied access because that person may have may not possess the expertise or technology to exercise those rights without trafficking in an access or copy control devise prohibited in §§ 1201(a)(2) or (b). §1201(c)(1) of the DMCA provides “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”94 But, the DMCA doesn’t provide a means for “fair use”95 or private use access.96 This is because a defense to copyright infringement is not a defense to the prohibitions on circumvention and anti-circumvention technology and devices in the DMCA.97


Since the late 1980s, the European Communities have worked to harmonize intellectual property laws within the Member States. This process has been achieved by way of directives98 requiring Member States to enact national legislation to achieve certain harmonized goals.99 On May 22, 2001, the EU adopted the Directive on Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (Copyright Directive). The Copyright Directive implements the WIPO Copyright Treaty by harmonizing Member State laws concerning reproduction, communication and
distribution rights and by establishing rights norms in the digital environment. Many directives include mandatory as well as discretionary sections that provide Member States with flexibility concerning whether to enact certain sections into national law. The Copyright Directive is no exception. Indeed, much concerning the future of the law in the European Union will depend upon how and whether Member States implement certain discretionary provisions of the Copyright Directive.

A. Distribution, Reproduction and Communication

Article 2 of the Copyright Directive deals with the owner’s right to reproduce a work. It mandates that Member States provide for the exclusive right of authors, performers, phonogram producers, film producers and broadcasting organizations “to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means or in any form.” The reproduction right includes indirect, temporary, and partial reproduction, reflecting the position in many Member States and clarifying the matter in Member States where there was uncertainty.

Article 3 requires Member States to harmonize legislation concerning the right to communicate works to the public. The right had already existed under EU law, but there existed uncertainty as to whether the communication right extended to on-demand services over the Internet. Article 3(1) provides:

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.

Recital 23 indicates the right of communication to the public

...[S]hould 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 the work to the public by wire or wireless means, including broadcasting.

The communication/making available to the public right in Article 3(1) only applies to authors. Article 3(2) pertains to performers, phonogram producers, film producers and broadcast organizations. Member States are directed to provide for “the exclusive right to authorize 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.” Article 3 specifically provides that the communication and/or making available to the public right is not exhausted by any action of communicating or making available. The right is enforceable in respect to each subsequent communication following the first act.

Article 4 concerns the distribution right and requires that Member States provide the exclusive right “to authorize or prohibit any form of distribution to the public by sale or otherwise.” Although all Member States broadly recognized the right to control distribution, they differed in their application of the exhaustion principle in which the rightholder loses exclusive distribution rights with the first sale. Article 4(2) will harmonize exhaustion in the European Union by providing that 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.

In other words, the distribution right is not exhausted within the EU unless and until the first sale or other transfer is made by the rightholder or with the holder’s consent. Sales outside the EU will not affect exclusive distribution rights.

B. Anti-circumvention of Technological Measures & Anti-Trafficking Provisions

The Copyright Directive tracks the purpose of Article 11 of the WIPO treaty concerning providing adequate legal protection against the circumvention of technological measures used by owners to protect their works. Article 6, concerns “[o]bligations as to technical measures” and is the most controversial part of the Copyright Directive. Like the DMCA, it goes beyond the requirements of Article 11 by requiring Member States provide legal protection for rights holders against
both circumventing and/or trafficking in technological measures. Article 6 mandates substantial changes in Member States’ laws, since at the time the Copyright Directive was adopted, no Member State had legislation preventing circumvention of technological measures. Article 6(1) prohibits acts of circumvention:

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.

The Copyright Directive goes on to define “technological measures” as:

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 [data base] right …

The technological measure is “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.

The anti-circumvention provision of Article 6(1) differs from that in the DMCA. First, Article 6 explicitly requires that national laws provide legal protection against circumvention of both access and copy control technology. The DMCA only prohibits circumvention of access control technology. In addition, unlike U.S. law, which applies only to copyrighted works, the Copyright Directive extends protection to works covered by related or “neighboring” rights and database rights.

Article 6(2) prohibits preparatory acts and trafficking in anti-circumvention technology since circumvention normally takes place after the acquisition of devices or services from a supplier:

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 marked 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.

Like the DMCA, the anti-trafficking measures of Article 6(2) are broad enough to encompass both access control and copy control technologies.

C. Limitations and Exceptions

The Copyright Directive also tracks the WIPO Copyright Treaty by providing for limitations and exceptions. Article 6(4) limits the broad scope of Articles 6(1) by the addresses the relationship between the technological measures and the exceptions and limitations delineated in Article 5:

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 [parts of Article 5]… the means of benefiting from that exception or limitation, to the extent necessary to benefit from the exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

Article 5 sets out a list of twenty exceptions and limitations to the reproduction, communication/making available, and distribution rights. Most of the limitations and exceptions are discretionary. The list is exhaustive and Member States may
not create a limitation or exception not included on the list. The Copyright Directive contains no specific privilege to
circumvent technological measure or to deal in circumvention devices. However, Article 6(4) obligates Member State to
impose certain exceptions and limitations in the event that the parties fail to use their freedom of contract to do so. If the
Member State chooses to include in its national law certain exceptions and limitations from Article 5, then Article 6.4(m)
mandates when these national law exceptions must be enforced EU wide in the digital environment.

Only one of the Article 5 limitations and exceptions is mandatory. Article 5(1) provides:

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
excepted from the reproduction right provided for in Article 2.

Article 5(1) favors Internet service providers (ISPs) who might inadvertently infringe the reproduction right when
transmitting or caching Internet resources. ISPs will be excepted if the reproduction meets the requirements of if 5(1).
Recital 33 explains that “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 recognized and used by industry, to obtain data
on the use of the information.” The exception seems to require that the intermediary transmit without modification. In
addition, Recital 27 provides protection for some Internet Service Providers by providing “the mere provision of physical
facilities for enabling or making a communication does not in itself amount to communication.” The “Internet Safe Harbor”
provisions under U.S. law are far more complex and provide more precise detail concerning when the exception applies than
the requirements found in Article 5(1). However, the exception will apply in much the same circumstances under the DMCA
and the Copyright Directive.

A Member State is free to enact none, any, or all of the remaining exceptions and/or limitations. Some of these
apply to the reproduction right or the communication/making available to the public rights in specified circumstances. Some
require the payment of “fair compensation.” The discretionary exceptions and limitations are summarized in Exhibit B:

### Exhibit B

**Article 5: Discretionary Exceptions and Limitations**

<table>
<thead>
<tr>
<th>Article</th>
<th>Art. 2 Reproduction</th>
<th>Art. 3 Communication</th>
<th>Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (2)(a) Reproductions on paper or similar medium, effected by photographic technique or similar process (does not include sheet music)</td>
<td>Yes</td>
<td></td>
<td>“Fair compensation”</td>
</tr>
<tr>
<td>5(2)(b) Reproductions in any medium by natural person for private use for non-commercial ends (subject to Art. 6)</td>
<td>Yes</td>
<td></td>
<td>“Fair compensation”</td>
</tr>
<tr>
<td>5(2)(c) Reproductions by publicly accessible libraries, educational establishments, museums, archives</td>
<td>Yes</td>
<td></td>
<td>No</td>
</tr>
<tr>
<td>5(2)(d) Ephemeral recordings made by broadcasting organizations for archival purposes</td>
<td>Yes</td>
<td></td>
<td>No</td>
</tr>
<tr>
<td>5(2)(e) Reproductions of broadcasts made by social institutions (hospitals, prisons) for non-commercial purposes</td>
<td>Yes</td>
<td></td>
<td>“Fair compensation”</td>
</tr>
<tr>
<td>5(3)(a) Use as illustration for teaching or scientific research</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5(3)(b) Use for the benefit of people with a disability</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5(3)(c) Reproduction, communication,</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>
making available of material on
current economic, political or religious
topics

<table>
<thead>
<tr>
<th></th>
<th>5(3)(d) Quotations for criticism or review</th>
<th>Yes</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>5(3)(e) Use for public security or governmental proceedings</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(f) Use of political speeches and extracts of public lectures</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(g) Use during religious or official public ceremonies</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(h) Use of architecture or sculpture located permanently in a public place</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(i) Incidental inclusion</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(j) Advertising to promote public exhibition or sale of artistic works</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(k) Use for caricature, parody or pastiche</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(l) Use to demonstrate or repair equipment</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(m) Use of building or drawing or plan to reconstruct a building</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(n) Use for purpose of research or private study</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>5(3)(o) Certain other cases of “minor importance” where exceptions or limitations already exist. Applies only to analog uses.</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

Of the hotly debated issues concerning technological measures, an exception for private copying was one of the most contentious. Article 6(4) treats the issue separately and provides:

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 reproduction in accordance with these provisions.

The exception or limitation contained in Article 5(2)(b) concerns non-commercial reproductions in any media. Recital 38 clarifies that Member States are allowed to provide for an exception or limitation for certain private uses of reproductions of audio, visual and audiovisual material but are not required to do so. Recital 38 also makes clear that Member States are to introduce or continue remuneration schemes for private copying and that due account should be taken of the differences between analogue private copying and the greater economic impact digital private copying is likely to have. It empowers a Member State to allow only analog private copying and not an exception or limitation for digital private copying.

**Conclusion**

As millions of otherwise law abiding citizen download and share copyright protected music, films, and books, increasingly, copyright rightholders will build digital fences around their property in an effort to protect their rights. Both the U.S. and at the European Community have recognize that providing increased levels of control to rightholders is in order. Granting control is not new. In the Anglo-American tradition, the law has focused on granting owners control over the copying of their property. In the author’s rights tradition, the focus has been on the author’s right to control what happens with the creation. On one hand, it seems logical that if the public has the ability to copy and use digital works on a massive scale, that the law should support the owner’s use of technology to block illegal or unauthorized use. Or, does making copyright the vehicle for that protection upset that delicate balance between the author’s right to economically benefit from a copyrighted work and what have always been limitations and exceptions to the author’s exclusive rights? Limitations on copyright are necessary to keep the balance between the public interest in rewarding creators and the public interest in
ensuring the widest dissemination of copyrighted works. The DMCA and the EU Copyright Directive appear to tip that balance in favor of the creators by granting broader control of access to and copying of the work. This, along with offering a narrower array of limitations and exceptions for users, tips the balance in favor of the owners.

Article 11 of the WIPO Copyright Treaty requires Contracting Parties to provide protection against circumvention for act “not authorized by the authors concerned or permitted by law.” Both the DMCA and EU Copyright Directive go beyond this dictate. To illustrate the difference concerning use in an analogue and digital environment, consider this example. If a researcher believes she is entitled to make a copy of a print article for her personal research, she will do so. It is only when that researcher is sued for infringement that the relevant defense of “fair use” in the U.S., “fair dealing” in the U.K., or the appropriate exception or limitation under national law is invoked. However, if the article happens to be in digital form and protected by access control and copy control technology, the result is very different. Rather than using the exception as a defense to an infringement action, the researcher must affirmatively put forth the exception to show entitlement to use the work. She may have to do this twice: first by requesting access to the work and again to make a copy of the work for use in her research. The result? The copyright owner has almost complete control over access to and personal use of a work protected by technology.

Copyright law has entered what has been characterized as the “paradigmatic phase” due to the technological advancements of our information age. Will copyright law as we know it change irrevocably as a result of digital technology? According to Simon Stokes, “[d]igital technology has put copyright at the crossroads. There are two conflicting ways ahead: the death of copy-right or the consolidation and revision of copyright to address the digital future.” While it seems much too early to ring a death knell for copyright, there is no doubt that in this digital world, the times they are a changing. At least in terms of how the WIPO Copyright Treaty has been implemented in the U.S. and is directed to be implemented in EU Member States, we are witnessing a palpable shift in the balance between the rights of owners and those of users. In the past, copyright protected rightholders from piracy and other illegal uses. Under the DMCA and the EU Copyright Directive it seems to have gone further to circumscribe uses that in the past were considered to be in the public interest.

Footnotes

* Associate Professor, University of St. Thomas, St. Paul, MN. The author extends her thanks to Victoria L. Jacobson, University of St. Thomas law student, for her research assistance on this project.
1 “Copyright” refers to the main acts and rights that relate to artistic creations, such as poems and music. WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY & PRACTICE 5 (1997)[hereinafter WIPO INTRODUCTION TO IP]. In most European languages, other than English, copyright is called “author’s rights.” Id. “Author’s rights” recognizes the author has certain rights in the creation that can only be exercised by the author or a licensee. Id. In addition, the laws protecting copyright or author’s rights typically also address “neighboring rights,” such as the right to publicly perform. Id. For ease, when the author uses the term “copyright” in the context of most of this paper, she is referring generically to copyright, author’s rights and related rights.
6 THE DIGITAL DILEMMA, supra note 4, at 28.
7 The Internet makes it possible for computers to exchange information and the Web provides the superstructure in which that information is organized and published. Id. at 39.
8 LITMAN, supra note 2, at 31.
9 Henning Wiese, Justification of the Copyright System in the Digital Age, 24 (8) E.I.P.R. 387 (2002)(The author notes that there is a significant portion of the population that doesn’t support copyright. In the wake of Naptster millions of youngsters turned into “electronic Hezbollah,” such that imposition of an unpopular law will be increasingly difficult on a huge population that doesn’t support it and that possesses easy means for evasion. In the instance of the Internet, it is basically law-abiding citizens, rather than professional pirates, who account for the majority of copyright infringers).
10 LITMAN, supra note 2, at 15.
11 Id. at 18.
12 *The Digital Dilemma*, *supra* note 4, at 29.


18 Jacqueline Lipton, *Copyright in the Digital Age: A Comparative Survey*, 27 Rutgers Computer & Tech. L. J. 333, 334 (2001). The internationalization of copyright law has occurred in a number of phases, beginning with bilateral agreements between nation states, through the creation of international conventions, such as the Berne Convention for the Protection of Literary and Artistic Works, Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, amended Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986)[Berne Convention] and its subsequent revisions and the 1994 World Trade Organization Agreement on the Trade Related Aspects of Intellectual Property, Apr. 15, 1994, 33 I.L.M. 1197 (1994)[TRIPS Agreement]. Daniel J Gervais, *The Internationalization of Intellectual Property: New Challenges From the Very Old and the Very New*, 12 Fordham Intell. Prop. Media & Ent. L. J. 929, 930 (2002). Gervais points out that from the adoption of the TRIPS Agreement in 1994 to the present, we are in what he categorizes as a “paradigmatic phase” because we are currently witnessing changes that may result in changes to copyright greater in scope than anything we have seen to date. *Id.* at 949.

19 Lipton, *supra* note 18, at 334.

20 Sterling, *supra* note 20, ¶ 1.02, at 7.


22 WIPO INTRODUCTION TO IP, *supra* note 1, at 7.

23 *Id.* For instance, the kings of France and England and the princes of states in Germany granted these rights.

24 *Id.*


26 Lipton, *supra* note 18, at 334.

27 Halbert, *supra* note 21, at 5.

28 *Id.*

29 WIPO INTRODUCTION TO IP, *supra* note 1, at 25.

30 *Id.*

31 8 Anne c. 19 (1710), An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such copies, during the Times therein mentioned.

32 This approach is reflected in the United States, where copyright is provided for in the Constitutional grant of power to Congress “To Promote the Progress of the Sciences and the useful Arts, by securing for Limited Times to Authors and Inventors the Right to their respective Writings and Discoveries. *U.S. Const.*, art. I, § 8, cl. 8. Inherent in this clause is the fundamental purpose of copyright is the public good of promoting science and the useful arts. It also recognizes that copyright must protect against unauthorized acts so that the holder of the right can either bring the work to market with a product based on the material or assign or license the rights to another. *See* Lipton, *supra* note 18, at 334.

33 *Id.*

34 Litman, *supra* note 2, at 334.

35 For example, in France the law is called *droit d’auteur*, in Germany *Urhegerrecht*, and Italy *diritto d’autore*. Goldstein, *supra* note 25, at 142.

36 Lipton, *supra* note 18, at 334.

37 *Id.* In France, the evolution from a system of privileges granted by the crown to a system protecting author’s right came about as a part of the French Revolution which abolished privileges of many types, including the privileges of publishers. WIPO INTRODUCTION TO IP, *supra* note 1, at 24. In the French Intellectual Property Code, authors are granted *droit de repentir*, or “a right to repent” which allows the author to withdraw every existing copy from circulations, subject to certain limitations. *See* Gervais, *supra* note 18, at 977-978.

38 WIPO INTRODUCTION TO IP, *supra* note 1, at 25.


40 *Id.*, Introduction, ¶ 4.
WIPO Copyright Treaty, supra note 15.

Id. art. 4.

Id. art. 5.

WIPO Performances and Phonograms Treaty, supra note 15.

WIPO Copyright Treaty, supra note 15, Preamble.

Id. art. 14(1).

For example, Article 4 recognizes computer programs are protected as literary works. Many nations, including the United States, had already categorized computer programs as literary works. In addition, Article 5 acknowledges that compilations of data (databases) require some form of protection. The U.S. and UK are forerunners in developing legislation to protect databases, but most nations aren’t moving quickly in this regard. See Lipton, supra note 18, at 336-338.

WIPO, Copyright Treaty, art. 6(1).

Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Agreed Statements Concerning The WIPO Copyright Treaty, <http://www.wipo.org/treaties/ip/WIPO Copyright Treaty/statements.html> (accessed May 29, 2003) [hereinafter Agreed Statements]. Several of the articles in the WIPO Copyright Treaty contain statements containing the understandings of the Contracting Parties concerning interpretation and terminology. The WIPO Copyright Treaty represents a specific recognition that an author’s right to authorize distribution of works is distinct from and in addition to the right to authorize reproduction of the works. STERLING, supra note 14, ¶ 23.09, at 566. Sterling notes that in France and Belgium the distribution right has long been recognized as part of the reproduction right, while in Germany it is recognized separately from the reproduction right. Id.

STERLING, supra note 14, ¶ 23.09, at 566. The WIPO Copyright Treaty allows Contracting Parties to make their own decisions about whether the authorized first sale or transfer of ownership in a particular copy exhausts the author’s right to control distribution. Id. at 567.

Article 9 of the Berne Convention provides: “(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”

Agreed Statements, supra note 51. See generally Selena Kim, The Reinforcement of International Copyright for the Digital Age, 16 INTELLECTUAL PROPERTY J. 93, 95 (2002).

WIPO Copyright Treaty, art. 8. When the provisions of the Berne Convention referenced in Article 8 are taken together, there remains doubt as to whether certain acts of communication by wire or wireless means are covered, for instance regarding dissemination of works through individual on-line access to works stored in databases. STERLING, supra note 14, ¶ 23.09(3), at 568.

Id., ¶ 23.09(3), at 569.

Id.

Id.

Kim, supra note 52, at 96.

Id. at 97.

A & M Records, Inc. v. Napster, Inc, 239 F.3d 1004 (9th Cir. 2001)(Napster, an online file sharing service, facilitated millions of downloads of music files).

Id. at 98.

WIPO Copyright Treaty, supra note 15, art. 11.

Kim, supra note 52, at 97.


Kim, supra note 52, at 99. Civil law countries tend to be restrictive in their limitations and exceptions and specifically enumerate them in legislation. Id. Commonwealth countries have a doctrine of “fair dealing” and the U.S. has the doctrine of “fair use,” which is the broadest category. Id. at 99–100.

WIPO Copyright Treaty, supra note 15, art. 10(1). The limitations or exceptions must comply with the “three step” test, so that the limitation or exception only applies (1) in certain special cases, (2) that do not conflict with the normal exploitation of the work and (3) that do not unreasonably prejudice the legitimate interests of the author. See generally STERLING, supra note 14, ¶ 23.10, at 570 (citations omitted)(for detailed explanation of WIPO test for limitations and exceptions).

WIPO Copyright Treaty, supra note 15, art. 10(1).

Agreed Statements, supra note 49.

Kim, supra note 52, at 100.


This measure didn’t go into effect until October 27, 2000, two years after enactment of the DMCA, to allow time for study of potential impact it would have on non-infringing uses of copyrighted works. This was in response to concerns expressed by librarians and educators on the potential negative impact of access controls on fair use, access to information, and public domain works. Samuelson, supra note 70, at 559


17 U.S.C. § 1201(a)(3)(A). This broad definition seems to encompass all unauthorized access. Theresa Foged, US v EU Anti-Circumvention Legislation: Preserving the Public’s Privileges in the Digital Age, 24(11) E.I.P.R. 525, 530 (2002). This means that a use authorized by law, like fair use, is not a defense for gaining unauthorized access. Id.


Foged, supra note 75, at 530. The anti-trafficking requirements took effect on October 28, 1998 when the DMCA was enacted. These provisions have already been the subject of litigation.


17 U.S.C. § 1201(b)(1). The DMCA defines key phrases in this subsection: (A) to “circumvent protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and (B) a technological measure “effectively protects a right of a copyright owner under this title” if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright holder under this title. 17 U.S.C. § 1201(b)(2).


This was done to ensure the public could still make fair use of copyrighted works. U.S. Copyright Office Summary, the Digital Millennium Copyright Act of 1998, at 4 (Dec. 1998). Commentators point out that because there is a ban on trafficking in copy control devices, effectively it means that only an individual with the skill to circumvent a copy control devise gets this benefit Foged, supra note 74, at 531. See also Sharp, supra note 80.

17 U.S.C. § 1201(c)(3). (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.”


Sharp, supra note 80.

Id. at 35–54.


The lack of a general fair use exception to anti-circumvention may mean that there will be no access to a copyrighted work when someone has a legal right to use it. Foged, supra note 75, at 531.

LITMAN, supra note 2, at 13.

Band & Isshiki, supra note 71, at 219.

In October of 1976, what had been a judicial limitation of fair use was added to the U.S. Copyright statute. 17 U.S.C. § 107. The statute requires a court to consider four factors in determining whether a particular use falls within this limitation: “(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.”


Band & Isshiki, supra note 71, at 219.

Recital 3 of the Copyright Directive states: “The proposed harmonization 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 express and the public interest.” Directive 01/29/EC. Since one of the chief objectives of the European Communities is the Common Market with free movement of goods, rules to prevent distortion of competition are important. The European Commission has extensively studied copyright, author’s rights, and related rights within Member States and proposed legislation to harmonize these laws. See generally STERLING, supra note 14, at 610 – 614. (history of Council Directives relating to harmonization of copyright).

Directives don’t directly create rights, obligations, or penalties. Rather they direct the Member States to enact legislation to achieve certain goals. If a Member State fails to implement a directive within the prescribed time, any individual from an
EU Member State may have the rights enforced in a national court as though the implementation had occurred. Directives include recitals designed to provide national law making bodies with interpretations of the substantive provisions in terms of helping to draft domestic law. The Copyright Directive is preceded by 61 Recitals.

100 Paul O’Hare and Dean Stelfox, EU Copyright Directive: Halfway to Harmony 7 (5) CYBERSPACE L. 19 (2002).

Member States were required to enact domestic legislation by December 22, 2002. Copyright Directive, supra note 17, art.13. As of April 4, 2003, only Greece and Denmark had fully implemented the Directive into national law. E-mail memorandum from Mauno Hänninen, European Commission, Internal Market Directorate General, Status of implementation in each Member State as of 4 April 2003 (Apr. 9, 2003) (copy on file with author). However, most Member States are likely to complete implementation during the summer of 2003. Id.

102 Copyright Directive, supra note 17, art. 2

103 O’Hare & Stelfox, supra note 99. (Article 2 may have inadvertently increases the existing rights of rights holders in some cases. For instance, the position in the U.K. prior to the directive was that a “substantial” part of the copyrighted work must be copied for infringement to occur. Article 2 doesn’t have a requirement that the reproduction be substantial).

104 Copyright Directive, supra note 2, art. 3(1).

105 Id. Recitals (23). The Copyright Directive does not provide guidance as to what constitutes making content “available to the public. Which has caused concerns in some Member States. O’Hare & Stelfox, supra note 99.

106 Copyright Directive, supra note 17, art. 3(2).


108 Copyright Directive, supra note 17, art. 4(1).

109 Traditionally, the distribution right was viewed to be exhausted with the first sale of a particular copy of the copyrighted work so that subsequent purchasers were free to resell the item. Stephen M. Stewart, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 62–63 (2d ed. 1989).

110 Copyright Directive, art. 4(2).

111 O’Hare & Stelfox, supra note 99. The DMCA formally adopts the WIPO treaties without expressly referring to the Distribution right. Rainford, supra note 107.

112 O’Hare & Stelfox, supra note 98; Rainford, supra note 105.

113 Kim, supra note 52, at 102.

114 Copyright Directive, supra note 17, art. 6(1).

115 Id. art. 6(3).

116 Id. art. 6(3). The definition is circular. The concept of “effective” in the DMCA is more useful by referring to achieving the protection measure “in the ordinary course of its operation”. 17 U.S.C. § 1201(a)(3)(B). See Lipton, supra note 18, at 346.


119 Copyright Directive, supra note 17, art. 6(2).

120 For a complete analysis and legislative history of Article 6.4, see Casellanti, supra note 118.

121 Copyright Directive, supra note 17, art. 6(4).

122 “This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.” Id. Even though the WIPO Copyright Treaty allows Contracting States to create new exceptions and limitations, the Copyright Directive Prohibits it. Kim, supra note 52, at 103. However, there is a grandfather clause allowing Member States to retain existing exceptions of minor importance provided they relate only to analogue uses. See O’Hare & Stelfox, supra note 99.

123 Besek, supra note 74, at 907.

124 Casellanti, supra note 118, at 379. The Article is written to encourage agreements between rightholders and others to avoid Member State intervention. Id. at 377.

125 Copyright Directive, supra note 17, art. 5(1).

126 Id. Recitals (33).

127 Rainford, supra note 107. The Online Copyright Infringement Liability Limitation Act, amends the U.S. copyright statute and provides for “safe harbors” for Internet service providers. 17 U.S.C. § 512. Under the safe harbor approach of § 512, “service providers,” defined for this purpose as “an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, or material of the user’s choosing, without modification to the content of the material as sent or received. 17 U.S.C. § 512(k). Service providers receive safe harbor for acting as a conduit, temporary caching material, storing infringing materials without knowledge provided the statutory provisions for each safe harbor are met. See generally Katherine C. Spelman and Rachel Matteo-Boehm, Copyright Current Developments, 22ND ANNUAL INST. ON COMPUTER L. 2002 at 801, 825–828 (PLI Pat., Copy., Trademarks, and Literary Prop. Course Handbook Series No. 69, 2002).
Member States are likely to enact the optional exceptions and/or limitations that most closely reflect their existing laws and traditions, which will have an impact on the extent to which they will actually become harmonized. Rainford, supra note 107.

See Casellanti, supra note 118, at 379–382.

Copyright Directive, supra note 17, art. 6(4).

This exception or limitation also requires the payment of fair compensation, which takes into account the application, or non-application of technological measures of Article 6. Id. art. 5(2)(b).

Id. Recitals (38).

Id.

Id.; Casellanti, supra note 118, at 382.

Stewart, supra note 109, at 79.

Kim, supra note 52, at 112.

Gervis, supra note 18, at 949.

Stokes, supra note 5, at 17.