Jun 1st, 12:00 AM

'Digital is not different' - copyright in digital environment

Barbara Szczepańska
Lovells

Barbara Szczepańska
Library and Information Services Manager
Lovells law firm in Warsaw

″Digital is not different″ - copyright in digital environment

Abstract

Development in technology has brought to the libraries new kind of resources. Digital works such as books, periodicals and other materials are now in libraries collections. In spite of the fact that basic principles of copyright remain the same for ”traditional” and digital works. Copyright in digital environment is much more difficult to control because of the ease of creation, modification and distribution of digital copies over networks. Libraries help copyright holders to protect digital works against copyright infringements. On the other hand they represent also users of protected materials, and have a crucial role to play in ensuring the access to books and periodicals regardless of technological innovation. The question is who's rights should be more protected by libraries? The paper addresses a number of rules and positions concerning copyright in digital world. Main part of the paper presents copyright law developments starting with TRIPS and Berne Convention through WIPO Treaties ending with Copyright Directive, particularly focusing on limitations and exceptions to copyright in the digital environment. This paper describes also positions concerning the copyright in the digital environment including IFLA and LACA position ”Digital is not different”, EBLIDA position on Copyright and Intellectual Property Rights and EBLIDA Position Paper on WIPO Copyright Treaties. The paper concludes with description of recent developments in the Polish Copyright and Neighbouring Rights.

Copyright, Libraries, Digital environment, Copyright limitations and exception, Copyright law, EBLIDA, IFLA, Copyright Treaties,

Copyrights have a great influence on the majority of library activities. They shape the type of services offered by libraries to their users and the conditions on which a library can offer access to materials protected by copyright. As a result, copyright affect the way libraries can function and conduct activities such as storing, protecting and making their collections available.

The copyright issue has gained additional significance in the context of the information society, the development of which we can witness where access to broadly understood media and means of public and direct communication plays the key role. Using digital technology to record, make available, store, archive and transfer works triggered the change in methods and scope of their exploitation. Apart from obvious and undisputable positive consequences of those changes, there are risks related to the infringement of copyright and neighbouring rights on an unprecedented scale by using protected property without the consent of authorized entities or by “manipulating” the content of the works distributed in digital format [1].

In order to prevent infringement of copyright in the digital environment, international organizations and individual states began to introduce in their binding legislation regulations aimed to increase protection of works and rights of their authors.

On the other hand, both in the context of international agreements and national legislation of individual states, there are limitations of exclusive rights of authors and owners of the neighbouring rights, which in certain specific situations allow using works without the consent of their authors and authorized owners. Permissible use of protected works or fair

use allows various entities, including libraries, to have free access to protected property, thus giving priority to important public needs over the individual financial interests of authorized owners [2].

In this paper I will discuss the most important documents referring to copyright in the digital environment, such as the Berne Convention, the TRIPS Agreement and WIPO Copyright Treaty, as well as 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. I will also analyse the position taken by IFLA and EBLIDA on the rights at issue. Finally, I will mention the most important changes in the Polish copyright law arising from approximation of the Polish copyright law to the EU Copyright Directive.

Berne Convention and TRIPS Agreement

The first and the most important international agreement on copyright law is the Berne Convention for the Protection of Literary and Artistic Works, concluded in Berne in 1886. This Convention was many times amended and revised, e.g. in Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971). The Convention is based on two fundamental principles: the states acceding to this Convention undertake to ensure that the authors enjoy (in national legislation) at least the level of protection as is provided for in the Convention (the principle of minimum protection), and a foreign author should in the territory of another member state be treated on an equal footing with the citizens of this country (the principle of assimilation). Obviously, the original text of the Convention does not mention the protection of works in the digital environment; nevertheless, I refer to it because it has had crucial significance for later relevant international agreements. Firstly, because, as I have already mentioned, this was the first agreement of its kind; secondly, it contains definitions of key importance for modern understanding of copyright law; thirdly, due to the fact that subsequent amendments to the Convention gave rise to provisions relevant to the subject under discussion.

The Berne Convention introduced the notion and scope of protection of “literary and artistic works”, subsequently used in other international agreements as well as the notion of “reproduction” [3]. According to the Convention, granting the right to copying (reproduce) is vested with authors of works irrespective of the way and form in which such reproduction was to be made. In order to explain fully the notion of reproduction, art. 9 of the Convention was amended in 1971 by adding sec. 3, in which reproduction was defined as any sound and visual recording [4]. Therefore, it should not be relevant whether a reproduction is made in a traditional way (e.g. on paper, photographic plate, or with the use of digital technology, e.g. on a magnetic tape, compact disc or a CD-ROM) [5].

In 1994 the World Trade Organization was established. One of the agreements signed when the WTO was being set up was the Agreement On Trade-Related Aspects Of Intellectual Property Rights for the purpose of introducing the protection of intellectual property within the group of states joining WTO. TRIPS did not introduce any direct provision on protection and use of works in a digital environment. However, it introduced the protection of two categories of works, important from the point of view of the digital environment, namely computer programs and databases.

In accordance with art. 10 of TRIPS, computer programs are protected as literary works in the Berne Convention [6]; the same provision of TRIPS also applies to protection of databases [7].

WIPO Copyright Treaty

On 20 December 1996 in Geneva, two Treaties of the World Intellectual Property Organisation were adopted.The first, i.e. *WIPO Copyright Treaty* focused on copyright law and the second, i.e *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms* on artistic performances and phonograms. Both Treaties had as an objective to grant protection to owners of the copyright and neighbouring rights with respect to usage of their properties in the digital environment .

The Copyright Treaty included computer programs and databases as the subject matter of copyright, which by then had not enjoyed specific protection in the international copyright law, by granting them the same protection as was vested with literary works in the light of the Berne Convention and TRIPS [8].

Establishing a common position on reproduction rights caused the most problems to the signatories of the Treaty. The Treaty contains neither regulations on the reproduction right understood as temporary record of a work (e.g. in a computer memory RAM) nor references to the notion of electronic publication or the digital environment. Those issues were presented in a joint statement of the parties i.e. Agreed Statements Concerning the WIPO Copyright Treaty [9]. The Statements say that the reproduction right and its limitations granted under art. 10 of the Treaty are applicable in the digital environment and in particular with reference to using works in electronic format [10]. Although the Agreed Statements are not legally binding, they affect interpretation of the Treaty (e.g. by such organisations as IFLA or EBLIDA).

Confirming the maintenance of the existing exceptions and limitations to copyright law and the fact that they will also apply to the digital environment, WIPO countries thus rejected the opinion that "digital means different". The signatories of the agreement can use the existing regulations with respect to the digital environment; they can also create new exceptions from the rules where this is justified.

Three steps test

One of the best known ways to assess the applicability of limitations and exceptions from copyright law is so called the **Berne three-step test.**

The **Berne three-step test** is a set of constraints on the limitations and exceptions to exclusive rights under national copyright laws. It was first applied to the exclusive right of reproduction by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967. Since then, it has been transplanted and extended into the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty. The most important version of the test is that included in Article 13 of TRIPS:
Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

In the WIPO document on Limitations and exceptions of copyright and related rights in the digital environment, the three-step test was applied to libraries within the following scope:

1. The kind of library or archives use needs to be clearly specified and the limits of this defined (first step). Clearly, a provision allowing wholescale copying of works for library users on request would be too wide. This may not be so in the case of a provision that limits copying by the library or archives to copying for preservation purposes or which

allows them to make copies for the research purposes of users and within the limits that these individuals may do for themselves.

2. The competing economic and non-economic normative considerations will need to be balanced: to what extent does the proposed exception conflict with uses that right-holders may reasonably expect to exploit for themselves, and to what extent should this be displaced by the educational or other purpose that the exception is intended to confer (second step)?

3. What limits are placed on the copying that is allowed, and do these prevent any prejudice to the right-holder from being unreasonable?Depending upon the amounts that may be taken, the persons by whom the copying can be done, and whether or not the copying is subject to an obligation to pay fair compensation, it may be that the third step is satisfied [11].

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 (Copyright Directive)

The problems of copyright and neighbouring rights became the subject of works of the European Communities considerably late. Despite the fact that the first relevant directives came from the beginning of the 1990s, in the last 14 years the European Union issued as many as 7 directives on this subject [12]. The most important from the point of view of the matter under discussion is 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, regulating the issue of digital exploitation of the protected intellectual property.

The first version of the Directive was issued in 1997. In the following year it was subject to consultation as a result of which more than 300 amendments were proposed. At first the Directive's content was not balanced, and clearly gravitated towards the copyright owners. If adopted, it would have made illegal many already existing rights to copying and using the works; i.e the rights regarded so far as the rights not detrimental to the interests of the copyright owners and necessary to maintain the balance of public interests. As a result of many social consultations and lobbying of organizations representing consumers' interests, the European Parliament approved the amended version of the directive, which was still far from perfect.

The Directive's objective was *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* [13] . The Preamble A to the Parliament's Resolution on the information society, culture and education (Morgan Report A4-0325/96) of 13 March 1997 provides that *the European model of the Information Society must be driven by democratic, social, cultural and educational concerns, and not dominated by economic and technological interests* [14].

However, point 31 of the Directive's preamble provides that *"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 [15].

Bearing this in mind, library circles in countries of the entire unified Europe got actively involved in drawing up and implementing the directive in national legislations, rightly sharing the opinion that libraries as intermediaries between copyright owners and users of the works protected by copyright law, strive to maintain balance between the rights of both parties. In accordance with the position adopted by IFLA, *Libraries will continue to play a critical role in ensuring access for all in the information society. Properly functioning national and international networks of library and information services are critical to the provision of access to information. Traditionally, libraries have been able to provide reasonable access to the purchased copies of copyright works held in their collections. However, if in future all access and use of information in digital format becomes subject to payment, a library's ability to provide access to its users will be severely restricted* [16].

From the very beginning of works on the Directive, librarians stressed that its provisions were restrictive with respect to the right to reproduce works and that there were risks arising from freedom to implement exceptions and limitations of art. 5 of the Directive. EBLIDA [17] and many national library organisations joined lobbying activities. The resistance of national circles was so strong that only two countries, i.e. Denmark and Greece implemented the Directive within the specified term, i.e. by the end of 2002.

Quite significant was the example of the United Kingdom, where the implementation of the Directive was rescheduled many times [18] due to objections of the representatives of the organizations representing consumers' interests (including library organizations) as to the form of its implementation.

The Directive assumes that all member states should approximate their national legislations to achieve full harmonization of national legislations with respect to copyright in the information society. However, it does not assume any amendments in the regulations that do not infringe correct functioning of the internal market. This seemingly logical structure was the most feared by library environment. It turned out that in fact each country is likely to have to introduce to its national legislation a different regulation on say, article 5 of the Directive specifying exceptions and limitations of its application. As a result, what according to the Directive should be harmonized would not be harmonised at all.

The position of IFLA on copyright in the digital environment

IFLA, earlier mentioned in this presentation, is an international non-governmental organisation established to initiate, support and coordinate research and scientific works and to disseminate information on all issues related to libraries and information activities in the world. IFLA also organizes meetings and trainings in this field. IFLA represents the interests of libraries and their users throughout the world. The Committee on Copyright and other Legal Matters (CLM) working within the framework of IFLA, which along with EBLIDA (the European Bureau of Library, Information and Documentation Associations) participates in international discussion on copyright, has issued many works and guidelines on using copyright in libraries [19].

IFLA supports the effective introduction of copyright law and is aware of a significant role played by libraries in controlling and facilitating access to the growing amount of information in electronic format, stored locally or in distant servers. Librarians and information specialists work with the objective to respect copyright and actively protect

relevant works both printed and electronic from piracy, illegal use or unauthorized exploitation. For a long time libraries have been regarded as institutions playing an important role in informing and educating their users about the significance of copyright and have acted in favour of observing the relevant laws.

In 2000 the Committee on Copyright and other Legal Matters together with EBLIDA and with cooperation of the British LACA (Libraries and Archives Copyright Alliance) elaborated a joint position on Copyright in the Digital Environment, according to which *librarians and information professionals recognise, and are committed to support the needs of their patrons to gain access to copyright works and the information and ideas they contain. They also respect the needs of authors and copyright owners to obtain a fair economic return on their intellectual property. Effective access is essential in achieving copyright's objectives* [20].

In order to introduce balance between interests of owners of copyright and users of libraries, IFLA elaborated the Summary of Principles**:**

1. *In national copyright legislation, exceptions to copyright and related rights, allowed in the Berne Convention and endorsed by the WIPO Treaties should be revised if necessary to ensure that permitted uses apply equally to information in electronic form and information in print.*
2. *For copying over and above these provisions there should be administratively simple payment schemes.*
3. *Temporary or technical copies which are incidental to the use of copyright material should be excluded from the scope of the reproduction right.*
4. *For works in digital format, without incurring a charge or seeking permission all users of a library should be able to:*
   - *browse publicly available copyright material;*
   - *read, listen to, or view publicly marketed copyright material privately, on site or remotely;*
   - *copy, or have copied for them by library and information staff, a reasonable portion of a digital work in copyright for personal, educational or research use*
5. *Providing access to a digital format of a protected work to a user for a legitimate purpose such as research or study should be permitted under copyright law.*
6. *The lending of published physical format digital materials (for example C-D Roms) by libraries should not be restricted by legislation.*
7. *Contractual provisions, for example, within licensing arrangements, should not override reasonable lending of electronic resources by library staff.*
8. *Legislation should give libraries and archives permission to convert copyright protected materials into digital format for preservation and conversation related purposes.*
9. *Legislation should also cover the legal deposit of electronic media.*
10. *National copyright legislation should render invalid any terms of a license that restrict or override exceptions or limitations embodied in copyright law where the license is established unilaterally by the rightholders without the opportunity for negotiation of the terms of the license by the user.*
11. *National copyright laws should aim for a balance between the rights of copyright owners to protect their interests through technical means and the rights of users to circumvent such measures for legitimate, non-infringing purposes.*
12. *Copyright law should enunciate clear limitations on liability of third parties in circumstances where compliance cannot practically or reasonably be enforced* [21].

In IFLA's opinion, if libraries and citizens cannot access information free of charge, in extreme situations, such as for public interest, educational or research purposes, there is

a risk that only those who can afford to pay charges will be able to benefit from the advantages of the information society. This may lead to even greater division into the information rich and information poor. Moreover, copyright law should not discriminate against people with impaired sight or hearing or with learning difficulties. The processing of materials in a way that makes them accessible should not be regarded as infringement of copyright but only as ensuring justified access to information.

Amending the Polish Act on Copyright and Neighbouring Rights

The Polish copyright law has been amended many times in recent years and the amendments were aimed to approximate the Polish copyright law to the law of the European Union, including the Copyright Directive.

According to legislators, the assumption of the latest draft act on amending the copyright and neighbouring rights act (entered into force at the beginning of 2004) is the adjustment to the Directive provisions specifying a number of obligatory and facultative limitations of the author's exclusive rights, taking into account new forms of exploitation and in particular using works and subjects of neighbouring rights through computer networks and digital techniques.

The most important provisions of the new act with respect to libraries are as follows:

- Widening the statutory licence under the act, vested with libraries, to make their resources available for research or educational purposes through terminals situated in library premises; and
- Admitting, under certain conditions, temporary and incidental, reproduction of works without the author's consent.

The Polish Librarians Association issued its own opinion on the draft of the proposed amendments stressing the libraries' rights regarding allowed public use. However, only a part of our suggestions has been taken into consideration by the legislators.

The world expansion of the Internet as a means of daily communication, characterized by lack of territoriality based on state frontiers, makes it necessary to unify legal protection of authors on the international scale. Such a law should cover not only copyright issues but also many other fields of law, related to privacy, technologies and inventions. Such a common cyber law would exclude conflicts of different legal systems and eliminate ambiguities and interpretations of any kind. The idea of a cyber law is interesting and various circles have raised it, however, it seems that such a law is unlikely to be implemented in the near future. Even an attempt to harmonise the copyright within the European Union has not been successful due to exceptions of the Copyright Directive, making it possible to implement the Directive in individual countries a different way. So far only the international Treaties ratified by majority of the states, mentioned in this paper, can provide a substitute of such a common law of the cyber space.

The direction of changes in the latest legal regulations constitutes a great danger. The Internet has broken all barriers in access to works, which on the one hand satisfied the users of protected works, but on the other hand frustrated their authors. The lobbying of copyright owners is stronger that consumers' lobbying and the Copyright Directive provides the sign, that the long-lasting compromise between the right holders and the public has been disturbed.

Libraries have always been custodians of equal and free access to information and respect for the law. Therefore, it is essential that we should support balanced copyright that favour development of the entire society and provide strong and efficient protection for

copyright owners and appropriate access to information in order to stimulate creativity, new solutions and development of science and education. This is why IFLA promotes the idea that “Digital is not different”.

1.Matlak A. Prawo autorskie w społeczeństwie informacyjnym. Zakamycze, Kraków 2004. s. 14

2.A.Kopff (w:) S. Grzybowski, A. Kopff, J.Serda: Zagadnienia prawa autorskiego. Warszawa 1973. s. 155

3.Article 9 (1) of the Convention *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.*

4. Article 9 (3) of the Convention *Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention*.

5. Matlak, A. s. 26

6. Article 10 of the Agreement *Computer Programs and Compilations of Data 1.Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).*

7. Article 10 of the Agreement *Computer Programs and Compilations of Data* 2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

8. Article 4 of the Copyright Treaty Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

9. AGREED STATEMENTS CONCERNING THE WIPO COPYRIGHT TREATY adopted by the Diplomatic Conference on December 20, 1996. Retrieved April 10, 2004 from the World Wide Web http://www.wipo.int/documents/en/diplconf/distrib/96dc.htm

10. *It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.*
It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

11. WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment. Geneva, June 23 to 27, 2003. Retrieved April 10, 2004 from the World Wide Web http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf

12. Matlak. s. 37.

13. Retrieved April 10, 2004 from the World Wide Web http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32001L0029

14.Resolution on the Commission communication to the Council, European Parliament, Economic and Social Committee and Committee of the Regions "Learning in the Information society: action plan for a European education initiative" (COM(96)0471 C4-0528/96) (OJ C 222 , 21/07/1997). Retrieved April 10, 2004 from the World Wide Web http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=51997IP0200(01)&model=guichett

15.Retrieved April 10, 2004 from the World Wide Web http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32001L0029

16.The IFLA Position on Copyright in the Digital Environment. Retrieved April 10, 2004 from the World Wide Web http://www.ifla.org/III/clm/p1/pos-dig.htm

17.More documents on EBLIDA`s webpage http://www.eblida.org/topics/position/position.htm

18. The UK Patent Office. Implementation of the Copyright Directive (2001/29/EC) and related matters. Retrieved April 10, 2004 from the World Wide Web http://www.patent.gov.uk/copy/notices/2003/copy_direct3.htm

19.More information available on IFLA webpage http://www.ifla.org/III/clm/copyr.htm

20.The IFLA Position on Copyright in the Digital Environment. Retrieved April 10, 2004 from the World Wide Web http://www.ifla.org/III/clm/p1/pos-dig.htm

21.The IFLA Position on Copyright in the Digital Environment...