WE NEED TO LOOK BEHIND THE SCENES …

The EU copyright acquis contains, with at present 11 Directives and two Regulations (and counting), the largest number of European Union legislative acts in the field of intellectual property. Yet, among all this copyright legislation there is one Directive that stands out, due to its rather unique features. Directive 2001/29/EC on Copyright in the Information Society1 is unique because it implemented the two WIPO ‘Internet Treaties’ WCT and WPPT into EU law and set the tone for the harmonization of the essential exclusive rights and exceptions in EU copyright. This Directive is a cornerstone of copyright protection in the European Union; and it is particularly its implementation into national law that matters. This is why this book, which assesses the crucial impact the Directive has had on national law, is so instrumental.

But at the outset, it is worth having a closer look at how this Directive came about. For me, to have been responsible, at the European Union’s side, for the negotiations of these WIPO Treaties and for the Directive 2001/29/EC, including its preparation, the negotiations between the EU institutions and its implementation by EU member states, was both a very challenging and most rewarding experience. Against this background, it gives me great pleasure to look behind the scenes and share with you my views on the history, the structure and the assets of the Directive.

At the same time, neither this Foreword nor the entire book can avoid the obvious question: to what extent can a Directive enacted in 2001 still be relevant for today’s copyright? In fact, on its face it is an easy argument to make that the Directive 2001/29/EC, which is heading for its 20th birthday, can hardly meet today’s challenges to copyright protection, with all the radical and ongoing changes that this field has seen in terms of technology, business models and consumer behaviour. In order to do justice to this argument, we need to extend our analysis of this Directive to the developments that have occurred in recent years – from the interpretation of the Directive’s provisions by the European Court of Justice, European Commission initiatives and reports of the European Parliament to the wider picture, including the recent international law-making at the World Intellectual Property Organization (WIPO) and, last but not least, the possible interface that the so-called ‘Brexit’ may have with the Directive.

All this we need to keep in mind when having a closer look behind the scenes.

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OF THIS VERY SPECIAL DIRECTIVE

Directive 2001/29/EC, due to its significant horizontal impact, is often referred to as 'The Copyright Directive'. It was adopted at the end of a particularly active phase of copyright harmonization, which took place between 1991 and 2001. Within not more than ten years, seven Directives were prepared, negotiated and adopted, each of them milestones in their own right. First of all, the Software Directive\(^2\) set the tone and decided on the parameters for the protection of computer programs including decisions on back-up copies, reverse engineering and decompilation, all new territory for national and international copyright. These decisions and the negotiations on the Software Directive had both a pioneering and an educational dimension. A pioneering function because this process paved the way for coming to grips with copyright protection in the new environment of computer software technology and, almost as a side effect, inspired and facilitated the negotiations on the WTO/TRIPs Agreement.\(^3\) An educational effect because the preparatory work and the negotiations on this Directive showed us, the Commission officials, who had to mastermind copyright harmonization from the Commission angle, that co-operation with stakeholders was a key to success, and that a common language had to be developed amongst rightholders, users and intermediaries to establish an updated and sustainable balance of rights and interests in the new world of computer software. Both aspects were instrumental for all other copyright directives that followed, including Directive 2001/29/EC, the subject of this book.

In fact, the other copyright directives enacted between 1992 and 2001 were based on, and benefited from the experience of the Software Directive, even if these instruments concerned different areas and were arguably more sector- or issue-specific. This is certainly true for the Rental Rights Directive\(^4\) (although it contained a distinct horizontal element in its Chapter 2 that harmonized, for the first time, the main related rights); for the Satellite and Cable Directive\(^5\) (which tackled the two rather separate problems of facilitating cable retransmission of broadcasts and satellite broadcasting); for the 'Term Directive'\(^6\) (which harmonized the terms of protection for authors’ rights and related rights, and, as a side effect, settled the long-disputed issue of the creativity and thus the 'work' character of photographs); for the Database Directive\(^7\) (which corresponded to the rather specific need for protecting non-creative databases); and for

\(^3\) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994.
the Resale Right Directive\(^8\) (which, again, addressed the specific needs of a specific sector). All of these six directives originated in the 1988 Green Paper\(^9\) and/or the 1990 Work Programme;\(^10\) they all obviously dealt with copyright harmonization in one way or another; and, no one would deny their importance and their direct impact on copyright protection and on the exploitation of copyright and related rights-based goods and services.

And yet, despite all this, only Directive 2001/29/EC of 22 May 2001 ‘on the harmonisation of certain aspects of copyright and related rights in the information society’ is often called ‘the Copyright Directive’. This is no coincidence, because this Directive stands out and is different from all the others, though, chronologically speaking, it is only the second to last of the seven copyright directives that were enacted between 1991 and 2001. This Information Society Directive, as I prefer to call it, is indeed special for several reasons – and this because of its unique features:

- It was not, unlike the other copyright directives, a follow-up of the 1988 Green Paper and/or the 1990 Work Programme deliberations. It was rather based on two pillars or needs, namely (1) the need to adapt copyright to the new environment of what used to be called the Information Society and is nowadays referred to as the Internet environment – a new issue that only emerged in the mid-1990s and was first addressed in the Green Paper of 1995;\(^11\) and (2) the need to implement the obligations of the two (then) new WIPO ‘Internet’ Treaties, WCT and WPPT of 1996.\(^12\) Thus:
  - The Directive adapted copyright to the new environment of the Internet – the most radical change that the copyright environment has ever witnessed; and
  - it was the first and – at the time – the only Directive in the area of copyright that implemented international obligations, as it prepared the EU and its member states for accession to the above-mentioned WCT and WPPT.

- On substance, this Directive addresses and harmonizes all basic rights and exceptions in the area of copyright and related rights for both authors and the holders of the main related rights, and is thus the most ‘horizontal’ of all copyright directives.

- Even compared with the two more recently adopted EU copyright directives, Directive 2012/28/EU and Directive 2014/26/EU,\(^13\) the Information Society Directive is still the one with the most far-reaching conceptual and horizontal approach. I would claim that this continues to be true even in comparison with the most recent EU legislation in this field, which addresses specific needs or issues.\(^14\)

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\(^9\) Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, COM (88) 172 final of 7 June 1988.


\(^12\) WIPO Copyright Treaty (WCT) of 20 December 1996, and WIPO Performances and Phonograms Treaty (WPPT) of 20 December 1996.


And, therefore, in the light of these features and of the enormous impact that this Directive has had on copyright protection in the EU Internal Market and beyond, it isarguably the most important of all copyright directives that have been enacted to date andis likely to maintain its particular relevance also in the future.

PREPARING THE CHOICE ABOUT THE DEGREE OF EU HARMONIZATION – NOT AN EASY CALL

Indeed, looking back and from today’s perspective (more than 17 years after the Information Society Directive was adopted and now that both WIPO Treaties have been acceded to by the EU and its member states), the need for a deliberate decision at the time on the degree of harmonization seems to have been the only possible conclusion. But for us, who were responsible in the European Commission services for making ends meet, it was not all that obvious in the second half of the 1990s, if and how we could really meet the challenge: updating copyright protection in the EU Internal Market for the digital environment.

To be sure, some sort of a master plan or basic orientation existed already back then, and it comprised several building blocks. First, the 1995 Green Paper served as a preparatory, consultation document that sought to translate the findings of the Bangemann Report into copyright language and needs. The follow-up Communication of 1996 identified the main action points. But it was clear (to us) from the outset that legislation at EU level on copyright in the Information Society would have to go hand in hand with a close coordination at the international level: finding common ground and agreeing on updating the rules of the Berne Convention and of the Rome Convention with our main trading partners, especially the USA, clearly was key for any successful and sustainable EU legislation in this area – which, to a large extent, was unknown territory to all of us. As recently as 1994, when the WTO/TRIPs Agreement was adopted as part of the Marrakesh Agreement, close co-operation with the USA had proven fruitful. Consequently, the then already ongoing preparatory work on a Protocol to the Berne Convention was channelled into the negotiations on new copyright treaties designed to adapt copyright protection to the digital environment – the second building block of the Information Society Directive was about to be created.

the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, OJ 2017 L 242/1 (20 September); Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2017 L 242/6 (20 September); on the way forward as I would perceive it, see below.

16 Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM (96) 568 final, 20 November 1996.
19 The TRIPs Agreement (fn. 3 above) is part of the Uruguay Round Agreements signed at Marrakesh on 15 April 1994.
FOREWORD

Immediately after the two new WIPO Treaties were adopted on 20 December 1996, we started the preparatory work on the Directive. In early 1997, we organized numerous brainstorming meetings in the Copyright Unit of DG Internal Market to determine the direction to take. Together, we soon realized that we stood – again – at a crossroads: should we ‘just’ try to draft a proposal for a Directive to implement as quickly as possible the WIPO Treaties – limit ourselves, so to speak, to a ‘copy and paste’ operation that would cast the obligations of the WCT and the WPPT into an EU Directive? I have to admit, this was an appealing thought and quite a temptation, because it might have saved us time. After all, simply reiterating the results achieved in Geneva in 1996 could not have been overly controversial; at first sight at least, this looked like a fairly easy call. But, then again, as eye witnesses and active participants in the Diplomatic Conference of 1996, we knew all too well the shortcomings of the WIPO Treaties, extending from the total absence of a provision on the reproduction right and suitable exceptions thereto for digital acts such as caching and browsing, to the lack of provisions on enforcement against intermediaries. Moreover, reiterating the rules of the WCT and the WPPT with all their gaps would hardly have lived up to the ambitions and needs for a meaningful EU harmonization instrument as spelled out and claimed in the 1995 Green Paper and the 1996 Communication.

To make a long story short, we decided for the more ambitious and, as we were convinced, the more sensible approach to the new proposal: the target was, and in our view had to be, to find operational common ground at the EU level amongst the EU family. This implied the harmonization of the reproduction right, of the right of communication to the public including the right of making available, and of the distribution right together with an exhaustive list of permitted exceptions thereto. And this implied notably pronouncing ourselves on digital private copying and its interface with Digital Rights Management (DRM) systems (i.e., the protection of technological measures), on injunctive relief measures regarding infringements on the Internet, and many other issues that were excluded from the WIPO Treaties either because no agreement could be found or because there was no need in the first place at international level.

It was clear from the outset that, with this – in our view necessarily – ambitious and comprehensive approach, we had chosen to do it the hard way. It was equally clear that this approach meant controversy and a rough ride at every level of decision-making, be it within our own hierarchy in the Commission, with Commissioners and their Cabinets, with member states in the Council, with the European Parliament, and, last but not least, with stakeholders, the ‘interested circles’.

And, talking about the latter, it thus came as no surprise when, on the eve of the adoption of the proposal for a Directive20 by the Commission, that is, on 9 December 1997 around 10 p.m., a representative of a group of rightholders called me to state firmly: ‘We will never be able to agree on this proposal – better no proposal than this one!’ Luckily, she later changed her mind, and I do not think she has ever regretted it.

DIFFICULT NEGOTIATIONS IN DIFFICULT TIMES (ALREADY BACK THEN)

Little more than one year after the WIPO Treaties were adopted, we found ourselves back at the negotiating table with the same member states’ experts with whom we had coordinated the

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EU positions at the Diplomatic Conference of December 1996, albeit with a different target and in a different setting: the Council Working Group in Brussels. The negotiations on the proposal started in the Council Working Group in January 1998. I will spare the reader the details of the co-decision procedure,\textsuperscript{21} but it is usually in the Council Working Group where the most intensive negotiations and discussions on a directive amongst EU member states’ experts take place.

Although the same experts spoke to each other, it was a whole new ball game. New, or at least different, were the objectives of the exercise: we now had to develop a harmonized legal EU framework for copyright protection in the new digital environment – as much harmonization as necessary and achievable, but as much flexibility for EU member states as possible. These were the targets. No longer were we talking about a fairly general set of international rules like in the WCT and the WPPT, but about the creation of secondary EU law subject to the interpretation of the European Court of Justice. For the functioning of the EU Internal Market, a higher degree of harmonization was needed than that provided for by the WIPO Treaties. Consequently, the cut into the national legal and cultural traditions could potentially be much deeper. Now, we did not have to convince third-country negotiating partners of EU positions, but we had to convince each other within the EU family of the then 15 member states of the parameters of copyright protection in much more detail and on the basis of a much more elaborate assessment of the scope of protection, of the balance of rights and exceptions and all the interests involved.

But something else was now different, too. What had already been lurking beneath the surface at the 1996 Diplomatic Conference reared its head in discussions about the copyright liability of access and other Internet service providers, and in particular the application of the right of reproduction to acts of caching or browsing. These issues had become the new reality of copyright protection. Indeed, many perceived copyright protection as being in the way of the new interactive digital services, as being a stumbling block to the promised land of unlimited communication, preferably free creative interaction and entertainment. Copyright works and the subject-matter of related rights were degraded to ‘content’ and their protection was widely seen as being outdated.

Negotiating a proposal for an ambitious copyright directive with difficult substance in an increasingly hostile atmosphere – this was the challenge we were facing.

And this challenge was inherent in all the issues that kept us busy over three years of negotiations with the EU member states and the European Parliament. The discussions circled around issues such as DRM systems/technological measures protection vs. collective rights management and copyright ‘levies’; ‘technical copying’ and notably acts of caching and browsing vs. the right of reproduction; digital vs. analogue private copying; a high level of copyright protection vs. a more ‘pragmatic’ approach to copyright and related rights; the freedom of member states to define and apply suitable exceptions to the rights themselves vs. an exhaustive and limited list of permitted exceptions; injunctive relief from intermediaries vs. wholesale exceptions from liability for access and Internet service providers.\textsuperscript{22} The conflicts of interests that were reflected in all these issues were well represented amongst members of the European

\textsuperscript{21} Under Arts 114 and 294 TFEU – formerly Arts 95 and 251 ECT – for the adoption of a Directive joint agreement by the European Commission, the Council and the European Parliament is required.

\textsuperscript{22} We also had to mind the interface with the Directive on electronic commerce (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1 (17 July) that was drafted and negotiated in parallel by other DG Internal Market colleagues.
Parliament, member states and stakeholders. Regarding the latter, the differences between the various groups of stakeholders were strong and accompanied the negotiations throughout: rightholders vs. users; rightholders vs. intermediaries; or rightholders vs. rightholders – the Information Society Directive served as a catalyst for these discussions. Not surprisingly, emotions and controversies were running high, up to the last phase of the discussions: even in the Second Reading before the European Parliament, initially still more than 200 Amendments were tabled – at the time, an unusually high number.

**THERE ARE MAJOR ACHIEVEMENTS OF THE DIRECTIVE ...**

What about the results then – were they worth the hassle, or isn’t it as it allegedly always was? Does the Information Society Directive not follow the same patterns, does it not fall into the same cliché as, it is claimed, many harmonization directives do? This cliché goes as follows. Inspired by influential lobbies and driven by its alleged ‘natural’ desire for over-regulation and harmonization of everything, the Commission presents an (in the perception of many: overly) ambitious proposal, which is watered down during the discussions in the Council and the European Parliament. Miraculously, the number of Recitals increases, while the substantive provisions become softer and in some cases are even meaningless. The result is a compromise and often the lowest common denominator that does not even require a vote, because it is deprived of meaningful content, ignoring the warning that too much ‘consensus’ equals nonsense. Once adopted, the ball is back in the court of member states, which have trouble implementing the Directive due, again, to its blurred compromise character and lack of clarity. Some member states implement too late, others wrongly, and eventually the European Court of Justice will have to pick up the pieces (with sometimes not all-too-obvious results); all this takes years and generates little benefit. ‘Außer Spesen nichts gewesen’ would be the appropriate term for this in my German mother tongue, which translates roughly into ‘Not worth the time and effort’. Is all this true for the Information Society Directive? Does it not, despite all good intentions, correspond to this stereotype?

I clearly and firmly believe that it does not. The above-mentioned cliché can already easily be rejected for all the other (older) copyright directives, and in my view, it has not materialized in the more recent ones, either. And this cliché certainly does not apply to the Information Society Directive, which was worth all the sometimes lengthy and almost never-ending discussions. In my view, the result is not less than one of the most relevant of all copyright directives – measured by its achievements.

Already on its face, the scope of the Directive is comprehensive. It harmonizes the reproduction right in Article 2, the right of communication to the public and the right of making available to the public of works and the right of making available to the public of the subject-matter of related rights in Article 3, as well as the distribution right in Article 4. It establishes obligations for the protection of technological measures in Article 6 and of rights-management information in Article 7. And it obliges EU member states in Article 8 to provide for certain sanctions and remedies.

Nevertheless, what was really achieved is not always obvious. Take Article 2 on the reproduction right. Only those who witnessed the claim of access and other Internet service
providers that certain acts of virtual copying, such as caching, should fall completely outside the scope of copyright and not be subject to the right of reproduction, as such copies would not qualify as ‘copies’ in the copyright sense, can really appreciate how difficult it was to agree on the wide definition of the term ‘reproduction’ that is contained in this Article (‘direct or indirect, temporary or permanent reproduction by any means and in any form’). This highest common denominator of the definitions contained in the Software and Rental Rights Directives reflects nothing else but a comprehensive harmonization of the reproduction right as the ‘king’s right’ of copyright, and it was achieved almost against all odds.

Article 3 on the right of communication and making available to the public certainly draws closely upon the related provisions of the WCT and the WPPT. And yet, read together with Recitals 23 to 27, it provides for an integral solution for the right of making available that accommodates both the continental-European and the Anglo-Saxon approaches.

Another example of the main achievements is Article 4(2), where the prohibition of international exhaustion is spelled out more clearly than in previous copyright directives, notably in the Software Directive.

Or take Article 5(1), the only mandatory exception in the entire Directive.24 It may seem odd, at least from a rightholder’s perspective, to list Article 5(1) as an achievement. And yet, it is one for all stakeholders: read together with Recital 33 and Article 8(3), this provision settles the, at the time highly controversial and emotional, dispute about the copyright relevance of acts of virtual transmission in networks and the respective responsibility of access and other Internet service providers. In this way, Article 5(1) has served both rightholders and intermediaries as an appeasement provision; and, it succeeded in solving an issue that the 1996 Diplomatic Conference had to exclude completely as a potential deal-breaker in order not to jeopardize its successful conclusion.

Another achievement is the combination of the exceptions for acts of private copying and reprography in Article 5(2)(a) and (b) with the obligation to pay ‘fair compensation’ – albeit only arguably so, because some may consider the new term ‘fair compensation’ a halfway house that raises more questions than answers. In this context, Recital 35 is of some help although it clearly indicates the compromise nature of the provision.25 Nevertheless, the mere fact that rightholders’ concerns about acts of private copying were recognized and found their way into the Directive is to be marked as an achievement, not only from the viewpoint of the one who is at the origin of the term ‘equo compenso’, the Rapporteur of the European Parliament in First Reading, Roberto Barzanti. At the same time, the provisions on private copying provide for a balanced approach to digital private copying and DRM systems.

But probably the most significant achievement in the context of Article 5 regarding exceptions and limitations to the rights relates to the very concept of this provision. As follows from the text of the Article and is explicitly confirmed in Recital 32, the list of permitted exceptions in Article 5 is ‘exhaustive’ – no other exceptions or limitations on top of those listed in Article 5 may be applied by member states, or be permitted under national law. The achievement is legal certainty, the price to be paid was the length of this list of exceptions (from eight permitted exceptions listed in the Commission’s proposal the list was increased during the

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24 Art. 5(1) was the only mandatory exception at the time of the adoption of the Directive. Two other mandatory exceptions were added only much later, one by the Orphan Works Directive 2012/28/EU (see above fn. 13), and another one by Directive (EU) 2017/1564 (see above fn. 14) with a view to implementing the obligations under the Marrakesh Treaty (Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled) of 27 June 2013.

25 Even to the point of it being misunderstood; cf., the CJEU’s judgment in the Padawan case (fn. 28 below).
negotiations to a total of 20). At the same time, these 20 categories of exceptions and limitations are not mandatory; member states may, but are not obliged to apply these exceptions, and many if not most member states do not apply all of them. The legal certainty therefore extends to the exceptions that may be applied.

Finally, a major step forward is Article 5(5). This provision subjects all exceptions and limitations listed in Article 5 to the three-step test, thus potentially linking the scope of all of them to what is absolutely needed, and reflects an appropriate balance of users’ and rightholders’ interests. Article 5(5) is also remarkable from an institutional viewpoint: it has made all exceptions and limitations in Article 5, even though formulated in general terms, subject to EU law, and thus submits their correct and fair application in the last instance to the scrutiny of the European Court of Justice.

This Foreword would become even longer than it already is if I were to address in detail also all the other achievements that this Directive has to offer. It may suffice to point out that a number of other almost hidden treasures amount to the, on balance, pretty significant list of added value elements of the Directive. There is Article 6 on the protection of technological measures. To be sure, it is based on the obligations that were introduced at international level by the WCT and the WPPT; but it goes far beyond. In a very subtle and effective manner, Article 6 in conjunction with the entire set of the seven sophisticated Recitals 47 to 53 addresses the interface between the protection and application of technological measures on the one hand and the functioning of exceptions and limitations to the rights on the other – in particular, but not only, regarding private copying. And this is not the only place where the Directive has succeeded in striking the balance between rights and exceptions, between the interests of rightholders and users, and the often-diverging views of EU member states. In Article 8(3), as well, new territory on injunctive relief was explored and courageous decisions were taken – assisted by the explanations provided in the related Recital 59.

…but also, some perceived or claimed shortcomings

Too much praise for this Directive? Quite naturally, the temptation of overstressing the positive sides of the Directive is strong for those who were in charge of guiding this big ship to a safe harbour. But we could not have managed this job without always having been aware of its real or potential shortcomings.

For a start, on the negative side of the balance sheet is the long duration of the negotiations. In fact, more than three years is not a short time and still above average in the field of copyright harmonization.

Some may claim that a number of controversial issues were shifted to the Recitals rather than settling on solutions in the substantive Articles of the Directive. In fact, during the negotiations, the number of Recitals (61 in total) almost doubled as compared with the 38 Recitals in the Commission’s original proposal.27

26 On the additional mandatory exceptions introduced later by Directive 2012/28/EU and by Directive (EU) 2017/1564 see above (fn. 24); and this is of course without prejudice to future EU copyright legislation that may provide for more mandatory exceptions; see the Commission’s proposal for a Directive on copyright in the Digital Single Market (fn. 30).

Moreover, the Council minutes reflect a total of 13 statements, of which two were issued jointly by the Council and the Commission (one on Recital 33 and a clarification on ‘proxy caching’, and another one on the need for a follow-up on rights management); six by the Commission alone (on Recitals 35 and 50 regarding acts of ‘time-shifting’, on Article 4(2) regarding exhaustion, confirming that there is no ‘hierarchy of exceptions’, promising appropriate proposals in case of any imbalances regarding the ‘optional exceptions’, and promising to closely survey technological and market developments with a view to considering ‘further adaptations of the existing Directives’); one jointly by Italy, Spain, and France (on the need for a high level of protection, a satisfactory degree of harmonization, and legal certainty within the context of the exceptions); another one jointly by Denmark, Ireland, Luxembourg, the Netherlands, Finland and Sweden (on Art. 4(2), in favour of international exhaustion); and three unilateral ones by Luxembourg (complaining about the ‘closed list’ of exceptions and its alleged negative effects on the development of the Information Society), the Netherlands (on Art. 5(3)(c) claiming flexibility for the interpretation of the term ‘press’), and Sweden (on Art. 9 and the term ‘legal deposit requirements’) respectively.

In fact, this may give the impression that, although the Directive was adopted unanimously (the abstention of Luxembourg does not count as a negative vote and thus does not impose any qualification on that unanimous vote), a number of unresolved issues or at least diverging perceptions prevailed. In any case, it certainly goes to show that some points of substance in the Directive left a number of member states with a feeling of uneasiness. And, as ambitious and comprehensive as this Directive may be, some may deplore the long list of exceptions, others complain about its exhaustive nature as a ‘closed list’; one may point at potential uncertainties regarding the application of exhaustion to (hybrid) acts of virtual distribution under Article 4 and Recital 29; some may have difficulties in dealing with the term of ‘fair compensation’; and others may hold that the interface between digital private copying and DRM systems is only a ‘half way house’.

**ORIENTATIONS ON THE WAY FORWARD**

Indeed, the discussions on these issues and on the possible need to revise the Directive so as to adapt it to new technological and market developments have never stopped. The discussions were fuelled by the issues stakeholders had encountered when applying provisions of national law based on the Directive 2001/29/EC; and the decisions of the European Court of Justice related thereto did their part.

Apparently, it was not always easy for the Court to interpret, and to strike a balance on the basis of, this rather complex and compromise-driven piece of EU legislation. Two examples may suffice: (1) the Court has repeatedly insisted that, under the requirement of ‘fair compensation’ for rightholders in cases of allowed acts of private copying (Art. 5(2)(b) of the Directive), proving harm to the rightholders was a precondition for any payment;28 and, (2) the Court has held that platform providers could only be held liable for acts of hyperlinking if these acts reached a ‘new public’.29 These and other decisions have raised many eyebrows and could

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28 *Padawan SL vs. SGAE*, C-467/08, ECLI:EU:C:2010:620.
even be seen to be in conflict with the ‘three-step test’ (Art. 5(5) of the Directive). Such case law could indicate that the time may have come for clarifications by the EU legislator.

Indeed, over the last years, attempts to amend the Information Society Directive have gained more shape. Following a number of consultations, Commission Communications and European Parliament Reports, the European Commission in 2016 tabled its proposal for a Directive on copyright in the Digital Single Market, which suggests several amendments to the Directive 2001/29/EC. This proposal reflects at least some of the issues that have occurred recently and seeks to respond to changes in the digital environment. So, to no surprise, the proposal focuses on additional exceptions to the reproduction right for acts of ‘text and data mining’ and the ‘preservation of cultural heritage’, as well as exceptions to several rights for acts of ‘digital and cross-border teaching activities’. In addition, it seeks to clarify the responsibility of platform providers for certain copyright-relevant acts.

While the negotiations on this proposal were ongoing, three other pieces of legislation were added to the copyright acquis, namely Directive (EU) 2017/1564 and Regulation (EU) 2017/1563, both concerning the use of protected works or other subject matter for the benefit of visually impaired persons, and the Portability Regulation (EU) 2017/1128.

It is worth noting that neither these three acts of legislation nor the above-mentioned proposal have called into question the main parameters of Directive 2001/29/EC – also in the view of the European Parliament and member states it seems to remain the overall recognized standard and common denominator. This may be due to a deliberate decision on the merits in favour of the Directive, but it may also be owed, on a more trivial notion, to the fact that among 28 member states with rather divergent views, agreement on a more radical change of paradigm is simply not feasible.

Speaking of 28 member states – who knows what kind of impact the UK’s departure from the European Union, the soon to be finalized so-called ‘Brexit’, will have on the Directive. From the UK’s perspective, it may be worth preserving the standards of the Directive as an asset even when it is no longer an EU member state. From the perspective of the (then) remaining EU member states, the UK’s departure may make EU law-making in the field of copyright easier – after all, a good portion of the compromise enshrined in the Information Society Directive bears its handwriting – or even more difficult as the case may be, because pragmatism will also be called for in the future and the UK’s input to this effect may be missed.

THE RESULT OF OUR CLOSER LOOK: THE ACCURATE IMPLEMENTATION OF THE DIRECTIVE INTO NATIONAL LAW MATTERS

Where does this leave us, and what has the look behind the scenes and into the future of the Directive revealed?

First, the Directive on the whole has remained, on balance, a stable cornerstone of EU copyright. It has a solid basis: at the time of its adoption, all EU institutions have agreed – unanimously in the Council amongst member states, and with vast majorities in the European Parliament. In the high-speed environment of ever-evolving technology and changing consumer habits, paved with questions about the value of intellectual property, high-running

31 On this Directive and the Regulations see above (fn. 14).
expectations of what new and extended digital services should do for our economies and society, continuous heavy lobbying from all sides, significant legal and cultural differences, and diverging appreciation of the EU’s role in all this – to date, the common ground has prevailed.

Secondly, we owe this stability to the substance of the Directive. It has provided us with a solid and at the same time forward-looking legal framework for a wide range of issues. It seems to be fairly future-proof. The overall prudent amendments to the Directive as contained in Directive (EU) 2017/1564 and as envisaged in the European Commission proposal of 2016 on Copyright in the Digital Single Market indicate that the EU institutions agree on this notion and are determined to preserve it as an asset and as a basis for future EU copyright legislation. Of course, the final shape of this new Directive on Copyright in the Digital Single Market remains to be seen.

Thirdly, at the same time, over all these years, the Directive has never been static. It has been part of a dynamic process, triggered by its adoption of course, but constantly fed through its interpretation by the decisions of the European Court of Justice. Indeed, rightly or wrongly, on several occasions, the Court has intervened to fill gaps that were left by the EU legislator.

But EU member states, too, have contributed to this dynamic process and to filling the Directive with life, notably through implementing it into their national law. Such implementation or, more generally speaking, what has happened to the Directive at the national level of EU member states, has provided constant feedback to the European Court and eventually to the EU legislator. One could almost say that it has resulted in a mutual exchange on how the Directive works or should work. In this respect, the Contact Committee under Article 12(3) of the Directive has provided for the appropriate forum.

Moreover, it seems essential to me to look not only at the text of the Directive and its Recitals, but also to bear in mind its negotiating history and the main thrust of its provisions – after all, an EU Directive is not national law, but rather it reflects, by way of the necessary compromise, the joint efforts of many different players and countries. In short, one cannot avoid ‘looking behind the scenes’ of the Directive.

Based on this understanding, the responsibility of the European Commission for safeguarding the functioning of the EU Internal Market and monitoring the implementation and impact of the Directive in this regard has been shared with all those who benefit from a properly functioning copyright aquis, including EU member states, and in fact all stakeholders.

And I am pleased to say that, with this book, the editors and contributors have also done their part and shared this responsibility: with its detailed and up-to-date information on how the Directive functions in each and every EU member state, this book will shed a clear light on the various aspects of the Directive and on the elements of the process that safeguards its functioning.

Jörg Reinbothe