

**TECHNOLOGICAL PROTECTION MEASURES IN THE UNITED STATES, THE
EUROPEAN UNION AND GERMANY**

HOW MUCH FAIR USE DO WE NEED IN THE “DIGITAL WORLD”?

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A. Introduction

The technological advances of the past few years have made possible new uses for copyrighted works and have given users previously unknown opportunities for exploiting copyrighted works. On the other hand, copyright owners face the fear of losing royalties. To protect their rights, they have devised new measures of protection in the digital environment like copy-protection software or password systems. However, because these new systems were subject to challenges by skilled users or hackers, experts at the World Intellectual Property Organization (WIPO) and in national governments concluded that the efforts of the copyright owners deserve protection. The contemplated provisions are embodied in the WIPO Copyright Treaty,¹ adopted at the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in December 1996.

For the first time, Article 11 of the Treaty mandates the protection of these technological measures in a multilateral treaty.² In the United States, Article 11 WCT has been implemented through the Digital Millennium Copyright Act³ which, among other things, introduced the new Chapter 12 to Title 17 of the United States Code. In the European Union, the “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”⁴ (EU Copyright Directive) contains a provision concerning technological protection measures in its Article 6.

This paper will analyze the implementation systems in the U.S. and the European Union and illustrates the differences, particularly the impact on the rights of beneficiaries of exceptions

¹ WIPO Doc. CRNR/DC/94, available at <http://www.wipo.int/treaties/ip/wct/index.html> (last visited April 13, 2003) [hereinafter WCT].

² JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996, Article 11 WCT note 10 (2002).

³ Pub. L. No. 105-304, 112 Stat. 2860 (October 28, 1998) [hereinafter DMCA].

⁴ 2001 OJ L 167 [hereinafter EU Copyright Directive].

and limitations. The question of how much “fair use” is appropriate in the digital world is addressed and the suggested solution, based on the market failure theory of fair use, respects the rights of all the parties involved, while preserving the bargain struck between the copyright owner and the public, on which the copyright laws are based.

The main focus, however, will be on the implementation of the EU Copyright Directive in Germany through the “Law for the Regulation of Copyright in the Information Society” which has been passed by the German Parliament on April 11, 2003.⁵ This law adds two new sections into the German Copyright Act which will contain the basic provisions for the protection of technological protection measures. This article explains and examines the new provisions in the German law, especially the obligation of copyright owners to provide certain beneficiaries of exceptions and limitations with the means for circumventing copy control technology. In the course of the article, the radically different approach of the EU Copyright Directive and the German Copyright Law towards “fair use” will be described. The system of fair use in the European Union is more narrowly tailored and in most cases requires compensation of the copyright owner. This requirement is preserved in the new German provisions and, therefore, corresponds to the suggested solution for a restriction of fair use in U.S. Copyright Law based on the market failure theory.

However, the European system is not perfect. Certain flaws have to be corrected and ambiguities might have to be clarified in order to truly value the bargain between the copyright owners and the public that is sought to be preserved with the new provisions, and to prevent a

⁵ Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft. The bill has been adopted as recommended by the legal committee of the Lower House of Parliament (“Bundestag”). The recommendation is published in Bundestags-Drs. 15/837 of April 9, 2003, available at <http://dip.bundestag.de/btd/15/008/1500837.pdf> (last visited April 19, 2003). The bill as proposed by the government, including the government’s explanations, is published in Bundestags-Drs. 15/38 of November 6, 2002, available at <http://dip.bundestag.de/btd/15/000/1500038.pdf> (last visited April 12, 2003). Now, the law has to be approved in its enacted version by the Bundesrat, signed by the President and published in the Federal Law Gazette (“Bundesgesetzblatt”) to enter into force. As of May 1, 2003, this has not happened.

circumvention of the provisions protecting certain privileged beneficiaries by the copyright owners.

B. Article 11 WCT

Article 11 WCT provides that:

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 or permitted by law.

I. Background

The WCT was adopted at the WIPO Diplomatic Conference in Geneva on December 20, 1996 and came into force on March 6, 2002.⁶ The WCT is a special agreement within the meaning of Article 20 of the Berne Convention.⁷ Therefore, interpretation of any provision of the WCT must not result in less protection than that granted by the Berne Convention.⁸ Prior to the Diplomatic Conference, several proposals were made for the inclusion of preparatory activities or a knowledge requirement.⁹ Not surprisingly, we will find these proposals again in subsequent parts of this paper.

II. Content of Article 11 WCT

The WCT only sets forth minimum requirements. The contracting parties may go beyond the provisions of the WCT and afford the technological measures a greater protection.¹⁰

Article 11 WCT mandates protection of “effective technological measures.” The definition of the term is left to the domestic law of the contracting parties.¹¹ Under Article 11

⁶ Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996: Ready to Come into Force*, [2002] EUROPEAN INTELLECTUAL PROPERTY REVIEW [E.I.P.R.] 199.

⁷ Article 1(1) WCT.

⁸ Mihaly Ficsor, *Copyright for the Digital Era: The WIPO “Internet” Treaties*, 21 COLUM.-VLA J.L. & ARTS 197, 200 (1997); Reinbothe & von Lewinski, *supra* (fn. 6), at 200.

⁹ REINBOTHE & VON LEWINSKI, *supra* (fn. 2), notes 4 and 5.

¹⁰ REINBOTHE & VON LEWINSKI, *supra* (fn. 2), notes 22, 26, 28.

WCT, only the measures “used by authors” are protected. In practice, however, “such measures are not used or applied by the authors themselves, but rather by their agents or licensees acting with the author’s consent.”¹² Therefore, the provision must be interpreted to cover not only to measures applied by authors, but also those applied by agents or licensees.¹³

The language of Article 11 WCT only mandates protection of technological measures “that restrict acts ... which are not authorized by the authors concerned or permitted by law.”¹⁴ Thus, contracting parties are not obliged to protect measures that restrict acts that are either authorized by the author or permitted by law by way of an exception or limitation.¹⁵ For example, circumvention of copy protection for the purpose of making a copy for private use, which is a recognized exception of the author’s exclusive rights¹⁶, would be allowed if a country has implemented only the provisions of Article 11 WCT. However, “Article 11 WCT provides in this respect for minimum protection, which Contracting Parties may go beyond.”¹⁷ Thus, contracting parties can and in fact do provide protection even for measures that restrict acts permitted by law.

The WCT requires protection “against the circumvention” of technological measures. This covers only the actual act of circumventing, but not preparatory activities, such as manufacture and importation, or the circumvention device, i.e. the technology, itself. The question which arises then is whether such a protection would be “adequate” and “effective” as required by Article 11 WCT.¹⁸ Arguably, acts of circumvention are likely to be committed by individuals in their homes, and will hardly be controllable. Therefore, to provide effective remedies and

¹¹ REINBOTHE & VON LEWINSKI, *supra* (fn. 2), note 24.

¹² REINBOTHE & VON LEWINSKI, *supra* (fn. 2), note 25.

¹³ *Id.*

¹⁴ Article 11 WCT.

¹⁵ See MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET, THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION, note C11.10 (2002), REINBOTHE & VON LEWINSKI, *supra* (fn. 2), note 27.

¹⁶ *Cf.* § 53(1) of the German Copyright Act which provides that it shall be permissible to make single copies of a work for private use.

¹⁷ REINBOTHE & VON LEWINSKI, *supra* (fn. 2), note 28.

¹⁸ *Cf.* REINBOTHE/VON LEWINSKI, *supra* (fn. 2), note 23.

adequate protection, contracting parties should not only prohibit the act of circumvention itself, but also preparatory acts, thereby preventing the acquisition of the devices necessary to circumvent the technological measures.¹⁹

In sum, Article 11 WCT requires protection only against the actual circumvention of protection measures that restrict acts that are either not authorized by the author or not permitted by law. Thus, under the WCT-scheme, copyright owners are only protected against acts that would also be an infringement of copyright. As will be seen, both the U.S. and the European Union go beyond this minimum level of protection.

C. Implementation in the United States – 17 U.S.C. § 1201

In the United States, 17 U.S.C. § 1201 implements Article 11 WCT by protecting technological measures against circumvention.

I. Background

The DMCA was signed into law on October 28, 1998. In Title I, it implemented the WIPO Treaties of 1996 – the WCT and the WIPO Performances and Phonograms Treaty (WPPT) – and created the new Chapter 12 of Title 17 of the U.S.C. The provisions of this Chapter became effective on the effective date of the DMCA. Only the access control anti-circumvention provision in § 1201(a)(1)(A) was delayed until October 28, 2000 in order to see how the implementation of access control technology “affect(s) availability of works in the marketplace for lawful uses.”²⁰

II. Content of § 1201

¹⁹ Cf. Dean S. Marks & Bruce H. Turnbull, *Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses*, [2000] E.I.P.R. 198, 201; REINBOTHE & VON LEWINSKI, *supra* (fn. 2), notes 22, 23. It is not entirely clear whether these authors interpret Article 11 WCT to cover preparatory acts or whether it is to be interpreted in a way that the contracting parties should prohibit preparatory acts.

²⁰ MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12A.03, A3 (2002).

Section 1201 contains three basic prohibitions: (1) it prohibits circumventing access control technology in § 1201(a)(1)(A); (2) trafficking in access control technology in § 1201(a)(2); and (3) trafficking in copy control technology²¹ in § 1201(b)(1). It does not prohibit the actual circumvention of copy control technology because such a prohibition is not necessary. The circumvention of copy control technology would result in unlawful copying, and thus, in copyright infringement which is remedied by §§ 501-513 of the Copyright Act²² unless the copying is exempted from liability.²³ The actions prohibited by § 1201 are distinct from copyright infringement.²⁴

Certain uses for specified purpose are exempted from the anti-circumvention prohibitions in § 1201(d)-(j).

III. Fair use before and after the DMCA

1. The “traditional” fair use doctrine

Section 107 of the Copyright Act contains a limitation on the exclusive rights of the copyright owner, known as the fair use defense to copyright infringement. It is “traditionally defined as a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”²⁵ This affirmative defense was first developed by the courts, and was later codified in the 1976 Copyright Act.²⁶ The availability of the fair use defense is not limited to particular fact patterns, but rather depends on a balancing of the four fair use

²¹ § 1201(b)(1) prohibits trafficking in any technology that circumvents a technological measure that “effectively protects a right of a copyright owner...” Thus, copyright owners can use technological measures to protect any of the exclusive rights granted by § 106 of the Copyright Act. However, the copyright owner will usually seek protection against unlawful copying of the work.

²² See FICSOR, *supra* (fn. 15), C11.15.

²³ The user could for example have a fair use defense. Since § 1201 is not intended to limit fair use, *see* § 1201(c) and *infra* C.III.2.a), this would not result in unlawful copying and the user would (theoretically) face no liability at all. In order to ensure this result, § 1201 contains no prohibition on circumventing copy control measures. *See* Reinbothe and von Lewinski, *supra* (fn. 6), [2002] E.I.P.R. at 205.

²⁴ Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium”*, 23 COLUM.-VLA J.L. & ARTS 137, 138 (1999); for the EU Copyright Directive: Kamiel J. Koelman, *A Hard Nut to Crack: The Protection of Technological Measures*, [2000] E.I.P.R. 272, 273.

²⁵ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

²⁶ *See* NIMMER ON COPYRIGHT (*supra* fn. 20) § 13.05.

factors that § 107 enumerates: (1) the purpose and character of the use, (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. These factors, however, are “not an exhaustive enumeration.”²⁷ There are no bright-line rules for determining whether a use falls within the scope of the defense, rather “the statute ... calls for a case-by case analysis.”²⁸

The fair use defense has been recognized by the courts in cases such as comment²⁹, criticism³⁰ and parody,³¹ news reporting³², research³³ and teaching³⁴. These examples are also mentioned in § 107. However, a balancing of the factors is nevertheless necessary in every situation. There is no automatic exception if the purpose of the use is, for example, said to be parody.³⁵

2. Fair use and the DMCA

a) In Theory

Upon cursory examination of § 1201 nobody would expect that problems concerning fair use could occur. As § 1201(c)(1) expressly states: “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” In addition, the circumvention of copy control technology is not prohibited by § 1201. This

²⁷ NIMMER ON COPYRIGHT (*supra* fn. 20) § 13.05, *see Harper & Row*, 471 U.S. at 549; Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1603 (1982).

²⁸ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

²⁹ *Campbell*, 510 U.S. 569; *SunTrust Bank v. Houghton Mifflin, Co.*, 268 F.3d 1257 (11th Cir. 2001).

³⁰ *Id.*

³¹ *Id.*

³² *Harper & Row*, 471 U.S. 539 (1985). In this case, the fair use argument was finally rejected after balancing the fair use factors with particular emphasis on the fact that the material used by defendant was unpublished and the “heart” of the work.

³³ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1995). In this case, the fair use defense was rejected because the court found that the copying was archival and merely superseded the original work.

³⁴ *Cf. Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996), stating that the copying for teaching purposes by professors and students might have been protected by the fair use defense. *Id.* at 1389.

³⁵ *Cf.*, for example, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 479 (1984) (Blackmun, J., dissenting).

means that the user only has to fear liability for copyright infringement under Chapter 5 of the Copyright Act unless he can claim the fair use defense.

b) In Practice

The practice, however, is different. Fair use is only a defense against a claim for copyright infringement. Since the violations under § 1201 are independent from copyright infringement,³⁶ the fair use defense does not help against a claim for violation of the anti-trafficking or access control anti-circumvention provisions. It has been suggested that access for fair use purposes “will not be a violation of the [access control] anti circumvention provision.”³⁷ However, the fair use doctrine only limits the exclusive rights granted to the copyright owner by § 106; it is a defense against an infringement claim. Under § 106, the copyright owner does not have a right to control access to the work. Therefore, the “fair user” cannot claim the defense if he wants to access the work in order to make fair use.³⁸ This can easily be demonstrated in the “real world”: A reporter who wants to write a comment about a play has to buy a ticket for the theater in order to view the play. A scientist has to buy the book which he needs for his research. The only right that the fair use defense grants is the right to copy (parts of) the work without being concerned about liability for copyright infringement.

With regard to works that are not protected by access control technology or to which the user has access, the law allows circumvention of copy control technology. However, the user usually will not have available the means that are necessary to circumvent the technology unless he is sophisticated enough to manufacture them himself. The manufacture, distribution, importation or offering of circumvention technology is not allowed.³⁹ It is possible to argue that

³⁶ Cf. Ginsburg, *supra* (fn. 24), 23 COLUM.-VLA J.L. & ARTS at 138; Koelman, *supra* (fn. 24), [2000] E.I.P.R. at 273.

³⁷ Bentley J. Olive, *Anti-Circumvention and Copyright Management Information: Analysis of New Chapter 12 of the Copyright Act*, 1 N.C.J.L. & TECH. 2 (end of II.B.1.) (2000).

³⁸ Cf. NIMMER ON COPYRIGHT (*supra* fn. 20) § 12A.06 (B.2.).

³⁹ See § 1201(b)(1).

circumvention technology that enables copying for fair use purposes is not primarily designed for the purpose of circumvention or has commercially significant purpose or use other than to circumvent protection measures.⁴⁰ But courts have not accepted this argument and did not follow the holding from the Sony case⁴¹. In Sony, the Supreme Court held that Sony was not liable for contributory copyright infringement for the distribution of VCRs because the technology was capable of substantial non-infringing uses.⁴² With regard to circumvention technology, the courts have held that Congress expressly refused to incorporate Sony and that every device that is capable of circumventing copy control measures has substantial infringing uses.⁴³ Thus, unless a technology is developed which is able to distinguish between lawful circumvention – for purposes of fair use or of public domain works – and unlawful circumvention which results in copyright infringement, users will not have the necessary devices to exercise their rights. This places a substantial burden on the fair use.

The question then arises whether fair use actually is still necessary in a world of the Internet and communication by telephone, fax and email. One of the justifications asserted for the fair use defense is that the transaction costs for acquiring a license to use the work would exceed the royalties that would be owed to the copyright owner. This fair use justification is known as the market failure theory.⁴⁴ In a world of instant communication at negligible cost, it is

⁴⁰ § 1201(b)(1) only prohibits trafficking in circumvention devices if they are “primarily designed or produced for the purpose of circumventing protection”, have “only limited commercially significant purpose or use other than to circumvent protection”, or “are marketed . . . for use in circumventing protection.”

⁴¹ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). In this case, Universal City Studios, Inc. sued Sony for contributory copyright infringement based on the manufacture and distribution of VCRs which enabled the users to tape copyrighted material and, thus, make copies of those works. The Supreme Court based its decision on the substantial non-infringing uses that the VCRs had. It held that home time-shifting by users was fair use and, thus, no copyright infringement.

⁴² Cf. *Sun Trust Bank*, 268 F.3d at 1269.

⁴³ See *Universal City Studios v. Reimerdes*, 111 F.Supp.2d 294, 323-324 (S.D.N.Y. 2000).

⁴⁴ Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 853-854 (2001). The market failure theory was introduced into copyright law by Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982). Professor Gordon proposed a three-part test for determining fair use: “(1) [whether] market failure is present; (2) [whether] transfer of the use to defendant is socially desirable; and (3) [whether] an award of fair use

theoretically easy to obtain a license quickly and at a fair price. Thus, under the market failure theory there is no justification for fair use. However, fair use does not in every case just serve to correct a market failure. It also “excuses certain ‘socially beneficial’ uses, such as criticism and parody.”⁴⁵ In these cases, the fair use defense assures that the use can be made at all because the copyright owner is likely to refuse to license his work for such a use.⁴⁶

A solution is to enter into a new system of balancing in order to determine whether we still need fair use in today’s world. On the one hand, there are traditional fair uses that can only be justified by the market failure theory while, on the other hand, the market failure theory in some situations is completely ancillary to the social justifications of fair use. In cases such as parody and criticism, it is probable that the user will not be able to acquire a license or that he will acquire a license only against payment of a huge royalty. Then, the market failure theory does not justify fair use because the royalty payment will always outweigh the transaction costs. In these situations, fair use is still a valid defense in the digital world. The same is true where the copyright owner is likely to have no or only a minor interest in royalties, which would for example be the case for de minimis copying. Fair use is also still a valid defense where the efforts to acquire a license would be too burdensome, for example because it is difficult to find out who the copyright owner is, though the latter will rarely be the case considering today’s possibilities to obtain information.⁴⁷ In all other cases, however, the new measures of communication, and especially the inclusion of copyright management information, have largely facilitated obtaining licenses so that the interests of the copyright owners which are protected not only by law, but also

would not cause substantial injury to the incentives of the plaintiff copyright owner.” *Id.* at 1614. This economic approach to fair use also played an important role in *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) and *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996).

⁴⁵ Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C.L. REV. 557, 584 (1998).

⁴⁶ *Cf. Campbell*, 510 U.S. 569, 592.

⁴⁷ Especially the implementation of copyright management information (see § 1202(c) for a definition) into the works facilitates this determination.

by the Constitution outweigh the interests of the users. Examples for the latter category would be teaching, research and news reporting.

D. Implementation in the European Union – Article 6 of the EU Copyright Directive

The protection of technological measures mandated by Article 11 WCT has been implemented in Article 6 of the EU Copyright Directive.

I. Background

The EU Copyright Directive has been adopted by the European Parliament and the Council of the European Union on May 22, 2001 and entered into force on June 22, 2001. A directive has no direct applicability in the Member States; rather it has to be implemented by the Member States into national laws. It allows the Member States to choose the means of achieving the result that the directive mandates.⁴⁸

Article 13 of the EU Copyright Directive provides that “Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002.” So far, only Denmark and Greece have implemented the directive into national law.⁴⁹ In Germany, the law which implements the provisions of the EU Copyright Directive has been passed, but not entered into force yet.⁵⁰

⁴⁸ Article 249 of the Treaty establishing the European Community (*available at http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf*, last visited April 4, 2003).

A directive may have “vertical direct effect” in the Member States under certain conditions. It is necessary that (1) the member state has not implemented the directive into national law by the time that is proscribed in the directive, (2) the directive is beneficial to the individual, and (3) the directive is sufficiently precise to have direct effect. The citizen then has a claim against the Member State for damages. *Cf.* Francovich and Bonifaci v. Italy, Case C-91/92, 1991 ECJ CELEX LEXIS 7156 (E.C.J. 1991). However, directives do not have “horizontal direct effect”, i.e. effect between the citizens. *Cf.* Faccini Dori v. Recreb Srl., Cases C-6/90 and C-9/90, 1994 ECJ CELEX LEXIS 6949 (E.C.J. 1994). Regarding the direct effect of European Community Law: *see* Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 307 (1999).

⁴⁹ Email from the Secretariat General of the Council of the European Union of April 7, 2003. In Denmark the EU Copyright Directive has been implemented through the “Lov om ændring af ophavsretsloven”, Lov n° 1051 of

The directive intends to prevent “restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency” through unharmonized legislative activities at the national level.⁵¹ It states that a high level of protection is necessary because copyright and related rights “are crucial to the intellectual creation.”⁵²

The provisions of the EU Copyright Directive with respect to protection of technological measures do not affect national provisions “which may prohibit the private possession of devices, products or components for the circumvention of technological measures.”⁵³ Additionally, the provisions on the protection of computer programs in the “Directive on the Legal Protection of Computer Programs”⁵⁴ are not affected.⁵⁵

II. Content of Article 6 EU Copyright Directive⁵⁶

December 17, 2002, p. 7881. In Greece, the pertinent law is the legislative act nr. 3057/2002, FEK A n° 239 of October 10, 2002, p. 4535.

⁵⁰ See *supra* fn. 5.

⁵¹ EU Copyright Directive, Recital (6).

⁵² EU Copyright Directive, Recital (9).

⁵³ EU Copyright Directive, Recital (49).

⁵⁴ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, 1991 OJ L 122. The Directive prohibits putting into circulation or possession of means for the circumvention of devices applied to protect a computer program in its Article 7(1)(c).

⁵⁵ EU Copyright Directive, Recital (50).

⁵⁶ Article 6 of the EU Copyright Directive provides:

Article 6 Obligations as to technological measures

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

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

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.

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

1. Anti-Circumvention and Anti-Trafficking Provisions

Article 6(1) of the EU Copyright Directive mandates protection against the circumvention of any effective technological measure. The EU Copyright Directive does not distinguish between access control and copy control measures; rather, the provision “cover[s] any type of technological measures used by right holders ... [and thereby] goes far beyond the scope of the DMCA.”⁵⁷ Thus, the circumvention of copy control technology is covered by the prohibition in Article 6(1) EU Copyright Directive, and not by § 1201.⁵⁸ Another difference between the EU Copyright Directive and the DMCA is that Article 6(1) EU Copyright Directive contains a subjective element that limits its scope: the act must be carried out with the knowledge that it is circumventing protection measures, or alternatively, the person circumventing the measures must have “reasonable grounds to know” that the conduct will constitute a circumvention.⁵⁹ The

transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

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

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

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

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

⁵⁷ Séverine Dusollier, *Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise*, [2003] INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW [IIC] 62, 69

⁵⁸ Cf. Terese Foged, *U.S. v. E.U. Anti-Circumvention Legislation: Preserving the Public’s Privileges in the Digital Age?*, [2002] E.I.P.R. 525, 535; Michael Hart, *The Copyright in the Information Society Directive: An Overview*, [2002] E.I.P.R. 58, 62.

⁵⁹ Article 6(1) EU Copyright Directive.

language indicates that mere negligence is not sufficient, rather gross negligence or intent is required.⁶⁰

The anti-trafficking provisions contained in Article 6(2) EU Copyright Directive are substantially the same as those in § 1201.⁶¹ Article 6(3) EU Copyright Directive defines the terms “technological measures” and “effective”. These definitions are similar to those in § 1201(a)(3)(B) and § 1201(b)(2)(B).⁶² A technological measure is “any technology ... that ... is designed to prevent or restrict acts ... which are not authorized by the rightholder...” Such a technology will be deemed effective “where the use of a protected work ... is controlled by the rightholders through application of an access control or protection process ... which achieves the protection objective.”⁶³

The provisions of Article 6(1), (2) and (3) EU Copyright Directive are mandatory. They have to be implemented by the Member States, though the “exact form of domestic legislation ... is left to the discretion of each Member State.”⁶⁴

2. Article 6(4) EU Copyright Directive

The major difference between the provisions in the DMCA and the EU Copyright Directive lies in Article 6(4) EU Copyright Directive which partially mandates and partially allows “appropriate measures [to be taken by the Member States] to ensure that rightholders make available to the beneficiary of an exception or limitation ... the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where the beneficiary has legal access to the protected work or subject-matter concerned.”

⁶⁰ Cf. Gerald Spindler, *Europäisches Urheberrecht in der Informationsgesellschaft [European Copyright Law in the Information Society]*, [2002] GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 105, 116: “The Directive does not limit the protection only to intentionally acting persons, rather it also includes negligence, whereas the formulation portends rather to gross than to mere negligence.” (author’s translation)

⁶¹ Foged, *supra* (fn. 58), [2002] E.I.P.R. 525, 536.

⁶² *Id.* at 535.

⁶³ Article 6(3) EU Copyright Directive.

⁶⁴ Foged, *supra* (fn. 58), [2002] E.I.P.R. at 536.

With this provision, the EU Copyright Directive not only gives the user a defense against a claim for circumvention of the protection measures, as the DMCA does, but helps the user in exercising his rights. “The European directive seeks to tip the balance in favor of the user, not at the stage of sanctions against circumvention, but at the earlier stage of the exercise of the exception constrained by a technological measure.”⁶⁵ Due to its nature as a directive, Article 6(4) does not define what the “appropriate measures” are. This decision is left to the implementing Member States.⁶⁶

Article 6(4) refers to certain exceptions and limitations that are contained in Article 5 of the EU Copyright Directive⁶⁷. Article 5 contains an exhaustive⁶⁸ list of exceptions and

⁶⁵ Dusollier, *supra* (fn. 57), [2003] IIC at 70.

⁶⁶ Cf. Foged, *supra* (fn. 58), at 538.

⁶⁷ Article 5 of the EU Copyright Directive provides:

Article 5 Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

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

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

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

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases

limitations⁶⁹ from which the Member States can generally “shop” and implement only those provisions that they wish to.⁷⁰ Only the exception in Article 5(1) EU Copyright Directive with regard to temporary acts of reproduction is mandatory and has to be enacted into national law.⁷¹ The discretionary⁷² list of Article 5(2), (3) EU Copyright Directive contains, inter alia, exceptions for photocopying, copying for private use (both subject to the payment of a fair compensation to the rightholder), use for illustration for teaching or scientific research, use for the benefit of

where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

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

⁶⁸ See Recital (32); Hart, *supra* (fn. 58), [2002] E.I.P.R. at 59.

⁶⁹ A more detailed description of the exceptions and limitations in European, and especially in German copyright law will follow in part F.I.

⁷⁰ Under Article 5(2) and (3), Member States may provide for the named exceptions and limitations. See Hart, *supra* (fn. 58), [2002] E.I.P.R. at 59.

⁷¹ See Hart, *supra* (fn. 58), [2002] E.I.P.R. at 59.

⁷² See fn. 70.

people with a disability, reproduction by the press of published articles on current economic, political or religious topics, quotations for purposes of criticism, use for purposes of caricature or parody, use for the purpose of research or private study and de minimis uses.

Article 6(4) subparagraph 1 obligates Member States to ensure that beneficiaries of certain exceptions and limitations can actually exercise their rights. These exceptions and limitations are photocopying (Article 5(2)(a)), non-commercial reproduction by libraries, educational establishments, museums or archives (Article 5(2)(c)), ephemeral recordings by broadcasting organizations (Article 5(2)(d)), non-commercial reproductions by social institutions (Article 5(2)(e)), illustration for teaching or scientific research (Article 5(3)(a)), uses for the benefit of people with a disability (Article 5(3)(b)) and use for the purposes of public security or performance of administrative, parliamentary or judicial proceedings (Article 5(3)(e)). Although it is mandatory to take “appropriate measures” to ensure that the user can exercise his rights, the Member States are not obliged to implement these exceptions into national law. Therefore, Article 6(4) subparagraph 1 creates an obligation only insofar as Member States decide to provide the pertinent exceptions and limitations in their respective national copyright laws.⁷³

With regard to private copying, the Member States may take measures to ensure the possibility that the beneficiaries are able to exercise their rights.⁷⁴ The implementation of this provision is in the discretion of the Member States. The Member States, however, cannot implement a privilege for private copying if the rightholder has already made reproduction for private use possible. In such a case, the rightholder can limit the number of copies to a reasonable number which is made clear by Article 6(4) subparagraph 2.⁷⁵

⁷³ See Foged, *supra* (fn. 58), [2002] E.I.P.R. at 536; Dusollier, *supra* (fn. 57), [2003] IIC at 74.

⁷⁴ Article 6(4) subparagraph 2.

⁷⁵ See Spindler, *supra* (fn. 60), [2002] GRUR at 118 (author’s translation).

Though the provision of Article 6(4) seems revolutionary in protecting the fair users' rights if compared to the DMCA, it has several questionable elements. Article 6(4) only applies to the anti-circumvention provision of Article 6(1), but not to the anti-trafficking provision of Article 6(2). "This means that, although circumvention for the specified lawfully excepted uses must be protected by the Member States, circumventing devices or services are excluded from their scope."⁷⁶ Therefore, it depends on the implementation chosen by the Member States whether the "revolution" that seemed to be about to start will actually be successful. Only if the Member States provide means to force the rightholder to permit the exercise of the excepted use, the provisions of Article 6(4) will be of value because otherwise "the user cannot be provided with a device which enables the circumvention of the technological protection measure" because these devices remain outlawed.⁷⁷ In addition, the user is not granted the excuse of self-help. He does not have a "right to hack" because the language of Article 6(4) subparagraph 1 only entitles the Member States to stipulate that the rightholder provides the user with the appropriate means, but not that the rightholder acts by himself.⁷⁸

The major drawback, however, is that the beneficiary has to have "legal access to the protected work" in order to make use of the exemption.⁷⁹ Article 6(4) does not help the user in getting access to the work. Whether such a right is on the other hand required by law will be examined later.⁸⁰

E. Implementation in Germany

I. Background

⁷⁶ Hart, *supra* (fn. 58), [2002] E.I.P.R. at 63.

⁷⁷ *Id.*

⁷⁸ See Spindler, *supra* (fn. 60), [2002] GRUR at 117 (author's translation).

⁷⁹ Article 6(4) subparagraph 1.

⁸⁰ *Infra* F.II.

In Germany, the provisions of the EU Copyright Directive and of Article 11 WCT are implemented through the “Law for the Regulation of Copyright in the Information Society.”⁸¹ On August 16, 2002 the German government introduced the “Bill for the Regulation of Copyright Law in the Information Society”⁸² into the Upper House of the German parliament in which the states are represented (“Bundesrat”).⁸³ The Bundesrat issued its comments on September 27, 2002. Subsequently, the bill was submitted to the Lower House of the German parliament, the “Bundestag”. The first of three required debates was held on November 14, 2002. The Bundestag has sent the bill to several committees, including the legal committee, the committee for consumer protection and the committee for culture and media. On December 20, 2002, the bill has additionally been sent to the committee for education, research and technological impact assessment.

The legal committee, which was in charge of the bill, issued a report and a recommendation on April 9, 2003.⁸⁴ The second and third debates in the Bundestag were held on April 11, 2003, and the law was passed as recommended by the legal committee. In comparison to the bill, it contains only minor changes. The law will enter into force after it has been signed by the President and published in the Federal Law Gazette.

II. Content of the new provisions

⁸¹ *Supra* fn. 5.

⁸² Entwurf eines Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft, Bundestags-Drs. 15/38 of November 6, 2002, available at <http://dip.bundestag.de/btd/15/000/1500038.pdf> (last visited April 12, 2003) [hereinafter UrhG-E].

⁸³ According to Article 76(2) of the German Constitution, bills by the federal government have first to be submitted to the Bundesrat. The German Constitution is available at http://www.bundestag.de/htdocs_e/info/gg.pdf (last visited April 6, 2003). For an overview of the German legislation procedure, see http://www.bundestag.de/htdocs_e/legislat/index.html (last visited April 6, 2003).

⁸⁴ Bundestags-Drs. 15/837 of April 9, 2003, available at <http://dip.bundestag.de/btd/15/008/1500837.pdf> (last visited April 19, 2003).

With regard to technological measures, the bill proposes to add several new provisions into the German Copyright Act⁸⁵. The provisions of Article 6 EU Copyright Directive will be implemented in the new §§ 95a, 95b UrhG⁸⁶.

⁸⁵ Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), v. 9.9.1965 (BGBl. I 1965, 1273), (available at <http://www.iuscomp.org/gla/>, statutes, Copyright Act; last visited April 6, 2003) [hereinafter UrhG].

⁸⁶ §§ 95a and 95b UrhG provide (author's translation):

§ 95a Protection of technological measures

(1) Effective technological measures for the protection of a work protected under this law or any other subject-matter protected under this law shall not be circumvented without the consent of the rightholder, provided that the person knows or it must under the circumstances be known to the person that the circumvention is pursued in order to gain access to such work or other subject-matter or to enable its use.

(2) Technological measures within the meaning of this law are technologies, devices or components that in the normal course of their operations are designed to prevent or restrict acts with regard to protected works or other subject-matter protected by this law that are not authorized by the rightholder. Technological measures are effective where the use of a protected work or other subject-matter is controlled by the rightholder through application of access control or protection process such as encryption, scrambling or other transformation, or copy control mechanism which ensures the achievement of the protection objective.

(3) The manufacture, import, distribution, sale, rental, advertisement for sale or rental and the possession for commercial purposes of devices, products or components or the provision of services which

1. are promoted, advertised or marketed for the purpose of circumvention of effective technological measures, or

2. have only a limited commercial purpose or use other than to circumvent effective technological measures, or

3. are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures

is prohibited.

(4) The prohibitions of paragraphs 1 and 3 do not apply to tasks and authorities of governmental agencies for purposes of protection of public security or enforcement of criminal laws.

§ 95b Enforcement of Exceptions and Limitations

(1) Insofar as a rightholder employs technological measures under this law, he shall make available to the beneficiaries of the provisions listed in the following the necessary means in order to benefit from these provisions, provided that the beneficiary has legal access to the work or the subject-matter:

1. § 45 (law enforcement and public security)

2. § 45a (disabled persons)

3. § 46 (collections for religious, school or instructional use), excluding religious use

4. § 47 (school broadcasts)

5. § 52a (making available to the public for purposes of teaching and research)

6. § 53 (reproduction for private and other personal uses)

a. paragraph 1 with respect to reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects,

b. paragraph 2 sentence 1 nr. 1,

c. paragraph 2 sentence 1 nr. 2 in conjunction with sentence 2 nr. 1 or 3,

d. paragraph 2 sentence 1 nr. 3 and 4 each in conjunction with sentence 2 nr. 1 and sentence 3,

e. paragraph 3,

7. § 55 (reproduction by broadcasting organizations)

Agreements which exclude the obligations under sentence 1 are invalid.

(2) The beneficiary of one of the named provisions can claim from the rightholder that he makes available the necessary means to exercise the respective right if the rightholder violates the obligation under paragraph 1. It shall be presumed that the offered means are sufficient if the means comply with an agreement between associations of rightholders and of beneficiaries of exceptions and limitations.

(3) The provisions of paragraphs 1 and 2 shall not apply where the works or other subject-matter are made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

1. Anti-Circumvention and Anti-Trafficking Provisions

§ 95a UrhG deals with the protection of technological measures and is nearly identical with Article 6 EU Copyright Directive. Paragraph 1 prohibits the circumvention of any technological measure without the rightholder's authorization. It also contains the subjective element which requires knowledge that the circumvention is intended to gain access to the work or to use the work in a way that violates an exclusive right of the rightholder. It is sufficient if the person acts in bad faith, which is presumed if he should have known that circumvention is the purpose of the act.

The government's explanation of the bill states that "circumventing acts solely for the purpose of scientific research (e.g. cryptography) are not covered."⁸⁷ It is not entirely clear what this statement means. If read together with Recital (48) of the EU Copyright Directive, it seems to imply that a scientist engaged in cryptography research does not intend to circumvent the protection measures. A cryptography scientist, however, knowingly circumvents the protection measures, and that is all Article 6(4) and § 95a(1) UrhG require. It may also be understood in a way that cryptography research does not violate one of the copyright owner's exclusive rights. However, § 53(2) nr. 1 UrhG contains an exception for reproduction for "personal scientific use[s]" which is one of the privileged uses in § 95b UrhG⁸⁸. Cryptography will usually involve a reproduction of the work in any manner. Thus, the scientist engages in an activity that is left to the exclusivity of the copyright owner, but he will not be liable for copyright infringement because he is the beneficiary of an exception. Yet, he might be liable for infringing § 95a UrhG

(4) Technological measures applied in order to comply with the obligations under paragraph 1, including measures applied in order to implement voluntary agreements, enjoy legal protection under § 95a.

⁸⁷ UrhG-E, *supra* (fn. 82), p. 62 (author's translation). This comment is apparently copied from Recital (48) of the EU Copyright Directive which states: "[L]egal protection [provided by Article 6 EU Copyright Directive and the domestic implementing legislation] should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography."

⁸⁸ *Cf. infra* F.I.

which is separate from copyright infringement. As Article 6(4) EU Copyright Directive, § 95b UrhG does not give a privileged beneficiary the right to hack. Consequently, the statement in the government's explanation is at least contradictory, if not wrong. The scientist knowingly circumvents protection measures, but he will probably be able to claim the benefit of the exception in § 53 UrhG which will, however, not shield him from liability under § 95a UrhG because this liability is distinct from copyright infringement.⁸⁹

The knowledge or bad faith requirement should not be mixed with the question of exceptions and limitations. Rather, the subjective element is only intended to exclude accidental circumventions from the scope of the prohibition.⁹⁰

Another element limiting the scope of the prohibition is that the technological measures must be employed for the purpose of protecting copyrighted works or other subject-matter protected by the UrhG. Technological measures protecting, for example, public domain works or not copyrightable subject-matter are not safeguarded by § 95a UrhG.⁹¹ The question, however, is whether the user will actually be able to circumvent the protection measures that are applied to public domain works. This very question is raised under the DMCA.⁹² Because the manufacture and distribution of circumvention technology is prohibited, only the user who is able to circumvent the protection measures himself will be able to use the public domain work.

The definition of “technological measures” and “effective” in § 95a(2) UrhG is identical to Article 6(3) EU Copyright Directive. The anti-trafficking provision of § 95a(3) UrhG is also a verbatim implementation of Article 6(2) EU Copyright Directive. The last paragraph of § 95a

⁸⁹ This result seems inconsistent as well: on the one hand, the scientist is privileged by § 53 UrhG and § 95b UrhG, on the other hand he is nevertheless liable because he circumvented the protection measure. This is based in the failure to provide a “right to hack” in European law. A privileged beneficiary only has a claim against the copyright owner for providing him with the means to circumvent the protection measure, but cannot do so by himself. For a suggestion to correct this result, *see infra* G.

⁹⁰ Cf. for the subjective element in Article 6(1) EU Copyright Directive Alvisse Maria Casellati, *The Evolution of Article 6.4 of the European Information Society Copyright Directive*, 24 Colum.-VLA J.L. & Arts 369, 375 (2001).

⁹¹ See government's explanation, UrhG-E, *supra* (fn. 82), p. 62.

⁹² *Supra* C.III.2.b), also *see infra* G. with regard to the impact on users' rights and suggestions.

UrhG exempts governmental agencies engaged in the protection of public security or enforcement of criminal laws from the prohibitions of the preceding paragraphs.

2. Rights of Beneficiaries of Exceptions and Limitations

The “revolutionary” provisions of Article 6(4) EU Copyright Directive will be implemented in § 95b UrhG. “The existing and well-proven system of exceptions and limitations ensures for the analog area a good balance between the legitimate claims of the copyright owners and those of the public. This balance would be endangered in the digital world if ... an all-encompassing protection which extends to preparatory measures was granted [through § 95a UrhG] without guaranteeing at the same time as an equivalent sufficient measures to successfully enforce the possibilities of use for beneficiaries of exceptions and limitations.”⁹³

a) Privileged Beneficiaries, General Provisions

Under § 95b(1) UrhG, the rightholder has the obligation to provide beneficiaries of the listed exceptions and limitations with the means necessary to benefit from the exceptions. § 95b(1) UrhG does neither list the exception for reproductions made by libraries, educational establishments, museums or archives⁹⁴ nor the exception for reproductions of broadcasts made by social institutions⁹⁵ because German copyright law does not contain these exceptions. The bill does not implement the possibility of Article 6(4) subparagraph 2 EU Copyright Directive to help beneficiaries of the general private-copying-exception in exercising their rights. The copyright owner’s obligation is, like the provision in the EU Copyright Directive, under the condition that the user has legal access to the work.

The parties cannot contract out of the provisions of § 95b(1) UrhG. The provisions are mandatory as expressly stated in § 95b(1) sentence 2 UrhG. It does not stipulate how the

⁹³ Government’s explanation, UrhG-E, *supra* (fn. 82), p. 63 (author’s translation).

⁹⁴ Article 5(2)(c) EU Copyright Directive.

⁹⁵ Article 5(2)(e) EU Copyright Directive.

rightholder shall enable the respective beneficiaries to exercise their rights, leaving room for several solutions, and the flexibility to adapt to new technological developments.⁹⁶

b) Enforcement of the User's Rights

The user does not have a right to circumvent the technological measures in case the rightholder does not provide him with the necessary means.⁹⁷ To ensure that the user is not deprived of his rights, § 95b(2) UrhG creates an individual claim that the user has against the rightholder. However, such an individual claim is usually not sufficient because the enforcement of that right is burdensome, might take a long time and binds the rightholder only in the individual case.⁹⁸

Therefore, to effectively protect the beneficiaries' rights, a new cause for group litigation⁹⁹ will be introduced into the "Law on Actions for an Injunction"¹⁰⁰ which gives certain associations the right to enforce the rights of the beneficiaries of one of the exceptions listed in § 95b(1) UrhG. Though this right to sue is remarkable, especially when given that such a group litigation right is an exception in German civil procedure, it is not certain that the group litigation

⁹⁶ See government's explanations, UrhG-E, *supra* (fn. 82), p. 64.

⁹⁷ Cf. for the EU Copyright Directive Spindler, *supra* (fn. 60), [2002] GRUR at 117.

⁹⁸ See government's explanation, UrhG-E, *supra* (fn. 82), p. 64.

⁹⁹ Group litigation ("Verbandsklage") is an exception in German civil procedure. Generally, only individual, subjective rights can be enforced in an action. Group litigation is only possible in certain limited cases such as "certain statutes concerning business self-regulation, consumer protection, labor law, industrial property, and environmental protection." See Harald Koch, *Non-Class Group Litigation under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 358 (2001).

¹⁰⁰ Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz), v. 26.11.2001, BGBl. I 2001, 3138, 3173 [hereinafter UKIG], available at <http://bundesrecht.juris.de/bundesrecht/uklag/index.html> (in German, last visited April 8, 2003).

The new provision will read:

§ 2a Injunctive relief under the Copyright Act

(1) A person who violates § 95b(1) of the Copyright Act can be sued for an injunction.

(2) The provision of paragraph 1 shall not apply where the works or other subject-matter are made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(3) § 2(3) shall be applied. (author's note: § 2(3) UKIG states that a suit cannot be brought if it would be improper under the circumstances, e.g. if the main purpose would be to constitute a claim for reimbursement of the legal costs for the action.)

Under the new § 3a UKIG, associations which non-commercially and not only temporarily foster the interests of the beneficiaries of the provisions named in § 95b(1) UrhG have standing to sue.

right will actually help the beneficiaries in enforcing their rights. The traditional field for group litigation rights is standard form contracts¹⁰¹ which are used by companies and violate the law because they unreasonably discriminate against the consumer. In these cases, the company is prohibited from using the clause in any contract in the future by way of an injunction. In case of § 95(b) UrhG, however, generally an action is required by the rightholder. Under § 2a UKlG, the association can only obtain an injunction which prohibits the rightholder from continue violating § 95b UrhG. Such an injunction does not help the individual beneficiary of an exception or limitation. He still must enforce his right individually unless the injunction has a “detering effect” on the rightholder who in turn initiates measures in order to fulfill his obligations under § 95b UrhG.

The second sentence of § 95b(2) UrhG has been proposed by the legal committee. It states that means that the rightholders offer the beneficiaries in order to exercise their rights and that comply with agreements between rightholders’ and beneficiaries’ associations are presumed to be sufficient.

Paragraphs 3 and 4 of § 95b UrhG implement Article 6(4) subparagraphs 3 and 4. A rightholder is not obliged to give beneficiaries the means for exercising their rights if the public may use the work under a contractual agreement. Because of this exception it will be easy for the rightholder to avoid the obligations under § 95b UrhG, e.g. by a simple click-wrap license.¹⁰²

3. Criminal and Civil Liability for Violating § 95a UrhG

Article 8 EU Copyright Directive mandates that Member States “provide appropriate sanctions and remedies” for violating technological measures. In addition, Member States must “ensure that rightholders ... can bring an action for damages and/or apply for an injunction”

¹⁰¹ See § 1 UKlG.

¹⁰² See for the provision in Article 6(4) EU Copyright Directive: Foged, *supra* (fn. 58), [2002] E.I.P.R. at 537-538; Dusollier, *supra* (fn. 57), [2003] IIC at 75.

against infringers and “intermediaries whose services are used by a third party to infringe a copyright or related right.”¹⁰³

§ 108b(1) nr. 1 UrhG makes a person who circumvents technological measures in violation of § 95a(1) UrhG with the intent to enable access or use of a work for himself or a third person subject to criminal liability unless the circumvention is solely for the own private use of the person or a person to whom the circumventor is personally related. In addition, the circumventor is subject to civil liability under the general provision of § 97 UrhG which provides for damages in case of intentional or negligent infringement of the copyright or any other rights protected under the Copyright Act. The liability for damages also attaches to actions that do not give rise to criminal sanctions, i.e. for circumventions for personal use.¹⁰⁴

F. “Fair Use” in the European Union and in Germany and the Impact of the New Provisions on “Fair Use”

I. Traditional Exceptions and Limitations in European and especially German Copyright Law

In order to determine what effect the provisions of the EU Copyright Directive and its implementation in Germany will have on “fair use” rights, it is necessary to describe the system of fair use in Germany.¹⁰⁵ The most striking difference between the German (and European) and the American system is that there is no general fair use right. Rather, the German Copyright Act only provides for exceptions and limitations of the authors’ rights in certain circumstances.¹⁰⁶

On the European Union Level, the EU Copyright Directive for the first time attempts to harmonize the laws in the European countries by providing a list of possible exceptions in its

¹⁰³ Article 8 EU Copyright Directive.

¹⁰⁴ Cf. government’s explanation, UrhG-E, *supra* (fn. 82), p. 68.

¹⁰⁵ For a general overview, see Adolf Dietz, *Germany*, in PAUL EDWARD GELLER AND MELVILLE B. NIMMER, 2-GER INTERNATIONAL COPYRIGHT AND PRACTICE § 8[2].

¹⁰⁶ Cf. DIETZ, 2-GER INTERNATIONAL COPYRIGHT AND PRACTICE § 8[2].

Article 5 from which the Member States can pick which exceptions and limitations to implement. However, they cannot go beyond the scope of the directive and provide for additional exceptions.¹⁰⁷ The new law also modifies the exceptions and limitations in the UrhG in order to implement provisions of the EU Copyright Directive.¹⁰⁸

1. Exceptions and Limitations

The most important (and probably most complicated) exceptions and limitations are contained in § 53 UrhG. This provision, inter alia, exempts from liability for copyright infringement reproductions by a natural person for private use unless the reproduction is made for commercial purposes, reproductions for the personal scientific use, reproductions of broadcast works for personal information concerning current events, and de minimis reproductions for other personal uses. The UrhG exempts certain acts for teaching purposes from the copyright owner's exclusive rights.¹⁰⁹ Other exceptions are provided for reproduction of newspaper articles and broadcast commentaries¹¹⁰, quotations in the necessary amount for certain purposes¹¹¹, non-commercial public performance of a published work unless the spectators are charged a fee¹¹², reproduction by broadcasting organizations¹¹³, and reproduction for commercial enterprises which sell audio or video recordings or appliances¹¹⁴. The new law adds exceptions for temporary

¹⁰⁷ See *supra* D.II.2.

¹⁰⁸ See UrhG, *supra* (fn. 84), p. 11-21.

¹⁰⁹ Under § 46 UrhG, reproduction and distribution of (parts of) works in compilations for religious, school and instructional use are permitted. § 47 UrhG exempts school broadcasts for use in class. Reproduction for instructional use in schools or for use in state examinations or examinations at schools and universities are permitted under § 53(3) UrhG. The new § 52a UrhG allows making published works publicly available for illustration purposes in class or for scientific research.

¹¹⁰ § 49 UrhG.

¹¹¹ § 51 UrhG: the privileged purposes are the inclusion in a scientific publication to illustrate its contents, quotations of passages in an independent work of language, and quotations of passages of musical works in an independent musical work.

¹¹² § 52 UrhG. There is a special privilege for performances for social purposes. In such cases, the user does not have to pay a reasonable compensation.

¹¹³ § 55 UrhG.

¹¹⁴ § 56 UrhG. This provision is re-phrased by the new law, however, the content is not changed.

reproductions¹¹⁵ and reproductions for use by disabled persons¹¹⁶. This list is not exhaustive, though the exceptions and limitations contained in the UrhG are.

There is no express exemption for parody; rather, this has been considered a free utilization under § 24 UrhG.¹¹⁷ A creation will be a free utilization if it is based on a prior work, but is independent and does “not take the protected core of that earlier work.”¹¹⁸

2. Limitations on the Limitations, especially Compensation Requirement

The beneficiary of an exception is not entirely free in using the protected work. He cannot modify the work and must clearly acknowledge the source.¹¹⁹ In addition, in some cases a reasonable compensation must be paid to the copyright owner, e.g. for the reproduction and distribution in compilations for religious, school or instructional purposes under § 46(4) UrhG, for the reproduction of school broadcasts unless they are deleted at the end of the following school year under § 47(2) UrhG, for the reproduction of newspaper articles and radio commentaries under § 49(1) UrhG, for a public performance under § 52 UrhG, and for reproductions for use by disabled persons under § 45a(2) UrhG. Some of the exceptions in Article 5 EU Copyright Directive also require compensation to be paid to the copyright owner. Thus, these uses, though allowed, are not completely free as it would be under the fair use doctrine in U.S. copyright law. These exceptions and limitations, where use is only permissible against reasonable compensation, resemble more a compulsory license than fair use.

For private copying, §§ 54-54h UrhG provide for a special remuneration scheme. Because it is nearly impossible to control private copying and to collect compensation, the duty to pay a

¹¹⁵ § 44a UrhG.

¹¹⁶ § 45a UrhG.

¹¹⁷ See DIETZ, 2-GER INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 8[2][b][ii].

¹¹⁸ *Id.*

¹¹⁹ See §§ 62 and 63 UrhG.

remuneration is imposed on the manufacturers and importers of recording and copying equipment and of recording media.¹²⁰

II. Impact of the Provisions of the EU Copyright Directive and of §§ 95a, 95b UrhG on “Fair Use”

As stated before, the provisions of Article 6 of the EU Copyright Directive have several drawbacks. Though, on the one hand, circumvention requires a subjective element of knowledge or bad faith which limits the scope of the provision, on the other hand, it is broad in covering every circumvention of a technological measure that protects a work or other subject-matter. That means that accidental circumvention is not a violation of the provisions, and circumvention of technological measures that protect public domain works or other unprotected and unprotectable subject-matter is allowed. However, the anti-trafficking provisions will prevent a user from having at hand the means necessary for such a permitted circumvention.

Article 6(4) EU Copyright Directive which requires the Member States to take measures to ensure that beneficiaries of certain exceptions and limitations can actually exercise their rights seems to be a good way to protect the interests of the copyright owners and of the public at the same time. However, Article 6(4) EU Copyright Directive only refers to certain exceptions and limitations, and excludes such important exceptions like parody. Member States arguably cannot go beyond the protection intended by Article 6(4) EU Copyright Directive and privilege other “fair uses”.¹²¹ In addition, Member States only have to provide for appropriate measures if the relevant exceptions and limitations are actually part of the domestic law. In simply not providing for the discretionary exceptions and limitations of Article 5(2) and (3) EU Copyright Directive, Member States can frustrate the efforts of the EU.

¹²⁰ See DIETZ, 2-GER INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 8[2][f][i].

¹²¹ See *infra*.

German law already provides for most of the exceptions and limitations included in Article 5 EU Copyright Directive. In the course of implementing the EU Copyright Directive, some of the provisions in the UrhG are rephrased without substantial changes in the content, and new exceptions are included into the law. It is in the discretion of the Member States to choose the “appropriate measures” that Article 6(4) EU Copyright Directive mandates. The German solution is to oblige rightholders to provide beneficiaries with the necessary means to use the rights under the exceptions.¹²² This relatively vague provision leaves it to the rightholders to decide in which way they want to fulfill their obligation under § 95b(1) UrhG. In the event that the rightholders fail to provide the beneficiaries with the necessary means, the individual beneficiary has a claim against the copyright owner. As described above, the bill proposes a new group litigation right for associations which allows them to sue rightholders violating their duty for an injunction. However, such an injunction is likely to have no value for individual beneficiaries because it only prohibits the rightholder from further violating their obligations, but whether such an injunction results in affirmative measures by the rightholders to give the means to the individual beneficiaries is open to question.

Article 6(4) EU Copyright Directive and § 95b(1) UrhG require that the privileged beneficiary has legal access to the work. In this regard, the situation is identical to the situation under § 1201 of the U.S. Copyright Act. Though copying is allowed – and the EU even goes one step further in providing “fair users” with the means for exercising their fair use rights – the statutes do not help the beneficiary in overcoming the access control measures.¹²³ However, as

¹²² *See supra* E.II.2.b).

¹²³ Some of the exceptions in § 1201 also apply to access control measures, such as the library-exception in § 1201(d), the exception for the benefit of law enforcement in § 1201(e), the reverse engineering-exception in § 1201(f), provided that the user has lawfully obtained the right to use the copy, and the encryption research-exception in § 1201(g), provided that the user has lawfully obtained a copy and has made a good faith effort to obtain authorization from the copyright owner.

described previously¹²⁴, the copyright does not give the author or other copyright owner the right to control access to the work. This is not an exclusive right of the copyright owner. Rather, the right to control access is derived from the reproduction and distribution right. The copyright owner licenses the right of reproduction and distribution to a publisher who then makes copies of the work and sells them to the users. The decision to restrict access to the work by charging a fee is the decision of the publisher. Again, a comparison with the analog world is useful: a teacher who wants to distribute a copy of a chapter of a book in class for purposes of illustration is allowed to do so. He is the beneficiary of the exception in § 53(3) UrhG. However, he cannot just go into the bookstore and take the book without paying in order to be able to make the copies. Rather, he has to pay the price which the publisher considered to be reasonable or he has to go to a library. The exception in § 53(3) UrhG does not give him the right to access the work. The same is true in the digital world: the teacher has to buy the e-book or CD first and is then allowed to make the copy. Under § 95b UrhG, he can even claim that the copyright owner provides him with a program or a code to overcome the copy control device.

Another question that arises under European and German law is whether the beneficiaries of exceptions that are not privileged in Article 6(4) can circumvent copy control technology without being able to claim help from the copyright owner in doing so. The language of the provisions does not support such a conclusion. The anti-circumvention provisions cover every act of circumvention. They do not exclude circumvention of copy control technology and simply rely insofar on copyright infringement as the DMCA does. In addition, even Article 6(4) EU Copyright Directive and § 95b UrhG do not give the beneficiaries a “right to hack”.¹²⁵ In the reverse, not privileged beneficiaries the more do not have the right to hack, assuming that they have the abilities to circumvent the protection measures by themselves.

¹²⁴ *Supra* C.II.2.b).

¹²⁵ *Supra* D.II.2. and fn. 78.

Furthermore, Member States also cannot grant rights identical or similar to those granted under Article 6(4) EU Copyright Directive and § 95b UrhG to other beneficiaries because this “would contravene the provisions of the directive.”¹²⁶ Additionally, this would impact the balance reached in the provisions between the rights of the copyright owner and the rights of the public. Only “exceptions that convey[] strong public interest” have been privileged.¹²⁷

Another major pitfall of the European provisions is that they can easily be circumvented by the copyright owners by using the exception in Article 6(4) subparagraph 4 EU Copyright Directive, implemented in § 95b(3) UrhG. These provisions privilege on-demand services in excluding applicability of the obligation to provide beneficiaries with the means of exercising their fair use rights. Thus, a simple click-wrap license prevents the copyright owner from claims by fair users. However, only interactive services are excluded. “Non-interactive forms of online use ... remain subject to those provisions.”¹²⁸

G. Comparison of the Effects in the U.S. and in Europe – What needs to be changed?

The question which now remains is: what system is preferable? Though the U.S. and the European/German system on the first view seem to have many differences, they also have a few things in common: while the circumvention of copy control measures may be permitted, circumvention of access control technology is always prohibited¹²⁹, even if the user wants to make a privileged use. This, however, is based on the decision of the respective legislatures to give the copyright owner only certain exclusive rights. The right to control access is not such a

¹²⁶ See Dusollier, *supra* (fn. 57), [2003] IIC at 73-74.

¹²⁷ *Id.* at 73.

¹²⁸ EU Copyright Directive, Recital 53.

¹²⁹ Unless the user can claim one of the exceptions in § 1201 which also permit circumvention of access control measures. See *supra* C.II and fn. 117. These exceptions are, however, narrowly crafted and permit circumvention only for limited purposes.

right. In the analog world, there have never been complaints about requiring the “fair user” to first gain access to the protected work before he can exercise his fair use rights. The same should be true in the digital world. Of course, one could argue that the possibilities to get free access are substantially greater in the analog world, e.g. by way of libraries. However, a reviewer still has to buy a ticket to see the theater play or movie he wishes to comment on, the other fair users usually have to buy the work they want to use or at least register to use a library which may incur payment of a fee. So, free access is by no means mandated by fair use exceptions and limitations. Only legislation could change this result. However, it has been apparent from the experience with the application of the DMCA that these results would occur. The fact that the EU legislature adopted the EU Copyright Directive the way it did shows that it did not see a need for providing the fair users with a right to access.

With regard to copy control technology circumvention, certain acts are allowed. The U.S. system solely relies on copyright infringement and thus the fair use doctrine is fully applicable. A user that could traditionally claim the fair use defense can circumvent the copy control technology because this activity is not prohibited by § 1201. The subsequent copying will be protected by the fair use defense. However, the user in doing so is entirely left to his own skills. Trafficking in circumvention technology is prohibited and the user will not be able to purchase the necessary technology.

The European/German system helps the user in this regard. Though it does not permit the user to resort to self-help and circumvent the technological measures by himself, it gives him a claim against the copyright holder to furnish him with the necessary means to exercise his rights. However, only certain beneficiaries of exceptions and limitations are privileged in § 95b UrhG. The remaining beneficiaries can claim the exception with regard to a claim for copyright infringement, but they will still be liable for circumventing the copy control technology. This is

the result of the distinction between copyright infringement and violation of the anti-circumvention provisions.

Additionally, one has to consider which fair uses are privileged in § 95b UrhG. Most of the listed uses require a reasonable compensation to be paid to the copyright owner.

If this perception is reconciled with the conclusion reached under the market failure theory, it becomes apparent that the European and German legislatures really valued the bargain between the copyright owner and the public. On the one hand, the copyright owner contributes to the enhancement of the culture and should be rewarded for that contribution. On the other hand, the public should not be deprived of certain rights. That is why certain uses are exempted, but only on payment of reasonable compensation. In that way, the rights of the copyright owner as well as those of the public are served. The legislatures made a determination about which uses deserve stronger legal protection. However, nearly all uses privileged in § 95b UrhG require compensation, either at the time of the fair use or – as for private copying – at the earlier stage of manufacture or importation. Thus, the user almost always has to pay, either the regular licensing fee that the copyright owner charges the user when he wants to acquire a license in order to make the desired use or the reasonable compensation which will usually be less than the licensing fee.

Thus, the technological development has contributed to a strengthening of the copyright owner's rights both in the U.S. and in Europe and a new assessment of the bargain between the copyright owner and the public. In the U.S. the market failure theory has far greater weight than before and only a more limited number of situations can be justified as fair use because they are under social considerations still necessary. However, the beneficiaries of such situations which still constitute fair use should receive some help in enforcing their rights. This is why the European system is preferable in this regard. It only privileges certain beneficiaries whose

preferential treatment is based on social considerations and who nevertheless have to pay for the use.

How can the disadvantages of the European system as it is implemented in Germany be avoided or corrected? One problem is the exception of on-demand-services from the obligation to provide beneficiaries with means to exercise their fair use rights. There is no justification for such an exception. Neither the Recitals to the EU Copyright Directive nor the government's explanations to the UrhG-E offer one. This provision should be abolished, especially since it facilitates circumvention of the obligations under § 95b UrhG.

Furthermore, the privileged beneficiaries should be allowed to circumvent the protection measures by themselves, assuming they have the necessary skills to do so. That way, results like the liability of a cryptography scientist who is a privileged beneficiary of an exception, but still liable for violation of § 95a UrhG are avoided. The scientist has the skills to circumvent the technology by himself and even has to do it in order to achieve the purpose of his actions, but under the current provisions, he is not allowed to do so. He can only claim the necessary technology from the copyright owner.

One could suggest merely adopting a part of the U.S. system in the German system by simply not prohibiting circumvention of copy control measures. However, this would not respect the decision the legislature made in only allowing certain beneficiaries the right to overcome protection measures. If copy control circumvention and the subsequent copying were only subject to copyright infringement liability, all beneficiaries would be allowed to circumvent the measures (though only a very limited number would actually be capable of doing so). Some of the beneficiaries could still claim to be provided with the necessary means. The legislators decided to privilege only certain beneficiaries, provided that they pay a reasonable compensation, while others have to deal with the rightholder in order to make the desired use. This decision expresses

the new valuation of the bargain between copyright owner and the public. To allow the circumvention of copy control technology would influence the balance on which the provisions are based. Therefore, the abolishment of the prohibition on copy control circumvention cannot be recommended.

Another problem occurring in Germany is how the rights will actually be enforced. It has to be taken into consideration that German civil procedure does not offer any other means of enforcement. The government has already taken a major step towards the beneficiaries in proposing a group litigation right. With regard to individual enforcement, it has to be noted that the copyright owner has to bear all costs of litigation if the beneficiary prevails. The still existing disadvantages of a lawsuit can, in my opinion, only be eliminated by creating a new system in which an independent agency acts as a trustee and stores the means for overcoming the protection measures. These means have to be provided to the agency by the copyright owners. Beneficiaries would be required to approach that agency and present their case to it instead of negotiating directly with the copyright owner. Such an agency could also collect the payments that have to be made by the beneficiaries for the use and could be financed by keeping a percentage of these payments.

But with such an agency, the flexibility which was intended by the vague formulation of § 95b UrhG would be eliminated. Therefore, we should first wait how the new provisions will function in their application.

H. Conclusion

The European/German system of protection of technological measures is preferable. Although it goes beyond the protection provided by Chapter 12 of the U.S. Copyright Act in prohibiting the circumvention of both access control and copy control technologies, it preserves

the rights of “fair users” to a greater amount. It privileges certain beneficiaries of exceptions and limitations enumerated in the law by mandating that the copyright owners provide means for the circumvention of copy control measures. This, however, does not allow the user to circumvent access control technology; but this is simply because the copyright laws do not grant the copyright owner an exclusive right to control access to the work that would be subject to the fair use defense.

In requiring the payment of a reasonable compensation for these beneficial uses, the European/German law correctly represents the new balance in the bargain between the copyright owner and the public that has become necessary through the “digital evolution”. It ensures that beneficiaries are able to exercise their rights granted in the exceptions and limitations without extensively depriving the copyright owner of his rights. This result has also been reached under a market failure analysis when considering the results of the application of the DMCA-provisions.

However, the European/German approach is not perfect. Some changes are necessary to correct the flaws described in this paper. The exception for on-demand services has to be abolished because it lacks a sufficient justification and opens the door for circumvention of the beneficiaries’ right to receive the means for circumventing copy control technology from the copyright owner. In addition, the privileged beneficiaries must be given the “right to hack”. Without such a “right to hack” a user who is benefited by two provisions – the traditional exception and the new provision in § 95b UrhG – will nevertheless be liable for an infringement of § 95a UrhG. This result cannot be justified, even though most of the beneficiaries will not have the skills necessary to circumvent the protection measures by themselves.

Whether changes to the German system of enforcement of beneficiaries’ rights are necessary has to be seen after the new provisions have first been applied in practice. The newly created group litigation right for enforcing the copyright owners’ obligation to provide the means

for circumventing copy control technology is a big achievement, but may not necessarily help the individual beneficiary who will still have to sue the copyright owner. The deterring effect that this necessity to sue individually may have could be prevented by creating an agency that administers the circumvention technology provided by the copyright holders and the requests of privileged users.