

The new Spanish Law of Intellectual Property and the “technical protection measures.”

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The report presents the status of the Spanish new law of intellectual property (as in the first Draft of November 2002)¹. After a brief introduction to the European Copyright Directive and the national law that is currently in force (TRLPI 1/1996), the exemptions and limitations introduced in the Draft are reviewed. The report puts special emphasis on the legal aspects related to “technical protection measures” and the proposed penalties for infringing copyrights and circumventing controls. Finally, a summary of the main actors participating in the debate and the main positions and arguments is included.

While there is not a concrete date for the final Draft, it is not expected big changes in the area of “technical protection measures”.

1 Background

On 22 May 2001, the new European Directive on Copyright 2001/29/EC was published in the Official Journal of the European Communities. According to the document, by 22 December 2002 Member States must implement the directive in their national laws.

The Directive seeks to harmonize aspects of copyright law across the European Community so as to encourage the development and exploitation of intellectual property. That harmonization of intellectual property law also aims to guarantee that the community and member states comply with the World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms signed treaties of 1996. Both WIPO treaties include in Article 11 and 18 respectively the need of introducing a set of law protections of “technical protection measures”.

The European Directive on Copyright imposes obligations on Member States to protect “technological measures” employed by rights owners to prevent unauthorized use (Article 6) and introduce appropriate sanctions and remedies in respect of infringements of the rights and obligations (Article 8). The Directive considers that the Member States shall ensure in their national laws not only legal protections against *circumvention of effective technological measures* but also against the provision of devices, products or services primarily designed to circumvent any effective technical protection measures.

2 Status of the Spanish law of intellectual property

The Law of Intellectual Property that is currently in force in Spain dates from 1996. The law is the successor of the first modern law of intellectual property that dates from 1987.

¹As today (May 2003), the Draft of November 2002 is the only public proposal of the new law of intellectual property; a second Draft, dated 23 January 2003, that includes some modifications has not been made official. There is not official date for the final proposal but it is most probable that it won't happen until the end of the summer 2003.

The reformulated text of intellectual property (TRLPI 1/1996) was promulgated through a royal legislative decree to comply with the European directives on questions of legal harmonization, specifically 1998/93/EC.

The responsibility for implementation of the new Copyright Directive 2001/29/EC in the Spanish national law lies with the Ministry of Education, Culture and Sport (MECD). The past 6 November 2002, the sub-secretary of the Ministry, Mariano Zabía, and the general technical secretary, Jose Luis Cádiz, presented a draft (“Draft” [1]) with the proposed modifications to the TRLPI 1/1996. The Draft, composed of 68 articles, outlines the suggested changes to the 164 articles of the existing Spanish Law of Intellectual Property of 1996.

The motivation of the government behind this Draft is not only to update the Spanish law to reflect the European Copyright Directive 29/2001/EC but also comply with the unanimous decision, taken by the Spanish Congress in 11 June 2002, that agreed to introduce remarkable changes in the intellectual property rights management. The Congress’ agreement requested to the Government to introduce and implement the necessary changes and effective mechanism as to enable conflict resolutions in intellectual property matters.

The Draft includes a considerable reform in the *Commission for Intellectual Property*, empowering its functions. The aim of the reform is to make the Commission for Intellectual Property a key organization when it comes to resolution of intellectual property conflicts.

2.1 Explanatory text of the proposed draft

During the presentation of the Draft in November 2002, the Government included a brief explanatory document of the proposed changes. In the explanatory document the Spanish government openly confesses: that due to the complex and very technical character of the sections concerning legal protection of “technical protection measures”, the new Spanish law of intellectual property tries to reproduce the European Copyright Directive as faithfully as possible.

In the explanatory text attached to the proposed Draft it can be read:

“The Directive establishes a system to protect the technical measures that are used to protect the works and the digital rights management information. These new measures constitute a novel matter, extremely technical, and very much discussed during the transaction of the communitarian Directive, and that is the reason why the incorporation of the related text fits faithfully to the original text of the Directive”.

In the same document, following the same European Copyright Directive reasoning, the government states that is not enough to legally protect the “technical protection measures” but it is also necessary to settle down dispositions that protect the work against devices, services or any auxiliary act that can lead to the circumvention of the protection measures.

It seems clear, that the Spanish Government has not been able to create a national policy related to “technical protection measures” and remains unaware of the possible implications in areas as computer security or interoperability.

3 Exceptions and limitations European Directive 2001/29/EC

The reformulated text of intellectual property (TRLPI 1/1996 or LPI 1996) describes in Articles 31 to 41bis the situations where a work or other subject-matter is exempted from the reproduction right.

The European Copyright Directive 2001/29/EC allows, in Article 5 section 2, limitations and exceptions to the reproduction right. Spain as Member State may provide for exceptions and limitations to the reproduction right provided for in Article 2 of the Directive in fifteen cases. The draft proposed by the Spanish Government, in articles 6 to 14, presents the changes and additions to the limitations and exceptions included in the law of intellectual property of 1996.

The final result seems to be that the suggested modifications to the reformulated text of intellectual property (LPI 1/1996) are mainly to include all exemption cases that the Copyright Directive allows including some extra limitations.

The following section compares the exceptions and limitations to the reproduction right described in the European Copyright Directive (EUCD), the Spanish law of intellectual property (LPI 1996) and the proposed new draft (Draft).

- 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;

Article 8 of the Draft modifies Art 32 of LPI 1996. (Draft includes that the limitation that the research work must already been made available to the public).

- 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;

Article 6 of the Draft modifies Article 31 of LPI 1996 that removes the specific exception in the case of blind people and Braille. Article 7 par.2 of the Draft adds a new Art 31bis to include any kind of recognize disability. (Draft similar to Directive).

- 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 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;

Article 9 of the Draft modifies Art 33 of LPI 1996. (Draft similar to Directive, includes that Parliament and public corporate speeches do not need to be about current events to be exempted from the reproduction right).

- 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;

Article 8 of the Draft modifies Art 32 of LPI 1996 . (Draft similar to Directive, includes specifically that press quotations that are part of a press review or press summary are also exempted).

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

Article 7 par 2 of the Draft adds a new Article 31bis to LPI 1996. (Draft similar to Directive)

- 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;

Article 9 of the Draft modifies Art 33 of LPI 1996. (Draft similar to Directive)

- use during religious celebrations or official celebrations organized by a public authority;

Included in Article 38 of LPI 1996. (*Draft includes a limitation: The music works, performed in religious or official celebrations, are exempted from the reproduction right if the entrance is free and the artists involved are not receiving any specific economical compensation*).

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

Article 11 of the Draft modifies Art 35 of LPI 1996. (Draft similar to Directive).

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

Included in Article 35 of LPI 1996.

- 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;

Article 11 of the Draft modifies Art 35 of LPI 1996. (Draft similar to Directive)

- use for the purpose of caricature, parody or pastiche; (Art 39)

Included in Article 39 of LPI 1996 (Draft includes two limitations: the parody should not create confusion with the original work and not damage the original work or its author)

- use in connection with the demonstration or repair of equipment;

Not included specifically

- 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;

Not included specifically

- 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;

Article 13 of the Draft modifies Art 37 of LPI 1996. (*Draft includes lots of blurry limitations* concerning the exemptions for libraries. The draft limits the exemption from property right to public libraries and institutions dependent of the Spanish educative system. It is required that the institution doesn't make any direct or indirect commercial use of the copy.

- 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.

It is worth mentioning that the Draft includes also in articles 10 and 12 specific exemptions and limitations for the uses of works *under certain technologies*. Both articles of the Draft are technology specific as they do refer to databases and works broadcasted by cable, satellite or radio stations.

For example:

- Article 10 that modifies Article 34 par 2 of the LPI 1996 refers to the right of the owner of the data in a database to access the registers without the authorization of the owner of the database (Article influenced by Directive 96/9/CE).
- Article 12 that modifies Article 36 describes the technical transformations of the work that are allowed to cable, satellite or radio when authorized to broadcast a work.

4 Technological Protection Measures

4.1 Penalties for infringing copyrights and circumventing controls

The Spanish Draft does not propose any concrete penalties for infringing copyright or circumventing controls. In that respect, the Draft in Article 64 and 65 adds two new articles to the LPI 1996 (Article 173 and 174) that refer to the limits of property rights and technological measures.

Article 173 establishes the Commission of Intellectual Property as the legal body to intervene in cases of property rights conflicts and technological protection measures. The Minister of Education, Culture and Sport, upon a proposal of Commission of Intellectual Property, can legally impose sanctions and penalties.

The new article Article 174 establishes a penalty of 6000 Euro per day to those who fail to release technical protection measures to the recognized beneficiaries of intellectual property.

4.2 Over-Protective technological protection measures, interoperability and other related issues

As mentioned in [2.1], when it comes to technical protection measures, the Draft tries to reproduce the European Copyright Directive as faithfully as possible. The Spanish proposal does not deal with over-protective technological protection measures or any other related aspects as interoperability, implications for the research community or security issues.

5 National organizations involved in the debate

5.1 SGAE

The General Society of Authors and Publishers of Spain (SGAE), funded in 1899, is a private organization of intellectual rights management dedicated to the defense and management of the rights of intellectual property of his more than 66,000 partners. As an intellectual rights management organization its mission is to protect intellectual works and to defend the interests of its partners. By declaring their works to the organization, the authors give the SGAE the rights to manage them.

SGAE's monopolistic position has been lately questioned in continuous lawsuits by DAMA (Derechos de Autor de los Medios Audiovisuales). DAMA, formed in 1999, is a new rights management organization that includes the majority of the directors and screenplay writers of the cinema and television.

According to the Spanish Government, the new Draft includes a reform of the Commission of Intellectual Property which main objective is to facilitate the resolution of this kind of conflicts between intellectual right management organizations. This opinion is not shared and strongly opposed by the SGAE that sees in the Commission a clear threat to their interests. SGAE has made numerous public statements against the new Draft and the functions of the Commission. [6]

5.2 FESABID

The Libraries and Intellectual Property Working Group (BPI-WG) is part of the Spanish FESABID (Federación Española de Sociedades de Archivística, Biblioteconomía, Documentación y Museística). The BPI working group has been very active representing the interest of the libraries in the discussions with the Spanish Government and supporting the new roles of the Commission for Intellectual Property.

As it can be read in their last public statement the past April 2003 [2], one of their points of disagreement is related to the content of Article 13 of the Draft that modifies Art 37 of LPI 1996. FESABID argues that the limitations for exemption included in the Draft are far more restrictive than the ones included in the European Union Copyright Directive. According to the intellectual property working group the Spanish Draft gives unfundamented privileges to State owned libraries versus other kind of libraries.

Another of the arguments presented by FESABID's BPI working group is the need of including in the Draft the limitation for copies realized for the purpose of conservation or research.

5.3 Proinnova and Sincanon

Proinnova is a group of interest of Hispalinux and ATI (Asociación de Técnicos de Informática). Their works focus on software patents and innovation. The group supports the petitions of the The Foundation for a Free Information Infrastructure (FFII) [5] and consider the European Union Copyright Directive and the Spanish proposal for a new law of Intellectual Property a threat for the free software and innovation in Spain and Europe. Proinnova also believes that legal protections to "technological protections measures" will make the development of inter-operable products impossible and degrade software security.

Sincanon emerged in early 2002 as another group of interest of Hispalinux after the Spanish Government agreed to apply a tax to computer CD-ROMs, on the supposition that these were regularly used for recording copyrighted music. Sincanon argues that the supposition clearly damages the free software community as free software has no right of remuneration for copying.

N.B. The Draft presented by the Spanish Government includes in Article 5 (modifies Article 25 LPI 1996) the possibility to apply an equitable “tax” to any equipment and material that can reproduce a work. The “tax” is conceived as a compensation mechanism to the authors of copyrighted work. The Government is responsible of publishing and updating a list of “taxed” equipment at least biannually.

5.4 CPSR-ES

In March 2003, the newly formed Spanish Chapter of Computer Professionals for Social Responsibility made public an analysis of the Draft [3]. Their position is aligned with the public statements of the European Chapter of Free Software Foundation [4]. CPSR-ES’s statement brought attention to the implications of the legal protections to “technical protection measures”. Their Draft’s analysis points out five worrying trends:

(1) The Internet is considered as a public communication and authors of works are required to have digital rights management intermediaries. (2) All cultural works are treated as a pure commercial product, the law does not refer to non-commercial works. (3) The Draft provides to the digital (intellectual) rights management bodies the power to monitor not only distributors but also the final consumers. (4) The editors are given more benefits than the author themselves. Editors receive the compensation rights when authors renounce its exercise. (5). The technologies that can be used to circumvent technological protection measures are banned. This measure limits the freedom of expression, hinders the scientific research in mathematics or computer science and threatens the right of using legitimate digital material.

6 Summary of arguments in the debate

Five are the main arguments present in the new Spanish Law of Intellectual Property debate. Unfortunately, the discussion related to “technological protection measures” is shadowed by other issues as the role of the Commission for Intellectual Property or the limitations and exemptions for privacy copy.

1. *The role and functions of the Commission for Intellectual Property.*

The governmental initiative of reinforcing the role of the Commission for Intellectual Property has been well received by most of the parties involved in the discussion. The main concerns against the Commission come mainly from the SGAE. The SGAE has made numerous public statements criticizing the Draft that they consider will bring big losses to the (“their”) sector.

2. *The private copy in libraries*

One of arguments in the debate has been the need of exemptions for private copies in cases of research or conservation and the legal requirements imposed to the different kind of libraries in their statutes or mission to enjoy the related exemptions. The debate is still open and FESABID issued a new statement the past first of April insisting that the limitations included in the last Draft are not consistent with the European Directive.

3. *The reproduction equipment and media support “tax”*

As a result of a court case between the SGAE and the CD-R producer Traxdata the latest January 2002, Traxdata has been forced to pay to the SGAE a fee for every CD produced since 1997. Despite of the voices of some initiatives, like the one from the group *Sincanon*, that considers the “tax” discriminative against the free software community, the Government’s Draft imposes a fee (“tax”) associated to equipment and any other reproduction material.

4. *The free software and intellectual rights management organizations*

Civil organizations as Hispalinux, the Spanish chapter of CPSR and Linux Users Groups have been trying to create awareness about the implications of the Draft for the Spanish free software development. The Draft does not provide any alternative to free software programmers to manage their property rights that with the services of an intermediary (i.e a intellectual rights management organization). During the creation of the Draft, the Government consulted to the eight recognized management organizations and some consumer groups as hotels federations and association of commercial televisions but very little consultation and attention was giving to other important sectors as the non-commercial and civil organization groups.

5. *The technological protection measures*

Very little has been discussed concerning the legal protections to the “technical protection measures”. The government openly confessed the past November 2002 that the topic was too complex and they have limited themselves to reproduce faithfully (i.e. copy literally) the content of the European Directive. Unfortunately neither the Draft nor a proper social debate has dealt with important issues as interoperability and technical protection measures.

The media has not paid much attention to this issue and, the confrontation between the SGAE and the government concerning other aspects of the Draft, as the role of the Commission of Intellectual Property, has taken much of the space in the newspapers.

7 Summary

The Spanish Government presented in November 2002 the first Draft of the new Law of Intellectual Property. The Draft, that included a set of changes to the old law of 1996 (LPI 1996), wants to reflect the European Copyright Directive and introduce changes in the Commission for Intellectual Property.

The main arguments in the debate have focused on the roles of the Commission and the definition of a “private” copy. Other topics as the vulnerable position of the free software or the legal protections to technical protection measures have been rarely included in the Ministry of Education’s (MECD) official statements. The research and free software community has been excluded from the official debates and most of the discussions are driven by the main intellectual rights management organizations and other pure commercial sectors (television, music and radio).

A consequence of this lack of awareness is that the Spanish Government has not developed a national policy concerning “technological protection measurements” up today and has limited to reproduce the European Copyright Directive as faithfully as possible.

About the author

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References

- [1] Draft of the Spanish law of intellectual property.
http://www.mcu.es/Propiedad_Intelectual/indice.htm
- [2] Opinions of FESABID’s Intellectual Property Group,
<http://www.bib.uab.es/project/cas/piadr8.htm>
- [3] Opinion of Computer Professionals For Social Responsibility (Spanish Chapter).
<http://www.spain.cpsr.org/20022003.php>
- [4] Schenier Declaration in Felten v. RIAA, August 2001.
http://www.eff.org/Legal/Cases/Felten_v_RIAA/20010813_schneier_decl.html
- [5] Opinion of Proinnova
<http://www.spain.cpsr.org/20022003.php>
- [6] Discussions between the SGAE and the Spanish Government
<http://es.news.yahoo.com/030305/4/21410.html>
and,
http://www.porlared.com/cinered/noticias/i_act03030601.html