Exceptions and Limitations in European Union Copyright Law

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Most countries, including all those in the EU, provide for exceptions and limitations to copyright by exhaustively listing and defining in their copyright laws all such permitted exceptions and limitations. The United States has been an exception in this respect, having instead a so called ‘fair use’ approach which provides four parameters for its courts to apply. Some EU Member States, unhappy at the inflexibility of their respective approaches to this issue are now starting to explore to what extent they can move towards a ‘fair use’ approach. This article considers why this issue has become a particular problem in the EU, what sort of scope EU Member States have to amend their national laws in such circumstances, and where further flexibilities might develop in the case law as a result of the courts applying principles from outside copyright law, notably on the basis of fundamental human rights.

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Article 13 of the TRIPS Agreement requires that exceptions and limitations to copyright in national laws meet the ‘three step test’ and thus be confined (1) to certain special cases (2) which do not conflict with normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder. Most countries, including all those in the EU, implement this by exhaustively listing and defining in their copyright laws all such permitted exceptions and limitations. The United States has itself been something of an exception in this respect, having instead a so called ‘fair use’ approach which provides four parameters for its courts to apply. However, even though the only country so far to have amended its law expressly to adopt ‘fair use’ is Israel, which used to base its copyright law on that of the UK, and amended it in 2007, there has been consistent interest internationally in recent years in the US approach, with its inherent flexibility, which is seen by many as being better able to accommodate technological developments and the new business models associated with these.

The latest manifestations of this pressure have been felt in the EU, even though no EU Member State would be able to expressly adopt a ‘fair use’ approach because the Copyright in the Information Society Directive of 2001 (ref. 4) provides, in Article 5, a list of limitations from which EU Member States can choose when drafting their national laws, but to which they cannot add. Several EU Member States, including Ireland, the Netherlands and the UK now seek to extend the scope of the limitations to copyright as currently set out in their national laws. They are thus considering the scope for so doing consistent with the 2001 Directive as it stands, although the UK Government has also said that it “will aim to secure further flexibilities at EU level that enable greater adaptability to new technologies.” Given that it seems unlikely that the EU will amend its legislation in this area, at least in the short term, this article considers why this issue has become a particular problem in the EU, what sort of scope EU Member States have to amend their national laws in such circumstances, and where further flexibilities might develop in the case law as a result of the courts applying principles from outside copyright law, notably on the basis of fundamental human rights.

Why has this Issue Become a Particular Problem in the EU

The exhaustive list of permitted exceptions and limitations in Article 5 of the 2001 Directive was not, unlike most other aspects of EU copyright legislation, the result of a full comparative law study, and neither was it formulated in pursuit of any coherently expressed policy aim. The 2001 Directive had been intended to enable the EU and its Member States to accede to the WIPO Treaties of 1996 and the issue of
exceptions was only raised at a late stage of the drafting, with Member States’ main aim in the subsequent negotiations being to retain the exceptions that already existed in their respective national laws.\textsuperscript{10} The unsatisfactory genesis of these provisions more than 10 years ago and the long legislative process that would be involved in amending them is however not the main problem.

One problem is Article 5(5) of the 2001 Directive, which subjects the permitted exceptions listed elsewhere in Article 5 to the ‘three step test,’ thus preventing them as they stand from providing the very certainty that the ‘fair use’ approach is criticised for not conferring. Another issue as to this arises in national implementation. Thus, is Article 5(5) to be applied only in determining whether national implementations of the exceptions listed elsewhere in Article 5 are consistent with the Directive, or is it to be applied also by national courts when interpreting such limitations, whether of their own motion or by virtue of a national implementation that makes Article 5(5) part of national law?\textsuperscript{11} Moreover, national implementation of the exceptions themselves has been problematic. The UK amended its already detailed legislation as to limitations in response to the 2001 Directive rather than recasting it anew, adversely affecting its coherence and rendering it even more complex and impenetrable than before. Neither have the civil law countries of the EU (namely, all except Ireland and the UK) with their traditions of much more flexibly expressed copyright legislation been able to escape unscathed from what has been the straitjacket (to them) of the 2001 Directive.\textsuperscript{12}

**How Member States and Courts are Responding**

In search of greater flexibility as to limitations, some EU Member States are now reviewing their national implementations of Article 5 of the 2001 Directive. The UK Government has already said that it ‘agrees ... that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK\textsuperscript{2} and so will legislate for what it describes as ‘a substantial opening up of the UK’s copyright exceptions regime.’ This will include proposals for a limited private copying exception, widening the exceptions for non-commercial research and for library archiving and introducing an exception for parody.\textsuperscript{13} As has been pointed out by the Dutch Professors Bernt Hugenholtz and Martin Senftleben\textsuperscript{14} there is more scope for flexibility in the generally expressed (at least to those from a common law tradition) wording of the permitted exceptions listed in Article 5 than is widely appreciated; indeed one way in which a Member State could avail itself of the widest flexibilities that this Article offers would be simply to write it in full (including Article 5(5)) into national laws without making any effort to stitch it into the already existing exceptions regimes.

Meanwhile some national courts have taken matters into their own hands by looking for sources of flexibility outside the copyright exceptions under national law. The Federal German Supreme Court recognised that the exception under German law for quotation did not apply to the reproduction and making available by way of ‘thumbnails’ of copyright protected pictures by search engines, but has instead held that such action does not infringe copyright under an implied licence theory, based on the permission inherent in posting material on the Internet.\textsuperscript{15} The Paris Court of Appeals\textsuperscript{16} came up with a different solution to the same problem, extending the safe harbour of the E-Commerce Directive\textsuperscript{17} to such activities because the owners of copyright in the works, the subject of the thumbnails, had failed to avail themselves of the ‘Notice and Takedown’ provisions of the Directive. Other national courts have applied the fundamental right of freedom of expression and information under Article 10 of the European Convention on Human Rights (corresponding to Article 11 of the Charter of Fundamental Human Rights of the EU) in order to provide a defence to infringement where the statutory exceptions under copyright law were inadequate to the task.\textsuperscript{18}

Relatively few of the increasing number of copyright cases heard in recent years by the Court of Justice of the European Union, (CJEU) as the ultimate authority on the interpretation of EU law, have so far considered Article 5 of the 2001 Directive.\textsuperscript{19} Only one of these, Case C-145/10 *Painer*,\textsuperscript{20} directly touches the issues here discussed although most, as one might have expected, observe that Member States which decide to enact a particular exception in Article 5 enjoy a broad discretion in that respect, but that such exceptions are to be interpreted strictly. The outcome of Case C-145/10 *Painer* as to exceptions, being in effect that these did not apply in a case such as this, was hardly unexpected or unreasonable, so it was not a case to explore such issues. The Court of Justice has also considered the ECHR and Charter in the context of provisions of the 2001 Directive other than Article 5, notably to requests under Article 8(3) of the 2001 Directive for an order as against Internet access
providers for the disclosure of the identity of the owners of certain IP address and for filtering injunctions. In these cases further fundamental rights have been applied, namely as to privacy (Article 8 of the Charter) and also freedom to run a business (Article 16 of the Charter), and the CJEU has rejected any suggestion that the right to intellectual property (Article 17(2) of Charter) is ‘inviolable and must be absolutely protected’.

The result is that one can expect legislation as to limitations and exceptions in several EU Member States soon to be amended so as to become more permissive. To the extent however that it is not, or to do so would be inconsistent with Article 5 of the 2001 Directive, and yet national courts or perhaps even the CJEU consider the activity in question to be ‘fair’ on some sort of basis then fundamental rights law provides extra scope for flexibility. Europe may never have ‘fair use’, but is likely to move towards something that approximates it more closely in practice.

References
1 Article 13 TRIPS was considered by a Panel established by the WTO Dispute Resolution Body in United States – Section 110(5) of the US Copyright Act - WT/DS160/R - 15 June 2000. The origin of the wording lies in Article 9(2) of the Berne Convention in respect of the restricted act of reproduction. Article 10 of the WIPO Copyright Treaty 1996 has corresponding wording.
2 In the UK, it is set out in Sections 28 to 75 of the Copyright Designs and Patents Act 1988 (which with new provisions inserted on amendment consequential on various EU Directives thus now consists of 65 sections in total) and forms the major part of the copyright provisions of the Act.
5 Apart from the mandatory limitation in Article 5(1) of the 2001 Directive.
6 Copyright and innovation: A consultation paper, Copyright Designs and Patents Act 1988 (which with new provisions inserted on amendment consequential on various EU Directives thus now consists of 65 sections in total) and forms the major part of the copyright provisions of the Act.
10 For a prescient critique of the legislative history of the measure, Hugenholtz P B, Why the Copyright Directive is unimportant, and possibly invalid, European Intellectual Property Review, 22 (11) (2000) 499, observing that ‘in view of the vast differences in purpose, wording and scope of limitations existing at the national level, many of which reflect local cultural traditions or business practices, one would have expected some more study and reflection before stirring up this hornet’s nest.’
14 Hugenholtz B P & Senfleben M R F, Fair use in Europe – In search of flexibilities, 2011, http://ssrn.com/abstract=1959554 (15 April 2012). Apart from recommending exploiting the flexibilities inherent in the language of Article 5, they suggest it could be argued that much transformative use would in fact infringe the adaptation right rather than the reproduction right and to the extent that the two do not overlap there is scope for flexibility in that the only harmonisation of the adaptation right that has taken place in the EU has been in relation to computer software.
15 Case I ZR 69/08, Google Thumbnails (German Federal Supreme Court, 29 April 2010).
16 SAIF v Google France (Paris Court of Appeals, 26 January 2011).
18 Scientology v XS4ALL (Hague Court of Appeal, 2003) and HFA v FIFA (French Cour de Cassation, 2 October 2007), as to preliminary injunction proceedings under the Community Design Right, Nadia Plesner v Luis Vuitton (District Court of the Hague, 4 May 2011).
19 C-5/08 Infopaq I and C-302/10 Infopaq II were rather specific in their scope as they both concerned Article 5(1), which relates to transient or incidental etc., temporary reproductions. Cases C-467/08 Padawan and C-462/09 Stichting de Thijskopie also considered the question of levies for private copying, for which exception Article 5 (2)(b) provides basis. In all these cases, Article 5(5) (mandating the three step test) was also considered to some degree.
20 Case C-145/10 Painer (CJEU 1 December 2011) considered the scope of the exceptions under Article 5(3)(d) for quotations for criticism or review and Article 5(3)(e) as to public security. Article 5(5) (mandating the three step test) was also considered to some degree. However, much of the decision considered issues of copyright subsistence.
21 Cases C-275/06 Promusicae, C-70/10 Scarlet Extended v SABAM and C-360/10 SABAM v Netlog.