Using YouTube: Practical Consequences of the Approach Adopted by EU Copyright Law

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EU copyright law, in connection with exceptions and limitations to copyright, is far from harmonized. This paper examines exceptions and limitations in EU copyright law, with regard to the feasibility of the system established by the InfoSoc Directive. Factual situations of everyday use of works via YouTube and similar sites have been presented in order to establish whether the legal treatment of such uses as infringement of copyright is really the right path to take. Following the review of current developments in EU copyright policy, the paper argues the need for a system of copyright in which holders enjoy more limited rights. Nevertheless, due to the evident political infeasibility of the proposal, the paper argues the introduction of a general and broad fair use exception which would amount to a system of copyright protection which better aligns with the expectations and actual activities of ordinary people.

Keywords: EU copyright law, making available to the public, exceptions and limitations, OSP’s liability

The host of ‘The Daily Show’, Jon Stewart, in the 14 May 2013 episode of the show, mocked US President Barack Obama on certain issues concerning domestic and international policy apropos a joint press conference held with UK Prime Minister David Cameron. While mocking President Obama’s answers and conversing with John Oliver, Stewart turned his attention to Prime Minister Cameron’s uncomfortable demeanour while President Obama was giving his answers on sensitive issues. Oliver stated that President Obama ‘picked the wrong Brit’, meaning that President Obama should have had a press conference with Prince Harry (Prince Henry of Wales) who would have served as a better distraction for the press than Prime Minister Cameron. During the back and forth discussion on the capacity of Prince Harry to serve as an effective distraction, John Oliver made a reference to an interview with Prince Harry at the end of his tour in Afghanistan which was cut short as Prince Harry ran to his Apache helicopter. Here, the chorus of the song ‘Take my breath away’ played in the background, for seven seconds, obviously as a reference to Tony Scott’s 1986 film ‘Top Gun’.

This author is not aware whether Comedy Central had requested permission for such use of the work ‘Take my breath away’. Nevertheless, one very interesting question arises: whether such permission was needed, bearing in mind the nature of the use of the work. Further, although the full episode of ‘The Daily Show’ was available on the official web page of the show, part of it was instantly uploaded to YouTube. The upload which this author first saw was removed soon afterwards, but it nevertheless resurfaced as a different upload. Thus there are two interesting facts in this case: first, the use of the 1986 song ‘Take my breath away’, and second, the upload of parts of the previously mentioned episode of ‘The Daily Show’ on YouTube. Both situations are relevant in relation to the right of a copyright holder to make the content available to the public. Such an interest is pertinent even in the case of use of the song, although Comedy Central is a cable network, since the full episode of ‘The Daily Show’ was uploaded on the show’s web page.

Thus, there are two situations, which would be interesting to examine under EU copyright law. Of course, in purely legal terms, this question should be addressed under applicable US copyright law. However, this author would like to use those factual situations as an example to establish whether such uses of works, presupposing that no permission was granted, would be legal under EU copyright law. Then again, only two specific factual situations are

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identified here, which may only be a fragment of the bigger picture. Sites like YouTube have become so common that their use and their capability to serve as a fully functional source of information has been elevated to a great extent. Thus, YouTube and other similar sites have reached beyond their entertainment function and become viable sources of information, in the broadest sense. Bearing this in mind, the issue is not only whether the previously identified factual situations would be legal under EU copyright law, but also establishing the functionality and the appropriateness of EU rules regarding acts of making content available to the public.

Naturally, the copyright argument arises when one has to frame the acts of using YouTube and similar sites. The notion of ‘using’, in terms of this paper, should be understood broadly, as not covering only the acts of persons who access the hosted content, but also of persons uploading the content, and of those managing it. Therefore, the legality of using sites like YouTube has several manifestations which will be analysed through this paper. Returning to the identified factual situations, one may come to a direct conclusion that both situations would appear illegal under EU copyright law. To be more precise, in the first situation, one may argue that if the use of the work ‘Take my breath away’ was done without permission, it could qualify as an exception to copyright but this would be rather contentious, considering the context of the use. As for the other factual situation, it appears rather obvious that the uploading of parts of the previously mentioned episode of ‘The Daily Show’, done without permission from the copyright holder, is a clear example of copyright (and related rights) infringement.

That infringement takes place when a work under copyright protection is made available to the public without permission, is a legal qualification that leads to the following premise; the introduction of which, naturally, calls for certain background suppositions. The premise actually builds upon the fact that uses of works protected by copyright, such as those identified here, is quite common. Parts of songs and bits of films are rather frequently used in the course of everyday life. One may characterize such a situation in two distinct ways: omnipresent infringement or inappropriate legal regulation. Of course, considering the current state of copyright protection, a lawyer will be tempted to use the maxim dura lex sed lex and in purely legal terms, would be right. The issue, on the other hand, is the perception that every legal rule must have an underlying idea attached. In law, when one tries to justify or explain the existence of a given rule, one is guided by certain principles of the relevant legal branch, or its overall ideological background. This is especially the case with private law, as private law is founded upon the economical basis of a societal organization. The economic base, furthermore, is comprised of economic transactions which are affected by certain legally recognized subjective rights: in copyright, these are the transactions between the copyright holder, who has certain entitlements relating to the object of protection, and users of the object of protection (the work). Therefore, one is directed to take into account not only the interests of the copyright holder, but also the interests of the users.

Where actual legal rules are concerned, the history of copyright has shown an exponential increase in the holder’s entitlements relating to protection, primarily as a result of ample international activity. Hence, the status of the entitlements comprising copyright is rather clear. For the matter at hand, the right of making content available to the public has resulted from the 1996 WIPO Copyright Treaty and, in the EU, from 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. On the other side, in economic and legal terms, is the user. As mentioned above, in terms of this paper, the notion of a user is relatively broad and may be an unconventional one. In any case, the common ground here is the need to strike a balance between the interests of the copyright holder and the interests of the user. As for the user, he or she is regarded not only as the person who simply browses the content, but also the person who downloads it. Furthermore, a user is also the person who potentially modifies and reuses the original content while performing acts of making the modified content available to the public. Such modified content is further subject to browsing, downloading or future reuse. Finally, one may speak of use also in terms of managing the original or the modified content, particularly by hosting it. In simplified terms, there is the ‘the browser’ or the person who performs acts of browsing through the content (who may or may not be an infringer), ‘the down loader’ or the person who performs act of downloading the content (who is an infringer), ‘the up loader’ or the person who performs act of uploading the content (who certainly is an infringer), and ‘the host’ or the person who performs act of hosting the content (who may sometimes be a contributory infringer).
Under EU copyright law, Recital (22) of the InfoSoc Directive provides that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works. Further, Recital (31) of the Directive calls upon safeguard of fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users of protected subject-matter. Thus, at least as a purported underlying idea, the InfoSoc Directive aims to achieve a fair balance between the holder of the right(s) and the user of the protected content. Consequently, the InfoSoc Directive regulates certain exclusive rights of the holder (the reproduction right, the distribution right, the right of communication to the public, and particularly the right of making available to the public), and certain exceptions and limitations to those exclusive rights.

The starting point in building the premise is the comprehension that legal rules in the area of private law should be formulated so as to mirror the actual state of economic transactions. When one decides on the manner of actual legal regulation of a certain subject matter, one is guided by certain ideas which are conceived as legal principles. In the area of private law, particularly, those principles should be in line with the interests of the concerned parties. All those interests should be relevant for the premise. In this author’s view, in terms of a premise, the current state of EU copyright law does not properly relate to all interests concerned. Of course, the author is here influenced by his own ideological background. This author, bearing in mind the current state of affairs on the Internet, is keen not to stigmatize the actions of Internet users and managers as encouraging infringement of copyright and related rights, although legal reasoning must lead to such a conclusion. Thus, there is a case of friction between the current legal and factual state. The latter also invites the consideration of interests of the (potential) direct infringer: the browser/downloader/uploader/sharer, and the interests of the (potential) contributory infringer: the online service provider (the OSP). Bearing all this in mind, the legal positions of these parties will be analysed, in order to provide a possible outcome which at least lessens the friction identified.

### The Current State: The Legal Position of the Browser

The act of browsing refers to the access of the content made available to the public by the end users. Therefore, in terms of the right of making available to the public, one cannot speak of copyright infringement when browsing is concerned. Yet, the act of browsing raises the question of temporary reproduction (Article 2 of the InfoSoc Directive) bearing in mind its technological process. Recently, this issue was addressed in Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others, where the Supreme Court of the United Kingdom held that the mere act of browsing a web page containing copyrighted material is not an act of infringement of that copyright. The reasoning of the Court was based on Article 5(1) of the InfoSoc Directive, which provides for a (mandatory) exception to copyright for temporary acts of reproduction which are an integral and essential part of a technological process. Hence, in terms of EU copyright law, this author did not infringe copyright while viewing the above mentioned episode of ‘The Daily Show’ on YouTube. Nevertheless, the Court referred the issue to the ECJ for consideration. Such a reference was deemed necessary although the ECJ had reached the same conclusion in the similar cases of Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd and in the Infopaq International A/S v Danske Dagblades Forening case.

Downloading, on the other hand, is quite a different thing. The acts of downloading were also expressly mentioned as infringement in Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others. Here, of course, one speaks of the right of reproduction and not of the right of making available to the public. Legally speaking, the person downloading copyrighted material, without the consent of the holder, will be liable and no exception similar to the one in Article 5(1) of the InfoSoc Directive exists. The (non-mandatory) exception from Article 5(2)(b) of the InfoSoc Directive may be applicable, but strictly for private use and subject to compensation. Were this author to save the above mentioned episode of ‘The Daily Show’ on the hard disc of his computer, he would infringe copyright.

### The Current State: The Legal Position of the Uploader

The acts of uploading are actually typical acts of making a work available to the public, in terms of Article 3(1) of the InfoSoc Directive. Returning again
to the above mentioned episode of ‘The Daily Show’, the person who uploaded the episode on YouTube, if without permission, committed an act of copyright infringement. This is more so the case as no correlative exception or limitation to copyright exists for such instances. Truth be told, Article 5(3)(c) of the InfoSoc Directive provides an (non-mandatory) exception to the right of making available in cases of making available of broadcast works or other subject-matter of the same character on current economic, political or religious topics, where such use is not expressly reserved and as long as the source, including the author’s name, is indicated. This provision also allows the 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 proves to be impossible.

‘The Daily Show’ is a comedy program with strong informative features, so current economic, political or religious topics are a standard part of the show. Even so, the show does not report on those issues but comments, mocks or (rarely) approves. Therefore, the first part of the Article 5(3)(c) of the InfoSoc Directive seems inapplicable. The second part of the provision seems also inapplicable as the incidental uploading of the whole (or part) of the show via an incidental YouTube account seems hardly to have been done in connection with the reporting of current events. Moreover, one must bear in mind that the right of making available to the public is not subject to exhaustion, something that is clearly stipulated in Article 3(3) of the InfoSoc Directive. Therefore, the fact that the abovementioned episode of ‘The Daily Show’ was made available on the official web page of the show bears no significance.

Uploading hence purports to be a case of direct infringement. One may hardly seek safe harbour in exceptions and limitations to copyright under the rules of EU copyright law. Some specific exceptions or limitations to copyright, as those connected to teaching or scientific research (Article 5(3)(a) of the InfoSoc Directive), to the benefit of people with a disability (Article 5(3)(b) of the InfoSoc Directive), or to the purposes of public security (Article 5(3)(e) of the InfoSoc Directive), have a rather limited effect and are so narrow and topic specific that one must be particularly careful when trying to label a certain act as falling under a certain exception or limitation. One must also bear in mind that the ECJ case law fully acknowledges the legal principle of interpretation that the exemptions of a given rule should be construed strictly. Such reasoning, on exceptions and limitations to copyright, was given by the ECJ in *Infopaq International A/S v Danske Dagblades Forening* 6, relating to temporary acts of reproduction which are an integral and essential part of a technological process. This reasoning, again for temporary acts of reproduction, was affirmed also in the joined cases of *Football Association and Karen Murphy* 12, although here with a greater emphasis on the need of safeguarding the fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of new technologies, on the other.

The ECJ did not develop a comprehensive practice where exceptions and limitations to the right of making available to the public are concerned. This may be a consequence of the fact that all exceptions and limitations to copyright regulated in the InfoSoc Directive, save the one from Article 5(1) of the InfoSoc Directive, are optional for Member States. Nevertheless, as those options are a part of the InfoSoc Directive, there have been references to the ECJ. Recently, the German *Bundesgerichtshof* made a reference to the ECJ on the legality of the act of so called ‘framing’. Acts of framing relate to cases where a ‘frame’ is formed on part of an existing webpage and, inside the frame, content from another source (e.g., YouTube) is displayed. Actually, the frame only provides the possibility of loading independent content from the same or another platform. This author is not a Facebook user, although the so called ‘posting of videos on the wall’ seems like a good example of framing, although the statement should be taken with reserve considering the lack of experience of the author with Facebook. In any case, the problem with framing is obvious in terms of whether such acts can initially be considered acts of making available to the public, as the framing entity is not uploading the content. Here, also, the acts of linking appear relevant to the issue. The ECJ has yet to give its ruling on whether the act of providing a clickable link to copyrighted material amount to making available to the public. 18

The uploading of certain content does not presuppose that the content is uploaded in its original form. Sites like YouTube and Facebook often provide examples of reuse of pre-existing available works. The ways to manipulate existent copyrighted material
are practically unlimited as modern technology evolves rapidly and is exceptionally user friendly. Returning to the factual situation mentioned above, one needs to qualify the act of using a part (seven seconds) of a well known song in a show. Under US copyright law such a use, if done without permission, may well fall under the fair use doctrine or (perhaps) under the de minimis defence; yet the issue remains open in terms of EU copyright law. On the de minimis defence, as a preliminary issue, the InfoSoc Directive seems to preclude such an interpretation especially following the reasoning of the ECJ in Case C-5/08 (ref. 16) and in Case C-302/10 (ref. 13), concerning an extract of 11 words. Such reasoning resulted in a decision of the Danish Højesteret.19 Thus, one’s attention is drawn to the exception in Article 5(3)(k) of the InfoSoc Directive in cases of use for the purpose of caricature, parody or pastiche. Legally speaking, in relation to the circumstances of the use analysed, a parody may seem farfetched in the case of Jon Stewart mocking President Obama. Practically, one would have to start with President Obama, proceed to Prime Minister Cameron’s demeanour and relate it to Prince Harry’s ‘distraction capabilities’, then go on to his Afghanistan interview and finally arrive at the point of the background music (seven seconds of the song ‘Take my breath away’). Hence, the exception to copyright in cases of parody would hardly work under EU copyright law.

In the situation at hand, the use occurred in a cable television show which was also made available to the public via the show’s web page. Such an act may have well been performed by an individual user and uploaded to YouTube, thus an example of user generated content (UGC).20 We have seen the possible legal outcome of such a use under EU copyright law. Yet one wonders whether such an outcome seems appropriate. Contrary to classical incentive theories, the online world seems to have opened the way for vast creativity.21 As human history suggests, actions of people have been based on previous experiences. One builds upon previous achievements, debates, contradicts or simply makes a reference. The law, at this point, seems to contradict the way people actually think and act.

The Current State: The Legal Position of OSPs

The legal position of OSPs, qualified as users in this paper, remains to be examined. It is rather clear that, speaking even colloquially, OSPs are more enhancers than users of copyrighted content.22 Yet they make UGC and sharing altogether possible. The regulation of the liability of OSPs in terms of copyright has been quite reasonable, particularly in terms of balancing different interests.23 The US 1998 Digital Millennium Copyright Act (the DMCA)24, which amended the 1976 Copyright Act (Title 17 USC), introduced the concept of limited liability of OSPs (Section 512). The EU followed with the introduction of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce, in the internal market25 and the Article 14 thereof. YouTube and similar sites provide hosting services and are liable for the information stored at the request of a recipient of the service only: (a) if the provider does have actual knowledge of illegal activity or information and, as regards claims for damages, is aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, does not act expeditiously to remove or to disable access to the information (Article 14(1) of the E-Commerce Directive).

The ECJ, in the joined cases of Google26, found that Article 14 of the E-Commerce Directive applies to an Internet referencing service provider when that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, the Court reasoned that the service provider cannot be held liable for the data which it has stored at the request of an advertiser unless, having obtained knowledge of the unlawful nature of that data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned. Later that year, in Gestevision Telecinco SA-Telecinco Cinema SAU v YouTube, the Court of Madrid held that YouTube is a hosting provider and therefore is exempted from liability for the copyright infringement committed by its users.27 The Court also made reference to UMG Recordings Inc v Veoh Networks Inc,28 where the US District Court, SD California found that Veoh benefitted from the so called safe harbour established by the DMCA regarding the hosting of UGC. Such reasoning was also recently confirmed by the US Court of Appeals for the Ninth Circuit in UMG Recordings Inc v Shelter Capital Partners LLC29 and by the US District Court, SD New York30 in Viacom International Inc v YouTube Inc.31 Hence, one might
conclude that under EU law, as under US law, YouTube would be eligible for exemption of liability for hosting the episode of ‘The Daily Show’.\(^{32}\)

**Latest Developments**

The first Commission report on the application of the InfoSoc Directive came in 2007 (ref. 33). It was very clear that, especially in relation to exceptions and limitation, harmonization had not been achieved.\(^{34}\) The approach of the InfoSoc Directive was also criticized in literature.\(^{35}\) In 2008, the Commission published a Green Paper on Copyright in the Knowledge Economy.\(^{36}\) The scope of the Green Paper was not particularly broad, as it raised only certain issues relating to exceptions and limitations to copyright. However, the Green Paper did tackle the issue of UGC particularly bearing in mind that, in 2006, the Gowers Review of Intellectual Property called for amendments to the InfoSoc Directive in order to allow for an exception for creative, transformative or derivative works within the parameters of the ‘Berne three-step test’. After a proper legal qualification of UGC under EU law and international treaties, the Commission called upon comments. Following consultations, in 2009, the Commission released a Communication on Copyright in the Knowledge Economy\(^{38}\) in which it concluded that most of the stakeholders consider that it is too early to regulate UGC while identifying many dilemmas. Also in 2009, the Commission (DG Information Society and DG Internal Market and Services) published a consultation paper where it was suggested that further harmonization relating to the different and optional limitations and exceptions would create more certainty for consumers about what they can and cannot do with the content they legally acquire.\(^{39}\)

Currently, one can identify that a greater consideration is given to the issues discussed here. In June 2012, the European Council, determined to achieve a well-functioning Digital Single Market by 2015 as part of the agenda ‘Compact for Growth and Jobs’\(^{40}\), stated that it is crucial to modernize Europe’s copyright regime and facilitate licensing, while ensuring a high level of intellectual property right protection and taking into account cultural diversity. The Commission published in 2010, its Communication on a Digital Agenda for Europe\(^{41}\), calling for the establishment of a vibrant digital single market. The following year, in 2011, the Commission, in its communication\(^{42}\), acknowledged the fact that ‘amateur’ users create UGC for non-commercial purposes and yet face infringement proceedings if they upload material without the right holders’ consent. The Commission therefore accepted that the time had come to build on the strength of copyright in order to strike a balance between the rights of content creators and the need to take account of new forms of expression.\(^{43}\)

At the end of 2012, the Commission launched another communication\(^{44}\), addressing the review of the EU copyright framework and expressly mentioning harmonization, limitations and exceptions to copyright in the digital age. As for UGC, the Commission seemed to be inclined to a bypass solution in terms of facilitating licensing. The whole process introduced by the Digital Agenda for Europe, actually, is a process of ‘Licensing Europe’. One has to conclude that the Commission opted for a rather sectorial approach: something which is not very unusual when the activities of the Commission are concerned. Concerning exceptions and limitations, EU policy is currently focused on private copying levies and access to copyright works for people with disabilities. If one nevertheless strives to give an objective critique, one must recognize that the Commission is determined to work towards providing greater access to online content. Private copying levies and the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market\(^{45}\) are very good examples. The bottom line is that no one can truly blame the Commission for being pragmatic and promoting mechanisms for facilitating licensing instead of tackling the issues of feasibility of the actual scope of copyright.

**Discussion and Conclusion**

From a purely legal point of view one may generally conclude that using YouTube, as defined in terms of this paper, leads to a greater probability of copyright infringement. In resolving the issue, under current EU copyright law, one is primarily directed to exceptions and limitations as the OSP’s position seems to have been settled reasonably. The browser is relatively off the hook, unless he becomes a downloader. Here reproduction rights are in question. The position of the uploader seems to be the most severe, as he is clearly infringing the exclusive right of making available to the public. Such a state persists
notwithstanding whether one speaks of original copyrighted content or of modified, cross-referenced or combined content. Here, on UGC, the concern is also the process of modification of the original content. If one returns to the factual situations mentioned above, the question that is posed is whether all those acts really justify the current state of copyright protection. This author is not convinced. The main reason for such a claim is the fact that this author cannot identify any potential or actual harm to copyright holders on the basis of the acts performed in the factual situations mentioned at the outset of this paper.

Yet, what is to be done? Academics have continually called for changes in the system. The suggestions have ranged from topic specific\textsuperscript{46} to more wide-ranging proposals. Academics have mostly argued the application of the ‘three-step test’. Under the current EU copyright law, the three-step test is existent but complementary to the enumeration of all (mandatory or optional) exceptions and limitations (Article 5(5) of the InfoSoc Directive). The ECJ reasoned in such a manner in the joined cases of Football Association and Karen Murphy\textsuperscript{12}, where it stated that in order for the exception laid down by Article 5(1) of the InfoSoc Directive to be pertinent, those acts must also fulfill the conditions of Article 5(5) of the InfoSoc Directive. In addition, in Eva-Maria Painer v Standard Verlags GmbH and Others\textsuperscript{47}, the exception in Article 5(3)(e) of the InfoSoc Directive was to be read in the light of Article 5(5) of the InfoSoc Directive. On the other hand, in Case C-302/10 (ref. 13), the ECJ held that Article 5(5) of the InfoSoc Directive must be interpreted as meaning that if acts of temporary reproduction carried out during a ‘data capture’ process fulfill all the conditions laid down in Article 5(1) of the InfoSoc Directive, they must be regarded as fulfilling the condition of not conflicting with a normal exploitation of the work or unreasonably prejudicing the legitimate interests of the right holder. It has been rightly noted in literature that, if such interpretation were to be accepted, the three-step test would be depleted of any normative context.\textsuperscript{48}

The International Association for the Protection of Intellectual Property (AIPPI) has also made inquiries into the feasibility of the three-step test (Q216 and Q216B on exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors) and argued for its wider application.\textsuperscript{49} The need for wider introduction and application of the three-step test into EU copyright has been rather successfully argued in literature.\textsuperscript{50} The Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law\textsuperscript{51}, \textit{inter alia}, asserts that the three-step test should be interpreted in a manner that respects the legitimate interests of third parties, including: interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development.

Although not so frequently as for the three-step test, authors have called upon the introduction of a ‘European fair use’ doctrine: in substance by supplementing and modifying the US model.\textsuperscript{52} The US doctrine of fair use\textsuperscript{53} may certainly be one of the answers, although in Dellar v Samuel Goldwyn Inc\textsuperscript{54}, it was found to be the most troublesome in the whole law of copyright. For civil law countries, and as such most of the Member States, the fair use doctrine may be questioned on the basis of the principle of legal certainty. In the US, on the other hand, the fair use doctrine has been incessantly concretized in practice. Setting aside the clear requirement for the transformative character of the use, case law has also suggested the public benefit aspect. In Kelly v Arriba Soft Corporation\textsuperscript{55}, the US Court of Appeals for the Ninth Circuit considered the public benefit of the transformative use while it held that the 1976 Copyright Act was intended to promote creativity, thereby benefitting the artist and the public alike. Later, in Perfect 10 Inc v Amazon.com Inc\textsuperscript{56}, the Ninth Circuit held that the automatic background copying as in the matter at hand has no more than a minimal effect on Perfect 10’s rights, but a considerable public benefit.\textsuperscript{57}

In terms of a general approach, one may argue either for further reform of the InfoSoc Directive or a more substantial change of the system. At the level of EU, the Commission recommended further harmonization relating to the different and optional limitations and exceptions. In practice, this would probably entail a reexamination of the optional character of existent exceptions and not a more fundamental change of the system. On the other hand, at least according to this author, the answer should be sought in the recalibrating of the copyright system as a whole, and not by providing bypass solutions. History has proved that building a system of strong copyright protection has always been the prevailing approach. Nonetheless, the digital age has brought an
entirely different structure of economic relations on which the system of copyright protection should be based. The international legislator tried to build on the new structure using the established approach. Claims for colonization of the cyberspace have been even made. ACTA came and for now has gone away. Yet it would be imprudent to imagine its resurfacing in the same or different form. It has been frequently argued in literature that copyright is ill-equipped to deal with the cyberspace. For the current system of strong copyright protection, this may well be true. The issue, on the other hand, is whether some uses should be initially covered by copyright. To be more precise, this author argues that the system should be turned upside down while being quite aware that this is highly improbable.

Therefore, there seem to be two options: the first that focuses on the rights, and the second on exceptions and limitations to those rights. For this author, the right way to go would be recalibrating the system in terms of the scope of rights by abolishing the holder’s exclusivity relating to non-commercial and private uses. From a legal point of view, the benefits of such an approach are rather self-evident, bearing in mind that the initial limitation of the scope of rights renders the subsequent analysis on the legality of non-commercial and private uses superfluous. The adoption of such an approach, in the EU, has unfortunately at least two setbacks. Primarily, the legislative capacity of the EU to fully regulate rights is controversial. Secondly and more importantly, the adoption of such an approach seems politically improbable even if there has been considerable advocacy to this extent. The EU does what it does best: it compromises. Practically, the intended policy is a policy of facilitation of licensing by working closely with holders for broader licensing and introduction of different modes of broader access to content. The so-called ‘no action’ policies are good examples. The premise of strong copyright nevertheless remains. If, however the premise is reversed, one should not examine what the user is permitted to do but rather what he is not permitted to do. As mentioned, such an approach seems to be highly improbable; yet one should continue to strive and argue for it.

The next best thing is a general clause of exceptions. The scope of rights, as prescribed by the legislator, would remain the same. On the other hand, the legislator would have to establish a general clause of exceptions to copyright which would practically amount to an unenforceable infringement claim if and when the conditions prescribed by the clause are met. In choosing the right clause, it is rather clear that the fair use doctrine and the three-step test appear different. It seems that although the fair use doctrine is more acceptable, particularly in terms of transformative use, the three-step test is more firmly established at the international level. The three-step test has the primary limitation that it applies only in certain special cases. The other elements of the three-step test (not conflicting with normal exploitation of the work or unreasonably prejudicing the legitimate interests of the right holder) are not only too vague but also take the right holder (and his rights) as a starting point of the analysis. The fair use doctrine, on the other hand, stems from common law and offers broad interpretation possibilities while providing a non-exclusive list of factors to be considered when determining whether a certain use is not an infringement of copyright. It therefore seems more manageable in terms of changing social relations. Although fair use claims are evaluated on a case-by-case basis, there is also the possibility to establish settled fair use groups of cases.

This author is quite aware that his proposal may appear as *nihil novi sub sole*. By acculturating the fair use doctrine in EU copyright law the problem would not be completely resolved, but one should hope that users would not be constantly stigmatized as infringers. As for the justification of the proposal for adopting such an approach, it should be clear that it is not based on legal reasoning, which can only be based on existing legal rules. When one tries to qualify the system as adequate, on the other hand, one speaks of ideas, principles and usual human behaviour. The current system of copyright protection simply does not comport with the actions and expectations of ordinary people. This is known because one knows the way he/she acts and thinks: even when IP lawyers are concerned. The result is simply ‘people-who-are-technically-infringing-but-will-never-get-sued’.

Returning to the factual situations defined at the outset of this paper, one must wonder where is the harm of said uses. The use of seven seconds of the 1986 song ‘Take my breath away’ appears to be not only transformative but also quite entertaining. It contributes to the quality of the show; yet no one can claim that the show would be less appealing to audiences if the allusion to ‘Top Gun’ was not
present. The commercial character of the show would therefore not be of great value in opposing a fair use claim. As for the uploading of parts of the mentioned episode of ‘The Daily Show’ on YouTube by an anonymous user, one can certainly claim that Comedy Central may have received a licence fee if the user had requested permission for such an act. The question is nevertheless whether this would really be the case in actual practice. Further, the only effect of the upload is the fact that someone else obtains information. Thus the remaining conceivable bottom line is that this author may not have had the proper inspiration to write this paper.

References
3 The song, written by Giorgio Moroder and Tom Whitlock, was performed by the music group Berlin.
4 ‘This video contains content from Viacom, who has blocked it on copyright grounds’, http://www.youtube.com/watch?v=InU2QPlLoW&feature=youtu.be (20 June 2013).
6 In more detail, Гаврилович Ненад, Фер употреба музичких дела, обим аутсорсираних заштитне и нови законодавствене развои [Fair use of musical works, scope of copyright protection, and new legislative developments], Ирано и природе, 49 (7-9) (2012) (in Serbian).
9 Compare with the terminology used in Mazzotti Giuseppe, EU Digital Copyright Law and the End-User (Springer, Berlin and Heidelberg), 2008, p. 4-5.
12 Joined cases C-403/08 Football Association Premier League Ltd and Others v QC Leisure and Others and C-429/08 Karen Murphy v Media Protection Services Ltd, 4 October 2011 (acts of reproduction performed within the memory of a satellite decoder and on a television screen).
18 Case C-466/12 Nils Svensson, Sten Sjögren, Madelaine Sahlin, Pia Gadd v Retreiver and Case C-279/13, More Entertainment v Linus.
19 Fredenslund Maria, Denmark: Infopaq-case finally decided after eight years, http://kluwercopyrightblog.com/2013/05/17/denmark-infopaq-case-finally-decided-after-eight-years/ (22 June 2013).
20 In more detail see Arewa Olufunmilayo B, YouTube, UGC, and digital music: Competing business and cultural models in the internet age, Northwestern University Law Review, 104 (2) (2010) 442-475.
26 C-236/08 Google France SARL and Google Inc v Louis Vuitton Malletier SA; C-237/08 Google France SARL v Viaticum SA and Luteceil SARL and C-238/08 Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others [2009] ECR I-02417.
29 UMG Recordings Inc v Shelter Capital Partners LLC, 2013 WL 1092793 (9th Cir, 14 March 2013).
31 The last two cases are very interesting in regards to the level of knowledge of OSP’s. See also Latham Robert P, Butzer Carl C and Brown Jeremy T, Legal implications of user-generated content: YouTube, MySpace, Facebook, Intellectual Property & Technology Law Journal, 20 (5) (2008) 1-11.
32 As mentioned, the first copy of a part of the episode (originally viewed by this author) was removed due to a notice from (none other than) Viacom, the parent company of Comedy Central.
38 Communication on Copyright in the Knowledge Economy, COM (2009) 532 final.
39 Creative Content in a European Digital Single Market: Challenges for the Future Commission, DG Information Society and DG Internal Market and Services, Consultation Paper. It is stated, in a footnote, that serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purposes.
40 European Council June 2012 Conclusions, EUCO 76/12.
43 Also, the Commission mentions the approach of a creation of European Copyright Code as a comprehensive codification of the present body of EU copyright directives in order to harmonize and consolidate not only the entitlements provided by copyright and related rights at EU level but also current exceptions and limitations to copyright.
46 In 2004, the Coalition of Copyright for Education and Research released the Göttingen Declaration on Copyright for Education and Research, which called upon action to ensure that the full potential of the digital media and communications systems remain open for use by the general public and, in particular, by science, and that these media and systems are not subject to restrictions which primarily serve the commercialization of information by the private sector, http://www.urheberrechtsbuendnis.de/index.html.en (26 June 2013).
47 Case C-145/10 Eva-Maria Painer v Standard Verlags GmbH and Others, 11 December 2011.
54 Delar v Samuel Goldwyn Inc, 104 F.2d 661 (2d Cir, 1939).
55 Kelly v Arriba Soft Corporation, 336 F.3d 811 (9th Cir, 2003).
56 Perfect 10 Inc v Amazon.com Inc, 508 F.3d 1146 (9th Cir, 2007).
58 Discussion in Litman Jessica, Digital Copyright (Prometheus Books, Amherst, NY), 2006.
63 WTO Panel Report, United States - Section 110 (5) of the US Copyright Act, WT/DS160/R (15 June 2000).
64 Maybe this was the reason why the ECJ, in Case C-302/10 Infopaq International A/S v Danske Dagblades Forening, 17 January 2012, considered the fact that the enumeration of a certain exception or limitation in the InfoSoc Directive must entail that it fulfills the condition of not conflicting with a normal exploitation of the work or unreasonably prejudicing the legitimate interests of the right holder.