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ately balanced in itself, *i.e.* if the legal grounds for protection are adequately reflected in the requirements for protection, and if the scope of protection granted for each right complies with the principles of efficiency and proportionality. From this point of view, the overlap of rights regularly does not pose a problem *per se*. It would therefore be wrong to conclude that the primary aim for future I.P. policy should be to avoid or preclude overlaps as a matter of principle. We do not have to be that restrictive. If problems do arise in an overlap situation, however, there is reason to examine the issue very carefully. Rather than being caused by the overlap as such, the problem could be, and very often is, indicative of the fact that one or both rights involved are not adequately balanced in themselves, *e.g.* because the scope of protection is too broad, or because specific limitations are missing, and/or because the legal objectives on which the right was originally founded are no longer adequately reflected in the manner in which the requirements are assessed in practice.[36] In other words: overlaps enhance the visibility of imbalances which might otherwise remain undetected.

*Séverine Dusollier**

Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise

Legislative solutions to the troublesome relationship between digital copyright management systems and "fair use" or limitations to copyright are diverse. The response recently given by European lawmakers in the Directive of 22 May 2001 on Copyright and the Information Society[1] to that burning

36 The situation can be illustrated by the example of trade mark/copyright overlap in respect of three-dimensional articles. In spite of the conceptual and terminological differences between both types of rights, it may occur in practice that the standards applied in the assessment of (copyright) originality on one hand and (trade mark) distinctiveness on the other are more or less the same, meaning that the only thing which matters in reality is whether the shape of the product is somewhat different from others already existing on the market. Thus, although the difference between the immaterial objects of protection is upheld in theory, this is no longer – or only rather poorly – reflected in the assessment of the respective prerequisites. This situation might be called an "asymmetric convergence" of rights, *i.e.* an approximation in respect of protection requirements and initial thresholds, while differences are maintained in respect of the general scope and the limitations of the rights. It is typically in these situations that imbalances will occur.

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1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ EC L 167, at 10–19 (22 June 2001), available at: <http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm>.

challenge is a bold one: contrary to the US Digital Millenium Copyright Act or Australian Copyright Act,[2] its main originality lies in the way it encourages implementing exceptions to copyright in the very design of the technical, business and contractual models for distributing copyrighted works.

Indeed, the European directive seeks to set the balance in favour of the user not at the stage of sanctions for circumvention, but at the earlier stage of the exercise of the exception constrained by a technical measure. To this end, the directive puts forward intricate provisions in Art. 6(4).

The first principle laid down in the directive is to entrust the rightholders with the task of reconciling technological measures with the safeguarding of exceptions. The first indent of the Art. 6(4) states:

> 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 (...), 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.

The intervention of lawmakers is therefore subsidiary to that of authors and other rightholders. Adoption of any voluntary measures by rightholders should be the preferred solution. The State should intervene only in default of such measures.

The directive does not define the "voluntary measures", save for mentioning agreements between copyright holders and other parties concerned. We could consider "building copyright exceptions by design" as one key example of such "voluntary measures". The rightholders could devise or revise the technological measures so as to accommodate some exceptions or put in place some breathing space in favour of the user in licences or business models. This solution is rather bold and revolutionary in the European context. In a way, it implies that the exceptions are given a positive meaning and not only a defensive character. It is certainly the first time that authors have been asked to facilitate the exercise of exceptions to their rights. Countries such as France, which considers exceptions to copyright only as "market failure" or as mere tolerance by the authors, will have a hard time in putting such a new principle in their copyright legislation.

The purpose of this paper will be to consider to what extent this "fair use by design" is sustained in the European directive and in the *acquis communautaire* which already grants some "rights" to software or database users. A quick explanation of the regime of exceptions to copyright as they stand in the European Union will first be considered (I.), with some emphasis on the recent

2 For a comparative analysis of anti-circumvention provisions in the United States, Australia, Japan and the European Union, *see* J. DE WERRA, "The legal system of technological protection measures under the WIPO Treaties, the DMCA, the European Union Directives and other national laws (Japan, Australia)", 189 R.I.D.A. 67 (2001).

failure to harmonize the diverse systems prevailing in the Member States and on the harmonized exceptions to copyright in software and databases. Then, the recent directive on copyright in the information society, and particularly the solution to the conflict between technological measures and the exceptions it puts forward, will be analyzed (II.). As a conclusion, this paper will highlight the flaws and restrictions of the European solution which makes the safeguarding of exceptions at the European level a broken promise (III.).

I. Exceptions and Limitations to Copyright in the European Union

In any regulatory framework, copyright is not absolute but is limited in scope, duration and in the ways in which it can be enforced. One key limitation to copyright consists of the so-called exceptions, *i.e.* uses, in theory covered by the monopoly of the author, that are considered as non-infringing. Such systems of copyright exceptions differ from one country to another. They are generally of two kinds: either they provide for a general and flexible defence to copyright infringement that can be granted by the courts on a case-by-case basis, like the American fair use, or the law provides for a list of circumstances where the author is said not to be allowed to enforce her rights, as in most European countries. In the former case, the exceptions system is "open" as it allows more new limitations to emerge. By its very nature, such a regime is thus evolutionary and does not set any fixed or definitive boundaries. The latter case, also qualified as a "closed" system of exceptions, is on the contrary clearly bordered by a list of narrowly defined and exhaustive cases.[3] For instance, France does permit some exceptions to the copyright or author's right for parody, quotations, or private copying, but does not allow for new exceptions outside the legal list to be granted by the courts.[4]

3 For a comparative view of copyright exceptions around the world, *see* L. BAULCH, M. GREEN & M. WYBURN (eds.), "The Boundaries of Copyright", ALAI Study Days 1998, 1999, and particularly the general report by JAAP SPOOR, at 27.

4 Nevertheless, recognizing that these exemptions are based on a balance between private and collective interests, some European courts indulge themselves in extending the exhaustive list of exceptions included in the law when a situation arises that jeopardizes this balance between competing interests. *See Dior v. Evora*, Netherlands Supreme Court, 20 October 1995, 1996 N.J. 682. The Supreme Court of the Netherlands considered that the logic of copyright itself entailed that the list of exceptions featured in copyright law could not be considered closed. When the rationale that has justified exceptions is found in a similar situation (*i.e.* when the general interest or higher interest of a third party can only be preserved by limiting copyright) it must be accepted that the author's rights must give way to this general interest or third party interest in seeing the work reproduced and/or made available to others. Or, for a French example, Paris Court of Appeals (*TGI*), 23 February 1999, 184 R.I.D.A. 374 (an exemption not provided for by copyright law can be recognized on the basis of the public's right to information as laid down in Art. 10 of the European Convention on Human Rights. This revolutionary and hence criticized decision has been reversed in appeal however). On all these rulings and some others, P. BERNT HUGENHOLTZ, in: R. C. DREYFUSS, D. L. ZIMMERMAN & H. FIRST (eds.) "Copyright and freedom of expression in Europe, in expanding the boundaries of intellectual property" 343 (2001).

It has to be added to that picture of copyright exceptions around the world that although the so-called continental countries look alike in the way they compile a closed list of exceptions, the contents of such lists are quite different. In Europe, exceptions to copyright are largely diverse and not harmonized. The following exceptions are generally recognized: private copying or other private use, parody, quotation, use of a work for scientific or teaching purposes, news reporting, library privileges, needs of the administration of justice and public policy. But not all these exceptions are recognized in all countries: for instance, France does not permit any exceptions for research or education, or for libraries, while Germany or the Netherlands do not have any exception for parody.

Next to these broad categories of copyright exceptions, there are also very specific cases regarding particular situations. For example, there is the Belgian exception that allows the Film Museum to make copies of films for purposes of restoration, the exception for disabled persons in the Nordic countries, or the German exception that exempts the communication of works during religious ceremonies.

This fragmented picture in the European countries has made obvious a need for harmonization amongst the Member States in order to prevent any hurdle to the proper operation of the internal market. This is what the European Commission has tried to achieve with its 1997 draft directive on the harmonization of copyright and related rights in the information society. The exceptions were amongst the key fields of copyright in which harmonization was pursued. The draft directive stipulated that the Member States limit their list of copyright exceptions to nine cases.[5] This goal of harmonization has failed, since the directive which was finally adopted in 2001 provides a long list of 23 exceptions,[6] only one of which (*i.e.* the exception for temporary acts of reproduction) is to be mandatorily implemented in the regulatory framework of the Member States. Other exceptions are in the

5 The only exceptions that would have been allowed were for the temporary act of reproduction, reprography, private copying, exceptions for archives and libraries, teaching and research, disabled persons, news reporting, quotations and for public security purposes.

6 The exceptions listed in Art. 5 of the directive are the temporary act of reproduction, reprography, private copying, the exception for archives and libraries, ephemeral recordings of works made by broadcasting organizations, reproduction made by some social institutions, use for the sole purpose of illustration for teaching or scientific research, use by disabled persons, news reporting, quotation, use for public security purposes, use of political speeches, use during religious or official celebrations, incidental inclusion of a work in other material, use for the purpose of advertising the public exhibition or sale of artistic works, parody, use in connection with the demonstration or repair of equipment, 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, use for the purpose of research or private study by dedicated terminals in libraries, and finally what has been called the "grandfather clause" which aims at preserving existing exceptions in Member States to the extent that the exception covers certain other cases of minor importance in the analogue environment. Each exception has to comply with strict requirements. Some have to provide fair remuneration to the rightholders.

form of what some have called a "shopping list" from which Member States can pick and choose. Moreover, a look at the current national proposals for transposition of the directive underlines that in most cases Member States have chosen to keep existing exceptions without suppressing others or to create new ones. This says a good deal about the outcome of the harmonization aimed at by the Commission.[7]

However, the exceptions regime is largely harmonized in Europe for specific works, *i.e.* software and databases. The directive of 1991 on the legal protection of computer programs has laid down a closed list of exceptions to the copyright vested in software, which is the same in each Member State. These exceptions are the use of the computer program, including for correction of errors, making a back-up copy, study of the program, and reverse engineering.[8] All these exceptions are restricted to the lawful user of the computer program.

As far as databases are concerned, the 1996 directive has allowed for the following exceptions: uses necessary for the purpose of access to the contents of the databases and normal use by the lawful user, reproduction for private purposes of a non-electronic database, illustration for teaching or scientific research, for the purpose of public security and where other exceptions to copyright that are traditionally authorized under national law are involved.[9] Specific exceptions to the sui generis right exist in case of extraction for private purposes of the contents of a non-electronic database, for the purposes of illustration for teaching or scientific research, and for the purposes of public security or an administrative or judicial procedure.[10]

Both directives state that most of these exceptions cannot be precluded by contract.[11] Any contract preventing the user from reverse engineering the computer program or from accessing the contents of the database shall be

7 *See* BERNT HUGENHOLTZ, "Why the copyright directive is unimportant and possibly invalid", 2000 E.I.P.R. 499.

8 Articles 5 and 6 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ EC L 122, at 42 (17 May 1991), available at: <http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm>.

9 Article 6 of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ EC L 077, at 20–28 (27 March 1996), available at: <http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm>.

10 Article 9 of the same directive.

11 Contrary to that legal provision in the European *acquis communautaire*, the relationship between fair use and contract has been regulated under the preemption doctrine in the United States. *See* I. TROTTER HARDY, "Contracts, copyright and preemption in a digital world", 1 Rich. J.L. & Tech. 2 (1995); DENNIS S. KARJALA, "Federal Preemption of Shrinkwrap and On-Line Licenses", 1997 Dayton L. Rev. 511; MARK LEMLEY, "Beyond Preemption: The Law and Policy of Intellectual Property Licensing", 86 Calif. L. Rev. 111 (1999); MAUREEN O'ROURKE, "Drawing the Boundary between Copyright and Contract: Copyright Preemption of Software License Terms", 45 Duke L. J. 479 (1995); DAVID A. RICE, "Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering", 53 U. Pitt. L. Rev. 543 (1992).

null and void.[12] Therefore, both directives and their transposition in Member States confer an imperative nature on some exceptions. Such a binding or imperative nature of certain exceptions does not appear in the 2001 directive on copyright and the information society.[13]

II. Copyright Exception v. Technological Measures – The European Solution

On 22 May 2001, the European Council adopted the directive on the harmonization of certain aspects of copyright and related rights in the information society.[14] This directive completes a process of harmonization of copyright and related rights amongst the Member States and of adaptation of copyright to the information society that began in 1995 with the Green Paper of the European Commission on copyright in the information society.[15] The directive also implements the WIPO treaties of 1996, as the United States did in 1998 with the Digital Millennium Copyright Act (hereinafter: DMCA).

The legal protection of technological measures, otherwise called the anti-circumvention provisions, was certainly one of the key issues in the negotiations that led to the adoption of the directive. The controversy surrounding such protection, and notably the relationship between technical lock-ups and limitations to copyright, was so intense it nearly blocked the whole directive. The issue finally found a solution in Art. 6(4) of the directive, which is however a delicate compromise between the friends and the foes of absolute legal protection.

Article 6, where anti-circumvention provisions are laid down, states:

> 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

12 The binding nature of some exceptions in the software or database context could have a specific outcome when dealing with technological measures. *See* THOMAS HEIDE, "The approach to innovation under the proposed copyright directive: Time for mandatory exceptions?", 2000 I.P.Q. 215.

13 It is worthwhile to note that, since 1998, the Belgian Copyright Act states that all exceptions to copyright, including private copying, though generally based on a market failure, are considered as imperative and cannot be precluded by contract. To my knowledge, it is the only country where such a peculiarity exists.

14 *Supra* note 1.

15 Green Paper on Copyright and Related Rights in the Information Society, Brussels, 19 July 1995, COM (95) final.

(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 authorized 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 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 Art. 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 Art. 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 Art. 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*.

The first two paragraphs deal with the activities to be prohibited by the Member States: the circumvention of a technological measure on the one hand, and the trafficking of devices enabling such a circumvention on the other hand. The third paragraph defines the technological measures to be protected to a very broad extent: it covers any technical tool used by a copyright owner to protect her work and the distribution thereof. While the US Digital Millennium Copyright Act clearly delineates the measures that control access and those that govern a right of the author, the European provisions cover any type of technological measures used by right holders, including access controls, rights-restriction mechanisms and any other technical tool to which the authors resort to control and manage the use of their works. This goes far beyond the scope of the DMCA.

Attention will only be devoted to the intricate provision of the fourth paragraph of Art. 6, which seeks to preserve some exceptions in a technologically protected environment.

Compared to other anti-circumvention provisions around the world, the European solution is peculiar in the manner in which it confronts the issue. Indeed, while the United States or Australia has only considered the solution to that "fair use" issue at the level of sanctions for circumvention, the European Union has chosen to regulate the matter even before the enforcement stage. The former countries have enacted different safeguard mechanisms but both exempt the user when the circumvention she carried out was in the framework of the legitimate exercise of some exceptions.[16] In such a case, the legitimate use being technically locked-up, the user has no choice but to circumvent the digital protection. The US law does not give her the tools to do so but will not hold her liable under some, albeit strict, conditions. The same is true for the providers of circumvention means under Australian law. The message here is thus: "circumvent-we-do-not-sue". It does not actually solve the issue of the digital lock-up. While in the analogue environment the copyright exemption was primarily used as a defense in litigation for copyright infringement – whatever its success might be –, in a digital world wrapped by technological devices, the function of the exemptions system will be completely different. If any act of reproduction or communication of a copyrighted work is inhibited by technological protection, the user will either have to sue the rightholder to enable her to exercise her exemption (for instance for purposes of research, education, or criticism), or to deploy some skill in circumventing the technical measure. In both cases,

16 Yet both systems are quite different. The US DMCA does not hold the circumventer liable in very limited cases (such as reverse engineering, security testing, etc...) that do not run parallel to the copyright fair use. Furthermore, generally the exceptions to anti-circumvention provisions – or the "fair hacking" rights, as Jane Ginsburg has qualified them – only applies to the circumvention itself and not to the trafficking in circumvention devices. Whether fair use will be a legitimate defence to the circumvention or to the trafficking in circumvention devices is widely discussed. Conversely, Australia does not prohibit the circumvention itself but only the trafficking in circumvention devices. The fair use concern is thus limited. Anyway, the Australian regime enables trafficking in circumvention devices where the user of the device signs a declaration that the device will only be used for an identified permitted purpose. On the Australian provisions related to the exceptions, *see* J. DE WERRA, *supra* note 2, at 170; Australia Report, ALAI 2001 Congress, "Adjuncts and Alternatives to Copyright", New York, 13–17 June 2001, available at: <http://www.law.columbia.edu/conferences/2001/home_en.html>; S. FITZPATRICK, "Copyright imbalance: U.S. and Australian responses to the WIPO Digital Copyright Treaty", 2000 E.I.P.R. 214–228.

the burden imposed on the user is rather heavy. The solution put forward by the DMCA and the Australian Copyright Act permits the function of the exception as a defence only in the case of an action brought against the user for having circumvented the system (or against the provider of a device in the Australian case for having distributed the device). Neither solution seeks to reduce technological restraints on the legitimate exceptions.

In turn, the European directive seeks to tip the balance in favour 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 technical measure. To this end, the directive puts forward an intricate provision, Art. 6(4), the first indent of which states:

> 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..., 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.

The second indent of Art. 6(4) provides a similar solution (appropriate measures of the States if rightholders fail to do so) for private copies. In that case, the intervention of the legislature is not mandatory but optional. Here also, the initiative lies with the rightholders.

The key principle of this provision is to encourage copyright owners to take care of the issue themselves by any "appropriate measure" they wish. The directive does not define the "voluntary measures" that can be taken by the copyright owners, save for mentioning agreements between rightholders and other parties concerned. As examples from the legislative history of the directive, the rightholders can provide some corporate or collective users with unlocked copies of the works, apply alternative pricing policy,[17] and devise or revise the technological measures so as to accommodate some exceptions, thus providing some breathing space for the user. In the latter case, the very design of the technological protection measures embeds some fair use principles. In that sense, one can say that the European directive puts forward a solution, amongst others to be decided by the rightholders, of "fair use by design". Fair use by design can also be inferred from the choice of a new business model that allows some space for the exercise of exceptions. In both cases, whether the fair use principle is embedded in the technical design of the management system or in the contractual design of the business model, its integration in the relationship between the author and the user will result from a choice or a negotiation preliminary to any litigation. The existence of the exceptions or fair use will be dependent upon an explicit decision by the author, in a private orderings model,[18] and not by a public and democratic process of lawmaking.

17 These are some measures mentioned by The International Federation of Phonograms Industry (IFPI).

18 *See infra* note 25 and the accompanying text.

The optional provision related to private copying confirms that "fair use by design" is the standard adopted by the European Union in the field of copyright exceptions. Here, Member States cannot prevent the rightholders from adopting "measures regarding the number of reproductions". This refers to anti-copying devices that allow for one or a small number of copies, such as serial copy management systems. The possibility to embed such restrictions to control the number of copies is specifically linked to the design of the technological measure. Moreover, the directive provides that "the technological measures applied voluntarily by rightholders ... [or] in implementation of the measures taken by Member States, shall enjoy the legal protection [against anti-circumvention]". This indicates that, with regard to measures to be taken by the authors or the States, European lawmakers have primarily thought about the integration of copyright exceptions in the very design and features of the technological measure.

In default of such measures from rightholders, the Member States are obliged to take "appropriate measures to ensure that rightholders make available ... the means of benefiting from [some] exception[s]". But nothing indicates when default on the part of the rightholders will be sufficiently patent as to necessitate intervention by the State. It should be stated in the national implementation of the directive, after what period of time the State must intervene if no measures have been taken by rightholders, and what the criteria are for considering the appropriateness of the measures taken by the authors. As to the latter, the directive prescribes nothing. Yet the State should be allowed to assess the merits of the measures taken by the rightholders before considering intervention. If any measure, however minimal, would relieve the State from its legislative duty to safeguard the public interest, it would give too much unrestrained power to the authors.

The purpose of the appropriate measures to be taken by the right holders or, in default, by the States is to make available to users the means of benefiting from exceptions. Such means should be made available only to "beneficiaries of exceptions who have legal access to the protected work". This does not mean that access to works should be granted to such users. Only the persons who already have access to works should be empowered to exercise legitimate exceptions. The case referred to here is where a work that has been legitimately purchased (or where access thereto has been legitimately gained in whatever manner) is technically protected to the extent that some legitimate uses cannot be accomplished. For instance, a technical lock-up on a CD-ROM on the history of the United States, rightfully purchased by a teacher, could prevent her from making any copies for use in the classroom. Or a library could be restrained from making an archival copy of a database it has bought. Article 6(4) is not about granting free access to users.

III. Fair Use by Design in the Directive: A Critical Comment

a) Contractual Freedom Favours Copyright Holders

Rather than safeguarding the exceptions and limitations of copyright, the authors' freedom of contract is favoured by the directive. It does not impose

any obligations on the authors, but leaves them some time and freedom before requiring the law to intervene. Authors also do not have to take measures according to certain requirements. Any measure appears to be sufficient, whatever its accuracy, efficiency or the actual outcome for users.[19]

Besides, one recital of the directive states that "the exceptions and limitations should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law".[20] This confirms that contractual relationships (or design) could prevail in drawing the contours or existence of any exception, whatever room the law has granted to the user of a copyrighted work.

The exception is thus clearly to be regulated by contract.[21] Such a principle stands alongside the solution advocated by Tom Bell who considers that "fair use" should become "fared use"[22] so that any exception can be licensed and paid for. Many scholars have discussed this shift of copyright from a public law to a regime of private ordering enabled by both contract and technological measures.[23] In Europe the discussion has not been as controversial so far. Yet Art. 6(4), to the extent it leaves authors the freedom to accommodate, design and restrict the exercise of exceptions, opens the way to a similar debate.

19 Save for the provision in Art. 12 of the directive that requires the European Commission to examine the implementation and effects of some provisions of the directive, and particularly to consider whether acts which are permitted by law are being adversely affected by the use of effective technological measures. The wording here reminds us of that of the DMCA entrusting the Library of Congress with a similar rulemaking. Nevertheless, in the European context, the rulemaking will be less direct, since the Commission, as a result of such a consideration, can only propose some amendments to the directive to be finally decided by the European Council and Parliament and eventually transposed in the Member States.

20 Recital 45 of the directive.

21 This is reinforced by the reference to "agreements".

22 Tom W. Bell, "Fair use v. fared use: the impact of automated rights managements on copyright's fair use doctrine", 76 N. Carolina L. Rev. 557, 558 (1998); Tom W. Bell, "Escape from Copyright: Market Success vs. Statutory Failure in The Protection of Expressive Works", 69 U. Cin. L. Rev. 741 (2001).

23 Against private ordering in copyright: Julie E. Cohen, "Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management'", 97 Mich. L. Rev. 462 (1998); Yochai Benkler, "Taking Stock: The Law and Economics of Intellectual Property Rights: An Unhurried View of Private Ordering in Information Transactions", 53 Vand. L. Rev. 2063 (2000); Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory", 41 Stanford L. Rev. 1343 (1989); Michael J. Madison, "Legal-Ware: Contract and Copyright in the Digital Age", 67 Fordham L. Rev. 1025 (1998); N. W. Netanel, "Copyright and a Democratic Civil Society", 106 Yale L.J. 283 (1996); in favour of private ordering as an appropriate answer to the market failure that copyright does not solve: Tom W. Bell, *supra* note 22; Kenneth W. Dam, "Self-help in the digital jungle", 28 Journal of Legal Studies 393 (1999); I. Trotter Hardy, "Property (and Copyright) in Cyberspace", 1996 U. Chi.Legal F. 217; Robert P. Merges, "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations", 84 Calif. L. Rev. 1293 (1996).

The only way that such a debate could differ from that in America, would result from the very nature of the exception in Europe. More than just a defence against a claim of copyright infringement, the exception is a natural boundary to the monopoly power of the author. Many European copyright acts formulate exceptions as "the author is not entitled to prohibit ...". In my view, it should mean that the author does not have the power to interfere with the legitimate exercise of an exception, be it by enforcement of her rights before a court, by a contract or with a technical device. Her exclusive rights stop where the exception starts. Therefore, should the exception be a matter for authorization by or negotiation with the rightholder, it would not differ much from the exercise of the exclusive right of the author. What remains of the exception, whose key principle is to obviate the need for authorization by the rightholder, in such negotiations?

b) The Safeguarding Regime is Limited to Some Copyright Exceptions

The regime put in place by Art. 6(4) only concerns some limited exceptions.[24] These are the exceptions in respect of reproductions on paper or any similar medium or reprography (Art. 5(2)(a)), specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives (Art. 5(2)(c)), ephemeral recordings of works made by broadcasting organizations (Art. 5(2)(d)), reproductions of broadcasts made by social institutions pursuing non-commercial purposes (Art. 5(2)(e)), use for the sole purpose of illustration for teaching or scientific research (Art. 5(3)(a)), uses for the benefit of people with a disability (Art. 5(3)(b)), and use for purposes of public security (Art. 5(3)(e)). The private copy exception enjoys a specific regime that I have already considered.

Neither the directive nor the legislative history explains why some exceptions have been selected for such preferential treatment while others have not. It has been said that these were exceptions that conveyed strong public interests, such as fundamental freedoms. Yet, neither the exception of parody which is a persuasive illustration of the freedom of expression, nor the exception for news reporting, which reflects the concern for freedom of information and of the press, is included in the restricted list of Art. 6(4). It could also explain that the criteria led to the choice of some exceptions because the user of each exception is easily identifiable, which would make it easier to establish a contractual relationship between the user and the rightholder. Some exceptions on the list indeed relate to identifiable users such as libraries and archives, broadcasting organizations, educational establishments, some social institutions, and administrative offices. But this argument is not altogether convincing. What about the reprography exception whose potential users encompass the entire public? Why, then, is the news reporting exception, whose beneficiaries, *i.e.* the press and reporters, can easily be identified, not included in the list?

24 The provision in Art. 6(4) also has to benefit similar exceptions that could exist in the related rights and sui generis right regimes.

Another question here is whether a Member State, when implementing the directive, is entitled to provide a similar regime to other exceptions than those on the list of Art. 6(4). On the one hand, rightholders can decide to grant other exceptions by designing their technological measures in a way that accommodates other interests, such as news reporting for instance, or by reconciling some other uses by contract. This is a matter of the general freedom of contract. On the other hand, if the State itself has the same liberty, it would contravene the provisions of the directive.

Member States should take appropriate measures for exceptions listed in Art. 6(4) only to the extent that such exceptions exist in their regulatory framework. We have seen that the list of exceptions allowed in Art. 5 of the directive is only optional. Therefore, if one exception under Art. 6(4) has not been chosen by a country to be part of its copyright regime, it does not make sense to grant that exception to users in the case of a technological restraint. For instance, France does not permit any education or research-related exceptions (this might not change after implementation of the directive). The French legislature will not be obliged to make available to educational institutions the means to benefit in practice from an exception that does not exist in the law. This underlines the strangeness of the whole Art. 6(4), which makes the safeguarding of exceptions mandatory although enactment itself is not.

c) The Exclusion of On-Demand Services

The fourth indent of Art. 6(4) might be the greatest defect of the whole construction. It states that the provisions of the first and second indents, *i.e.* the obligation to take measures to safeguard some exceptions, 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.

The wording of this provision plainly refers to the definition of the right to make works available to the public,[25] as laid down in Art. 3 of the directive. It would mean that any on-demand service will not have to comply with the obligation to safeguard the exceptions and could be completely locked up. One case put forward by the music industry is the making available of music for a limited time, *e.g.* for the duration of one weekend where you plan to have a party. According to the IFPI, enabling some exceptions, such as for private copies, would ruin this new business model of distribution, and thus the normal exploitation of the work. If Warner Music "lends" you Björk for your birthday party, it does not mean you can keep her for longer – unfortunately. If a technical device obliges Björk to go home once the party is over and other guests have left, you cannot rely on Art. 6(4) to force Warner Music to change the rules of the game.

25 Article 3 of the directive states that "Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".

The vagueness of the wording could nevertheless jeopardize all the good intentions of Art. 6(4). Making available works on the Internet on demand could become the prevalent business model for distribution of works. The requirement that such services have to be delivered on contractual terms does not matter much given the easiness of embedding a click-wrap licence in digital products. Some scholars have expressed concern about this paragraph, which could relate to any distribution on the Internet and make void any obligation to preserve some exceptions. The uncertainty of the business models that will prevail on the Internet in the future could definitely prove them right.

IV. Conclusion

At first sight, embedding the fair use or copyright exceptions in the design of the contractual or technical model of distribution of works seems to be a perfect, concrete and flexible solution. Such a fair-use-by-design principle has been chosen by the European Union in its recent directive on copyright in the information society, with regard to the delegation to copyright owners or the authorities of the further elaboration of norms for circumvention exceptions.[26] The directive suggests that accommodation of the exceptions will result from a specific or revised design of the technical measures protecting copyrighted works, or from contractual or business models integrating the demands of users. One might reasonably wonder whether this miracle cure is nothing but pretense. Indeed, the solution does not cover all exceptions to copyright and, more importantly, will not cover most distribution of works on the Internet.

Fundamentally, the very principle of the fair-use-by-design model can be criticized. Its premise is based upon the broad freedom and encouragement given to authors to devise their business models accordingly. Under a balanced and public-oriented exterior there lies a clear choice towards a private orderings model where the authors' interests are privileged and preserved. They are undeniably stronger in any contractual negotiations with users, which could actually end in most cases in standard forms, and they are the only ones in charge of designing technological measures that will govern the distribution and enjoyment of works. Asking them to embed users' interests in such contracts or technical tools does not mean much.

The fair use that might be the product from that peculiar process could be a poor substitute to the legal defense or, as to Europe, to copyright exceptions which reflect, after a democratic and public process, a proper consideration and balance of interests both of any member of the society and of the society as a whole. We could lose fundamental public benefits that a private orderings model will never be able to value accurately.[27]

26 On the extent and consequence of this delegation *see* PIERRE SIRINELLI, "The scope of the prohibition of the circumvention of technological measures: Exceptions", ALAI 2001 Conference, Columbia Law School, available at: <http://www.law.columbia.edu/conferences/2001/Reports/GenRep_id2_en.doc>.

27 JULIE E. COHEN, "Copyright and the Perfect Curve", 53 Vand. L. Rev. 1799 (2000).