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FAIR USE BY DESIGN IN THE EUROPEAN COPYRIGHT DIRECTIVE OF 2001

By Séverine Dusollier

How should legislation address the troublesome relationship between digital copyright management systems and fair use? In Europe, the May 22, 2001 Directive on copyright and related rights in the information society[1] enacted anti-circumvention provisions, as the U.S. Digital Millennium Copyright Act (DMCA) did in 1998. These provisions prohibit the circumvention and trafficking in circumvention tools related to any technological measure used by copyright owners to protect their works. As to the exceptions to copyright, the Directive offers a bold solution. Contrary to the DMCA and the Australian Copyright Act, its originality stems from the way it induces to implement fair use—or "exceptions to copyright," as we say in Europe—in the design of the technical, business, and contractual models for distributing copyrighted works.

Is it an empty promise, privileging and preserving author interests at the expense of the public goal of safeguarding fair-use exceptions?

[1]Directive 2001/29/EC of the European Parliament and of the Council May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society; see europa.eu.int/comm/internal_market/en/intprop/docs/index.htm.

Indeed, while the U.S. and Australia have considered the solution to the fair use issue only at the level of the sanction for circumvention, the European Union seeks to preserve fair use even before the enforcement stage. The U.S. and Australia have each enacted different safeguard mechanisms but exempt users when their circumvention is in the framework of the legitimate exercise of some exceptions. In such cases, when the legitimate use is technically locked up, users have no choice but to circumvent the digital protection. In limited cases, the DMCA does not hold them liable under some, albeit strict, conditions. The same holds for providers of the means of circumvention in Australian law. The message in the DMCA and the Australian Copyright Act is thus:

This exercise of national sovereignty UNDERSCORES THE STRANGENESS OF ARTICLE 6(4), making mandatory the safeguarding of exceptions but not their enactment.

"circumvent we do not sue." They do not, however, solve the issue of the digital lock-up when built-in DRM software prevents all forms of potential fair use.

The European Directive seeks to tilt the balance in favor 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, it includes the intricacies of article 6(4).

Depends on Voluntary Measures

The first principle in article 6(4) is to entrust rights holders with the task of reconciling technological measures with safeguarding exceptions. The first indent of the article states: "In the absence of voluntary measures taken by rights holders, including agreements between rights holders and other parties concerned, Member States shall take appropriate measures to ensure that rights holders 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 rights owners. Adoption of any voluntary measures by rights holders should be the preferred solution. The State, it says, should intervene only in default of such measures.

The second indent of article 6(4) provides for a similar solution for private copying (appropriate measures by the State if rights holders fail to provide them). Intervention by a State's legislature is optional, not mandatory. Here, too, the initiative is with rights holders. This solution is rather revolutionary in the European context, implying the exceptions are given a positive meaning, not only a defensive posture. It is certainly the first time in European copyright law that authors have been asked to facilitate the exercise of exceptions to their own rights.

The Directive does not define "voluntary measures," save for mentioning agreements between copyright holders and other concerned parties. For example, rights holders can provide corporate or collective users an unlocked copy of the works, apply alternative pricing policy, or devise or revise the technological measures so as to accommodate some exceptions, thus adding breathing space in favor of the user.

Fair use principles may be embedded in the design of technological protection measures; for example, the digital rights management system can acknowledge the individual requesting a copy of the work as a teacher, allowing this person to take a portion of the work for quotation. Or it can allow someone to extract an insubstantial portion of a database. In that sense, one can say the Directive offers a solution involving fair use by design to be determined by rights holders. Fair use by design can also infer from the choice of a new business model allowing for the exercise of exceptions. 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. Member States cannot prevent rights holders from adopting "measures regarding the number of reproductions"; this refers to anti-copy devices allowing one or some small number of copies (such as in a serial copy management system).

In default of such measures from rights holders, Member States are obliged to take "appropriate measures to ensure that rights holders make available (...) the means of benefiting from [some] exception[s]." But nothing indicates when the default by rights holders is sufficiently patent as to necessitate a State taking action.

When implementing the Directive, a State uses its national laws to set the duration of a copyright; at its expiration, in default of appropriate measures by the rights holders, the State intervenes and proposes a solution, along with the criteria for considering the

appropriateness of the measures taken by rights holders. As to the evaluation of the measures adopted by rights owners, the Directive prescribes nothing. Yet it allows States to address the merits of the measures taken by the rights holders before considering its intervention. Would any measure, even a minimal one, free the State from its legislative duty to safeguard the public interest? If it did, too much unrestrained power would go to authors and other rights holders of copyrighted works.

The Directive does not indicate the measures States might take to preserve the exceptions. When transposing the Directive, some of them proposed fining copyright owners who do not let users exercise fair use, granting to users a legal action and remedies before a court or administrative body, as well as negotiations with all parties to achieve a contractual or technical solution.

The purpose of the measures by the rights 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 with legal access to the protected work. This does not mean that access to the work must be granted to such users; only the persons who already have access to works are empowered to exercise legitimate exceptions. Consider a work that has been legitimately purchased (or to which access has been legitimately gained) and is technically protected to the extent that some legitimate uses cannot be accomplished; for example, a locked CD-ROM on the history of the U.S., rightfully purchased by a teacher, could prevent the teacher from making a copy for use in a classroom. Moreover, a library would be prohibited from making an archival copy of a database it has purchased. Article 6(4) does not grant totally free access.

Therefore, the safeguard solution in article 6(4) does not deal with technological measures controlling access to works—only the acts a user carries out after the access, whether or not such access is technically or contractually controlled. This does not mean the acts of circumvention needed to exercise an exception are permitted. The solution is based on the premise that circumvention is no longer needed, since the exercise of fair use is made possible by voluntary or State measures. As a consequence, article 6(4) does not exempt the act of circumvention or the trafficking in circumvention devices.

Limited to Some Copyright Exceptions

The regime established by article 6(4) is granted only to some limited exceptions. Each State has its own legally and exhaustively defined exceptions to copyright. The Directive nevertheless tries to harmonize the admissible exceptions, listing 23 that could be used by Member States. However, only seven such exceptions are entitled to the safeguard regime of article 6(4): those concerning reproductions on paper or similar media and reprography; those concerning specific acts of reproduction by publicly accessible libraries, educational institutions, museums, and archives; those concerning ephemeral recordings of works by broadcasting organizations; those concerning reproductions of broadcasts made by social institutions pursuing noncommercial purposes; those concerning illustration in teaching and scientific research; those concerning the benefit of people with disabilities; and those concerning public security.

Neither the Directive nor the legislative history explains why only some exceptions were selected for preferential treatment while others were not. It has been said that these exceptions reflect strong public interest in fundamental freedoms, including speech, assembly, and the press. Yet neither the exception of parody, reflecting concern for the freedom of expression, nor the exception for news reporting, reflecting concern for the freedoms of information and of the press, is included in the restricted list in article 6(4).

Member States take appropriate measures concerning the exceptions to the extent they exist in their own regulatory frameworks. The exceptions in article 5 of the Directive were only optional. Therefore, if a particular exception in article 6(4) is not chosen by a country to be part of its copyright regime, it does not make sense to grant the exception to users in the case of a technological restraint. For instance, even though France does not endorse education and research-related exceptions, this might not change when it implements the Directive. French lawmakers are not obliged to make available to educational institutions the means to benefit from an exception that does not exist in France's copyright laws. This exercise of national sovereignty underscores the strangeness of article 6(4), making mandatory the safeguarding of exceptions but not their enactment.

Excluding On-Demand Services

The fourth indent of 6(4) might represent the Directive's most notable defect. It states that the provisions of the first and second indents—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 personally chosen by them.

The wording of this provision plainly refers to the

definition of the right to make works available to the public, as per the definition of the right of public communication in World Intellectual Property Organization treaties and in the Directive's own article 3. It would mean that on-demand services need not comply with the obligation to safeguard the exceptions and could use technical means to prohibit exceptions of any kind.

The case put forward by the music industry, as represented by the International Federation of the Phonographic Industry (IFPI), involves making available music for a limited time (such as for a weekend during which the user plans to have a party). According to IFPI, enabling some exceptions (such as making a private copy) would ruin this new business model of distribution and thus the normal exploitation of the work. For example, Warner Music's "lending," say, Bjork's musical works to a party-giver for the duration of a party does not mean this person is permitted to keep them longer. If a technical device obliges Bjork to leave when the guests leave and the party ends, the party-giver cannot rely on article 6(4) to force Warner Music to change the rules of the game.

Exceptions and fair use are effective ONLY THROUGH AN AUTHOR'S EXPLICIT DECISION, in a private orderings model, not from a public and democratic process of lawmaking.

The vagueness of its wording might nevertheless undermine the good intent of article 6(4). Making available works on-demand via the Internet could emerge as the prevalent business model for distributing digital works. The requirement that such services have to be delivered on contractual terms is not a strict burden for copyright owners, given the ease of embedding click-wrap licenses in digital products. Some legal scholars have expressed concern about this paragraph, which in their view could cover the entire Internet and make void any obligation for preserving exceptions. Today's uncertainty as to future business models that might prevail on the Internet might prove them prescient.

More important, excluding the safeguard clause of article 6(4) as to when a contract is concluded online means European lawmakers want such contracts to prevail on fair use principles.

Contractual Freedom

Rather than safeguarding the exceptions and limitations of copyright, the Directive privileges the freedom to contract by copyright owners, giving them time and freedom of action before lawmakers intervene. Authors are not obliged to devise the measures needed to adhere to specific requirements. Any measures would appear to be sufficient, whatever their accuracy, efficiency, or effect on the outcome for users.

The Directive states: "The exceptions and limitations should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rights holders insofar as permitted by national law."[2] This confirms that contractual relationships (or technical design) could prevail in drawing the contours or even the existence of an exception, no matter how much leeway the law grants users of a copyrighted work.

The exception is thus contracted. Many legal scholars have discussed this shift of copyright from public law to a regime of private orderings enabled by both contract and technological means [1, 3, 4]. It has not, however, prompted much controversy in Europe. But article 6(4), to the extent it gives authors the freedom to accommodate, design, and restrict the exercise of exceptions opens the way to a similar debate.

The only way such a debate might differ from its counterpart in the U.S. concerns the nature of the fair use regime in Europe. More than being a defense against a claim of copyright infringement, an exception is a natural boundary to an author's monopoly power. Many European copyright laws formulate the exceptions by stating: "the author is not entitled to prohibit ..." It should mean that authors have no power to intrude the space occupied by the legitimate exercise of an exception, whether by enforcement of their rights in court, by contract, or by technical device. Their exclusive rights stop where the exception begins. Therefore, if the exception is a matter for authorization or negotiation with rights owners, it would not differ much from the exercise of authors' exclusive rights to authorize, prohibit, and negotiate the use of their work. What then remains of the exception—whose key principle is the lack of need for authorization from the rights owner—in such bargaining?

Conclusion

Embedding fair use and other copyright exceptions in the contractual and technical models of the dis-

[2] Recital 45 of the Directive.

tribution of digital works might seem a perfect yet flexible solution. Such a principle of fair use by design was adopted by the European Union in 2001. Its Directive suggests that the accommodation of exceptions will result from a specific or revised design of the technical measures protecting copyrighted works or from contractual or business models integrating the legitimate demands of users. One might therefore wonder whether this miracle cure is only pretense. Indeed, it does not cover all exceptions to copyright; more important, it does not cover most forms of distribution of works on the Internet.

The principle is based on the broad freedom and encouragement given by European copyright law to rights holders to devise their own business models. Behind a balanced, publicly oriented exterior, however, lies a private-orderings model in which author interests are privileged and preserved. The Directive renders them undeniably stronger in any contractual negotiations they engage in with users; moreover, they are in charge of designing the technological measures governing the distribution and enjoyment of their works.

Exceptions and fair use are effective only through an author's explicit decision, in a private orderings model, not from a public and democratic process of lawmaking. Asking authors to embed user interests in such contracts or technical tools means little. Especially when one recognizes they are entitled to completely lock up user interests by contract and distribute their works through an on-demand business model.

The fair use that might be produced by this peculiar process would be a poor substitute for the legal defense of fair use or, in Europe, to copyright exceptions, reflecting, after a democratic and public process, the proper consideration and balance of the interests of all members of society, as well as of society as a whole. All could lose a fundamental public benefit a private orderings model would never value properly [2]. ■

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