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THE ROLE OF THE LAWMAKER AND OF THE JUDGE IN THE CONFLICT BETWEEN COPYRIGHT EXCEPTIONS, FREEDOM OF EXPRESSION AND TECHNOLOGICAL MEASURES

Mesa Redonda / Table Ronde / Round Table

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The development of technological measures for protecting copyrighted works has added two new layers of protection in literary and artistic property, the first being the copyright itself protecting against unauthorised reproduction and communication of the work. The technical barrier also triggers an additional layer of protection, that is, a factual protection preventing or controlling unauthorised uses of the work. The third and final layer results from the anti-circumvention provisions that most national laws have enacted following the WIPO Treaties of 1996. That ultimate protection, enshrined in the law, prohibits to tamper with the second layer of protection, that of the technological measure, adjoining therefore a supplementary deterrence against unauthorised uses. This metaphor of the three layers of protection has become a common way of describing the combined forces of the technology and law in the protection of copyright in a digital world¹.

While the lawmakers have been eager to let fully deploy the three levels of protection, they paid less attention to keep the internal balance embedded in copyright in each new protection tier. Given the topic of this conference, I will limit my analysis to the consideration of the fundamental freedoms of expression and access to information in relation to the introduction

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1 On the consequence of this multiplicity of protection layers, see S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des oeuvres*, Larcier, Bruxelles, 2005 (2^a ed. 2007).

of the technological measures in the copyright architecture.

My general point will be to try to delineate the respective role of the lawmaker and of the judge in the accommodation of copyright protection and the protection of free speech, particularly as far as technological measures and anti-circumvention laws are concerned. In my view, the key mission of the lawmaker is to define the existence of each right, fundamental freedom and legitimate interest, and to provide for the general rules of conflict between them. As to the courts, they are vested the competence to rule conflicts between rights, freedoms and interests, as well as to recognize new legitimate interests that might not have been taken into account so far by the law. Let me apply now this grid of analysis to the conflict between technological measures, exceptions and fundamental freedoms in three successive arguments.

1st thesis: the delimitation of the rights and their limitations, as justified by the consideration of fundamental freedoms and legitimate interests, is primarily the competence of the lawmaker and not of the judge. The judge should not have the power to modify the prerogatives defined by the law, but in particular circumstances, namely when solving conflicts.

The scope of the rights to be conferred to the authors by copyright and of the limitations thereof in favour of the users should be decided by the law, after a democratic discussion in the parliaments.

Leaving that task to the courts should not be admitted, save where an overall frame leaves the judge decide when a use is to be considered as fair according to some legal criteria. However, the judges have the natural competence to give shape to legitimate interests that might not be properly recognised and protected by the law, particularly when such interests rest upon the fundamental freedom of expression and access to information².

Once the delimitation of copyright exclusive rights and exceptions has been established by the law, these contiguous prerogatives should only be applied by the courts, not modified by them. That does not prevent the judge to interpret the legal provisions so as to devise the proper scope and boundaries of the rights and exceptions, when the law is unclear in that regard. The consideration of the fundamental freedoms and legitimate interests that underlie the copyright exceptions and the exclusive rights, can help such an interpretation.

² C. Geiger, *Droit d'auteur et droit du public à l'information – Approche de droit comparé*, Litec, Paris, 2004, p. 391.

One illustration of this thesis can be found in the application of the three-step test. In my view the test is only a tool for lawmakers when deciding to introduce new exceptions in the copyright law or when considering whether existing exceptions have still an acceptable scope in new technological environments³. The courts should not be given the task to scrutinize the legitimacy of the concrete application of an exception in the light of the triple test. One knows that the European Directive 2001/29/EC concerning the copyright in the information society has introduced the three-step test as a general condition to be applied to all copyright exceptions. While the Berne Convention, WIPO Treaties and the TRIPS agreement only intend the test to the lawmaker, the European Directive 2001/29/EC on copyright in the information society seems to give it to the judge as a tool to appreciate the legitimacy of a defence to a copyright infringement, additionally to the conditions laid down by the law to the exception invoked by the defendant.

When transposing that directive, some countries, such as Belgium, have limited the consideration of the test to the legislative adoption of exceptions, leaving it to the courts only to interpret exceptions in marginal cases. Others have expressly added the test in their copyright law, making it a supplementary condition for the exceptions to fulfil. It is inherently wrong to me, since it jeopardizes the preservation of fundamental freedoms and legitimate interests in the overall copyright architecture. Some European case law has already applied the three-step test in litigations where defendants argued that they benefit from a copyright exception. In the Netherlands, a judge has used the test to interpret the scope of an exception allowing for the making of press reviews and has denied its extension to digital press reviews⁴. This decision can be understood as entitling the courts to seize the test only when construing a legal provision whose scope of application is not clearly determined.

A more disturbing case is the so-called *Mulholland Drive* decision held by the French *Cour de Cassation*, in February 2006⁵. A person having bought the DVD of the film of David Lynch wanted to make an analogue copy thereof so as to view the film with his parents. The making of that copy being prohibited by the technical anti-copy device embedded in the DVD, he sued the owner of the copyright in the film to be provided the

³ S. Dusollier, "L'encadrement des exceptions au droit d'auteur par le test des trois étapes", 10 *Intellectuelle Rechten-Droits Intellectuels* 213-223 (2005).

⁴ Rb. 's-Gravenhage, 2 mars 2005, 21 *Computerr.* 143 (2005), note K. Koelman.

⁵ Cass. fr., 28 février 2006, 2 *Auteurs & Média* 178 (2006).

means to make that copy under the private copy exception, that he considered as a right. He was denied that right in first instance, namely because the private copy of a DVD was held being contrary to the three-step test. However the court of appeal of Paris infirmed the decision, holding that the making of this private copy was not at odds with the test since, in default of being capable to do so, the acquirer of a DVD would not buy a second one: the private copy would not then deprive the right owners of their normal exploitation. As a consequence, the rights owners have been requested to enable the making of a private copy, and more precisely (and probably more questionably) to refrain from selling technically protected DVDs that might actually deprive the users from the possibility to enjoy the private copy exception.

It is rather difficult to understand the full meaning of that French decision. The competence of the judge to grab the test to appreciate the validity of the exception was barely discussed. A reassuring way of understanding the decision would be to consider that the French courts have used the test to appreciate the legitimacy of the private copy only in default of the lawmaker to transpose the European directive in due time. In other words, the judge would have substituted to the lawmaker in the application of the test to validate the preservation of some exceptions in the digital environment.

However, it does not seem that the decision of the *Cour de cassation* is only a provisional one in the waiting of the transposition of the directive. In the notice publishing the decision on the court's website, it is said that the decision indicates that the opinion of the court is the way in which the inferior courts will have to construe the private exception in the future. Would that mean that the users will never be certain that the copy they make of a work will be immunised by the private copy exception? That the definitive benefit of the exception might be indefinitely jeopardized in the wait of the intervention of a judge whose final word could allow for the exception? Should this conclusion be true, it would mean that the definitive delimitation of any exception is left to the courts and not to the democratic process of the parliament. That is not desirable.

Another consequence of this first thesis is that the definition of the prerogatives granted to copyright owners and to users should not be decided by the copyright owners themselves, through private ordering mechanisms such as technological measures or contracts. That implies a general obligation for the lawmaker to prevent the technological measures

from substituting to the balances achieved by the copyright law⁶.

2nd thesis: the conflicts between rights, freedoms and exceptions should be envisaged by the lawmaker and accommodated in the law itself, while the judge should solve conflicts using the precise rules delineated by the law as well as referring to general rules of conflict between rights, freedoms and interests

Limiting the copyright exclusive rights by rules of exceptions is about recognising conflicts that might arise between the rights granted by copyright and some fundamental rights or legitimate interests. The distinction made by Bernt Hugenholtz between exceptions justified by fundamental freedoms and those justified by public or private interests is now a great classic in copyright doctrine⁷. No one will contest nowadays that some exceptions, such as the parody, the quotation or the press reviews, are justified by the necessity to allow free speech and freedom of the press. Recent exceptions (e.g., the exception in favour of handicapped persons) can also be considered as being the spokespersons of the freedom to get access to information or to take an active part in the cultural life. Other exceptions appear in the copyright law as ways of accommodating other interests, such as the education and the dissemination of knowledge (educational and library privileges), the interests of competitors (reverse engineering) or the interests of some specific persons or groups (use of works during religious ceremonies). What is still being discussed is the right classification of some exceptions such as the private copy where the protection of the fundamental right of privacy is intertwined with mere consumers' interests.

When allowing for technological measures to be deployed and enacting legal provisions to sanction their circumvention, the legislation has tended to forget that it is not really the exceptions as such that should be preserved, but the fundamental freedoms and legitimate interests underlying them. Any solution should then allow for the effective benefit of the exception in a way that achieves the objective protected by the freedom or interest conveyed by the exception.

At each new layer of protection, such fundamental rights and interests should be considered. First, the lawmaker has to devise ways to curb the

6 S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, op. cit., p. 519.

7 B. Hugenholtz, "Fierce creatures – Copyright exemptions: Towards extinction?", in *Rights, Limitations and exceptions: Striking a proper balance*, Conference IFLA/IMPRIMATUR, Amsterdam, 30-31 Octobre 1997, disponible sur <<http://www.ivir.nl/publications/hugenholtz/PBH-FierceCreatures.doc>>.

prerogative granted by technical means to copyrighted works when it conflicts with the fundamental freedom or legitimate interest of users. This is what the European lawmaker has done by the Article 6(4) of the Directive 2001/29/EC, even if one can doubt of the efficiency and comprehensiveness of the solution⁸. For some exceptions and in some limited circumstances, it is said that their exercise should prevail over the technical lock. However the solution to the conflict has been mainly left to the right owners, with no real limitation of what the technological measures are entitled to do. The right owners can propose solutions either by devising technological measure that would be more respectful of privileges of users or by contracts with some types of users, but they should not be the ones deciding the survival of copyright exceptions at the layer of the technical protection. The lawmaker should oblige the right owners having recourse to technological measures to make such a distribution of works compatible with the enjoyment of fundamental rights.

In the United States, nothing has been done at the level of the second layer of the protection (no exception or fair use is said to curtail the technical measure) and attention has been focused only on the third layer, that of the anti-circumvention provisions⁹.

This is the second step: in order to protect the exceptions, the act of circumvention can be left out of the anti-circumvention provisions' realm, which would then solely focus on the prohibition of devices enabling the circumvention. Anti-circumvention provisions could also be limited when the circumvention does occur to benefit from an exception, whether based on fundamental freedoms or on legitimate interests. The extent of the limitation both to the control exerted by technological measures and to the anti-circumvention provisions can depend on the type of freedoms or interests at stake, the former being more important than the latter. There are two ways to limit the anti-circumvention provisions to safeguard the copyright exceptions: one can reserve the technological measures to be protected strictly to those that prevent an unauthorised use of the work or one can state that circumventing

8 S. Dusollier, "Exceptions and Technological Measures in the European Copyright Directive of 2001", 34 *IIC* 62-83 (2003); B. Hugenholtz, "Why the copyright directive is unimportant and possibly invalid", 11 *EIPR* 499 (2000).

9 D. Nimmer, "How Much Solicitude for Fair Use is There in the Anti-Circumvention Provision of the Digital Millennium Copyright Act?", in N. Netanel and N. Elkin-Koren (eds.), *The Commodification of Information*, Kluwer Law International, The Hague, London, New York, Information Law Series, n°11, 2002, pp. 193-221; J. Ginsburg, "Copyright use and excuse on the Internet", 24 *Columbia-VLA J.L. & the Arts* 1-45 (2000).

the technological measure to benefit from a copyright exception is not prohibited. Either solution has been chosen by some countries¹⁰. But generally, the copyright exceptions do not overcome the sanctions for circumvention or for the distribution of circumvention devices neither in the European Union nor in the United States.

Some other interests can also be recognised by the law as allowing for the circumvention of the technological measure, such as the need to study the security of the technological measure, to get access to information needed for interoperability, to disable anti-privacy mechanisms, and so on.

In addition to indicate which prerogative should triumph over the others, the lawmaker should also indicate what will be the rules for solving the remaining conflicts, either by designating a regulatory body in charge of the resolution of such conflicts or by giving some indications to the courts. Declaring that copyright exceptions are mandatory and cannot be contracted out, is nothing but indicating what should be the rule of solving a conflict occurring in a contract. But the traditional rules of conflict between different types of prerogatives have also a role to play. They have been excellently presented in a recent book by Thierry Léonard¹¹, a Belgian civil law scholar. One can summarize and apply such conflict rules in the copyright field as follows:

- 1) a subjective right (such as the exclusive rights granted by copyright and their technical translation in DRM) will prevail over a fundamental freedom (e.g., freedoms conveyed by some copyright exceptions or freedoms invoked as such beyond what is considered by existing exceptions), except where, in accordance to the traditional rule of the fundamental rights legislation, the limitation that copyright puts on the fundamental freedom is said excessive and unnecessary¹², or when the exercise of the rights is abusive.

10 The United Kingdom has defined the technological measures to be protected as those that protect a right of the copyright owner. The Belgian law limits the illicit circumvention to the act that is followed by a copyright infringement, leaving outside its prohibition the tampering with technological measures that aim at benefiting from an exception.

11 T. Léonard, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes – Un modèle de résolution basé sur l'opposabilité et la responsabilité civile*, Larcier, Bruxelles, 2005.

12 For instance, as far as freedom of expression is concerned, the European Convention on Human Rights states in its article 8 that it can be limited by

- 2) a subjective right (such as the exclusive rights granted by copyright) will prevail over a legitimate interest (e.g., interests conveyed by some copyright exceptions as well as other interests not yet considered by copyright law), except where there is an abuse of right.
- 3) the exercise of a freedom (such as the freedom of industry that justifies the deployment of technological measures over copyrighted products, even beyond the control of the use included in the copyright monopoly) can be reduced when it conflicts with another freedom. In that case, the two competing freedoms should be allowed a parallel exercise and the judge should achieve the balance between both. The freedom exercised by the technological measure could trump the freedom of expression if the latter could be achieved by other means than by requiring the technological measure not to operate.
- 4) When the freedom to deploy technological measure conflicts with a mere interest, the judge should weigh the two interests at stake and, in some cases, might make the interest protected by the exception (or not yet protected by a rule of exception) overcome the technological measure. It will depend on the merits on the case and specifically of the extent of the constraint imposed on the users by the technical barrier.
- 5) When the conflict between the sanctions for circumvention and copyright exceptions has not been settled by the law itself, the judge can weigh the interest invoked by the user and the interest of protecting the work through the prohibition to circumvent its technical defence.

I should add that the French *Cour de cassation* in the *Mulholland Drive* case appears to have added a new rule for solving conflicts in copyright, by referring to the three-step test. Of course, the test is a rule of conflict between exclusive rights and freedoms and interests in the sense that the test helps the lawmaker to decide to make the freedom or interest concerned prevail over the exclusive right, by enacting an exception. One has also seen that in some cases,

law when "necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

the triple test is a rule of conflict used by the judge to disallow the exercise of an exception. But the *Cour de cassation* went a step further by introducing the test in the conflict between the technological measure and the exception. One possible reading of the decision is indeed to conclude that the *Cour de cassation* has denied the court of appeal to make the private copy prevail over the technological measure, when the outcome of that solution, that is, the prohibition to sell DVDs with a technical protection, would harm the normal exploitation of the work and thus the three-step test. The test should then be taken into account in the balance to be achieved between the exercise of the freedom to use technical means to protect the works and the preservation of the fundamental freedoms underlying some exceptions. Is this new function of the three-step test legitimate or even desirable? I doubt it.

The Constitutional Council has confirmed this extension of the role of the triple test. Besides, it has also considered the test could be used to allow for the deployment of the technological measures over the normal scope of the exceptions¹³. That gives the triple test a new role to the extent it grants too much leeway to the technical exercise of copyright.

3rd thesis: a regulatory body could be set up to solve conflicts when it would be more efficient than the judge.

Many countries have transposed the Article 6(4) of the European Directive 2001/29/EC by entrusting a regulatory or mediation body to solve the conflicts between the technological measures and the copyright exceptions. That solution can be preferred to the courts as different decisions by different judges on the same territory could lead to an uncertainty as to how copyrighted works can be distributed in a technically-protected format. In the *Mulholland* case, the court of appeal had prohibited the distribution of the DVD with technological measures impeding the private copy. One can imagine that another court would have achieved another solution for that same DVD or for another work but on the same format. That might lead to a very fragmented way of dealing with the TM/exceptions interface. Therefore, submitting such litigations to a unique body in one territory that could rule preventively for all works, depending on their type, on their format and on any other relevant criteria seems a better idea. One has to wait however for the practical working of the solutions put in place by the European member states (mediation, regulation or judicial proceeding) to compare their advantages and to try to achieve a harmonised and centralised solution for the

whole European Union. In the United States, a regulatory body has also been entrusted to decide what uses could justify the circumvention of a technological measure and to enact limitations to the prohibition.

One advantage of a regulatory solution is to be able to rule a possible conflict between copyright limitations and technological measures on its own initiative, whereas the court is only seized by an actual conflict concerning some users and copyright holders and some works.

Such a regulatory solution could also observe the evolution of the market on an on-going basis and suggests legal modifications to the lawmaker, for instance in order to mandate some specific features of the technological measures helping to preserve other interests at stake, and namely the freedom of expression. It would then intervene at the level of the technological measure, *ex ante*, and not *ex post*, i.e. when the technological measure would already have prevented the exception from occurring, as would be the case with a judicial action. That would be a means to restore a balance within the technological measure itself whose mode of operation is by nature *ex ante*, compared to the two other layers of copyright protection.

In that case, the initiative still lays upon the market actors, but the regulatory body is entrusted to assess the effectiveness of the pacification brought upon by the market.

The system put in place by these three thesis described here seems rather intricate. This complexity is however inherited from the increasingly complex legislative framework in copyright, notably relating to technological measures. One could regret the loss of simplicity in copyright but we should mainly deal with that new complexity.