



INSTITUTE FOR INFORMATION LAW

RESPONSE TO THE GREEN PAPER ON COPYRIGHT IN THE KNOWLEDGE ECONOMY

1. INTRODUCTION

The Institute for Information Law (IViR) of the University of Amsterdam is one of the largest academic research institutes in the field of intellectual property law and other areas of information law in Europe. IViR staff are regularly commissioned to perform studies in the field of intellectual property for the European Commission and many other international, regional or national institutions. Directly relevant to the issues addressed in the *Green Paper on Copyright in the Knowledge Economy* are the two following IViR studies commissioned in 2006 by the European Commission: *Recasting of Copyright and Related Rights for the Knowledge Economy*,¹ and *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*.² While the first study examines the coherency and consistency of the *acquis communautaire* in the field of copyright law, the second study evaluates the impact of the implementation of Directive 2001/29/EC on the European market for copyright protected content.

On the basis of the findings in these two studies, the undersigned authors wish to contribute to the consultations on Copyright in the Knowledge Economy.

2. GENERAL ISSUES (QUESTIONS 1-5)

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society entered into force on 22 June 2001. The objectives of the Directive were twofold: (1) to adapt legislation on copyright and related rights to reflect technological developments, and (2) to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996. With the adoption of the Information Society Directive, the European legislator therefore pursued several objectives among which was the creation of a harmonized legal framework that is consistent with international norms that would

¹ P.B. Hugenholtz, M. van Eechoud, S. van Gompel, L. Guibault, N. Helberger et al., *Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, report to the European Commission*, ETD/2005/IM/D1/95, DG Internal Market, November 2006 (hereinafter 'Recasting Study'), available at: <http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf>.

² L. Guibault, G. Westkamp, T. Rieber-Mohn, P.B. Hugenholtz, M. van Eechoud et al., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, report to the European Commission, ETD/2005/IM/D1/91, DG Internal Market, February 2007 (hereinafter 'Infosoc Study'), available at: <http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf>.

provide legal certainty to market players, would be sustainable and would preserve a balance between protecting the rights of right holders and the freedoms of users.

In light of the findings of the two IViR studies, it is clear that Directive 2001/29/EC hardly met its intended objectives, especially with respect to the regime of exceptions and limitations on copyright.

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

Contracts play a fundamental role in copyright law, for without them the production of works as well as their dissemination to the public would be most problematic. In application of the principle of freedom of contract, parties are and should in principle be free to negotiate the content of their agreement, so as to best suit their needs and to ensure the most efficient exploitation and dissemination of their works. No encouragement from the legislator is needed for the conclusion of contractual arrangements between right holders and users of copyright material. Nor is there any indication that the intervention of the legislator is needed to encourage the development of model licence agreements. Successful licensing models, like the Creative Commons licensing model, are emerging in the market without difficulty.

However, action may be necessary to prevent unbalanced licensing agreements due to disparities in the bargaining power of parties. European copyright law, in particular Directive 2001/29/ EC on the harmonization of copyright and related rights in the information society, currently fails to address these concerns.

As information and entertainment are increasingly distributed on-line, contractual relations between right holders or their intermediaries and (end) users proliferate. Particular categories of users, including cultural heritage institutions, educational institutions, and consumers are emerging as the weaker party in online transactions with content providers relating to the use of copyright and related rights protected material. It is not uncommon for right holders to wield their bargaining power to arrive at contractual terms that purport to set aside the privileges that the law grants users pursuant to the limitations on copyright. To restore the balance of interests inside online contractual agreements, some limitations on copyright and related rights could be declared imperative. Wherever the European legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, private parties should be prevented from unilaterally derogating from the legislator's intent. At the European level, the Computer Programmes Directive and the Database Directive both specify that exemptions provided therein may not be circumvented by contractual agreement. At the national level, Portugal has adopted a measure to prevent the use of standard form contracts excluding the exercise of limitations on copyright to the detriment of the user. Following these models, a provision could be introduced in the copyright legislation according to which any unilateral contractual clause deviating from the limitations on copyright and related rights would be declared null and void.

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

An exhaustive list of optional exceptions and limitations lacks sufficient flexibility to take account of future socio-economic and technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework that allows new and socially valuable uses that do not affect the normal exploitation of copyright works to develop without the copyright owners' permission, and without having to resort to a constant updating of the Directive, which might take years to complete.

Not only is the list of exceptions and limitations contained in article 5 of the Directive exhaustive, but all but one exception are optional. The regime of limitations established by the Information Society Directive leaves Member States ample discretion to decide if and how they implement the limitations contained in article 5 of the Directive. This latitude not only follows from the fact that all but one of the twenty-three limitations listed in the Directive are optional, but more importantly from the fact that the text of the Directive does not lay down strict rules that Member States are expected to transpose into their legal order. Rather, articles 5(2) to 5(5) of the Directive contain two types of norms: one set of broadly worded limitations, within the boundaries of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations. The outcome is that Member States have implemented the provisions of articles 5(2) to 5(5) of the Directive very differently, selecting only those exceptions that they consider important.

With such a mosaic of limitations throughout the European Community, the aim of harmonization most likely has not been achieved, and legal uncertainty persists. The assessment of the boundary between infringing and non-infringing conduct, remains therefore highly uncertain and unpredictable. The fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the European Community, could ultimately constitute a serious impediment to the establishment of cross-border services.

(4) and (5) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions? If so, which ones?

In order to ensure more legal certainty and better protection of beneficiaries of exceptions and limitations, the Community legislator should indeed consider declaring a number of limitations mandatory for transposition in all Member States.

Among the limitations that should be declared mandatory are those that reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, principles which are part of Community law. In addition, a list of mandatory limitations should include those that have a noticeable impact on the Internal Market or concern the rights of European consumers. These mandatory limitations should be reformulated in specific terms leaving little room for interpretation by the national legislators. Only then, would the rules concerning the limitations on copyright and related rights be sufficiently clear to incite rights owners and other content providers to invest in cross-border services.

Among the limitations contained in article 5 of the Directive that could be given mandatory status based on the safeguard of fundamental rights are the following:

- . Use for quotations for purposes such as criticism and review (art. 5(3)d));
- . Use of political speeches as well as extracts of public lectures (art. 5(3)f));
- . Use for the purpose of caricature, parody or pastiche (art. 5(3)k));
- . Use for educational and scientific purposes (art. 5(3)a));
- . Use by disabled persons (art. 5(3)b)); and
- . Use for news reporting and press reviews (art. 5(3)c)).

In addition, a list of mandatory limitations should include those that have a noticeable impact on the Internal Market or concern the rights of European users. Among the limitations contained in article 5 of the Directive that could be given mandatory status based on their potential or actual impact on the Internal Market are the following:

- . Transient copies (assuming this would not be converted into a carve-out of the economic rights) (art. 5(1));
- . Reprographic reproductions (art. 5(2)a));
- . Private copying (art. 5(2)b));
- . Reproductions by libraries, archives and museums (art. 5(2)c));
- . Use of works for research and private study (art. 5(3)n)); and
- . Ephemeral recordings by broadcasting organisations (art. 5(2)d)).

To make sure that these limitations would be implemented in the same way across all Member States, the Community legislator should consider adopting a strictly worded text for each limitation that Member States would transpose integrally in their national order. Other non mandatory limitations would be left to the discretion of the national legislator, according to the subsidiarity principle. Among the non-mandatory exceptions and limitations currently contained in article 5 of the Directive that should be left to the discretion of each Member State are the following: art. 5(2)e), 5(3)g), h), j), l), m), and o).

In addition to declaring a specific number of limitations and exceptions mandatory for implementation in all Member States and inside contractual relations, the European legislator could also consider the introduction of an open norm (either on the model of the American *fair use* defence or of the civil law norm of ‘redelijkheid en billijkheid’, ‘Treu und Glauben’, ‘bonne foi’ etc.). The introduction of an open norm, against which circumstances not falling under a specified exception would be tested, would ensure that the European exceptions and limitations regime would not be too rigid and would allow some flexibility to take account of unforeseen technical and socio-economic developments.

3. EXCEPTIONS: SPECIFIC ISSUES (QUESTIONS 6-25)

General remarks

The Green Paper focuses on the exceptions to copyright which are most relevant for the dissemination of knowledge, namely: the exception for the benefit of libraries and

archives; the exception allowing dissemination of works for teaching and research purposes; the exception for the benefit of people with a disability; a possible exception for user-created content.

The determination of the extent to which the dissemination of knowledge can take place should not be left exclusively to contractual arrangements without providing for a solid basis for negotiations in the form of exceptions and limitations. Limitations and exceptions are reflections of the public interest at large. Their scope and application should not therefore be determined solely by those parties directly addressed by these provisions.

As the European Commission justly pointed out in its Staff Working Paper of 2004, the horizontal nature of the Information Society Directive itself is not a sufficient argument for incorporating or extending the application of the list of exceptions as a whole to each of the other Directives that were adopted earlier.³ However, the convergence of electronic databases with other categories of digital works and subject matter would require that the limitations of the Information Society Directive be extended to databases.⁴ This way a single product containing different categories of works, including a database, would be subject to the same set of limitations.

Orphan works (Questions 10 to 12)

While the orphan works problem seems real and legitimate, it appears premature for a legislative initiative to be developed at the EU level. So far, it has not been demonstrated that the problem of orphan works has a noticeable impact on the internal market. In fact, the exact scale of the orphan works problem remains largely unknown, as quantitative data on the degree to which orphan works actually present a problem for the reutilization of these works, or on the frequency with which orphan works impede creative efforts, are not yet available. At the present time, therefore, the Commission Recommendation 2006/585/EC of 24 August 2006, which calls upon Member States to create mechanisms to facilitate the use of orphan works, appears satisfactory.

In the longer run, however, obstacles to the intra-Community trade in orphan works may arise, if each Member States were to adopt its own set of rules to deal with the problem. In order for the issue of orphan works to be effectively addressed for the whole European territory, therefore, complementary measures at EU level, which attend to the licensing difficulties in the case of cross-border exploitation of orphan works, seem indispensable. A Commission Recommendation of a limited scope, calling on the Member States to mutually recognize any mechanism adopted in another Member State, or allowing multi-territorial licensing, authorizing the use of orphan works in different Member States (or perhaps even the entire EU), may be in order here.

User created content (Question 25)

In the Green Paper the Commission asks stakeholders whether a new exception for 'creative, transformative, or derivate works' should be introduced into Directive

³ Commission Staff Working Paper on the Review of the EC legal Framework in the Field of Copyright and Related Rights, SEC (2004) 995, Brussels, 19.07.2004, p. 7.

⁴ Recasting study, p. 74.



INSTITUTE FOR INFORMATION LAW

2001/29/EC to cater for the interests of makers of user created content (UCC). New solutions that would favour the making of transformative or derivative works might prove necessary and beneficial. At present, however, there is still considerable uncertainty of how this objective should be best achieved.

First, systematically, this question seems to derive from a misunderstanding of the legal structure of the Directive. The Directive does not harmonise a right of adaptation, nor does its catalogue of permitted exceptions relate thereto. In other words, insofar as an exception would allow certain transformative uses, it would have no place in a revised Directive, unless the Directive's scope would be broadened to include a right of adaptation. Absent harmonisation of the adaptation right, Member States remain autonomous and may elect to codify exceptions or limitations to this right to permit certain non-commercial transformative uses.

Second, at this time, the introduction of a new exception for 'creative, transformative, or derivative works' that allows for UCC appears premature. There is yet too much ambiguity as regards the definition and scope of such a new exception. It is uncertain, for example, who should be its beneficiaries (e.g. the amateur or also the professional?), whether and how these beneficiaries could be legally defined (e.g. how could the distinction between amateurs and professionals be made in practice?) and what type of acts it would cover (e.g. would the already frequently occurring acts of incorporating third party music files in amateur videos also be deemed 'transformative?'). Furthermore, it is not quite clear how a new exception for 'creative, transformative, or derivative works' would relate to existing limitations, such as quotations, incidental use, and parodies, which to a certain degree already permit the creation of new or derivative works. More research and consultations are necessary in order to identify the specific needs of makers of user created content and to investigate whether an easy, affordable and user-friendly method of clearing rights aimed at amateurs and non-professional would not be more effective to preserve the balance of interests and the integrity of the copyright system.

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