Rights, Limitations and Exceptions:

Striking a Proper Balance

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FIERCE CREATURES

Copyright Exemptions: Towards Extinction?

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1. Introduction

In his most recent movie (*Fierce Creatures*, a sequel to *A Fish Called Wanda*) John Cleese plays the role of a zookeeper with a mission. His mission: to make the zoo more commercial. To this end a business plan is developed, including a number of money-making schemes, some obvious (animals may carry advertising), some less so. The film turns on the plan's most controversial proposal: to exterminate all harmless animals, preserving only the *fierce creatures* (that bite).

The film reminded me, somehow, of today's and tomorrow's conference theme. Copyright exemptions are curious animals; they come in a wide and wild variety. Some exemptions are harmless, some strange, some stink; some are essential, some can be missed; some are friendly, others bite.

Let's have a look at a few of the stranger species in this zoo:

Under article 18 (3) of the Hungarian Copyright Implementing Decree, "any performance of works by way of radio, phonogram, or tape while productive work is in progress, such performance being made for reasons of work psychology and in the interests of increased efficiency", is exempted. Echoes of Animal Farm, if I may say so.

The United States Copyright Act has a number of my favorite exemptions. S. 110 (6) exempts performances of musical works by a "nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition". Excellent lobbying, folks!

S. 110 (10) exempts similar performances "in the course of a social function (i.e. a party) which is organized and promoted by a non-profit veterans' organization or a nonprofit fraternal organization to which the general public is not invited (!), but including the invitees of the organizations (!), ..." Bravo, again!

Speaking of parties, under article 52(1) of the Copyright Act of India, musical works may be performed at any *bona fide* religious ceremony, including a marriage procession or other social

festivities associated with a marriage. The same section, by the way, allows the making of "no more than three copies of a book...for the use of the library if such book is not available in India".

Comparative analysis of existing national laws reveals a bewildering variety of limitations. Some legislators provide for lengthy, hard-to-read and hard-to-apply sets of copyright exemptions (such as the United Kingdom's breathtaking library privileges). Others provide for only minimal exceptions, or even none at all (such as Luxembourg).

In many cases, limitations are drafted as outright exceptions to the copyright owner's exclusive rights. Sometimes, limitations take on the form of statutory or compulsory licence schemes. The exclusive right, then, is replaced by a right to equitable remuneration. Often, such schemes are complemented by a regulatory framework for the collective administration of rights.

Most copyright acts contain limitations for the following purposes:

* personal use
* news reporting
* quotation, criticism
* science
* classroom teaching or other educational uses
* archival storage
* library and museum privileges
* administration of justice
* other government uses

In addition to these "dedicated" exemptions, copyright laws of the Anglo-American tradition provide for general *fair use or fair dealing* provisions.

The Berne Convention imposes certain limits on the freedom of Union countries to allow exemptions. The reproduction right may be limited "in certain special cases", in accordance with article 9 (2) BC:

> `It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.'

The recent WIPO Copyright Treaty contains similar language in respect of *all* rights protected under the Treaty or Convention (article 10).

2. Nature of exemptions

In view of the extreme diversity of copyright exemptions one may wonder whether there is any reason to treat copyright exemptions or limitations as a distinct category (worth, e.g., to be discussed in the context of an international conference). Is there a common denominator to these exemptions? Of course, in a legal-technical sense, there is. They are, by definition, *limitations* to the rightholders' exploitation rights. They are the tools *par excellence* for "fine-tuning" the rights protected under copyright.

Perceived merely as a box of legislative tools (another metaphor), copyright exemptions do not deserve a special status. Whether the copyright monopoly is limited by precisely defining the exclusive right (e.g. the right to publish, broadcast, rent) or by carving out detailed exceptions to a

broadly worded exclusive right (e.g. the right of communication to the public) is, ultimately, a matter of legislative technique.

From this legal-technical perspective it immediately becomes clear that copyright exemptions are not, necessarily, *exceptions*. Notwithstanding the limits imposed upon national legislators by article 9 (2) of the Berne Convention, the principle of narrow construction of copyright exemptions, so often found in copyright treatises and case law, is ill-concieved. Even in those countries where *droit d'auteur* principles of natural law form the solid bedrock of copyright law and jurisprudence, the notion that the law must preserve a balance between protecting the rights of authors and safeguarding fundamental user freedoms is now generally accepted. In defining this balance, copyright limitations are mere (but essential) instruments, not exceptions to a rule.

3. Other beasts

The mechanism of copyright consists of other balancing tools as well. The concept of the "work of authorship" (with its "built-in" originality requirement) is, in itself, an important instrument in delineating the borderline between protected information and the public domain. This is exemplified by the *idea/expression dichotomy*, developed in American doctrine and case law. In the oft-quoted words of Justice Warren Brandeis:

> `The general rule of law is, that the noblest of human productions - knowledge, truths ascertained, conceptions and ideas - after voluntary communication to others, are free as the air to common use.'

In addition, some copyright laws expressly deny copyright protection to government produced (or published) works, to laws and other products of the legislature, and to court decisions.

The *definition of the rights protected* under copyright is, perhaps, the most important "balancing tool" of all. National legislators have defined the catalogue of exclusive rights in different ways, enumerating the various "restricted acts". In some countries, copyright laws provide for detailed, media-specific definitions of these acts. In others, broader and more abstract notions of "reproduction", "distribution" and "communication to the public" are applied.

Either way, these exploitation rights serve as abstractions of the various acts that constitute *exploitation*. Unlike patent law, copyright has traditionally stopped short from granting exclusive *use* rights. Thus, copyright does not (or should not) impede the right of individuals to be informed or to receive copyright protected information (freedoms protected, e.g., by article 10 § 1 of the European Convention of Human Rights). Under existing copyright law, mere acts of information reception or consumption (e.g., reading a book, listening to a concert, watching television) are not restricted acts.

The *exhaustion rule* (or first sale doctrine) found in most national laws, is another boundary of copyright. Copies of protected works, after their first authorized sale, may circulate freely on the market without the rightholders' additional permission.

The limited *term* (duration) of copyright epitomizes the compromise between property rights and cultural heritage inherent in the copyright system. The duration rules, too, are important "balancing" tools.

4. The expansion of copyright

Recent developments, many inspired or triggered by the new digital networked environment, have affected the delicate balance between copyright protection and user freedoms.

Over the past 100 years we have seen a host of newcomers entering the intellectual property arena: performing artists, phonogramme producers, broadcasters, software producers, publishers of ancient manuscripts, and - the latest arrivals - database producers.

Inspired by successful lobbying, legislators all over the world have greatly expanded the traditional domain of copyright and neighbouring rights. This expansion has gone hand in hand with a gradual abolishment of formal restrictions to obtaining protection. No longer are copies to be registered with government agencies; no longer are published works to be stamped with c's in circles; no longer are complementary copies to be deposited at national libraries (I hear a few sobs in the audience, here and there).

Attempts to expand (or, more subtly, "clarify") the *scope* of copyright protection have dominated the international copyright agenda of recent years. A proposal to write into the WIPO Copyright Treaty a provision that would stretch the right of reproduction to include all temporary copies that occur during acts of digital transmission and reception, was thwarted only in the last minute.

On the European front, a similar provision will probably feature prominently in the Commission's draft directive soon to be announced. Already, the European Software and Database Directives expressly recognize an exclusive right of temporary copying. Thus, a powerful new right is being added to the copyright owners' panoply of rights: a right to *use* works electronically.

Not surprisingly, in this age of expanding rights, the exhaustion rule - once a formidable beast - has come under attack. Exclusive rights of commercial renting and public lending have been recognized, in recent years, in many national legislations. What is left of the exhaustion rule is a rather toothless tiger, all but extinct. In the Commission's draft directive the exhaustion rule has been reworked into an *exception* to a general, exclusive right of distribution. In line with various earlier directives, the exhaustion rule would apply only in respect of copies first circulated within the European Union: *Community* exhaustion.

Finally, the term of protection has been extended as well. Thanks, again, to the European legislature, the Berne Convention minimum of 50 years *post mortem auctoris* has been increased, for all states of the European Economic Area, by another twenty years.

5. Limits outside the law of copyright

In view of the ever widening scope of copyright, users may find some comfort in the notion that there is a body of law *outside* copyright that may help defend against overbroad copyright claims. In civil law countries, the doctrine of abuse of right (*détournement de pouvoir*) may impose a limit on a copyright owner's unreasonable exercise of his exclusive rights. Consumer protection law may protect consumers (but not professional users) against unfair licensing practices, especially in respect of non-negotiated transactions. Moreover, competition law has proven to be an effective instrument in curing abusive behaviour by dominant copyright owners, as in the *Magill* decision delivered by the European Court of Justice. Last, not least, constitutional law may come into play in cases where copyright affects users' fundamental rights and freedoms. In the European context, article 10 of the European Convention of the Human Rights (safeguarding the freedom of expression and information) and article 8 ECHR (guaranteeing the right of privacy) deserve special mention.

Of course, using civil law, competition law or constitutional law as a *deus ex machina* to defeat overbroad copyright claims, is unsatisfactory. If courts were to routinely resort to other bodies of the law to impose limits on the copyright monopoly, this would be a sign of crisis. Ideally, the delicate balance between protection and user freedoms must be found *within* the framework of the copyright law itself. This brings us back to copyright limitations and exemptions.

6. Exemptions in a digital environment

Somewhat paradoxically, modern copyright laws have more problems in adapting to the new electronic media than their old-fashioned counterparts. Traditional "old media" exclusive rights and limitations are mostly defined in media-independent ways, thus accommodating not only traditional print (and other analogue) media, but also many of the electronic media of the present and the future. By contrast, legislators attempting to keep up with current technological developments are confronted with narrowly defined, media-specific rights and limitations, that can not be easily re-interpreted to fit the digital networked environment.

Until recently, no copyright limitation explicitly dealt with *electronic* uses of protected works, except as regards computer programs. The European Database Directive, adopted in the Spring of 1996, is now changing all that. Under the Directive's copyright regime (article 6 § 2) and sui generis right (article 9a), reproduction for private purposes is allowed only in respect of *electronic* databases. A similar rule is proposed for copyright law in general, in the Commission's soon to be published draft directive.

In its reply to the Commission's *Green Paper on copyright and related rights in the information society* the Legal Advisory Board (the Commission's advisory committee on matters of information law) cautioned against such a technology-specific approach:

> `The emerging multimedia environment will eventually make technology specific rulemaking, either within or outside the framework of intellectual property, obsolete. As heterogeneous categories of works, specific media and technologies "converge" into a homogeneous multimedia environment, existing legal distinctions between specific work categories, media or technologies will be increasingly difficult to maintain.'

I concur.

7. To preserve or to abolish?

The inflexibility of current media specific limitations combined with the expanding scope of copyright protection threatens to upset the existing balance between copyright protection and user freedoms. Not surprisingly, libraries, intermediaries and users are pressing for the preservation of copyright limitations in the digital environment. This concern is reflected in the Green Paper of the NII Working Group on Intellectual Property Rights (U.S.):

> `As more and more works are available primarily or exclusively on-line, it is critical that researchers, students and other members of the general public have opportunities *on-line*

equivalent to their current opportunities *off-line* to browse through copyrighted works in their schools and public libraries.'

Right owners, on the other hand, argue that many of the existing limitations should *not* survive in the new environment. Existing statutory licenses for photocopying, home taping and other mass private reproduction do not reflect a fundamental `freedom to copy'. These statutory licenses have been introduced for merely practical reasons; no individual licensing of mass private reproduction was considered feasible. According to right owners, all this is changing in the digital networked environment. The built-in intelligence of the superhighway will enable them to grant and administrate licenses to individual users themselves. Works disseminated over the superhighway will carry identifying `tags', inviting prospective users to (automatically) contact right owners, or `permission headers', containing pre-determined licensing conditions to which users may agree in real time. Thus, the digital networked would bring back to rightholders what they (nearly) lost in the age of mass copying: the power to transact directly with information users.

There is merit in both arguments. Consequently, it would be simply too facile to recommend a mere restatement of existing limitations and exemptions in digital (or media-neutral) terms. The rationale of many existing limitations may not justify simply converting them to the digital environment. Instead, we must differentiate.

Not being a zoologist or a taxonomist, I propose to divide the beasts into only three distinct categories, each sharing a different rationale:

a. *Fundamental rights*

The first and foremost category is expressly (or implicitly) aimed at safeguarding the fundamental rights of information users: freedom of expression and information, right to privacy. These are the lions of the zoo; they may bite, but a zoo simply can't do without them.

The "fundamental rights" category comprises traditional limitations for the purposes of news reporting, criticism, academic and (other) scientific purposes, parody, etcetera. Exemptions allowing for (limited) copying for personal or other private uses also fit into this category.

Exemptions of this category must, in my opinion, be kept intact, as much as possible, in the digital environment. The reasons for respecting essential informational freedoms (and making them immune to the exercise of property rights) are as valid in the digital environment as they were (and still are) in the analogue world.

b. *Public interest*

Perhaps the majority of existing exemptions are motivated by various public interest considerations. In this category we find exemptions for educational purposes, library privileges, archival exemptions, privileges for musea or other cultural institutions, and facilities for the blind and handicapped. Here too, if nowhere else, we must place the farmers' and veterans' privileges of the U.S. Copyright Act.

In all cases, the public interest served by using, without authorization, protected works is deemed (by the legislature) to outweigh the private interest of full copyright protection. Exemptions of this category are, in fact, "subsidies" to the public good.

These are the monkies of the zoo. No zoo is complete without them, but you must contain them (or they will run the zoo for you).

Should exemptions of this type be preserved in the digital environment? Perhaps. If public or university libraries deserve an alleviated copyright regime in the analogue world, why not in cyberspace?

The problem is: nobody knows what a "library" really looks like in the digital environment. A traditional library has four walls, a front door, stacks of books and limited opening hours. The physical construct of a library (located in "meatspace", as they say) serves as a natural limit to the library privilege. By contrast, a digital (or virtual) library is (at least potentially) *ubiquitous*, and open day or night to an unlimited global user group. The digital library has the potential of totally usurpating the roles of publishers, vendors and other *primary* exploiters of copyrighted works.

Clearly, in redefining a library privilege for the future, an institutional definition of "libraries" exempted (e.g. publicly funded libraries) would lead to unacceptable results. What is called for, then, is a clear definition of library *functions* that merit special treatment under copyright law. Ultimately, preserving library priviliges in the digital environment will require a thorough rethinking of the public service role of libraries as such.

The same is true, mutatis mutandis, for exemptions for educational purposes (there's only a thin line between distance learning and online publishing), and museum privileges. Anyone having visited *The Louvre* online, will know what I mean.

c. *Market failure*

Finally, the market failure exemptions. These are the dinosaurs of the zoo, already extinct, surviving only in artificial surroundings.

Right holders are right in claiming that market failure-induced limitations, such as the reprography rules and home taping provision found in many countries, must not be mindlessly transplanted into the digital environment (as, unfortunately, has occurred in the new Greek Act). Let the enormous potential of the Internet prove itself first. Let's do wild experiments with direct or voluntary licensing! Let's put IMPRIMATUR© software into Netscape Navigator 5,0. Let a thousand blossoms bloom!

8. Licenses in lieu of limitations

Which brings me, finally, to licensing. Licensing, as we all know, is *le dernier cri*. If there's one thing that publishers and librarians can agree upon, it's that licensing is the thing of the future. Indeed,

the digital network environment is giving rise to more direct, and more complex, contractual relationships between information producers, intermediaries and end users. There is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property, will be derived from contract law. Some even say, contract law will make copyright entirely obselete. In a world where all information users are contractually bound to information providers, the need for protection *erga omnes* may, indeed, be rather limited.

Especially in view of the expanding scope of copyright, this development may call for copyright exemptions that cannot be overridden by contract. Both the Computer Programmes Directive and the Database Directive already contain provisions to this end.

These so-called *unwaivable use rights* represent an important development, but an extremely complex legal issue as well. Are copyright exemptions simply default rules that parties may contract around at will? Or are (some) exemptions imperative rules, provisions of *ordre publique*?

9. Conclusion

Will exemptions be preserved or are they heading for extinction? Nature tells us the answer. For a healthy equilibrium we need not only cows and sheep, but lions, monkees and an

occasional wolf. Exemptions may bite, from time to time, but they serve an important cause. Let's keep them in our zoo!

Nature teaches us another lesson. Diversity is a sine qua non for evolution. As the examples in the beginning of my speech have demonstrated, many exemptions have their origins in diverse social or cultural circumstances. Efforts to harmonize the law on a regional or global level must take these differences into account. I therefore would strongly oppose any instrument of harmonisation in which exemptions are enumerated in an exhaustive manner. We must not, as they say in the Netherlands, "shave all sheep over the same comb".

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