

Flexible Copyright

*Can EU Author's Right Accommodate Fair Use?**P. Bernt Hugenholtz**

ABSTRACT

Almost everyone agrees that modern copyright law needs to be flexible in order to accommodate rapid technological change and evolving media uses. In the United States fair use is the flexible instrument of choice. Author's right systems in Europe are generally deemed to be less flexible and less tolerant to open-ended limitations and exceptions. But are they really?

This chapter makes the case that (1) author's rights systems can be made as flexible as copyright systems, and (2) that the existing EU legal framework does not preclude the development of flexible norms at the national level.



8.1. INTRODUCTION

Like the European Union (EU) itself, the law of copyright in the EU seems to be in a state of perennial crisis. Surely, a major cause of this crisis is the increasing gap between the rules of copyright law in Europe and the social norms that are shaped by states of technology. Of course, technological development has *always* outpaced the process of lawmaking, but with the spectacular advances in information technology of recent years the law-norm gap in copyright has become so wide that the system is now almost at breaking point. In the EU this problem is exacerbated by two additional factors. One is the complexity of the EU lawmaking machinery, which may require many years for a harmonization directive to be adopted or revised, and thereafter implemented in national law. The other is the general lack of flexibility in the law of copyright in the EU and its Member States, which – unlike the United

* This chapter is partly based on a study by P. Bernt Hugenholtz & Martin R. F. Senfleben, 'Fair use in Europe. In search of flexibilities', November 2011, *available at* <http://ssrn.com/abstract=1959554>. The author wishes to thank James Boyle and Lisa Ramsey for comments on a previous version.

States – does not generally permit ‘fair use’ and thus allows less leeway for new uses not foreseen by the legislature.

Consequently, there is an increasing mismatch between the law of copyright and emerging social norms in Europe. Examples abound. Whereas social media have become essential tools of social and cultural communication, current copyright law leaves little room for sharing user-generated content that builds upon pre-existing works. By the same token, the law in most Member States fails to take into account emerging educational and scholarly practices, such as the use of copyright protected content in PowerPoint presentations, in digital classrooms, on Blackboard sites, or in webinars. The law of copyright in the EU also finds it very hard to accommodate information location tools, such as search engines and aggregation sites. By hindering these and other uses that many believe should remain outside the reach of copyright protection (and would probably be qualified as ‘fair use’ in the United States), the law impedes not only cultural, social and economic progress, but also undermines the social legitimacy of copyright law.

Copyright laws in the Member States of the EU traditionally provide for closed lists of limitations and exceptions that enumerate uses of works that are permitted without the authorization of rightholders. Examples of such uses are: quotation, private copying, library archiving and uses by the news media. These exceptions are sometimes very detailed and connected to specific states of technology, and therefore easily outdated. To complicate matters, the EU legal framework leaves Member States limited room to update or expand existing limitations and exceptions. The Copyright in the Information Society Directive of 2001 lists twenty-odd limitations and exceptions that Member States may provide for in their national laws, but generally does not allow exceptions beyond this ‘shopping list’.

While *fair use* in Europe is often regarded as an oxymoron or even a taboo in classic author’s rights doctrine, the idea of introducing a measure of flexibility in the European system of circumscribed limitations and exceptions is now gradually being received in European political discourse, both in common law and civil law states and at the EU policy level. Already in 2006, the Gowers Review in the United Kingdom recommended that an exception be created for ‘creative, transformative or derivative works’, particularly in the context of user-generated content.¹ In 2008, the European Commission took this suggestion on board in its Green Paper on Copyright in the Knowledge Economy, which however did not lead to amendment of the EU legal framework.² The Dutch Government has repeatedly stated its commitment to initiate a discussion at the European political level on a European-style fair use rule.³ In 2011,

¹ Gowers Review of Intellectual Property (December 2006), Recommendation 11.

² European Commission, ‘Green Paper on copyright in the knowledge economy Brussels’, COM(2008) 466/3 (16.07.2008), pp. 19–20.

³ Kamerstuk (Parliamentary Record) 21501–34, no. 155.

the Hargreaves Review in the United Kingdom recommended ‘that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners’.⁴ While the UK Government’s response to the Review⁵ and recent amendments to UK copyright law⁶ reflect many of the Hargreaves proposals for new exceptions to British copyright law, the Government shied away from promoting the introduction into EU law of a U.S. style fair use exemption. In 2013, the Irish Copyright Review Committee advised the Irish Government to consider the introduction of a general fair use rule to complement existing limitations and exceptions in the law.⁷ The European Commission’s consultation document accompanying its public consultation on the review of the EU copyright rules, which took place in 2014, specifically addressed the issue of (more) flexibility:

Finally, the question of flexibility and adaptability is being raised: what is the best mechanism to ensure that the EU and Member States’ regulatory frameworks adapt when necessary (either to clarify that certain uses are covered by an exception or to confirm that for certain uses the authorisation of rightholders is required)? The main question here is whether a greater degree of flexibility can be introduced in the EU and Member States regulatory framework while ensuring the required legal certainty, including for the functioning of the Single Market, and respecting the EU’s international obligations.⁸

Most recently, the idea of introducing (more) flexibility in EU copyright law was unequivocally embraced by MEP Julia Reda in her draft report for the European Parliament’s influential Legal Committee on the implementation of the Information Society Directive.⁹

⁴ I. Hargreaves, ‘Digital opportunity. A Review of Intellectual Property and Growth’, May 2011, p. 5.

⁵ UK Government, ‘MODERNISING COPYRIGHT: A modern, robust and flexible framework’, available at www.ipso.gov.uk/response-2011-copyright-final.pdf.

⁶ See notably: Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, entered into force 1 June 2014; Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, entered into force 1 October 2014; Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, entered into force 1 October 2014.

⁷ Copyright Review Committee, ‘Modernising Copyright’, Dublin, 2013, available at www.enterprise.gov.ie/en/Publications/CRC-Report.pdf.

⁸ European Commission, Public Consultation on the review of the EU copyright rules, Brussels, December 2013, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf, p. 16.

⁹ Draft Report on the implementation of 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 (2014/2256(INI)), Committee on Legal Affairs, Rapporteur Julia Reda, 14 January 2015.

This chapter looks at copyright flexibilities in EU law from an author's right perspective. Why is there a need for flexibilities today and to what extent are open norms compatible with the author's right system that prevails in the EU? Does the EU legal framework leave Member States, in particular those states that subscribe to the tradition of *droit d'auteur*, discretion to adopt in their national laws open 'fair use' style limitations and exceptions to copyright? Does the European Convention on Human Rights, in particular the European Court's recent case law on copyright v. freedom of expression, create (additional) flexibilities?

This chapter is structured as follows. Section 8.2 provides a general discussion of open norms in copyright regimes, and seeks to explain why author's right regimes have lost much of their flexibility. Section 8.3 explores the policy space that the European legal framework, in particular the Information Society Directive, leaves to Member States aspiring to introduce flexible copyright exceptions. Section 8.4 analyses recent decisions of the European Court on Human Rights on the conflict between copyright and freedom of expression. Section 8.5 offers conclusions.

8.2. COPYRIGHT, DROIT D'AUTEUR AND OPEN NORMS

Copyright is confined by a subtle structure of limits and limitations. In the ideal copyright system these limits and limitations are essential balancing tools, calibrated to allow users of copyright works sufficient freedoms to interact with these works without unduly undermining copyright's multiple rationales. While the general limits of copyright define the subject-matter, scope of protection and duration of the exclusive rights, the statutory limitations (or 'limitations and exceptions' as they are usually called today) accommodate more specifically a variety of cultural, social, informational, economic and political needs and purposes. Flexibilities may be found in all elements of this structure. For example, the notion of 'originality' and the idea/expression dichotomy allow courts certain ad hoc freedoms to decide what is and what is not copyright protected. By the same token, the rules on copyright infringement leave courts some discretion, particularly in jurisdictions where the scope of copyright protection is determined by the (level of) originality of the appropriated portion of the work.¹⁰ Regardless of the relative fluidity of these and other core concepts of copyright law, limitations and exceptions are obviously the main instruments of flexibility.

Like any other structure of rulemaking, copyright law must mediate between the maxims of legal certainty, which favours precisely defined legal provisions that provide optimal predictability *ex post*, and of fairness, which favours open and

¹⁰ CJEU, 16 July 2009, Case C-5/08, *Infopaq International v. Danske Dagblades Forening*.

flexible legal concepts that allow a wide margin of judicial appreciation *ad hoc*. In modern civil law this compromise between certainty and fairness is usually achieved by codifying relatively abstract legal provisions that spell out the general rules without impeding civil courts to apply general normative principles, such as ‘reasonableness and fairness’ (in Dutch: *redelijkheid en billijkheid*; in German: *Treu und Glauben*), to arrive at fair judgments. In common law codified norms tend to be more precise and extensive, since they constrict rather than empower the court’s mandate to apply the common law to distinct cases.¹¹ In copyright law, these conflicting traditions of codification are still visible today in the relatively concise, abstractly phrased codes of the *droit d’auteur* tradition, and the much more voluminous and detailed codifications of Anglo-American copyright law. Whereas, for example, the Dutch Copyright Act comprises some 75 provisions laid down in a mere 20 pages, the U.S. Copyright Act amounts to well over 200 pages.

These systemic differences to some extent explain why general rules of fairness are mostly absent from the codified laws of the *droit d’auteur* tradition. The relatively flexible norms that civil law jurisdictions traditionally provided never necessitated codifying a general rule of fairness. By contrast, such a rule – originally developed by the U.S. courts in the course of more than a century of case law – eventually did find its way into the U.S. Copyright Act.¹²

An example of a fairly open exception commonly found in laws of the authors’ right tradition is the quotation right. Article 10(1) of the Berne Convention requires Contracting States to provide for copyright limitations that permit quotations subject to certain conditions ‘provided that their making is compatible with *fair practice*’. The corresponding provision of Article 5(3)(d) of the Information Society Directive similarly refers to ‘fair practice’, whereas its implementation into Dutch law (Article 15(a) of the Dutch Copyright Act) requires the quotation be ‘commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved’. References to fair practice also appear in other limitations and exceptions in civil law jurisdictions. For example, the French parody exemption that inspired the inclusion of parody in the Information Society’s list of permitted limitations and exceptions refers to ‘the rules of the genre’.¹³

¹¹ A. STROWEL, *DROIT D’AUTEUR ET COPYRIGHT*, 147 (1993).

¹² U.S. Copyright Act, § 107, provides that uses for such purposes as criticism, comment, news reporting, teaching, scholarship and research are fair and non-infringing depending on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount appropriated from the copyrighted work; and the effect of the use upon the potential market for or value of the copyrighted work.

¹³ Intellectual Property Code (France), Article L122-5 (4).

Unfortunately, as Prof. Strowel has explained¹⁴, *droit d'auteur* codifications have lost much of their original flexibility in the course of the twentieth century, as copyright laws were updated ever more frequently to accommodate the needs of a changing society, so as to respond to technological development and to implement the dictates of European harmonization. Thus, much of the original conciseness, elegance and openness of the laws following the *droit d'auteur* tradition has been lost.

Another, more important reason why laws of the author's rights tradition have become less tolerant to unauthorized but 'fair' uses, lies in the natural rights philosophy that in the course of the twentieth century increasingly came to dominate the discourse on copyright in continental Europe, and which eventually became the main underpinning of the author's rights paradigm. If protecting author's rights is, indeed, essentially a matter of natural law, limitations to this right must remain 'exceptions'.¹⁵ Following this line of reasoning, courts in *droit d'auteur* jurisdictions such as France, have developed a rule of restrictive interpretation of copyright limitations.¹⁶ By contrast, the U.S. copyright system that has its main justification in utilitarian considerations ('to promote the progress of science and useful arts')¹⁷, more easily absorbs 'fair' uses that are in line with its main goal of optimizing the production and dissemination of creative works.

In parallel with this tendency towards closure of the author's rights system, and inspired by economic theories (and, of course, powerful lobbies) that posit copyright as 'property', the economic rights that the law grants to copyright owners are increasingly perceived, by courts, politicians and some scholars alike, as absolute. According to these theories, just as property rights in tangible goods warrant complete and perpetual control, making unauthorized uses unlawful as a matter of principle, copyright should ideally become a perpetual and absolute right that tolerates few 'free' uses.¹⁸

Paradoxically, as authors' rights systems have gradually lost much of their openness, the need for flexibility in copyright law has greatly increased. Whereas, legislatures of the nineteenth and early twentieth century could still anticipate and adequately respond to the main technological changes that required modification of the law,

¹⁴ STROWEL, *supra* note 11, at 149.

¹⁵ M.R.F. Senteleben, *Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 (3) J. COPYR. SOC. U.S.A. 524–5 (2010).

¹⁶ See, e.g., A. LUCAS & H.-J. LUCAS, *TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE*, 3rd edn., 259–60 (Paris, 2006). A similar rule of narrow construction of exceptions, based however on principles of EU law, was articulated by the European Court of Justice in *Infopaq International v. Danske Dagblades Forening*, CJEU 16 July 2009, Case C-5/08; see below text accompanying note 53.

¹⁷ Article I, Section 8 of the U.S. Constitution.

¹⁸ C. Geiger, *Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law*, 39 INT. REV. INTEL. PROP. COMPET. L. 178 (2008).

the accelerating pace of technological change in the early twenty-first century no longer allows such legislative foresight. Conversely, the length of the legislative cycle in copyright has become ever longer, as copyright law is no longer perceived as a mostly 'technical' legal matter but has become highly politicized. Aggravating matters, the European harmonization machinery has added an additional, complex and lengthy legislative cycle. As a result, in Europe the total legislative response time to a new technological development may easily exceed ten years.¹⁹

All in all, current calls for reinstating (or introducing) a measure of flexibility in the law on author's rights in the EU, should come as no surprise. These appeals often go by the name of 'fair use'.²⁰ While fair use is indeed an appealing concept and its political potential undeniable – who would dare disagree with 'fair'? – there are conceptual and systemic dangers here. The doctrine of fair use has its origin in the common law of the United States. Simply transplanting this doctrine into civil law-based *droit d'auteur* might lead to unintended consequences and ultimately systemic rejection.²¹

More generally, there are obvious risks and drawbacks to a legal structure of open norms, such as fair use. There is a vast scholarly literature that analyses the pro's and con's of 'vague norms' from various perspectives such as legal philosophy,²² law and economics²³ and legal practice,²⁴ which need not be rehearsed here. The main arguments against overly open or vague norms relate to the tradeoff between precise lawmaking by the legislature and ad hoc adjudication by the courts. While vague norms allow justice to be served more fairly in concrete cases – something that civil courts are generally well accustomed to – this enhanced fairness comes at the price of reduced legal certainty. Rules are generally more efficient than

¹⁹ MIREILLE VAN EECHOU D A.O., HARMONIZING EUROPEAN COPYRIGHT LAW. THE CHALLENGES OF BETTER LAWMAKING 298 (Kluwer Law International, 2009).

²⁰ See, for example, the Dutch Government's letter to the Parliament confirming its commitment to initiate a discussion at the European political level on a European-style fair use rule; Kamerstuk (Parliamentary Record) 21501–34, no. 155; see www.boek9.nl/?//Kabinet%3A+discussie+starten+over+een+uitzondering+voor+fair+use///27678/.

²¹ Nonetheless, this step has been proposed by J. Griffiths, *The 'Three-Step Test' in European Copyright Law – Problems and Solutions*, INTEL. PROP. Q. 489 (2009), available at <http://ssrn.com/abstract=1476968>. With regard to the introduction of fair use in Israel, see O. Fischman Afori, *An Open Standard 'Fair Use' Doctrine: A Welcome Israeli Initiative*, EUR. INTEL. PROP. REV. 85 (2008); G. Pessach, *The New Israeli Copyright Act – A Case-Study in Reverse Comparative Law*, 41 INT. REV. INTEL. PROP. COMPET. L. 187 (2010).

²² F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (Clarendon Press, 1993).

²³ L. Kaplow, *Rules versus Standards*, 42 DUKE L. J. 557 (1992).

²⁴ See, e.g., J. M. BARENDRECHT, RECHT ALS MODEL VAN RECHTVAARDIGHEID: BESCHOUWINGEN OVER VAGE EN SCHERPE NORMEN, OVER BINDING AAN HET RECHT EN OVER RECHTSVORMING (Deventer: Kluwer, 1992).

vague standards given that they better inform citizens of their rights and obligations upfront, and allow those seeking justice to assess their legal position without needing to resort to the courts. Moreover, an obvious constitutional objection against vague norms is that political decisions are effectively delegated from the legislator to the courts without the necessary democratic checks and balances. While open norms may thus be ‘easy’ and relatively inexpensive for lawmakers to produce, the costs of the lawmaking process are effectively shifted to the judicial apparatus, and to those seeking justice at the courts. Conversely, vague standards are generally more efficient, and will lead to fairer outcomes, in hard (marginal) cases and in situations that lawmakers cannot predict.

Both in Europe and in the United States opponents of fair use often cite fair use’s supposed lack of predictability, or even arbitrariness, as a reason not to (further) go down this road.²⁵ This criticism, however, seems to overlook the fact that vague norms may eventually become more predictable as sufficient jurisprudence is created by the courts. As recent studies by American scholars Barton Beebe, Pamela Samuelson and Neil Netanel suggest, this now seems to be the case for fair use.²⁶ As analysed by Samuelson, fair use case law ‘tends to coalesce in consistent patterns.’²⁷ Netanel concludes that this scholarly work ‘provides a convincing and salutary corrective to the widespread view that fair use is fundamentally arbitrary and ad hoc’.²⁸

Opponents of infusing authors’ rights systems with a measure of flexibility also tend to ignore that in civil law jurisdictions open and abstract norms are quite common, and civil courts are generally well versed in applying vague norms to hard cases. For example, in The Netherlands – a civil law jurisdiction – an entire body of unfair competition law was created by the courts based on a single, flexible provision in the Civil Code generally prohibiting ‘unlawful acts’.²⁹

Moreover, the advantage of legal certainty that is usually ascribed to the European system of precisely defined exceptions should not be overstated. In the first place, courts unhappy with the literal application of a precise norm in a given case will sometimes find solace in overriding (and usually vague) norms external to the law

²⁵ See, e.g., David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 DUKE UNIV. L. J. 263 (2003); Herman Cohen Jehoram, *Fair use – die ferne Geliebte*, AMI/Tijdschrift voor auteurs-, media- en informatierecht (1998), 174; Herman Cohen Jehoram, *Restrictions to Copyright and their Abuse*, 27 EIPR 359 (2005).

²⁶ B. Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 UNIV. PENNSYLVANIA L. REV. 549 (2008); P. Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); N. Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS CLARK L. REV. 715 (2011).

²⁷ Samuelson, *supra* note 26.

²⁸ Netanel, *supra* note 26, at 718.

²⁹ See R. W. de Vrey, *The Netherlands in INTERNATIONAL HANDBOOK ON UNFAIR COMPETITION* (2013), Ch. 18., 399 ff.

of copyright, such abuse of right³⁰, implied consent³¹ or freedom of expression³². Secondly, the introduction into the fabric of EU law of the ‘three-step test’³³, and its literal implementation in several laws of the Member States, has considerably reduced legal certainty, since courts are now invited to examine and (re)interpret statutory exceptions in the light of this entirely open-ended norm.³⁴

In conclusion, what copyright laws in Europe ideally need today is a statutory system of limitations and exceptions that guarantees both a level of legal certainty and fairness, by combining relatively precise norms with sufficient flexibility to allow a fair outcome in hard or unpredictable cases. An example of such a semi-open structure of limitations and exceptions can be found in the *European Copyright Code* that was drafted as a model law by a group of European scholars.³⁵ Article 5.5 of the Code permits the application by analogy of all limitations and exceptions specifically enumerated in the Code – both compensated and uncompensated – subject to the application of the three-step test.

8.3. IN SEARCH OF FLEXIBILITIES INSIDE THE EU ACQUIS

In the EU, the uneven ground of limitations and exceptions has been partly harmonized by the Copyright in the Information Society Directive of 2001.³⁶ Article 5 of the Directive enumerates exhaustively the types of limitations that member states may implement in their national law.³⁷ The list includes a single mandatory

³⁰ See generally for France: C. Caron, *Abuse of Rights and Author's Rights*, 176 R. I. D. A. 2, 4 (1998).

³¹ See, e.g., *Google thumbnails*, Federal Constitutional Court (Germany), April 29, 2010, case I ZR 69/08

³² See, e.g., *Germania 3 Gespenster am toten Mann*, Federal Constitutional Court (Germany), 29 June 2000, [2000] Zeitschrift für Urheber- und Medienrecht (ZUM) 867; *HFA v. FIFA*, Court of Cassation (France), October 2, 2007, 214 R.I.D.A. 338 (2007).

³³ Information Society Directive, Article 5.5. See below, text accompanying note 48.

³⁴ For an overview of the application of the three-step test by national courts, see J. Griffiths, *The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions*, INTEL. PROP. Q. 489 (2009), available at <http://ssrn.com/abstract=1476968>; M. R. F. Senftleben, *Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57, (3) J. COPYR. SOC. U.S.A. 521 (2010), available at <http://ssrn.com/abstract=1723902>; id., ‘Fair Use in the Netherlands: A Renaissance?’, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2009, p. 1, available at <http://ssrn.com/abstract=1563986>.

³⁵ Witten Group, *European Copyright Code*, available at www.copyrightcode.eu.

³⁶ See generally L. Guibault 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 (2007). For national implementations see Part II: G. Westkamp, *The Implementation of Directive 2001/29/EC in the Member States* (2007).

³⁷ The exhaustive character of the Directive's list of permitted limitations has inspired interest among several Member States in more open, fair use-like exemptions; see P. Bernt Hugenholtz & Martin R. F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* (2011), available at <http://ssrn.com/abstract=1959554>.

limitation permitting transient copying incidental to digital communications,³⁸ and a menu of twenty optional limitations, from which Member States may choose.³⁹ The limitations approved by the European legislature concern not only such generally accepted uses as photocopying, private copying, archival and ephemeral copying, educational uses, news reporting, quotation, and parody, but also more arcane uses, such as the use of works in religious celebrations, ‘use in connection with the demonstration or repair of equipment’, etc. The Directive does allow some pre-existing minor ‘analogue’ exemptions (i.e., those dating from pre-digital times) to survive in national law. However, it does not permit any limitations or exceptions beyond the list, and therefore most likely would not allow a Member State to provide for a generally worded American-style ‘fair use’ provision.⁴⁰ Moreover, any limitation implemented at the national level must comply with the ‘three-step test’.⁴¹

The Directive’s complex structure of a single mandatory and twenty optional exceptions subject to the overriding norm of the three-step test has attracted considerable criticism.⁴² According to Martin Senfleben, ‘the current EC system provides neither sufficient flexibility for copyright limitations nor sufficient legal certainty for users of copyrighted material. It combines the two disadvantages of the Anglo-American and the continental-European approach’.⁴³ Nevertheless, there does appear to be at least a measure of flexibility in the EU *acquis* due to the way many of the limitations in the Directive’s smorgasbord are drafted.⁴⁴ While some provisions in Article 5 are formulated in rather precise language, requiring (near) literal implementation by national legislatures⁴⁵, most others are framed in more general terms, loosely describing the type, function or purpose of the permitted exception. According to the European Court of Justice, such provisions leave the

³⁸ E.C. Copyright in the Information Society Directive Art. 5(1). See §11.3.2, below.

³⁹ E.C. Copyright in the Information Society Directive Art. 5(2) and (3).

⁴⁰ A Member State desiring to take full advantage of all policy space available under the Information Society Directive, and thus maximize flexibilities available at the EU level, might achieve this literally transposing the Directive’s entire catalogue of exceptions into national law. In combination with the three-step test, this could in theory lead to a semi-open norm almost as flexible as the fair use rule of the United States. See Hugenholtz & Senfleben, *supra* note 38, at 17–18.

⁴¹ E.C. Copyright in the Information Society Directive Art. 5(5).

⁴² See, e.g., Bert Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, 11 (2000) EIPR 501–2. Martin Senfleben, *Bridging the Differences between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine*, 57(3) J. COPYR. SOC. U.S.A. 521–52 (2010).

⁴³ Senfleben, *supra* note 42, at 529.

⁴⁴ See L. Bently, *Exploring the Flexibilities Available to UK Law*, submission to the HARGREAVES REV., 3 March 2011, available at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-bently.pdf>.

⁴⁵ For example, Article 5(3)(n): ‘use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections’.

Member States ‘a broad discretion’ to tailor national exceptions to their domestic needs.⁴⁶ As a consequence, the scope and breadth of national exceptions within the EU may differ markedly. For example, whereas the French copyright law notoriously allows quotation only under the strictest of conditions,⁴⁷ Nordic copyright law presents the quotation right as a relatively open rule of reason.⁴⁸

While the broad wording of many of the Directive’s permitted exceptions in principle leaves plenty of policy space to national legislatures, this space is reduced by various constricting factors. In the first place, Article 5(5) subordinates all national exceptions and limitations within the ambit of the Directive to the overriding norm of the ‘three-step test’. Exceptions ‘shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’. This provision, which obviously has its roots in international copyright law,⁴⁹ affects and constricts copyright exceptions at two levels. National legislatures are not allowed to provide for limitations that, although within the literal confines of the exceptions enumerated in Article 5(2) and (3), would not comply with the three-step test. For example, in the *ACI Adam* case the European Court of Justice held that a provision in Dutch copyright law exempting private copying without distinguishing between private copies made from legal or illegal sources, overstepped the test, in particular the second (no conflict with normal exploitation of works) and the third (no unreasonable prejudice to rightholders).⁵⁰ Moreover, several Member States, including France and Spain, have seen fit to transpose Article 5(5) into their national copyright law.⁵¹ As a consequence, national courts are generally invited to interpret national exceptions in line with the three-step test. Remarkably, even in countries

⁴⁶ *Eva-Maria Painer v. Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*, ECJ 1 December 2011, case C-145/10, ECR [2011] I-12533, para. 101.

⁴⁷ Intellectual Property Code (France), Article L122-5(3), provides: ‘Once a work has been disclosed, the author may not prohibit: [...] 3° on condition that the name of the author and the source are clearly stated: a) analyses and short quotations justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated [...]’.

⁴⁸ Copyright Act of Sweden, Article 22 reads: ‘Anyone may, in accordance with proper usage and to the extent necessary for the purpose, quote from works which have been made available to the public’. Translated text available at www.regeringen.se/content/1/c6/01/51/95/20edd6df.pdf. See generally Ole-Andreas Rognstad, *Opphavsrett*, Universitetsforlaget 2009, pp. 241–52.

⁴⁹ Notably Article 9(2) *Berne Convention*, Article 13 TRIPS and Article 10 WIPO Copyright Treaty.

⁵⁰ *ACI Adam BV and Others v. Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*, CJEU 10 April 2014, Case C-435/12, paras 39–40.

⁵¹ See J. Griffiths, *The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions*, INTEL. PROP. Q. 489, 495 (2009), available at <http://ssrn.com/abstract=1476968>.

where the three-step test has not been implemented, such as The Netherlands, courts have also applied the test to exceptions codified in national law.⁵²

A second constricting factor is the ‘principle’ announced in the CJEU’s landmark *Infopaq* decision and regularly repeated afterwards, that limitations and exceptions must be narrowly construed. This, according to the European Court, is not so much a matter of natural law, but rather an established maxim of EU law according to which exceptions to a rule in a directive are to be strictly interpreted.⁵³ According to the Court, ‘[t]his is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’.⁵⁴

By contrast, recent decisions of the European Court reflect a more liberal manner of interpreting limitations and exceptions. While still providing lip service to the rule of narrow construction, these decisions emphasize the need to interpret the limitations in the EU *acquis* in line with their purpose or objective⁵⁵ and in light of the need for EU copyright law to achieve a *fair balance* of rights and interests between the rightholders and users involved. This balancing principle, which is expressly enshrined in the preamble of the Information Society Directive,⁵⁶ has increasingly become the cornerstone of the European Court’s jurisprudence in the area of copyright and related rights.⁵⁷

⁵² Martin Senftleben, *Bridging the Differences between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 (3) J. COPYR. SOC. U.S.A. 530–2 (2010).

⁵³ CJEU, 16 July 2009, case C-5/08, *Infopaq International/Danske Dagblades Forening*, available at www.curia.eu, paras 56–7.

⁵⁴ CJEU, *supra* note 53, para. 58.

⁵⁵ See, e.g., *Football Association Premier League Ltd and Others v. QC Leisure and Others*; and *Karen Murphy v. Media Protection Services Ltd*, ECJ 4 October 2011, joined cases C-403/08 and C-429/08, para. 164; *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, CJEU 3 September 2014, case C-201/13, paras 22–5. See European Copyright Society, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564772.

⁵⁶ Recital 31 of the Directive reads: ‘A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded.’

⁵⁷ See, e.g., *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, CJEU 3 September 2014, case C-201/13, paras 26–7; *Technische Universität Darmstadt v. Eugen Ulmer KG*, CJEU 11 September 2014, Case C-117/13, para. 31; *Copydan Båndkopi v. Nokia Danmark A/S*, CJEU 5 March 2015, Case C-463/12, para. 77. See also European Copyright Society, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564772.

In sum, EU law's closed list of permitted limitations and exceptions does leave Member States considerably more room for flexibilities than its closed list of permitted limitations and exceptions, and EU law's maxim of narrow interpretation of exceptions, *prima facie* suggests. In the first place, the enumerated limitations are in many cases broadly worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States a broad margin of implementation, as is confirmed by actual legislative practice. In the second place, recent decisions of the European Court of Justice underscore the need to interpret EU copyright law's limitations in line with their objectives, and in light of the need to fairly balance the interests of rightholders and users.

While this policy space would probably not permit Member States to introduce a fair use rule as open and flexible as the American original, EU law does leave room for an array of semi-flexible norms at the national level. For example, the Dutch Copyright Committee that advises the Ministry of Justice on matters of copyright law and policy proposes to permit the use of user-generated content by way of amending the quotation right.⁵⁸ The proposed legislative solution would, according to the Committee, stay well within the discretion left by EU law to the national legislature.

8.4. FLEXIBILITIES IN FREEDOM OF EXPRESSION

Additional flexibilities may arise from the body of human rights law that guarantees, *inter alia*, freedom of expression. In Europe, freedom of expression is recognized as a fundamental right at three levels, that of national constitutions or 'basic laws', that of the European Convention on Human Rights⁵⁹ and that of the much more recent Charter of Fundamental Rights of the European Union.⁶⁰ In civil law countries, where copyright limitations and exceptions are often narrowly circumscribed and exhaustively enumerated, free speech may offer a safety valve when application of the letter of the law would lead to unjust results. Freedom of expression defences

⁵⁸ Commissie Auteursrecht, Advies aan de Staatssecretaris van Veiligheid en Justitie over de mogelijkheden van het invoeren van een flexibel systeem van beperkingen op het auteursrecht. Deel 1: Een flexibele regeling voor user-generated content, October 2012, available at www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/10/30/advies-een-flexibele-regeling-voor-user-generated-content.html.

⁵⁹ European Convention on Human Rights (ECHR), signed in Rome on November 4, 1950. Article 10 (1) ECHR reads: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. In many European states the norms of the Convention are deemed self-executing, i.e., may be invoked directly before the courts.

⁶⁰ Charter of Fundamental Rights of the European Union (2000/C 364/01).

have in the past been particularly successful before national courts in Europe in cases where literal copying was considered inevitable, for example, for purposes of literal quotation or in cases of ‘live’ broadcasting of works of art.⁶¹

In early 2013, the European Court of Human Rights – the highest judicial authority in Europe on human rights – for the first time pronounced itself on the interface between author’s right and freedom of expression, in two different cases. In *Ashby and Others v. France*⁶² the Court addressed a complaint by three fashion photographers that were convicted in France to considerable criminal penalties and damages for infringing the copyrights of French fashion houses by posting photos of fashion shows on their website. According to the Court, disseminating photographs over the Internet is an act protected by freedom of speech, and the plaintiffs’ conviction under French law therefore constituted an interference to be assessed under the three-part test of Article 10(2) of the ECHR.⁶³ While the tests of legality (‘prescribed by law’) and legitimate aim (‘protection of the [...] rights of others’) were easily met, the Court’s application of the proportionality requirement (was the interference ‘necessary in a democratic society?’) is less straightforward. In line with its established case law on Article 10 the Court posits, first, that states enjoy a ‘margin of appreciation’ when applying this test. In cases involving commercial speech, such as the case at hand, this margin is ‘broad’, and it is even broader in cases like *Ashby* where freedom of speech needs to be balanced against a right (i.e., copyright) that is in itself protected by the Convention, notably by Article 1 of the First Protocol.⁶⁴ In sum, in the case at hand France had enjoyed ‘a particularly wide margin of appreciation’ in balancing copyright against the

⁶¹ See P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY. INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 343–63 (Rochelle Cooper Dreyfuss, Diane L. Zimmerman and Harry First eds., 2001).

⁶² *Donald Ashby and Others v. France*, European Court of Justice 10 January 2013, No. 36769/08, full text available in French only at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845>, summary in English available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7393>.

⁶³ Article 10(2) ECHR reads: ‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary’.

⁶⁴ First Protocol to the ECHR, Paris, 2 March 1952, Article 1 reads: ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.

complainants' speech. Consequently, the Court held that no violation of Article 10 had taken place.

In another case decided only a month later, the European Court reiterated that copyright interferes with freedom of expression, but that states enjoy a 'particularly wide margin of appreciation' in mediating between copyright and free speech. In this case Fredrik Neij and Peter Sunde, founders of the *The Pirate Bay* file sharing platform, complained that their rights to freedom of expression had been infringed by their conviction by a Swedish criminal court to hefty prison terms.⁶⁵ According to the ECHR these convictions stayed within Sweden's margin of appreciation; again, no violation of the Convention was found.

Whereas, the apparent ease with which the European Court in both cases has let copyright trump freedom of expression raises eyebrows, and its holding that in such cases states enjoy 'a particularly wide margin of appreciation' is questionable, the ECHR's decisions do send an important signal to national courts and legislatures across Europe. The Strasbourg Court's case law essentially requires legislature and courts to perceive copyright protection as a limitation to freedom of expression, and to assess – both generally at the legislative level, and in individual cases before the courts – whether the positives of copyright protection outweigh the negatives of encroachment of free speech. Although the Court leaves national authorities broad discretion, the Court's subordination of copyright to freedom of expression is significant, not only in theory, but probably also in practice.⁶⁶ While in normal situations covered by the rights and limitations enshrined in copyright law it is unlikely a violation of Article 10 will be found, the Strasbourg case law might play a role whenever new technology creates uses unforeseen by the legislature.

Moreover, as recent case law of the European Court of Justice illustrates, other fundamental rights may come into play as well, such as the right to privacy,⁶⁷ or the freedom to conduct a business,⁶⁸ a novel fundamental right enshrined in the EU Charter.⁶⁹ Why in such cases, where multiple fundamental rights collide, states would always enjoy 'a particularly wide margin of appreciation', as the Strasbourg Court's case law seems to suggest, is difficult to comprehend. The Luxembourg

⁶⁵ *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden*, European Court of Human Rights 19 February 2013, No. 40397/12, available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-117513>.

⁶⁶ See, e.g., *GS Media v. Sanoma a.o.*, Supreme Court of the Netherlands (Hoge Raad), 3 April 2015 [intellectual property and freedom of speech are equivalent fundamental rights; freedom of speech may override copyright not just in exceptional cases; which right takes precedence depends on facts of the case, including whether or not expression serves general public interest, or is merely commercial].

⁶⁷ *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, ECJ 29 January 2008, case C-275/06, ECR [2008] I-00271.

⁶⁸ *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*. ECJ 24 November 2011, case C-70/10, ECR [2011] I-11959.

⁶⁹ EU Charter, Article 16.

Court's approach makes much more sense: between copyright and conflicting fundamental freedoms a *fair balance* must be found.⁷⁰

8.5. CONCLUSIONS

There are good reasons and ample opportunity to (re)introduce a measure of flexibility in the national copyright systems of Europe. The need for more openness in copyright law is almost self-evident in this 'information society' of highly dynamic and unpredictable change. A historic perspective also suggests that, due to a variety of circumstances, copyright law in the civil law jurisdictions of Europe has lost much of its flexibility in the course of the past century. In other words, making author's rights regimes more flexible would not go against the tide of legal tradition.

Ironically, as copyright law has gradually lost its openness, with the accelerating pace of technological change in the twenty-first century the need for flexibility has greatly increased. Concomitantly, the process of revising copyright law has become much more complex and time-consuming as national lawmakers in the Member States of the EU are increasingly constricted by European harmonization, making the need for flexible copyright norms – both at the EU and the national levels – ever more urgent. As this chapter has demonstrated, EU law leaves considerably more room for flexibilities than its closed list of permitted limitations and exceptions initially suggests. Additional flexibilities may be inferred from recent European case law juxtaposing copyright and freedom of expression.

This need not necessarily imply the introduction into European copyright law of an American-style *fair use* provision. There are drawbacks and risks associated with instituting a completely open norm into copyright systems that, like those of the author's rights tradition in the EU, traditionally provide for circumscribed limitations and exceptions that offer a good deal of predictability and legal certainty. Instead, introducing a measure of flexibility *alongside* the existing structure of well-defined limitations and exceptions, would better fit the European tradition of author's right, combining the advantages of legal certainty and technological neutrality.

Will the EU legislature follow suit? The Copyright in the Information Society Directive of 2001 is currently under review, and the Commission's proposals for revision are expected in late 2015. With copyright reform in the EU a clear priority of the newly elected Commission,⁷¹ adding flexibility to EU copyright law will, in all

⁷⁰ *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*. ECJ 3 September 2014, case C-201/13.

⁷¹ See Jean-Claude Juncker (President of the European Commission), Mission Letter to Günther Oettinger, Commissioner for Digital Economy and Society, Brussels, 1 November 2014, available at http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/oettinger_en.pdf.

likelihood, be on the table. In her draft report for the European Parliament's Legal Committee MEP Julia Reda '[c]alls for the adoption of an open norm introducing flexibility in the interpretation of exceptions and limitations in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or rightholder'.⁷² If the Reda Report is a sign of things to come, fair use European style is already in the making.

⁷² Draft Report on the implementation of 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 (2014/2256(INI)), Committee on Legal Affairs, Rapporteur Julia Reda, 14 January 2015.