Adapting copyright for a connected
digital single market

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I. The Commission's copyright Work Programme 2015

On 16 December 2014, the European Commission adopted its Work Programme for 2015\(^1\). The Programme includes a certain number of targeted actions, one of which relates to the "connected digital single market". The Commission's aim is to "modernise EU legislation on copyright". According to the press release that accompanied the Programme, this will mean rolling out an ambitious set of measures in 2015, in order to create conditions that will encourage the development of a dynamic digital society and economy\(^2\).

On the Commission's website, under the heading "Commission Priority. Digital Single Market"\(^3\) we read that "the borderless nature of digital technologies means it no longer makes sense for each EU country to have its own rules for [...] copyright". The objective will therefore be to "modify copyright rules to reflect new technologies".

We do not yet have a precise idea of the changes that may be proposed\(^4\). It is probable that, in order to stimulate the digital single market, new arrangements or adaptations may be proposed with various aims, particularly promoting more interconnectivity, facilitating access to online content, organising the portability of works and services beyond national borders, making it easier to set up digital libraries, allowing for public lending online, facilitating university and scientific research, and allowing individual users to take possession of existing content in order to use it in non-commercial production.

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\(^1\) Commission Work Programme 2015, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2014) 910 final.


\(^3\) http://ec.europa.eu/priorities/digital-single-market/index_fr.htm

\(^4\) Vice-President Ansip has announced an action plan for the month of May: http://ec.europa.eu/commission/2014-2019/ansip/blog/digital-single-market-europe-situation-so-far_en;

Here are some of the questions that may be asked, among others. The first response will have to be political. Our concern here is not to debate the pros and cons of the answers that could be provided, but rather the method by which they are arrived at.

II. What method should be adopted to overcome the principle of the national territoriality of copyright?

Digital technology is an essential growth factor for the economy of the 21st century. There is general agreement that when the single market develops Union-wide, the fewer obstacles it encounters in the territories of its 28 constituent states, the more successful it will be. One such obstacle could be the fact that copyright law is based on the principle of territoriality, which means that national laws and practices in this field are fragmented.

It is therefore understandable that the European Union is making a real effort to overcome these obstacles. A major step has already been taken in this direction by applying the principle of the free movement of goods to products covered by copyright, combined with occasional interventions based on competition law. However, the fact that there are still 28 different national copyright regimes has continued to prevent the principles of the single market from being applied on a wide scale.

This is why the European Community decided, somewhat tardily, to complete its action with a more positive intervention that was intended to reduce the differences between national regimes. The instruments to achieve this goal existed, thanks to the provisions of the Treaty on the harmonisation of national legislations. However, they were only used with respect to copyright from the 1990s. The approach was gradual, cautious and hesitant. No text stipulating the comprehensive harmonisation of the whole sector ever saw the light of day. We watched as no fewer than nine directives, each one regulating a fraction of the subject, made an appearance. The current set of nine partial directives creates a disparate impression.

5 The principle of Community exhaustion by the legitimate sale of copies, which was first recognised under the rules of the free circulation of goods, should be mentioned here. V. F. Gotzen, "La libre circulation des produits couverts par un droit de propriété intellectuelle dans la jurisprudence de la Cour de justice", Revue trimestrielle de droit commercial et de droit économique, 1985, p. 467-481.


Furthermore, they do not cover the whole subject, and important aspects are still governed by the various national legislations. The Union's piecemeal efforts scattered among a set of texts with little to connect them, and their incompleteness, contrast strongly with the results achieved in trademark law and those expected with respect to patents.  

Things might change if, one day, the Union decided to introduce a European Copyright Code. Moreover, faced with the challenges of the single market, a comprehensive and coherent response of this type would be the only effective way to overcome the principle of the national territoriality of intellectual property regimes. Copyright would then be protected territorially at the level of the whole Union. Applied to today’s digital market, the introduction of a European code seems to be the only way to fully satisfy the wishes of Jean-Claude Juncker, the President of the Commission, who has said that “we will need to have the courage to break down national silos in […] copyright […] legislation”. If we wish to solve the problem noted by Commissioner Oettinger, namely a "fragmented regulatory framework (including

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"we must abandon the method of harmonising one step at a time, issuing directives that only harmonise aspects of the subject imperfectly. This goal could only be fully achieved by following the examples of trademark and patent law, leaving regional environments and overcoming obstacles that derive from the territoriality of rights. This would mean proposing a single and complete system at Union level, i.e. a European Copyright Code, that would cover the whole of this subject for the 28 States. This idea, which used to be unthinkable, has slowly gained ground\(^\text{11}\). It has become even more attractive since the Lisbon Treaty created a new possible means of action in its article 118 on the functioning of the European Union\(^\text{12}\). This text was specially drafted with a view to making it possible to put in place "measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union"\(^\text{13}\). Therefore, nobody will be surprised that one of the questions that was asked in the public consultation that was launched by the previous Commission in December 2013, with a view to inviting the interested parties to express their opinion on the initiatives intended to revise and modernise the European rules on copyright, related to a possible European Copyright Code\(^\text{14}\). The report of 24 July 2014\(^\text{15}\),

\(^{10}\) Answers to the European Parliament. Questionnaire to the commissioner-designate Günther Oettinger Digital Economy and Society, point 7.


\(^{11}\) In a reflection document dated 22 October 2009, which already envisaged the possibility of a European intervention by means of regulation, the Commission had this to say: "A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights. It would overcome the issue that each national copyright law, though harmonised as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs. Unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation directives mandate basic economic rights, but merely permit certain exceptions and limitations. A regulation could provide that rights and exceptions are afforded the same degree of harmonisation" (Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT, p. 18-19. See http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf).

\(^{12}\) The first point reads as follows: "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."


\(^{14}\) Question no. 78 was worded: "Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?" http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf

giving the results of this consultation, shows that, in many circles, the idea of a European copyright title has encountered growing interest. This favourable view is emerging not only among many researchers and academics, individual and institutional users, but also among many authors and performers themselves. However, this report also shows that many of these supporters have doubts about the feasibility of this idea in the short term. Meanwhile, there is a significant group of stakeholders who are opposed to this idea because they fear a fall in levels of protection or decline in cultural diversity. These fears are expressed by other authors and performers and by the majority of their organisations, by publishers, producers, broadcasters, distributors, service providers and Member States.

In these circumstances it may be that the discussions of these issues will be confined to the realm of harmonisation and that they will concentrate on an adaptation of the text of the most comprehensive of the nine directives that we have so far, i.e. Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. If this is the case, it must not be forgotten that, in spite of everything, certain other more specialist directives will also have a contribution to make, such as those on the protection of computer programs or on databases, the directive on rental and lending rights and on certain rights relating to copyright, or even the directive on orphan works, which is important for digitization as its regime contains a mechanism that comes within the exceptions. It might also seem desirable to include a more horizontal directive in the debate, i.e. Directive 2000/31/EC on electronic commerce, whose articles 12 to 15 have an influence on the future of copyright in a digital environment.

In any event, whichever option is chosen—unification by means of a regulation or harmonisation at a later date by adapting the directives—, the challenges of the digital revolution will be posed in the same terms.

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18 This refers to another group of authors and performers and all their organisations, publishers, producers, broadcasters, distributors, service providers and Member States.

19 Sirinelli report, which is available on the website of the French Ministry of Culture: CSPLA Report, December 2014.
III. How should we respond to the challenges of the digital revolution in a single market?

1. The scope of the exclusivity

If copyright is to be adapted to the problems of the digital world, the natural tendency is to examine its exceptions and limitations. It should, however, be understood that the content of copyright must, first of all, be determined positively by defining the author’s prerogatives. A certain number of questions relating to digital matters can be answered adequately when the scope of the exclusivity is determined, at the first stage of this process.

It will be recalled that Directive 2001/29/EC duly took account of the obligations that flow from the WIPO "Internet" Treaties\(^{20}\) in its statement of exclusive rights by granting, apart from the usual rights of reproduction, communication of works to the public and distribution, a right to "make works available to the public", which was specifically devised to cover the online consultation of protected content.

We know that, with respect to these rights, the Court of Justice has established the principle that they are to be interpreted broadly, so as to allow adequate remuneration for those who are behind the creations used\(^{21}\). It is precisely their flexible, open wording that leaves a margin of interpretation wide enough to allow the judge to adapt the exclusive right to authorise or prohibit to modern developments.

\(^{20}\) WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva, 20 December 1996.

\(^{21}\) The Court of Justice stresses that it is clear from the 9th to 11th recitals in the preamble to Directive 2001/29/EC that the main purpose of the directive is to put in place a high level of protection, particularly for authors, so that they will be remunerated appropriately for the use of their works, and thereby enabled to continue their creative and artistic endeavours. Similarly according to the Court and in the same optic, the 21st and 23rd recitals in the preamble to Directive 2001/29/EC require acts that come within the concept of communication to the public, or the right of reproduction, or the right of distribution, to be given a broad interpretation. See Court of Justice 7 December 2006, C-306/05, SGAE v. Rafael Hoteles, point 36; Court of Justice 16 July 2009, C-5/08, Infopaq v. Danske Dagblade Forening, points 40-43; Court of Justice 22 December 2010, C-393/09, BSA v. Ministerstvo kultury, point 54; Court of Justice 16 June 2011, C-462/09, Thuiskopie v. Opus, point 32; Court of Justice 4 October 2011, C-403/08 and C-429/08, Premier League, points 185-189; Court of Justice 7 March 2013, C-607/11, ITV v. TVCatchup, point 20; Court of Justice 11 July 2013, C-521/11, Amazon v. Austro-Mechana, point 52; Court of Justice 13 February 2014, C-466/12, Svensson v. Retriever, point 17; Court of Justice 27 February 2014, C-351/12, OSN v. Léčebné lázně, point 23; Court of Justice 23 January 2014, C-355/12, Nintendo v. PC Box, point 27; Court of Justice 22 January 2015, C-419/13, Allposters v. Pictoright, point 47.
With respect to the digital field, which is the subject of this paper, we would add that the issue of the admissibility of hyperlinks was approached by the Court of Justice, not through the optic of the exceptions, but through a definition of the concept of communication to the public. Since the Svensson case, the Court has considered that article 3, paragraph 1 of Directive 2001/29/EC must be interpreted to mean that the provision on a website of clickable links to works that are freely available on another website does not constitute an act of communication to the public, as referred to in this provision, provided the work in question is not made available to a new public nor communicated by means of a specific technical method, different from that of the original communication^{22}.

Similarly, we had already noted that, in order to free up the online resale of second-hand computer programs, the Court of Justice applied the principle of the exhaustion of the right of distribution, provided for in article 4, paragraph 2 of the Computer Programs Directive, in the case of UsedSoft^{23}. By this process it began to construct its solution on the basis of the delimitation of the substance of the exclusivity. It also invoked an exception—if only as a secondary issue—namely the exception in article 5, paragraph 1 of the same directive, in order to clarify the room for manoeuvre allowed persons it considers to be "lawful acquirers" of the software.

If it is therefore clear that, as of now, a court, dealing with a digital issue, already has a power of interpretation that allows it to specify the scope of the protection, it is also clear that, if there was any need, and subject to the limitations imposed by the international treaties in this field, the legislature itself could intervene again in order to adapt further the protected field to the specific features of the digital world. This is what happened, for example in Germany when a new type of related right for press publishers, intended to control the commercial activities of Google News, was introduced^{24}. If this example was adopted at Union level, as

^{22} Court of Justice 13 February 2014, C-466/12, Svensson v. Retriever; Court of Justice 21 October 2014, C-348/13, Bestwater v. Mebes.

^{23} Court of Justice 3 July 2012, C-128/11, UsedSoft v. Oracle.

^{24} Articles 87f to 87h of the Copyright Law of 9 September 1965, introduced by the amending Law of 7 May 2013 (BGBl. I,1161) which allows publishers an exclusive right to make press products or articles available to the public for a commercial purpose, for a period of one year, except for isolated words or small fragments of text. Going further, in an amending Law of 4 November 2014, the Spanish legislature targeted any reproduction, even if only minimal, of the content of press publications by an electronic aggregation service. In article 32 of the "Ley de Propiedad Intelectual", a new paragraph 2 introduces an inalienable right for press publishers to receive fair remuneration, to be collected by collective management bodies, whenever content from the periodical press is made available to the public by the providers of electronic aggregation services (Boletín Oficial del Estado, No. 268, 5 November 2014, I, 90404).
Commissioner Oettinger\textsuperscript{25} has suggested, it would be classified under the scope of protection and not with the exceptions.

\section*{2. The adaptation of exceptions to rights}

\subsection*{a. Exceptions within the framework of harmonisation}

If the digital world poses new problems that are not able to be resolved by adequately defining or interpreting the content of rights, we can think about introducing or reinterpreting specific exceptions.

While the subject of the exceptions is also dealt with in specialist directives relating to computer programs and databases, as well as in the directive on rental and lending rights and on certain rights related to copyright, it is above all Directive 2001/29/EC on the information society that will take centre stage. This subject is dealt with in article 5 of the directive. We know that the system followed by this text is fairly ambivalent. It effectively contains a list which, although closed overall, in practice is fairly open, both in its wording and in the number of cases, and in the fact that it is essentially optional. The freedom allowed the States, except for technical reproduction in article 5.1, to choose from among the exceptions those that suit them, encourages States to legislate in a disorganised way\textsuperscript{26}. In consequence national transpositions do not always offer the result sought from the harmonisation of intellectual property rights in the European Union. The exhortation in recital 32 in the preamble to the Directive: "Member States should arrive at a coherent application of these exceptions and limitations", therefore seems to be more of a pious wish\textsuperscript{27}.

\begin{itemize}
\item \textsuperscript{25} \url{http://www.euractiv.de/sections/europawahlen-2014/oettingers-reformplaene-fuer-das-urheberrecht-309561}.
\item \url{http://www.handelsblatt.com/politik/international/schutz-geistigen-eigentums-bis-2016-eu-plant-urheberrechtsabgabe-im-internet/10900130.html}
\item \textsuperscript{27} T. Dreier, "La situation en Allemagne. État des lieux", \textit{Propriétés intellectuelles}, 2005, p. 125 even writes that "with respect to the exceptions, the failure of harmonisation is almost total". The result is a "mosaic of exceptions" in the words of F. de Visscher and B. Michaux, "Le droit d'auteur et les droits voisins désormais dans l'environnement numérique", \textit{J.T.}, 2006, p. 144.
\end{itemize}
b. Exceptions that unite

In order to avoid a break-up of the internal market by a patchwork transposition of optional provisions, varying from one State to another, mandatory exceptions should be introduced. This approach is the only way to achieve real harmonisation. Indeed, this method has already been adopted to settle a certain number of problems in the digital field. The directive on the legal protection of computer programs28 did not allow national legislatures to choose whether or not to transpose the exceptions in its article 5 on the necessary technical uses, on back-up copies or on the testing of program functioning. This also applies to the decompilation exception provided for in article 6. It is also in relation to the issue of the necessary technical use, which closely affects the digital world, that the States have been obliged to accept the exceptions to copyright mentioned in article 6, point 1 of Directive 96/9/EC of 11 March 1996 on the legal protection of databases and in article 5, point 1, of Directive 2001/29/EC.

While mandatory exceptions appear to offer the most effective way to achieve a genuine digital single market, they will also be the most difficult to achieve in practice, as this solution presupposes that States relinquish some of their decision-making powers. Which is why the alternative, i.e. continuing to use the less restrictive technique of optional provisions, should also be considered. While they certainly offer fewer advantages for the internal market, they are more likely in reality.

c. Exceptions that divide

It is clear that the introduction of digital technology could be facilitated by the express creation of new optional exceptions under points 2 or 3 of article 5 of Directive 2001/29/EC. This solution would make it possible to respond flexibly to new needs, either by lengthening the list inside the existing closed system, or even by abandoning the straightjacket of the closed list. It will not be easy to oppose this trend.

The great danger of this approach, however, even while it appears to be so obvious, is that it could prove to be a Pandora's box. Given the lengthy and difficult negotiations that preceded the initial drafting of article 5, one can only fear that there will be another discussion on the number of exceptions that are necessary or possible. All the stakeholders will seize the opportunity to reopen old discussions and exert pressure to extend the existing list with their own exceptions, even outside the digital field.

Another reason to oppose the temptation to extend the current list indefinitely, is to avoid accentuating the differences between national legislations even further, which would impede the development of the internal market. Indeed, if the list of exceptions remains optional, each new exception will only increase the differences between the countries that decide to join and those that do not. It is relevant to note the difficulty highlighted by many individual or institutional users, distributors, service providers, researchers and academics in their responses to questions 21 to 23 of the public consultation, namely that the directive, in its current wording, has already generated very disparate rules as it leaves the States too much freedom as to whether or not they adopt the exceptions set out in points 2 and 3 of article 5.

**d. Should the exceptions be made more flexible or more precise?**

Whether they become mandatory or remain optional, a decision will also have to be reached on whether the drafting of existing or future exceptions is open-ended or not.

Several users, especially individual or institutional users, have been vocal in denouncing a lack of "flexibility" in the exceptions that are currently admissible. In the current environment in which the existing provisions are interpreted restrictively, demands have been made for the texts to be revised. The Court of Justice starts from the principle that the exceptions to the rights contained in the copyright directives should be interpreted strictly.

Should the drafting of these exceptions be made more flexible? Before pursuing this line it would be advisable to weigh up the advantages and disadvantages. Account must be taken of


31 The principle applies just as much with respect to the mandatory exception in article 5, paragraph 1 (Court of Justice 16 July 2009, C-5/08, Infopaq v. Danske Dagblades Forening, points 56-58; Court of Justice 17 January 2012, C-302/10, Infopaq II; Court of Justice 5 June 2014, C-360/13, PRC v. NLA, point 23) as to the optional exceptions contained in paragraphs 2 or 3 (Court of Justice 21 October 2010, C-467/08, Padawan/SGAE; Court of Justice 9 February 2012, C-277/10, Luksan v. van der Let, point 101; Court of Justice 10 April 2014, C-435/12, ACI Adam v. Thuiskopie, Case C-435/12, points 22-23; Court of Justice 1 December 2011, C-145/10, Painer v. Standard, point 109; Court of Justice 3 September 2014, C-201/13, Deckmyn v. Vandersteen, point 22.
the fact that such an approach could jeopardise harmonisation. In some ways, if the exceptions are made more flexible this will have a divisive effect, as it will mean giving more freedom to the States to choose different solutions.

First of all, even without changing the current wording of article 5, a certain number of current exceptions are already indeterminate enough to allow national legislatures to use them as a shelter for all kinds of solutions deemed to be necessary in the modern world. The Court of Justice has already noted that the drafting of some of these exceptions allows the Member States that decide to include them a "broad discretion"32. A less invasive solution than the amendment of the text of article 5 could come in the form of a European Communication or Recommendation, emphasising that the existing exceptions should be interpreted in a more open but harmonised way in the digital environment.

Some stakeholders—mainly individual or institutional users33—have argued that maximum flexibility could be achieved by adopting the American "fair use" clause34, which could constitute a general limitation on copyright, and might complete or even supplant specific exceptions. The replacement of the current system, in which the admissible exceptions to copyright are drafted specifically, by a general provision authorising the reasonable use of an existing work, seems to offer the great advantage of permanent flexibility given the fact that the technology is subject to constant change. Courts would then be able to adapt the legislative system by means of a decision that would take account of the specific context of a case. This is why some people have suggested that we breathe some fresh air into the European system, which is based on closed exceptions, by adopting the American practice of fair use. This addition could free the legislature from the delicate task of formulating new exceptions in detail or expanding the scope of existing texts.

However, it should be understood that the doctrine of fair use was patiently developed by the American courts over a long period, in a series of tests, before it was adopted in section 107 of the Copyright Act of 1976. As the drafting of this clause remains very open, it continues to

34 The English exceptions which are based on the concept of "fair dealing" operate in a restrictive context, which is not comparable to American fair use. P. Torremans, "The Perspective of the Introduction of a European Fair Use Clause", in T.E. Synodinou, Codification of European Copyright Law, Information Law Series, Vol. 29, Kluwer Law International, Alphen aan den Rijn, 2012, p. 331 explains that "the UK fair dealing exceptions are narrowly circumscribed specific exceptions that fit in rather well with the civil law tradition of a list of narrowly defined exceptions".
generate case law, which is still developing. Section 107 does no more than list the possible applications as examples only. Whether the use of the work is fair or not is assessed by reference to four non-restrictive factors. How these factors will be applied in a given case is not therefore so obvious for a "fair" user, who will have the difficult and onerous responsibility of proving before the court that the items in issue meet the criteria used for these tests. The case-by-case approach and the interwoven nature of the four factors in section 107 make it very difficult to predict the outcome of a court case.

In addition, replacing or completing the list in article 5 of the Directive of 22 May 2001 with an express provision introducing an American-style fair use clause does not correspond to the legislative tradition of the great majority of States in the European Union. It should be understood, first of all, that this approach has only been able to prosper in an Anglo-American legal culture in which solutions are built on judicial precedents. This system is different from the continental European tradition, which attaches more importance to the legislature intervening from time to time.

Finally, the fair use approach seems to be too far removed from our continental system to have any chance of being adopted in its American form in Europe. Its introduction would be opposed not only by authors and performers and their organisations, but also by publishers,

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36 "Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors”.

37 D. Nimmer, "Fairest of them all", 66, Law & Contemporary Problems, 263, 282 (Winter/spring 2003): "it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases”.

producers and broadcasters.39

The alternative might possibly involve seeking a compromise between the common law and the continental European systems, in the form of a provision drafted in the style of article 5.5 of the European Copyright Code, suggested by a team of researchers from both sides of the Channel.40 After setting out a list of precise exceptions in chapter 5, the text proposes adding another provision to the list in an article 5.5, which, while allowing other uses that are not specifically described, would be restricted by a dual obligation on the part of the court. The court would have to restrict itself to cases that were "comparable" to express exceptions, taking account of the same limitations and after checking that they did not interfere with the normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the interests of the parties concerned.41

If this latter idea also proved to be too audacious and if it was decided to keep the existing closed system of detailed, express exceptions, using precise and substantive conditions, would this mean that we were condemned to permanent rigidity? Not necessarily, as even if the principle of the law is precise, the court would be able to use its discretion when applying it. The Court of Justice itself has made this point. Despite its above-mentioned guidance, that in principle exceptions are to be interpreted strictly, it also stresses the importance of taking account of "all the circumstances of the case".42 The interpretation of the exceptions must, while safeguarding their effect and purpose, aim to maintain a "fair balance", particularly between the rights and interests of authors on the one hand, and the rights and interests of the users of protected subject-matter, on the other.43

Therefore the court of first instance will have some discretion, allowing it to take a decision in each case that will take account of all the aspects of the case before it.


40 http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf

41 "Further limitations. Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties."

42 Court of Justice 3 September 2014, C-201/13, Deckmyn v. Vandersteen, point 28.

43 Court of Justice 21 October 2010, C-467/08, Padawan v. SGAE, point 43; Court of Justice 4 October 2011, C-403/08 and C-429/08, Premier League, points 162-164; Court of Justice 1 December 2011, C-145/10, Painer v. Standard, points 132-133; Court of Justice 10 April 2014, C-435/12, ACI Adam v. Thuiskopie, points 53-57; Court of Justice 3 September 2014, C-201/13, Deckmyn v. Vandersteen, points 23 and 26.
e. Correction by means of the three-step test

Whatever measures are introduced into the existing texts to make them more flexible or whatever new exceptions are added, it should be stressed that, whatever happens, the laudable desire to promote a digital single market should not deprive the protection of authors and performers of its substance. The Court of Justice has stressed on many occasions that the main purpose of Directive 2001/29/EC is to create a high level of protection for authors in particular, which is essential to intellectual creation and which allows such individuals to be remunerated appropriately for the use of their works.\(^\text{44}\)

Exceptions introduced or revised in order to facilitate the operation of the digital single market will therefore have to be applied under the terms of, and within the limit of the three-step test in article 5.5 of Directive 2001/29/EC. This text, which derives from international conventions, reads as follows: "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 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".

In any event, it is clear from the case law of the Court of Justice relating to this test, which is still fairly limited, that the court will apply the three-step test in the conventional way, i.e. not according to the suggestions of a group of academics who have made public a "Munich declaration", under which article 5.5 would be transformed into a means of introducing greater flexibility\(^\text{45}\), but following the standard interpretation, shared by the WTO panel of 15 June 2000\(^\text{46}\), according to which article 5.5 operates as a check on the exceptions. The Court has

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\(^{44}\) Court of Justice 7 December 2006, C-306/05, SGAE v. Rafael Hoteles, point 36; Court of Justice 16 July 2009, C-5/08, Infopaq v. Danske Dagblades Forening, points 40-43; Court of Justice 22 December 2010, C-393/09, BSA v. Ministerstvo kultury, point 54; Court of Justice 16 June 2011, C-462/09, Thuiskopie v. Opus, point 32; Court of Justice 4 October 2011, C-403/08 and C-429/08, Premier League, points 185-189; Court of Justice 7 March 2013, C-607/11, ITV v. TVCatchup, point 20; Court of Justice 11 July 2013, C-521/11, Amazon v. Austro-Mechan, point 52; Court of Justice 23 January 2014, C-355/12, Nintendo v. PCBox, point 27; Court of Justice 13 February 2014, C-466/12, Svensson v. Retriever, point 17; Court of Justice 27 February 2014, C-351/12, OSA v. Léčebné lázně, point 23; Court of Justice 23 January 2014, C-355/12, Nintendo v. PC Box, point 27; Court of Justice 22 January 2015, C-419/13, Allposters v. Pictoright, point 47.


already decided that "Article 5(5) of Directive 2001/29 does not provide for exceptions or limitations that the Member States may establish in respect of the rights referred to, […] but merely states the scope of the exceptions and limitations provided for in the [preceding] paragraphs"47. It added that, "Article 5(5) of that directive does not therefore define the substantive content of the different exceptions and limitations […], but takes effect only at the time when they are applied by the Member States. Consequently, Article 5(5) of Directive 2001/29 is not intended […] to extend the scope of the different exceptions and limitations"48.

The established exceptions must therefore respect the normal exploitation of the works and make provision for systems of monetary compensation for any harm caused, where necessary. Legislatures that introduce an exception will certainly have to take account of this obligation, as, in all likelihood, will the courts that have to apply them in a given case49.

IV. External limits

Whatever the solution adopted within copyright [law], it should not be forgotten that the issue of the exceptions also arises in relation to other rights outside intellectual property law, which are often in conflict with it, such as the right to information, the right to culture, the right to education, and freedom of expression.

As we can see from the case law of the Court of Justice, the protection of intellectual property rights, although sanctioned in article 17, paragraph 2, of the EU Charter of Fundamental Rights, does not mean that this right is inviolable and that it should enjoy absolute protection. The protection of the fundamental right of property, of which intellectual property rights form


47 Court of Justice 27 February 2014, C-351/12, OSA/Léčebné lázně, point 40.

48 Court of Justice 10 April 2014, C-435/12, ACI Adam/Thuiskopie, points 25 and 26.

49 Comp. the opinion of the Advocate General, Jääskinen, of 10 March 2011 in the case of Thuiskopie v. Opus, C-462/09, point 42: "However, when interpreting national provisions, national judges will have to do so in light of that test, to the extent that national laws are ambiguous or leave room for different results. Hence, though being primarily a norm addressed to the legislature, the three-step test must also be applied by the national courts in order to ensure that the practical application of the exception to Article 2 of Directive 2001/29 provided by national legislation remains within the limits allowed by Article 5 of that directive". See in the same vein, the opinion of Advocate General Cruz Villalón of 9 January 2014 in the case of ACI Adam v. Thuiskopie, C-435/12, point 48.
part, must effectively be weighed against the protection of other fundamental rights. When adopting or applying measures intended to protect copyright holders, national authorities and courts have a duty to ensure a fair balance between the protection of this right and the protection of the fundamental rights of those who are affected by such measures. These fundamental rights are, more particularly, freedom of enterprise, the protection of personal data and the freedom to receive or communicate information\(^{50}\).

Respect for others' fundamental rights is also an obligation for any person who wishes to assert an exception to copyright. Therefore, while the right of parody is a form of freedom of expression, it cannot justify an attack upon the principle of non-discrimination on grounds of race, colour, or ethnic origin, as this principle has been enshrined in Council Directive 2000/43/EC of 29 June 2000, relating to the implementation of the principle of equality of treatment among individuals without any distinction of race or ethnic origin (\textit{O.J.} L 180, p. 22), and confirmed particularly in article 21, paragraph 1, of the EU Charter of Fundamental Rights\(^{51}\).

\(^{50}\) Court of Justice 29 January 2008, C-275/06, Promusicae v. Telefónica, points 62-68; Court of Justice 24 November 2011, C-70/10, Scarlet v. SABAM, points 43-54; Court of Justice 16 February 2012, C-360/10, SABAM v. Netlog, points 41-52; Court of Justice 27 March 2014, C-314/12, UPC v. Constantin, points 46-47 and 61.

\(^{51}\) Court of Justice 3 September 2014, C-201/13, Deckmyn v. Vandersteen, point 30.