Executive summary

Adapting copyright for a connected digital single market

Yves GAUBIAC, a member of the Paris Bar

Frank GOTZEN, Professor at the K.U.Leuven

English version-March 2015
Translated from the French version by C.G Traduction
This study was commissioned by the Fondation pour le Droit Continental and this document is a summary of the report. Its aim is to promote the techniques of continental law internationally in order to highlight their effectiveness and the security that they provide in business dealings. The European Commission’s Work Programme for 2015 includes a targeted action relating to a "connected single digital market". The Commission’s aim is to "modernise EU copyright law". Everyone agrees 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. Furthermore, some think that this copyright law should be more flexible. As can be seen from the numerous responses to the public consultation organised by the Commission\(^1\), many questions will be asked on this subject. 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. The Fondation pour le Droit Continental was keen to take part in the debate surrounding these questions in order to provide a vision of copyright law in Europe, which draws inspiration from the heritage of French law and its continental tradition.

The report is the work of Yves Gaubiac, a lawyer admitted to the Paris bar, the editor-in-chief of the Revue Internationale du Droit d'Auteur (RIDA), General Secretary of the Association littéraire et artistique internationale (ALAI) and lecturer at Panthéon-Assas University, Paris 2, and of Professor Frank Gotzen, Professor Emeritus at Louvain University (KU Leuven) and founder of the Centre de recherches en Propriété Intellectuelle (CIR).

On the basis of this report, the Fondation has identified certain strengths of French law and its continental tradition, which might be of interest to the European Commission when it implements its copyright action plan. Following on from this, the Fondation hopes to suggest certain ways forward to the Commission.

I. What method should be followed to overcome the principle of the national territoriality of copyright?

The most comprehensive and coherent solution would involve drafting a regulation incorporating a European Copyright Code. The alternative would be to achieve a higher degree of harmonisation by means of directives. In this latter case it will be necessary to go beyond the framework of Directive 2001/29/EC, in order to also take account of other directives that have an impact on this subject.

II. How should we respond to the challenges of the digital revolution in a single market?

The study shows that a certain number of issues relating to digital matters can be resolved when the scope of the exclusivity is determined. Courts dealing with digital matters already have a power of interpretation which allows them to determine the extent of the scope. If necessary, the legislature itself could intervene in order to adapt further the protected field to the specific features of the digital world.

The introduction or reinterpretation of specific exceptions should only be considered as a secondary solution. In this latter case, it will be necessary to choose between mechanisms that unite and mechanisms that divide.

Only mandatory exceptions will ever unite. Only mandatory exceptions would be able to prevent the internal market from being broken up by the patchwork transposition of optional provisions, varying from one State to another. If, on the other hand, the move towards digital technology is to be achieved by the express creation of new optional exceptions under points 2 or 3 of article 5 of Directive 2001/29/EC, the differences between national legislations will inevitably be accentuated.

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. Should the exceptions be made more flexible? Before pursuing this line it would be advisable to weigh up the advantages and disadvantages. 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.

The study finds that, even without changing the current wording of article 5, a certain number of current exceptions are already so indeterminate that they allow national legislatures to use them as a shelter for all kinds of solutions deemed to be necessary in the modern world. 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 have also advocated that maximum flexibility could be achieved by adopting the American "fair use" clause, which could constitute a general limitation on copyright, and might complete or even supplant specific exceptions. This study shows however that this system does not correspond to the legislative tradition of the great majority of States in the European Union. This approach has only been able to prosper in an Anglo-American legal culture in which solutions are built patiently on judicial precedents. How these factors will be applied in a specific case is not 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. A case-by-case approach of this kind would make it very difficult to predict the outcome of a court case.

The study shows that if it was decided to keep the existing closed system of detailed, express exceptions, using precise and substantive conditions, this would not mean that we had chosen permanent rigidity. 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 has stressed the importance of taking account of "all the circumstances of the case". 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.

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 that the main objective 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.

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. It is clear from the case law of the Court of Justice relating to this test, that the court will apply the three-step test following the standard interpretation, shared by the WTO panel of 15 June 2000, according to which article 5.5 operates as a check on the exceptions. 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.