Fair Use in Europe: in Search of Flexibilities in Copyright

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Recent Calls in EU for More Flexibility

- **UK Gowers Review (2006):**
  - Exception for ‘creative, transformative or derivative works’
- **UK Hargreaves Review (2011):**
  - Explore L&E’s allowed by EU to the max
- **UK Government Response (2011)**
The Government will aim to secure further flexibilities at EU level that enable greater adaptability to new technologies including use of data for research. We support a review of relevant EU legislation to this end and will be in dialogue with European partners to identify how this can best be achieved. IPO will make the removal of EU-level barriers to innovative and valuable technologies a priority to be pursued through all appropriate mechanisms. Given the possible time required for change at EU level, the Government will also explore what more can be done at UK level.
Recent Calls for More Flexibility

• Dutch Government (2010-2012):
  – Need for ‘fair use’, flexible L&E’s
  – Report of Copyright Committee out soon

• Irish Copyright Review (2012):
  – Explore open-ended *fair use* provision

• Non-EU countries:
  – Canada, India, Australia
Background:
Limitations and Exceptions

- EU Member States: ‘closed’ list of L&E’s
  - Enumeration of circumscribed permitted uses
    - UK: ‘fair dealing’ under specified conditions
- US, Israel, Sing, Phil: *Fair use*
  - Open norm allowing spectrum of ‘fair’ uses
- Extensive copyright harmonization in EU
Increasing Need for Flexible, Open Norms

- Accelerating pace of technological change
- Legislature cannot respond, must anticipate
  - Need for more abstract norms
- EU harmonization requires extra cycle of law making
  - Total legislative response time > 10 years!
Copyright Law Used to be (More) Flexible

• Gradual loss of flexibility due to:
  • Tech development: media/tech specific rules
  • Rule of narrow construction of ‘exceptions’
  • Property rights discourse, lobbying
  • Implementation of EU Directives
Where Flexibility is Needed:
Examples

• User-generated content: creative remixing
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Where Flexibility is Needed: Examples

- User-generated content
  - Parody or quotation exceptions may be too narrow
Where Flexibility is Needed: Examples

• User-generated content
• Information location tools (search)
Where Flexibility is Needed: Examples

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Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
  - Cache: transient copying exception may not apply
  - Search results: quotation exception may not apply
    - See e.g. *Copiepresse v. Google* (CoA Brussels 2011)
Where Flexibility is Needed: Examples

• User-generated content
• Information location tools (search)
• Digital classroom
Where Flexibility is Needed:

Examples

- User-generated content
- Information location tools (search)
- Digital classroom
Where Flexibility is Needed:
Examples

• User-generated content
• Information location tools (search)
• Digital classroom
  • PPT, Blackboard, e-boards, etc. not (always) covered by educational exceptions
Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making
Where Flexibility is Needed:

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Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making
  - Media reporting & current events exceptions too narrow
Where Flexibility is Needed:

Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making
- Unknown unknowns
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Why Flexibility is Needed:
Goals

- Promoting creation (transformative use)
- Promoting technological innovation
- Promoting education
- Promoting freedom of expression
National Courts Pulling at the Chains of L&E’s

- *Dior v Evora* (NL): analogous application of statutory exception allowed
- *Bildersuche* (Ger): theory of implied consent applied to image search
- *SAIF/Google France* (Fr): application by analogy of ISP safe harbour to search engines
- *Google* (Sp): three-step test is enabling clause, similar to fair use
So What about Legal Security?

- Trade-off between flexibility and predictability
- Flexible rules will require (more) interpretation by courts
- But: frequent references to ‘fair practice’ in existing copyright law
- And: civil law system is built on open norms, e.g. reasonableness, fairness, care, etc.
Does the EU Framework Allow Flexible Norms?

• InfoSoc Directive: closed list of L&E’s
  • Rec 32: ”exhaustive enumeration of exceptions and limitations to the reproduction right and right of communication to the public”

• But L&E’s in Directive loosely circumscribed
  • Prototypes rather than precise exceptions
  • Rec 2: ”need to create a general and flexible legal framework […] to foster the development of the IS”
Examples from InfoSoc Directive

Art. 5(3)(d) (quotation):

“….quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose
National Implementations: From strict to liberal

Article L122-5 Intellectual Property Code (France)
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 […]

Art. 22 Norwegian Copyright Act
Det er tillatt å sitere fra et offentliggjort verk i samsvar med god skikk og i den utstrekning formålet betinger.
Examples from InfoSoc Directive

Art. 5(3)(i):

“…. incidental inclusion of a work or other subject-matter in other material; …. ”
Examples from InfoSoc Directive

Art. 5(3)(k):

“…. use for the purpose of caricature, parody or pastiche;….”
Additional Space in the EU Acquis

- Right of *adaptation* not harmonized
  - Could leave room for national L&E’s allowing exceptions for non-commercial non-parody transformative uses

- *Free adaptation* rules in Ger, Au, NL
The Three-Step Test

- Art. 5.5 InfoSoc Directive: ‘three-step test’
  - Special case
  - Not undermine normal exploitation
  - No unreasonable prejudice to right holders
- *Infopaq II* (C-302/10): if conditions of 5.1 are met then no need to test against 5.5
Interpreting L&E’s in EU Law

• *Infopaq I* (C-5/08): principle of narrow construction of exceptions

• But *Premier League* (C-403/08), *Painer* (C-145/10):
  • Interpretation must ensure effectiveness of exception, safeguard *fair balance*

• Growing impact of *EU Charter*
  • Works both ways!
What Kinds of Flexibilities?

• General open norm *(fair use)*?
S. 107 US Copyright Act

Notwithstanding […] 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 nonprofit 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. […]

[…].
“It does not constitute an infringement to use a work or other subject-matter for non-commercial scientific research or illustrations for teaching, for the reporting of current events, for criticism or review of material that has already been lawfully made available to the public, or quotations from such material serving comparable purposes, for caricature, parody or pastiche, or the incidental inclusion in other material, provided that [the three-step test is satisfied]”
EU Compatible *Fair Transformative Use* Rule

“It does not constitute an infringement of the adaptation right to create a derivative work based on a work or other subject matter, for non-commercial artistic purposes, or for reasons of criticism, caricature, parody or pastiche, provided that [the three-step test is satisfied]”
What Kinds of Flexibilities?

• General open norm (*fair use)*?
• Create flexibilities *inside* circumscribed L&E’s
  • Remunerated or non-remunerated
“It shall not be regarded as an infringement of copyright in a literary, scientific or artistic work to adopt news reports, miscellaneous reports or articles concerning current economic, political or religious topics or works of the same nature that have been published in a daily or weekly newspaper or weekly or other periodical, radio or television program or other medium fulfilling the same purpose, if […]”
What Kinds of Flexibilities?

- General open norm (*fair use)*?
- Create flexibilities *inside* circumscribed L&E’s
- Create flexibility *alongside* circumscribed L&E’s
What Kinds of Flexibilities?

- General open norm (fair use)?
- Create flexibilities inside circumscribed L&E’s
- Create flexibility alongside circumscribed L&E’s
Introduction

The *European Copyright Code* is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The project has its roots in an International Network Program run by three Dutch universities (Radboud University of Nijmegen, University of Amsterdam and Leiden University), and sponsored by the government-funded Dutch ITER Program.

The aim of the Wittem Project and this Code is to promote transparency and consistency in European copyright law. The members of the Wittem Group share a concern that the process of copyright law making at the European level lacks transparency and that the voice of academia all too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Nevertheless, the Group does not take a position on the desirability as such of introducing a unified European legal framework.

The Code was drafted by a Drafting Committee composed of seven members. Each chapter of the Code was originally drafted by one or two members of the Drafting Committee, acting as rapporteurs. The rapporteurs for each chapter were: Prof. Quaedvlieg (Chapter 1: Works), Prof. Hugenholtz (Chapter 2: Authorship and ownership), Prof. Strouw (Chapter 3: Moral rights), Prof. Visser (Chapter 4: Economic rights) and Professors Dreier and Hilty (Chapter 5: Limitations).

Each draft Chapter, accompanied by an explanatory memorandum, was discussed in a plenary session with the members of the Wittem Advisory Board and other experts that were invited ad hoc. The proceedings of these plenary sessions were fed into the second versions of each chapter, and thereafter redacted and integrated into a final consolidated version by the Drafting Committee. Although discussions with the Advisory Board and experts have greatly influenced the final product, responsibility for the Code lies solely with the Drafting Committee.

While drafted in the form of a legislative instrument and thereby exceeding the level of detail normally associated with common principles of law, this Code is not comprehensive. It concentrates on the main elements of any codification of copyright: subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4) and limitations (Chapter 5). The Code does not, for instance, treat such remuneration rights as public lending right and droit de suite, nor does it deal with the legal protection of technical measures. Also, the Code does not contain rules on copyright liability or enforcement, nor does it touch upon neighbouring (related) rights and database right.

This Code is not a recodification of EU copyright law *tabula rasa*. Since European copyright law must operate within the confines of the international commitments of the European Union and its Member States, the Code takes account of the substantive norms of the Berne Convention and the TRIPS.
European Copyright Code
(Wittem Group)

Art. 5.5 – 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. [55]
Conclusions

• Need for more flexibility generally recognized
• EU *acquis* leaves (some) space to national legislation
  • Irish Review: ”there is a great deal of scope under EU law for MS’s to adopt a fair use doctrine”
• But: policy space may be reduced as CJEU sets more precise standards
FAIR USE IN EUROPE. IN SEARCH OF FLEXIBILITIES

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