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### Flexible copyright: the law and economics of introducing an open norm in the Netherlands

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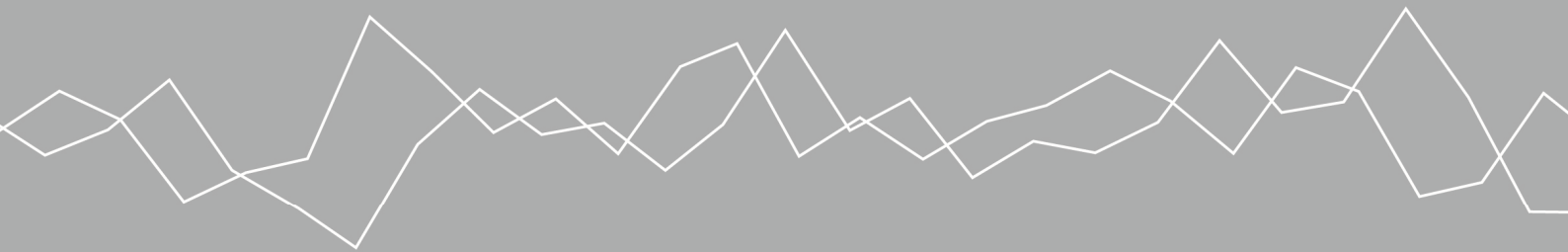
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## Flexible Copyright





Amsterdam, August 2012  
Commissioned by the Dutch Ministry of Economic Affairs, Agriculture & Innovation

## Flexible Copyright

The Law and Economics of Introducing  
an Open Norm in the Netherlands

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# Table of Contents

Summary .....	i
Samenvatting.....	iii
<b>1 Introduction.....</b>	<b>1</b>
1.1 The Trade-off between Creation and Dissemination.....	1
1.2 Towards Flexible Copyright?.....	1
1.3 Research Question and Method.....	2
<b>2 Deficiencies in the Current System of Exceptions and Limitations .....</b>	<b>5</b>
2.1 General Legal Framework.....	5
2.2 Specific Problem Areas under the Current System .....	9
2.3 Conclusion.....	23
<b>3 Defining an Instrumental Open Norm for the Economic Analysis .....</b>	<b>25</b>
3.1 Preliminary Observation .....	26
3.2 More Flexibility Within the Existing Framework .....	27
3.3 Towards a Generic Open Norm.....	31
3.4 Conclusion.....	35
<b>4 Case Study: Economic Rationale of Fair Use in Israel .....</b>	<b>37</b>
4.1 The Israeli Copyright Framework .....	38
4.2 Economic Rationale and Consequences .....	39
4.3 Concluding Remarks.....	45
<b>5 Economic Effects of Introducing Copyright Flexibility .....</b>	<b>47</b>
5.1 Introduction .....	47
5.2 The Economics of Copyright.....	48
5.3 Permitting Current Uses.....	51
5.4 Flexibility in Permitting (New) Uses .....	58
5.5 Conclusion.....	60
<b>6 Conclusion.....</b>	<b>63</b>
Literature.....	67
Appendix A      List of Interview Partners.....	73



## Summary

- This study analyses the law and economics of introducing flexibility in the system of exceptions and limitations in Dutch copyright law. Such flexibility would exist in an open norm, on the basis of which the courts can decide whether certain uses of copyrighted material are permissible or not, instead of explicitly defining this in the law. First, it assesses problem areas where the lack of flexibility creates legal disputes and potential barriers to innovation and commercialisation. Second, it analyses the economic rationale and economic effects of introducing flexibility. The study was commissioned by the Dutch Ministry of Economic Affairs, Agriculture & Innovation. Research methods used are literature review and in-depth interviews. The study includes a case study of Israel, where a fair use exception was introduced in the Copyright Act in 2007.
- Exceptions and limitations in the current copyright system are meant to balance the protection granted to rights owners with the public interest's need to make certain unauthorized uses. However, this report identified a number of situations that do not fit well within the current set of exceptions and limitations and attributes this to a lack of flexibility. Among these uses are the activities of search engines, the use of works in User Created Content, cloud computing, data mining, distance learning, and transformative uses by, for instance, documentary filmmakers.
- Several of these problem areas have given rise to court proceedings with varying outcomes. The interpretation given by courts to existing exceptions and limitations – such as the quotation right, the exception for transient and incidental copying, the private copying exception, and the incidental use exception – is usually too narrow to respond to new technological developments, new developments in the creation process, or new commercialisation models. These types of uses generally do not 'fit' the narrowly defined exceptions and limitations and therefore lack legal basis. The same is true for things not yet invented.
- Because the law is not flexible in itself, courts have increasingly found inventive ways to create legal space for uses that are not covered by the exhaustive list of exceptions. In these cases flexibility with specific evaluation criteria could have been more satisfactory from a legal perspective.
- Flexibility could be obtained by introducing an open norm in the copyright system. This report defines such an open norm for the purpose of analysing the effects of more flexibility in copyright law. The norm has two main properties. First, it would coexist with the exhaustive list of exceptions and limitations in the current Dutch Copyright Act. Second, a use of a work would only benefit from the open norm if it passes the so-called *three-step test*, which takes the interests of the author or right holder into account.
- The first category of economic effects of introducing an open norm is that for some known uses that otherwise require licensing, the open norm would allow unlicensed use. This



potentially reduces the reward to the creator of a work and therefore *decreases* the incentive to create. By contrast, it is also likely to reduce the creator's costs of using another work *as an input* when producing a new work, and therefore to *increase* the incentive to create. It is difficult to predict which of these two opposing effects ultimately turns the scale in specific markets. Traditional creators generally worry about the negative effect on their reward and seem to believe that the first effect dominates. For businesses that use large numbers of protected works as an input for their services, such as *Google*, the opposite is true. They emphasise the benefits of reduced input costs and are likely to improve their legal position with an open norm. Collective rights management organisations in turn fear that their bargaining power vis-à-vis users like UCC-platforms, such as *YouTube*, would suffer from an open norm.

- However, given the design of the open norm, it is unlikely that rewards for creators are significantly affected. The application of the open norm by the courts tests for adverse effects on the business model of the rights holder (the previously mentioned three-step test). In case of severe adverse effects on the rights holder, the open norm does not apply. The shift in bargaining power from rights holders to user (platforms) is limited to cases that are currently licensed and where parties are sufficiently confident that the use benefits from the open norm.
- The second category of economic effects of introducing an open norm is that the legal delineation between infringement and permissible use becomes capable of accommodating developments in technology and society. This enables entrepreneurs to develop new products and services that rely on currently unforeseen use of protected material. On the downside, flexibility may reduce legal certainty in the short run, until jurisprudence on the practice of flexible copyright has developed.
- The countries that have recently introduced an open norm in their copyright laws have not produced any ex-ante or ex-post studies on the magnitude of these economic effects. The case study of fair use in Israel shows that the change may decrease legal certainty in the short run (as case law needs time to develop), but improve legal certainty in the longer run, as the legal position of acts that do not 'fit' a rigid system with an exhaustive list of static exceptions is being clarified.
- In sum, the main effects of introducing an open norm seem to be of a legal nature: it changes the legal position of some businesses and therefore affects the costs these businesses make to comply with copyright. 'Tomorrow's inventions' are likely to be facilitated by an open norm. Since most businesses seem currently not chilled by the lack of flexibility, the effect on products and services available in the market is likely to be secondary to the legal effects.

## Samenvatting

- Dit rapport analyseert juridische en economische aspecten van het introduceren van flexibiliteit in het stelsel van uitzonderingen en beperkingen in de Nederlandse Auteurswet. Flexibiliteit kan worden bereikt door het opnemen van een open norm, op basis waarvan rechters kunnen beslissen of een bepaald gebruik van auteursrechtelijk beschermd materiaal is toegestaan of niet. Ten eerste analyseert deze studie probleemgebieden waar het gebrek aan flexibiliteit leidt tot juridische geschillen en drempels voor innovatie en commercialisatie. Ten tweede beschrijft dit rapport de economische motivering en effecten van de introductie van een open norm. Het onderzoek is verricht in opdracht van het Ministerie van Economische Zaken, Landbouw en Innovatie. De gebruikte onderzoeksmethoden zijn literatuurstudie en interviews. De studie omvat ook een *case study* naar de introductie van *fair use* (een vorm van flexibiliteit) in Israel in 2007.
- De bestaande uitzonderingen en beperkingen in het auteursrecht zijn erop gericht een balans te vinden tussen de bescherming voor auteurs en het belang van gebruikers om in sommige gevallen zonder toestemming auteursrechtelijk beschermde werken te mogen gebruiken. Voor een aantal gebruiksvormen schiet het huidige stelsel van uitzonderingen en beperkingen echter tekort, vanwege gebrek aan flexibiliteit. Een aantal van deze situaties zijn: de diensten van zoekmachines, het maken van *User Created Content*, *cloud computing*, *data mining*, gebruik van werken binnen het onderwijs, en creatief hergebruik door bijvoorbeeld documentairemakers.
- In Europa hebben verscheidene van deze probleemsituaties tot rechtszaken geleid, met vaak wisselende uitkomsten. De bestaande uitzonderingen en beperkingen worden veelal te eng uitgelegd om deze ten goede te laten komen aan gebruik dat gestoeld is op ontwikkelingen in technologie of creatieve productie. Deze gebruiken passen doorgaans niet in de nauwkeurig gedefinieerde uitzonderingen en beperkingen en ontberen daardoor een juridisch fundament. Dit geldt ook voor de uitvindingen van de toekomst (*tomorrow's inventions*).
- Door dit gebrek aan flexibiliteit in de regels, komen rechters in Europese landen steeds vaker met creatieve oplossingen om dergelijke gebruiken toch te accommoderen. In deze gevallen zou een open norm – met specifieke criteria – juridisch gezien de voorkeur genieten boven het creëren van flexibiliteit door middel van creatieve oplossingen.
- Flexibiliteit kan bereikt worden door het opnemen van een open norm in het auteursrecht. Dit rapport specificeert een open norm. De belangrijkste eigenschappen daarvan zijn: (i) het laat de reeds bestaande uitzonderingen en beperkingen intact en (ii) het is gebaseerd op een driestappentoets en waarborgt daarmee de belangen van auteursrechthebbenden.
- Er zijn twee typen economische effecten van de introductie van een open norm. Het eerste type is dat voor sommige afgebakende toepassingen de open norm gebruik zonder licentie zou toestaan. Dit zou er toe kunnen leiden dat de inkomsten voor auteurs(rechthebbenden) afnemen. Wanneer deze voldoende afnemen, zou ook de prikkel om werken te creëren

kunnen afnemen. Aan de andere kant zou de vermindering van auteursrechtbescherming het goedkoper kunnen maken voor auteurs om werken van anderen te gebruiken. Dit zou dan de kosten van creatieve productie verlagen. Het is niet goed te voorspellen welke van deze tegenovergestelde effecten het zwaarst weegt. Traditionele makers maken zich zorgen over het negatieve effect op hun inkomsten en lijken te geloven dat het eerste effect overheerst. Voor bedrijven die hoge volumes van beschermde werken aggregeren en omzetten in informatieproducten, zoals *Google*, geldt het tegenovergestelde. Deze bedrijven benadrukken de inputkant van het productieproces waar zij als gevolg van een open norm een versterking van hun juridische basis verwachten. Collectieve beheersorganisaties tot slot vrezen dat de onderhandelingspositie vis-à-vis gebruikersplatforms, zoals *YouTube*, zou afnemen. In welke mate deze effecten daadwerkelijk gaan optreden, kon niet worden vastgesteld.

- Dit rapport concludeert wel dat het onwaarschijnlijk is dat de inkomsten voor auteurs sterk zullen afnemen door de introductie van een open norm. De reden hiervoor is dat de in deze studie geconcretiseerde open norm de belangen van auteurs waarborgt. Rechters dienen voor elk specifiek geval te toetsen in welke mate er negatieve effecten zijn te verwachten voor de normale exploitatie van het werk, en dus de bedrijfsvoering van de auteur (de driestappentoets). Wanneer de negatieve effecten te groot zijn, profiteert een gebruiker niet van de open norm. De verschuiving in onderhandelingspositie van rechthebbenden(organisaties) naar gebruikers(platforms) blijft beperkt tot gevallen die ook nu al gelicentieerd worden en waarin partijen verwachten dat de open norm daarop van toepassing zou zijn.
- Het tweede type economisch effect is dat de afbakening tussen inbreuk en toegestaan gebruik flexibel wordt en daardoor technologische en maatschappelijke ontwikkelingen kan meewegen. Dit stelt ondernemers in staat om producten en diensten te ontwikkelen en te commercialiseren die berusten op nieuwe toepassingen van auteursrechtelijk beschermd materiaal. Het nadeel is dat deze flexibiliteit (op korte termijn) de rechtszekerheid doet verminderen. De rechtszekerheid kan op langere termijn toenemen wanneer jurisprudentie zich gaat ontwikkelen.
- In de landen waar recent een open norm is geïntroduceerd zijn geen studies gedaan naar de omvang van deze economische effecten. De *case study* Israël laat zien dat de rechtszekerheid op korte termijn afneemt maar op langere termijn juist toeneemt, wanneer de juridische status van allerlei toepassingen duidelijk wordt.
- De belangrijkste effecten van de introductie van een open norm lijken juridisch van aard te zijn: de open norm verandert de juridische positie van sommige ondernemingen en heeft daarmee invloed op de kosten die ondernemingen maken voor naleving van het auteursrecht. Flexibiliteit vergemakkelijkt *tomorrow's inventions*. Het lijkt er echter op dat ondernemingen thans niet ontmoedigd raken door het gebrek aan flexibiliteit. Het effect op de beschikbare producten en diensten in de markt is om die reden waarschijnlijk ondergeschikt aan de juridische gevolgen.

# 1 Introduction

This study analyses the law and economics of introducing flexibility in the system of exceptions and limitations in Dutch copyright law. Flexibility would exist in an open norm, on the basis of which the courts can decide whether certain uses of copyrighted material are permissible or not, instead of explicitly defining this in the law. The report assesses problem areas where the lack of flexibility creates legal disputes and potential barriers to innovation and production. The core of the study concerns the analysis of the economic rationale and effects of introducing flexibility in the Dutch legal order in the form of an open norm. The study was commissioned by the Dutch Ministry of Economic Affairs, Agriculture & Innovation and carried out by a consortium of SEO Economic Research and the Institute for Information Law (IViR) at the University of Amsterdam. The authors thank Prof. Bernt Hugenholtz for his useful comments on a draft version of the report.

## 1.1 The Trade-off between Creation and Dissemination

Copyright grants the author of a work a certain degree of monopoly power on the exploitation and use of his or her work. The economic rationale for this is to provide the incentive to create and exploit the work. However, monopoly power comes with a disadvantage for social welfare: in general, output (e.g. the number of copies or downloads sold or the amount of other related services) is reduced in monopoly. Also, it raises the costs for the creation of other works in various ways: it imposes licence costs and transaction costs on creators for the use of copyrighted material, and it limits their access to material. Monopoly rents therefore cause a welfare loss to society. Policy analysis on copyright should take into account the trade-off between creation and dissemination and the costs imposed by protection and enforcement, such as monitoring costs.

## 1.2 Towards Flexible Copyright?

Exceptions and limitations to copyright are, implicitly or explicitly, aimed at striking a balance between the creation and dissemination of works, for example, by tailoring copyright to different types of works and by increasing dissemination for certain subgroups of consumers and professional users, without eroding the business model of the producer. As in most areas of public policy, however, refinements to the design of copyright, including the design of copyright exceptions and limitations, are being debated since relevant parameters change with time.

In the current digital landscape, copyright law is sometimes said to lack flexibility for enhancing innovation, creative re-use and commercial exploitation and for the development of new business models. Against this background, the *Digital Agenda* of the Netherlands announced a study into the effects of the absence of an open norm in copyright law: “[T]he government feels that copyright law

*must be adapted to the requirements of the 21st century. The rapid technological developments and the possibilities they create for consumers raise questions about the exhaustive list of exceptions in current copyright law”<sup>1</sup>*

The advantage of a specific list of exceptions and limitations lies in its predictability and clarity. In a world without technological change, this may be the preferred system. However, it is impossible to predict future technological developments that affect copyright and hence to pinpoint the exceptions and limitations that may be required in the future. This makes a certain amount of flexibility desirable.

The *Copyright 20©20* letter by State Secretary Fred Teeven (*Speerpuntenbrief Auteursrecht 20©20*) also calls for a fair use exception for non-commercial re-use of copyrighted material: “*Supporting European plans for orphan works, international copyright licences for the internet, and the introduction of a fair-use exception in the Copyright Directive (...) for the purpose of encouraging the creative, non-commercial reuse of works*”.<sup>2</sup> This would at least involve *User Created Content* (UCC). In a broader sense, the *Copyright 20©20* letter argues that the internet and social media have made the current system of exceptions and limitations more problematic: “*Recognising the importance of a fair-use exception would introduce more flexibility in the way that copyright responds to rapid technological changes on the internet*”.

### 1.3 Research Question and Method

The current report is the result of the study announced in the *Digital Agenda*. The main research questions addressed in the study are:

*Which exceptions in current Dutch copyright law, or the absence of which exceptions, lead to bottlenecks for innovation and commercialisation?*

*What are the welfare economic consequences of the introduction of an open norm in Dutch copyright law? What would be the effect of such an open norm on commercialisation of protected works and the Dutch innovation climate?*

Innovation and commercialisation are the focal points of both research questions. This implies that both the current exhaustive list of exceptions and limitations and an alternative regime with an open norm are discussed and analysed within this context. The focus is on instances in which the absence of flexibility creates legal barriers to innovation, to creative re-use and commercial exploitation or to the development of new (online) business models. It also implies that debates on copyright exceptions that do not (directly) relate to bottlenecks for innovation and commercialisation are beyond the scope of this study. Examples are the suggestion in the *Copyright 20©20* letter to treat as an illegal act the downloading of copyright protected material from unauthorized sources (which is currently permitted by the private copying exception) and the calls by some stakeholders to introduce new copyright exceptions or limitations for certain non-commercial uses (e.g. for music played in carnival parades and retirement homes).

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<sup>1</sup> Ministerie van Economische Zaken, Landbouw en Innovatie (2011), *Digital Agenda.nl: ICT for innovation and economic growth*, p. 15

<sup>2</sup> Letter from the Dutch State Secretary for Security and Justice Fred Teeven to the House of Representatives on the government’s priorities for Copyright 20©20, 11 April 2011.

The structure of this report is as follows. Chapter 2 analyses to what extent the current system of exceptions and limitations (as opposed to an open norm) leads to bottlenecks for innovation and commercialisation. To this end, it studies the relevant literature, in particular the contributions by various stakeholders to the 2006 Gowers Review and the 2011 Hargreaves Review in the United Kingdom and to the 2008 European Green Paper on Copyright in the Knowledge Economy and the resulting Communication from the Commission on Copyright in the Knowledge Economy of 2009. It also contains the results of a quick scan of relevant case law in different European Member States.

Chapter 3 defines the open norm for the purpose of the economic analysis in this report. It does so on the basis of existing models and studies that examine the introduction of an open norm.

Chapter 4 presents a case study of Israel, where a fair use defence was introduced into the Copyright Act in 2007. Is it based on a series of interviews in Israel as well as a document study and focuses on the economic motivations for, and effects of, these amendments.

Chapter 5 analyses the possible economic effects of introducing an open norm in copyright law. It discusses the relevant economic literature and presents a conceptual framework for analysing the welfare economic effects.

Chapter 6 contains the general conclusion of this study.



## 2 Deficiencies in the Current System of Exceptions and Limitations

This chapter presents the general legal framework of exceptions and limitations on copyright under European and Dutch copyright law with a view to answering the first research question formulated in the introduction. The main focus of the analysis in this section is therefore to determine in which instances the absence of sufficient flexibility creates barriers to innovation, to creative re-use and commercial exploitation or to the development of new (online) business models. The analysis purports to shed some light on new and unfamiliar borderline cases brought about by recent technological developments, by new behavioural patterns in the creation process or commercialisation models or by a combination of technological changes and behavioural patterns, none of which could be foreseen by the legislator when the current copyright system was established. It is for these situations that the introduction of an open norm might be beneficial. The chapter therefore does not aim at discussing known situations that are clearly covered by the specific exceptions or limitations but do not meet the criteria set by the current system: infringement remains infringement. Nor does it consider current types of uses for which a licensing practice between rights owners and users has developed over the years.

The chapter is divided in three sections: first, Section 2.1 gives an overview of the general legal framework of exceptions and limitations, looking at the European harmonisation efforts and the current Dutch system. Section 2.2 follows with specific examples of types of uses where more flexibility might be beneficial, namely the use of search engines, either for the display of thumbnails in search results or for the dissemination of news articles; the use of works in ‘user created content’; cloud computing; data mining; distance learning; and other transformative uses, such as those of documentary filmmakers. Section 2.3 concludes the chapter.

### 2.1 General Legal Framework

#### 2.1.1 EU Harmonisation

With the Information Society Directive the European legislator pursued two goals: First, to bring the laws on copyright and related rights in the European Union in line with the WIPO Internet Treaties, in order to set the stage for joint ratification of the Treaties by the Member States and the European Community. The second, largely unrelated goal of the Directive was to harmonise certain aspects of substantive copyright law across the board, including limitations and exceptions (Hugenholtz, 2000, p. 501; Guibault, 2002, p. 540; Jehoram, 2001, p. 387; Van Eechoud *et al.*, 2009, pp. 102-103). The harmonisation of exceptions and limitations proved to be a highly controversial issue. The difficulty of choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States also proved to be a daunting task for the drafters of the Information Society Directive.<sup>3</sup> Between the time when the

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<sup>3</sup> Explanatory Memorandum to the Proposal for the Information Society Directive, p. 35.



proposal for a Directive was first introduced in 1997 and the time when the final text was adopted in 2001, the amount of admissible limitations went from seven to twenty.

When the time came to devise the limitations on copyright and related rights in the Information Society Directive, the European legislator could therefore rely only on the six express limitations contained in the Berne Convention and on the open norm of the three-step test, according to which limitations must (1) be confined to special cases; (2) they must not conflict with normal exploitation of the protected subject-matter; and (3) they must not unreasonably prejudice the legitimate interests of the author. Until the adoption of the Information Society Directive, the exceptions and limitations were harmonized at the European level only in respect of neighbouring rights<sup>4</sup> and of the use of computer programs and databases.<sup>5</sup> The existing *acquis communautaire* with respect to exceptions and limitations offered little additional concrete hold upon which the Commission could base new limitations. The limitations listed in the Information Society Directive apply to all categories of works and are modelled either on the provisions of the Berne Convention or on the provisions found in the legislation of many Member States. Article 5 of the Information Society Directive contains a detailed list of limitations on the exclusive rights granted under articles 2 to 4 of the Directive, namely the reproduction right, the right of communication to the public and the distribution right.

The European legislator's decision to restrict the exceptions and limitations to those cases enumerated in article 5 of the Information Society Directive has given rise to severe criticism in the literature. At least three reasons may be advanced cautioning the use of an exhaustive list. First, as the Legal Advisory Board (LAB) already pointed out early on, harmonisation does not necessarily mean uniformity.<sup>6</sup> According to the LAB, rules at EC level should allow distinctive features found in national legislations to subsist, as long as they do not hinder the internal market. Second, previous efforts at the international level to come up with an exhaustive catalogue of limitations on copyright and related right have consistently failed. The Berne Convention provides a clear illustration of such unsuccessful efforts, for the possibility of introducing a complete and exhaustive list of exemptions into the Berne Convention had been considered at the Stockholm Conference. The proposal was rejected for two main reasons: 1) because in order to encompass all the principal exemptions existing in national laws, such a list would have had to be very lengthy, and it would still not have been comprehensive; and 2) since not every country recognised all the possible exemptions, or recognised them only subject to the payment of compensation, experts feared that by including an exhaustive list of limitations, States would be tempted to adopt all the limitations allowed and abolish the right to compensation, which would have been more prejudicial to the rights owners (Ricketson & Ginsburg, 2006, p. 761).

<sup>4</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 346/61, 27 November 1992.

<sup>5</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ No. L 122/42, 17 May 1991; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No. L 77/20, 27 March 1996.

<sup>6</sup> LAB, *Commentaires du Legal Advisory Board sur la Communication de la Commission du 20 novembre 1996: Suivi du Livre vert*, § 9A. The Legal Advisory Board (LAB) was established by the European Commission with the task of increasing the awareness of these legal challenges and to submit ideas and recommendations to the Commission on eliminating disparities and aligning national legal provisions. The members of the LAB are experts invited in a personal capacity. See [http://ec.europa.eu/information\\_society/topics/telecoms/internet/related/lab/text\\_en.htm](http://ec.europa.eu/information_society/topics/telecoms/internet/related/lab/text_en.htm).

A third, and probably decisive argument against an exhaustive list of limitations, is that a fixed list of limitations lacks sufficient flexibility to take account of future socio-economic and technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework that allows new and socially valuable uses that do not affect the normal exploitation of copyright works to develop without the copyright owners' permission, and without having to resort to a constant updating of the Directive, which might take years to complete (Hugenholtz, 2000, p. 502).

Not only is the list of exceptions and limitations contained in article 5 of the Directive exhaustive, but all but one exception are optional. The regime of limitations established by the Information Society Directive leaves Member States ample discretion to decide if and how they implement the limitations contained in article 5 of the Directive. This latitude not only follows from the fact that all but one of the twenty-three limitations listed in the Directive are optional, but more importantly from the fact that the text of the Directive does not lay down strict rules that Member States are expected to transpose into their legal order. Rather, articles 5(2) to 5(5) of the Directive contain two types of norms: one set of broadly worded limitations, within the boundaries of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations. The outcome is that Member States have implemented the provisions of articles 5(2) to 5(5) of the Directive very differently, selecting only those exceptions that they consider important. With such a mosaic of limitations throughout the European Community, the aim of harmonisation most likely has not been achieved, and legal uncertainty persists. The assessment of the boundary between infringing and non-infringing conduct, remains therefore highly uncertain and unpredictable. The fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the European Community, could ultimately constitute a serious impediment to the establishment of cross-border services.

### 2.1.2 The Dutch Legal Framework

Since its very first enactment in 1912, the Dutch Copyright Act has always contained a list of exceptions and limitations allowing under specific circumstances certain uses of copyright protected works to take place without the prior authorisation of the rights owner. Statutory exceptions and limitations, as they have been given content and meaning throughout the years, therefore form an integral part of the copyright system through which a balance is achieved between rights holders and users.<sup>7</sup> The idea of introducing a *fair use*-type defence within the Dutch copyright system is not new, however: This issue gave rise to discussions in the past, most notably in the context of the adoption and implementation of the Information Society Directive (Jehoram, 1998, 2005; Senftleben, 2003; Alberdingk Thijm, 1998a, 1998b). In its 1998 *Advice on copyright, related rights and the new media*, the Dutch Copyright Advisory Committee observed that the system of statutory limitations contained no open norm allowing a judge to decide whether in circumstances not covered by any of the express limitations recourse could be had on a non-written exception.<sup>8</sup> In the Committee's opinion, the absence of such a norm could create

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<sup>7</sup> House of Representatives, Session 2001–2002, 28 482, nr. 3, p. 17.

<sup>8</sup> The Committee referred to the decision of the Supreme Court in the Dior/Evora case (HR 20 December 1995, *NJ* 1996, p. 682, § 3.10), in which the Court noted that the statutory limitations on copyright presuppose a balancing of the interests of the copyright holder with the social or economic interests of

difficulties in a system where exclusive rights are formulated in open terms, finding application with respect to any new mode of exploitation, but where statutory exceptions often concern specific technology-dependent situations. Knowing that legislative amendments are often unable of reacting timely to rapid technological changes, the Committee believed that there nevertheless existed a need on the part of the Government to set a certain standard. The Committee saw a need for such a norm especially with regard to new media, where the unpredictable character of technological developments could give rise to an important amount of very specific cases. The vast majority of the Advisory Committee recommended that, in those cases not covered by the statutory limitations but where doubt persists as to the desirability of a strict exercise of the exclusive rights, an open norm be formulated as a defence to a copyright infringement claim and according to which all interests at stake would be weighed against each other. The three-step test, laid down in article 5(5) of the Information Society Directive, could serve as model while conforming to international obligations.<sup>9</sup> In the Committee's vision, it would have been the burden of the party invoking the defence to establish why it should be honoured (Commissie Auteursrecht, 1998, p. 46).

In view of the exhaustive character of the list of exceptions and limitations permitted under the Information Society Directive, however, the possibility to introduce a *fair use*-type defence in the Dutch system was virtually eliminated. Following the advice of the Copyright Advisory Committee, the Dutch legislator decided to make full use of the possibilities offered under the Directive and to implement the vast majority of the exceptions and limitations listed therein (Spoor, Verkade, & Visser, 2005, p. 217). Today the Dutch Copyright Act contains a number of exceptions to the exclusive rights of copyright holders that are free of charge but subject to some conditions of application.

#### Box 1 Exceptions in the Dutch Copyright Act

Article 15 (use by the press)  
 Article 15a (quotation)  
 Article 15b (published works of public authorities)  
 Article 15h (closed networks)  
 Article 16a (use in a report on current events)  
 Article 16b (private copy)  
 Article 16n (reproductions by libraries, museums and archives)  
 Article 17c (congregational singing during a religious service)  
 Article 18 (pictures of works located in public places)  
 Article 18a (incidental use)  
 Article 18b (parody)

In addition, the Dutch Copyright Act contains a number of limitations that are subject to the payment of compensation to the rights owner. Compensation is collected either as a levy on

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others, including the public interest. The Court ruled that the express exception of article 23 of the Dutch Copyright Act did not preclude that in certain cases, other limits on copyright could be recognized on the basis of a comparative assessment, especially when the need for the relevant limitation by the legislature has been recognized and it fits in the legal system in the light of the evolution of copyright as a means of protecting commercial interests.

<sup>9</sup> The three-step-test of art. 5(5) Information Society Directive 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."

blank recording material/equipment or via negotiations between collecting societies and users who avail themselves of particular copyright limitations.

### Box 2 Limitations in the Dutch Copyright Act

Article 15c (public lending)  
 Article 15i (exploitation for the benefit of handicapped individuals)  
 Article 16 (educational use)  
 Article 16c (digital private copy)  
 Article 16h (reprographic reproduction)

More than ten years after the adoption of the Information Society Directive, digital technology keeps evolving at an astonishingly rapid pace, bringing about situations that were unforeseen at the time of adoption of the Directive. Although the wording of the exceptions and limitations in the Dutch Copyright Act was rendered as technology-neutral as possible, circumstances can occur that fall outside the scope of the narrowly defined exceptions and limitations, while they could nevertheless justify being exempted. Should such situations arise without being exempted, the development of technology and new business models could be stifled, ultimately harming the public interest. Discussions around the introduction of an open norm have recently resurfaced in the Netherlands and elsewhere in the European Union.<sup>10</sup> The positions of stakeholders are as polarized as ever: On the one hand, certain stakeholders call for more flexibility in the copyright system as a means to foster innovation and the development of new online business models;<sup>11</sup> while on the one hand, others, mainly among right holders and their representatives, consider more flexibility as a threat to their interests and to innovation as a whole.<sup>12</sup> The design of a system of copyright exceptions and limitations therefore requires a careful balance of all interests involved: the interests of right holders must be weighed against the freedoms of users. So when considering an update of the existing system, it is necessary to find a balanced solution that creates more space for users yet does not compromise the legitimate interests of right holders.<sup>13</sup>

## 2.2 Specific Problem Areas under the Current System

From the stakeholders' submissions to different rounds of public consultations<sup>14</sup> and from the case law that emerged over the past few years in different Member States, a number of specific circumstances can be identified in which the use of copyright protected material through newly developed technology has given rise to friction between rights owners and users. For the largest part these types of uses are considered to fall outside the scope of the narrowly defined

<sup>10</sup> Discussions have mostly taken place in Ireland and the UK.

<sup>11</sup> See e.g. the submissions to the consultation on the Green Paper on Copyright in the Knowledge Economy by Kennisland Nederland and Computer & Communications Industry Association (CCIA), available at: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp> (last consulted on 18 July 2012).

<sup>12</sup> See e.g. the submissions to the consultation on the Green Paper on Copyright in the Knowledge Economy by European Writers Congress (EWC), European Newspaper Publishers Association (ENPA), British Screen Advisory Council (BSAC), International Federation of the Phonographic Industry (IFPI), International Federation of Film Producers' Associations (FIAPF), Motion Picture Association (MPA) and Reed Elsevier.

<sup>13</sup> Reaction of the Dutch Cabinet to the "Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market", House of Representatives, Session 2011–2012, 22 112, nr. 1292, p. 16.

<sup>14</sup> The public consultations examined here are the EU consultation of the Green Paper on Copyright in the Knowledge Economy, the UK Gowers Review and the UK Hargreaves Review.

exceptions and limitations on copyright, with the consequence that such uses either do not take place at all or if they do, their legal basis is uncertain at best. Where such new forms of uses have led to legal disputes based on claims of copyright infringement, the outcome has been variable between the Member States both in terms of final solution and in terms of motivation. Court decisions have ranged from a finding of copyright infringement to an outright exemption of liability. The problem areas discussed in the pages below include: the use of search engines, either for indexing, for the display of thumbnails in search results or for the dissemination of news articles; the use of works in ‘user created content’; cloud computing; data mining; distance learning; and other transformative uses, such as those of documentary filmmakers. The identification of the key problem areas in this section does not purport to pass judgement on the question whether these situations would – or should – be exempted under an open norm. This decision would have to be made by a judge on a case-by-case basis according to a yet to be defined concrete norm.

### 2.2.1 Search Engines

Search engines, or information location tools, are a key example of Internet based technologies that have come up in recent years and developed very quickly. Search engines have gained tremendous societal significance, both commercially and more abstractly as a means to promote the free flow of information by locating and thus giving users access to all sorts of information.<sup>15</sup> Without information location tools, it would be impossible to find one’s way in the ever-increasing amount of information available to citizens and companies on the web. Internet is growing into an infinite database, as a result of which information, goods and services could not possibly be found if not for the ‘guidance’ offered by search engines.<sup>16</sup> The technology of search engines is now fully accepted by society. In carrying out their activities, search engines perform the two main acts that are normally exclusively reserved to the copyright holder, namely the reproduction of (parts of) works and their communication to the public. Case law in the US shows that Google’s practices have been accepted under the fair use doctrine (section 107 of the US Copyright Act) from fairly early on.<sup>17</sup> If not for the defence to copyright infringement claims provided by the US fair use doctrine, information location tools would also risk liability for infringement, which would constitute a serious hindrance to the provision of these services. By contrast, the current European framework of exceptions and limitations leaves this particular type of users little room to perform their activities, giving rise to legal uncertainty.

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<sup>15</sup> The Computer & Communications Industry Association (CCIA) study “Fair Use in the U.S. Economy” by T. Rogers *et al.* (2010) calls search engines “a force driving the expansion of the Internet as a tool for commerce and education” by providing “the user’s ability to locate useful information”, p. 13.

<sup>16</sup> Yahoo also stresses this in its contribution to the 2006 Gowers Review of Intellectual Property, available at: [http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/yahoo\\_144\\_70kb.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/yahoo_144_70kb.pdf) (last consulted on 18 July 2012), p. 8, stating: “Without a legal framework which allows search providers to surface pieces of site content and target these sites to other users, neither market nor audience would present itself”.

<sup>17</sup> Rogers *et al.* 2010, p. 95: “17 U.S.C. § 107 (fair use: search engine cache copies) Under the fair use doctrine, search engines’ reproduction in their search databases of images and text they crawled on the World Wide Web, and subsequent display of these materials in search results, are permitted because of their significant social utility. *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003); *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006); *Perfect 10, Inc. V. Amazon, Inc.*, 487 F.3d 701 (9th Cir. 2007).” Another factor that has contributed to the emergence of information location tools in the United States is the specific safe harbour provision for search engines in section 512 (d) of the US the Digital Millennium Copyright Act (DMCA), which exempts under certain circumstances search engines from copyright liability for acts carried out by third parties.

## Indexing

In the execution of their core activity as information locators, search engines copy (large) amounts of content. This information is copied from publicly accessible websites by ‘crawling’ images and text on the World Wide Web, and subsequently indexing them in order to create a database. These copies of websites that are put in the database are so-called ‘cache’ copies (Rogers *et al.*, 2010, p. 13 (footnote 10) & p. 95). Interestingly, the Hargreaves Review opines that the copying for the purpose of search engine indexing is ‘really only carried out as part of the way the technology works’, because ‘copies need to be created for the computer to be able to analyse; the technology provides a substitute for someone reading all the documents’. According to the Review, this is a type of use that ‘does not compete with the normal exploitation of the work itself – indeed, they may facilitate it’. The Review therefore calls it ‘non-consumptive use’ (Hargreaves, 2011, p. 47). Search engines communicate this content, or a part thereof, to the public by presenting it in a list of search results. In Yahoo’s contribution to the Gowers Review, Yahoo states that in the US it relies on fair use principles to ‘provide users with *limited portions* [italics added] of copyrighted third-party content as links or references’. Under the European framework however, it is not always clear whether the core activities of search engines and their use of copyright protected works fall within the scope of the existing exceptions and limitations. Among the core activities of search engines is the need to index all information available on the web. So far most courts have been favourable to such activities and have found ways of interpreting the law to make them possible, although there are also cases in which the court declared the search engine’s cache service to be illegitimate, see Box 3 and Box 4.

### Box 3 (Un)Lawfulness of Google Cache Service

Whether the use of copyright protected material by the Google Cache service constitutes an unauthorized reproduction and making available of a website’s contents:

- **Belgium:** In a case involving the Google News service, the Court of Appeal of Brussels ruled against Google, finding that the “cache” service of Google could not be compared to the computer “caching” aimed by the exception of transient and incidental copies. Furthermore, the Court noted also that the public communication of the cached webpage was not necessary from a technical point of view and that the copies were not temporary as they were kept a long time on Google’s servers and remained accessible even when the articles were not freely available any more on the editor’s websites.<sup>18</sup>
- **Spain:** The Supreme Court recently ruled in favour of Google concluding that the unauthorized uses by Google (reproduction and making available) under its “Cache service” were not substantial enough to amount to an infringement. In the absence of an exception or limitation to justify this conclusion, the Court based its decision on the grounds that intellectual property must abide to its “social goal” (as envisioned by art. 33 Spanish Constitution), to the *ius usus inoqui* principle, and to the general principles of the law, such as good faith and prohibition of an abusive exercise of rights (ex art. 7 Spanish Civil Code). Furthermore, the Court stated that the three-step test must be read not only in a negative manner but also in a positive sense, so as to include all these principles.<sup>19</sup>

<sup>18</sup> Court of Appeal Brussels 5 May 2011 (Google Inc. v Copiepresse).

<sup>19</sup> Sentencia n.172/2012, of 3 April 2012, Supreme Court, Civil Chamber; confirming Provincial Court Barcelona (Audiencia Provincial Barcelona), 17 September 2008; see R. Xalabarder Plantada, ‘Spanish Supreme Court rules in favor of Google search engine’, 15 June 2012, available at <http://kluwercopyrightblog.com> (last consulted on 18 July 2012); and M. Peguera, Copyright Issues Regarding Google Images and Google Cache, in A. Lopez-Tarruella (ed.), *Google and the Law – Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, The Hague, T.M.C. Asser Press, 2012, p. 193.



#### Box 4 Lawfulness of Google Suggest Service

Whether the 'Google Suggest' service infringed a collective rights management society's copyright every time it referred Internet users searching for music to peer-to-peer file sharing sites that offer potentially illegal content by suggesting keywords like 'torrent', 'megaupload' and 'rapidshare'.

- **France:** The Court of Appeal of Paris ruled in favour of Google saying that Google Suggest operates automatically providing users with automatic access to requests from other users. It declared that the suggestion of these sites does not in itself amount to an infringement of copyright since the files on these sites are not all necessarily meant to facilitate illegal downloads.<sup>20</sup>

#### Display of Thumbnails in Search Results

Several legal disputes have arisen in the countries of the European Union involving the display of reduced-size images, known as 'thumbnails', as result of a search request from a user. Courts have generally held that the quotation exception does not apply 'because the images in the (...) search results are not used as part of a new work in which the second author explains, criticizes, or comments on the original work, as required by law' (Guibault, 2011). Some courts have ruled that the reproduction of downsized images can be seen as transient or incidental acts of reproduction under article 5(1) of the Information Society Directive, because thumbnails are not stored on the server for longer periods.

#### Box 5 Lawfulness of 'Thumbnails'

Whether the display of thumbnails as results of a request to a multifunctional search engine constitute an infringement of copyright:

- **Germany:** Two decisions from the Federal Court of Justice.<sup>21</sup> In both cases, the Court agreed that none of the existing exceptions was applicable but nevertheless found in favour of Google, holding that there was no infringement of copyright since the author herself authorized the use. Website owners have the possibility to use commands in their website that can instruct search engines not to index all or part of their site or files. Google could not be held liable if the rights owner failed to block her website from being indexed by search engines, thus giving an implied permission to any search engine to display the thumbnail images.
- **France:** The Court of Appeal of Paris reached a similar conclusion to the German Federal Court, and ruled in favour of Google Images. The Court considered that the indexation of images was made automatically through a robot crawler and that each website's publisher of the original images had the possibility to exclude its images from the indexation. According to the Court, the display of the thumbnails on the page result was necessary to ensure the functionality of the service and only constituted a technical performance. The storage of the results in cache or through a temporary memory was necessary to ensure the fluidity of the network. As for the reproduction of images, it was temporary and constituted an essential part of a search engine.<sup>22</sup>
- **Austria:** The Highest Court ruled that the display of reduced-size images did not constitute a reproduction of an original work and in any case such automated display without human intervention did not encroach upon the rights of the copyright owner. Moreover the display of thumbnails could be considered as a temporary act that is transient or incidental to a technical process or legitimate use.<sup>23</sup>
- **Netherlands:** The Court of Appeal of Arnhem ruled that the display of thumbnails as results of search in a real estate database constituted a transient and incidental reproduction which does not fall within the scope of the exclusive right. Moreover the display of thumbnails could qualify as a quotation under the Dutch Copyright Act.<sup>24</sup>

<sup>20</sup> Court of Appeal of Paris, Decision of 03 May 2011 (Snep / Google France, Google Inc).

<sup>21</sup> Federal Court of Justice (Bundesgerichtshof) 29 April 2010, Google thumbnails, Abs. 40; Federal Court of Justice (Bundesgerichtshof) 19 October 2011.

<sup>22</sup> Tribunal de Grande Instance Paris 20 May 2008, SAIF v. Google; Cour d'appel Paris 26 January 2011, SAIF v. Google.

<sup>23</sup> OGH, 20 September 2011 4Ob105/11m (*Vorschaubilder/123people.at*), MR 2011, 313 with annotation from Walter.

<sup>24</sup> Hof Arnhem, 4 juli 2006 (Zoekalhuizen) LJN: AY0089; Mediaforum 2007, nr. 1, p. 21, with annotation from Beuving; AMI 2007, nr. 12, p. 93, with annotation from Koelman.

Although the outcome of the French and German cases may be socially desirable, it is questionable whether the position taken by the courts vis-à-vis the right holders of these images can be defended if copyright law's principle of exclusivity is to remain. A model based on implied licences suggests that rights owners have to take extra measures to indicate that the rights are reserved (Guibault, 2011).

### Newspaper Clippings Services

Yahoo, Google and probably many other search engines in Europe offer in addition to their normal keyword search tools indexes of news articles. For these services the companies rely in the United States on the fair use defence 'to return the opening words or sentences of each article along with a link to the article in order to assist the user in better pinpointing relevant content within the search results'.<sup>25</sup> Can the reproduction and making available of newspaper articles by such news aggregation services fall under any of the exceptions or limitations listed in any of the national copyright acts in the EU, for example the right to quote or to make press reviews? With respect to the news exception in article 5(3)(c) of the Information Society Directive, Advocate General Trstenjak stated her opinion on the *Infopaq* case that for the news exception to apply, an act would have to concern 'reproduction in the press as newspapers and magazines have traditionally come under'.<sup>26</sup> In the current digital environment, it is not always clear whether a medium or website can be considered to fall under the notion of 'press' in the sense of article 5(3)(c) of the Directive. For the quotation exception, it is required that this takes place 'for purposes *such as* [italics added] criticism or review'. A.-G. Trstenjak emphasized that this exception does not apply when 'quotations are not in fact used for criticisms or reviews of the newspaper articles in question but are on the contrary used for the production of summaries of the newspaper articles'.<sup>27</sup> The words *such as* in the provision seems to leave some room for acts similar to the ones mentioned in the article.

It is worth mentioning here, however, that in most countries of the European Union, newspaper clippings services are subject to either a voluntary or a statutory licensing system, for which fair compensation must be paid to the rights holders. In the Netherlands, newspaper clippings services were for long accepted as falling under the exception of press reviews. However, the situation changed after the Court of Appeal of Leeuwarden ruled that the unauthorized making of paper clippings of newspaper and periodical articles for which the rights were expressly reserved amounted to copyright infringement.<sup>28</sup> As a result of this new jurisprudential trend, most Dutch newspaper publishers have joined in the new 'Copyright Licentie- en Incassobureau PRO' (CLIP), which is entrusted with the right to grant licences to suppliers of newspaper clipping services.

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<sup>25</sup> Yahoo's response to the Gowers Review 2006, p. 8.

<sup>26</sup> ECJ 16 July 2009, *Infopaq v DDF*, Opinion of the AG, paragraph 118.

<sup>27</sup> ECJ 16 July 2009, *Infopaq v DDF*, Opinion of the AG, footnote 53.

<sup>28</sup> Court of Appeal of Leeuwarden, 26 July 2011, LJN: BR3119, *AMI* 2011-6, p. 232-235 (*NDP v. Provincie Flevoland*), with annotation from Koelman.



### Box 6 Unlawfulness of News Clipping Services

Whether Google News service's reproductions of headings, article excerpts, photographs, graphics and the like in the cache memory of its servers constitutes copyright infringement:

- **Belgium:** The Court of Appeal of Brussels ruled against Google News on the basis of article 5(1) of the Information Society Directive saying that the "cached" copy cannot be qualified as transient' because 'it remains available free of charge even if the publisher charges a fee for its downloading and no longer publishes it on its site'; and because the duration of storage is not 'limited to what is necessary for the proper completion of the technological process in question on the understanding that that process must be automated so it deletes that act automatically without human intervention once its function of enabling the completion of such a process has come to an end'.<sup>29</sup>
- **UK:** The Court of Appeal for England and Wales has upheld the ruling in first instance that end-users of media monitoring service Meltwater required end-user licences to access and use search results consisting of the headline of each article mentioning the search term (which hyperlinks to the article), the opening words of that article and an 11-word extract showing the context in which the search term appears.<sup>30</sup>

As shown above, 'essential information tools as search engines' find a difficult fit in a rigid system with an exhaustive list of static exceptions (Hugenholtz & Senftleben, 2011, p. 10). As was also mentioned in the Hargreaves Review, the European framework as it is, considers 'new kinds of copying which have become possible due to advancing digital technology (...) automatically unlawful' (Hargreaves, 2011, p. 43). Interestingly, the Review also states the following in its recommendations to the UK Government: 'That these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect' (Hargreaves, 2011, p. 47). In other words, the fact that such new uses fall within the scope of the rights owner's exclusive rights derives from the extensive interpretation given by courts to the reproduction right.

## 2.2.2 User Created Content (UCC)

Users have with web 2.0 technologies access to widely available, affordable and increasingly sophisticated tools to create, assemble and distribute digital content, and to interact with content from other users. The content that users produce spans a wide range, from personal self-expression through the posting of baby pictures, vacation clips and online scrabbles, to artistic expression, political or social commentary and citizen journalism. Similarly, the quality of user created content can be that of a badly-made home video, but can also reach professional or semi-professional quality (Helberger *et al.*, 2008, p. 197). Although UCC as such is not new, its increasing popularity as a means of creating and disseminating content outside of traditional channels raises a range of copyright law related issues. Not only does the production of user created content follow different paths than more conventional creative initiatives, but UCC oriented platforms and applications also enable a wide range of activities to take place with respect to UCC allowing users to mash-up, remix, and share each other's works. In many cases, the current set of exceptions and limitations in the copyright act is ill-suited to address the different situations arising from UCC.<sup>31</sup>

<sup>29</sup> Court of Appeal Brussels 5 May 2011 (Google Inc. v Copiepresse), para. 26.

<sup>30</sup> *The Newspaper Licensing Agency Ltd & Others v Meltwater Holding BV & Others* [2011] [EWCA Civ 890](#).

<sup>31</sup> Green Paper on Copyright in the Knowledge Economy, p. 20. See also P.B. Hugenholtz, 'The need for flexibility in copyright law', presentation given at the conference "Towards Flexible Copyright", The Hague, 10 February 2012. In the same sense the submission to the consultation on the Green Paper on Copyright in the Knowledge Economy by the Copenhagen Business School.

Within social networking and sharing communities, like MyVideo, Flickr, Mobango and YouTube, it is not uncommon for makers of UCC to incorporate copyright protected third party content into their own works, with or without adaptation of these works. Permission is required if the content is to be subsequently adapted, distributed, communicated or otherwise made available to the public, unless the third party content is in the public domain or the communication is covered by an exception or limitation. The production of UCC may involve both the right of reproduction and the right of adaptation, e.g. the right to prepare derivative works. Whether specific exceptions and limitations can cover the users' activities on UCC platforms depends on the facts of each case. The simple reproduction of a work for personal purposes could fall within the scope of the private copy exception, but any further making available of the work to third parties would disqualify the action as a private copy under European law. Adaptations, or any other type of transformative use, would need to be assessed against the criteria of existing exceptions, such as the quotation, parody or news reporting exceptions. While some of the expressive uses might fall within the scope of one of these exceptions, the strict interpretation commonly given by courts to these provisions would probably result in many cases in a finding of infringement. Such a strict application of the copyright rules may prove too harsh and may risk stifling creation and encroaching upon UCC makers' freedom of expression (Gervais, 2009).

If no exception or limitation applies, permission from the rights owner is in principle necessary when a user incorporates another author's song as background to his video, modifies it or uploads someone else's TV programme, video, film, text or photograph on his blog or on a platform like YouTube, MyVideo or Mobango. Some platforms – and most notably YouTube – have signed agreements with a number of content providers, including CBS, BBC, Universal Music Group, Sony Music Group and others. In Europe, license agreements have also been concluded between UCC platforms and collecting societies: for example, between YouTube and BUMA and Dailymotion and the *Société Civile des Producteurs de Phonogrammes en France* (Cabrera Blazquez, 2008, p. 6; The Associated Press, 2006). One important question arising in this context is whether the licence agreements reached between the collective rights management societies and the UCC platforms also cover acts of adaptation of works (mash-up and remixing) or whether the collective societies' legal mandate vis-à-vis the authors and publishers they represent is strictly limited to granting permission for the distribution, communication to the public and making available of the works in their repertoire (sharing).

### Box 7 (Un)Lawfulness of music sampling

Whether the sample of a sequence of two seconds from the sound recording 'Metall auf Metall', put on a loop and used as the continuous rhythmic layer for the sound recording 'Nur Mir' infringed the record producer's exclusive rights

- **Germany:** The Federal Court of Justice allowed the revision and remanded the case for further investigation to the Appeals Court: it considered that sampling might be legitimate as free use under Article 24 German Copyright Act. However, whether this provision applies would depend on three aspects: 1) The user is not able to perform the sequence himself, 2) the sample must not contain the melody of the original or parts of it, 3) the sampling recording is a new, an independent recording. Since the Court of Appeals did not examine the facts required to decide about these aspects, the Federal Court of Justice had to remand the claim.<sup>32</sup>

In all cases where no exception applies and no global agreement has been reached between the platform operator and content providers, users should clear the rights on third party content that they upload. Obtaining permission imposes transaction costs, such as the costs of establishing the copyright status of the work, the costs of identifying, locating and contacting the right owner, and the costs of negotiating with the right owner to obtain a license to reproduce or otherwise use the work. In some cases, these costs can be so high that prospective users either renounce in actually reutilising the work or prefer running the risk of facing a claim for infringement (Hugenholtz, Van Eechoud, Van Gompel, *et al.*, 2006, p. 176). Especially for amateur and semi-professional creators, who form the biggest share of individuals active on UCC platforms, the difficulty of tracing the right owners on third party content so as to obtain permission may appear as an insurmountable obstacle (Helberger *et al.*, 2008, p. 29). Even if, in theory, a licence for the use of a work on a UCC platform could be easily obtained because the right holder is a member of a collective management society, the problem remains that, in practice, collective management societies usually refuse to grant a license to a non-professional entity or user. Moreover, it is questionable whether such license would entitle a subsequent UCC maker to make the work available to the public on another platform.

### Box 8 Unlawfulness of Display of Pictures on eBay

Whether damages should be paid to the rights owner for the unauthorized use of pictures accompanying an object for private sale on eBay:

- **Germany:** The Court of Appeal of Braunschweig and the District Court of Cologne declared in two distinct cases that the defendants must pay the normal market licence fee per photograph and that there were no circumstances justifying a higher fee. In either case, there was no evidence of ground for the payment of an extra fee due to the failure to give attribution to the photograph. There is also no evidence of any economic impact on the commercialisation of the pictures.<sup>33</sup>

<sup>32</sup> Record sampling, Federal Court of Justice (Bundesgerichtshof), 20 November 2008, I ZR 112/06 ('Metall auf Metall') available at: <http://www.jurpc.de/rechtspr/20090149.htm>; the decision was remanded to the Court of Appeal of Hamburg, decision of 17 August 2011, 5 U 48/05 ("Metall auf Metall 2")

<sup>33</sup> OLG Braunschweig, decision of 8 February 2012 – 2 U 7/11 (Unberechtigte Nutzung von Fotos bei eBay-Verkauf) ; AG Köln, judgement of 24 May 2012 137 C 53/12 (Unberechtigte Nutzung von Fotos bei 4 Verkäufen über eBay).

**Box 9 Unlawfulness of Display of Fixed Images**

Whether the use of single images from a film (fixed-images) in an online archive or a website constitute copyright infringement:

- **Germany:** The Federal Court of Justice ruled that images which are part of a film are not exploited in a 'cinematographic' way, according to the former Article 91 German Copyright Act (now Art. 89 sec. 4), if they are neither used within the evaluation of the film nor in form of a film. The defendant had not violated the plaintiff's rights concerning the film medium by using images from the films in his online archive. The defendant had, however, possibly violated the rights in the photographs (that also apply to fixed-film-images) according to Article 72 German Copyright Act and might thus be liable to pay damages. The Court repealed the judgement of the second instance and referred the case back to the Court of Appeal for a new decision, since the Court of Appeals had not given the plaintiff the possibility to prove his entitlement in the rights in the photographs.<sup>34</sup>
- **Sweden:** The Supreme Court declared that the act of making photographic pictures available on a website was to be classified/defined as "public performance" or "public exhibition", and constituted an infringement (of any of these rights).<sup>35</sup>

The problems associated with rights clearance are certainly not new nor are they specific to UCC. However, because UCC is primarily characterised by amateur and semi-professional initiatives, these creators are generally speaking less knowledgeable about copyright issues and have fewer resources to invest in the rights clearance process. More importantly, however, some types of creative re-uses contribute so much to the public debate and to the promotion of the users' freedom of expression that they should never be subject to a licence from the rights owner or his representative(s) and should be simply exempted. Therefore, the call for the adoption of an exception for 'creative, transformative, or derivate works' can be heard in different circles. In 2006, the British Gowers Review referred in this context to the fair use exception in the United States of America, which allows 'transformative works'. The purpose of this exception is to enable creators to rework material for a new purpose or with a new meaning. Such new works can create new value, and can even create new markets.<sup>36</sup> The Canadian government recently recognized the societal importance of user-created content when it enacted a specific exception for non-commercial user-created content:

<sup>34</sup> Federal Court of Justice (Bundesgerichtshof), 19 November 2009, 19 November 2009 I ZR 128/07 (*Film fixed-images*).

<sup>35</sup> Supreme Court (Högsta Domstolen), 5 March 2010 NJA 2010 s. 135 (T 3440-08) (*Thumbnails on website*).

<sup>36</sup> See the submission to the consultation on the Green Paper on Copyright in the Knowledge Economy by EuroISPA – pan European association of European Internet Service Providers Associations (ISPAs).

**29.21** (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.<sup>37</sup>

In 2009 the European Commission considered it too early to regulate UCC and instead indicated that it intended to further investigate how to deal with UCC.<sup>38</sup> An open norm could be applied in similar circumstances as those depicted in the Canadian provision and give courts the necessary leeway to assess whether a particular user-created content should be exempted or not.

### 2.2.3 Cloud Computing

Probably one of the most evident technological developments of the last couple of years is the advent of Cloud Computing. This phenomenon can be defined as ‘the delivery of computing and storage capacity as a service to a community of end-recipients. Cloud computing entrusts services with a user’s data, software and computation over a network (...). Using Software as a Service, users also rent application software and databases. The cloud providers manage the infrastructure and platforms on which the applications run’.<sup>39</sup> Cloud providers are steadily conquering the consumer market, assisted by expanding transmission capacities of fixed and mobile networks as well as the escalating functionality of mobile devices. While cloud computing services are gaining importance as modes of online distribution, thereby supplanting downloading as a major vehicle to experience content online, their assessment through the lenses of copyright law is still unsettled (Borghi, 2011).

From the perspective of those offering cloud computing services, the unanswered question is whether such services as storing, streaming or other (near) on-demand delivery constitute acts of reproduction and communication to the public for which permission should be obtained from the rights owner. The line between an act falling within the scope of an existing limitation and exception and an infringing act is difficult to draw, mostly because of the provisions granting the rights owner’s exclusive rights are generally worded broadly, whereas the limitations are often formulated in narrow and technology dependent terms. This means that new forms of exploitation of works will tend to be interpreted as falling within the scope of exclusive rights, but outside the scope of existing limitations and exceptions. This may have an impact on the development of new business models in the cloud. For example, it is unclear why the offer of a music streaming service constitutes an unlawful act of making available to the public and why a

<sup>37</sup> Canadian Act Amending the Copyright Act, Statute of Canada, 2012, c. 20, art. 29.21.

<sup>38</sup> Communication on Copyright in the Knowledge Economy, p. 9.

<sup>39</sup> [http://en.wikipedia.org/wiki/Cloud\\_computing](http://en.wikipedia.org/wiki/Cloud_computing)

TV catch-up service where consumers can store their favourite television programs in the cloud doesn't fall under the private copying exception (see Boxes 10 and 11). It is also unclear whether a service offering consumers the possibility to store lawfully acquired works in the cloud and to share these among a restricted circle of relatives, friends or equivalent persons would fall within the scope of the exclusion from the right to communicate a work to the public. A too strict interpretation of the limitations and exceptions risks stifling innovative activity, thereby preventing new services from emerging to the detriment of society as a whole.

#### Box 10 Unlawfulness of live-streaming retransmission

Whether service streaming television broadcasts and films over the Internet at approximately the same time as they were being broadcast constitutes an infringement of the rights owners' right of communication to the public:

- **UK:** The video was not stored on a disk or any other permanent storage means. However, a very small amount of data, usually 1 to 5 seconds' worth, was held in the memory of the relevant servers. The High Court ruled that the retransmission of broadcasts and films via live streaming amounts to an act of communication to the public for which the rights owner's permission must be obtained, but referred the question to the European Court of Justice for clarification. The Court's provisional view was also that reproductions of broadcasts and films in the buffers are non-infringing, as they are covered by the exception for acts of temporary reproduction.<sup>40</sup>

#### Box 11 Unlawfulness of online recording services

Whether an online recording service violates the right of reproduction and right of making available of the rights owner of the TV programmes or whether such service falls under the private copying exception:

- **Germany:** The Federal Court of Justice questioned whether the provider of a Personal Video Recording (PVR) service or - in the case of a fully automated system - his customers had to be considered as the "user", i.e. the person who made the copies when using the PVR service. The Court referred the case back to the Court of Appeal, stating: 1) If the provider of a PVR service saves the programs himself on the server, he violates the exclusive rights of the plaintiff; but 2) If the procedure is fully automated, the respective client can be considered as the user of the service. In this case the copy would normally be legal since it is intended for the client's private use. Because the provider of a PVR service in this case forwards the programs from his reception devices to the customers' PVR, the provider nevertheless violates the plaintiff's rights in the programs.<sup>41</sup>
- **France:** The Court of Appeal of Paris ruled that the copy of a TV programme stored by an online recording service infringed the copyright on the programme because such a copy is not a temporary act that is transient or incidental to a technical process or legitimate use; nor does it constitute a private use if it is realized by the company instead of the end-user. Note that the defendant in this case has declared bankruptcy since the judgement in first instance has been rendered.<sup>42</sup>

From the perspective of consumers, the advantage of cloud computing is that it enables consumers to store various types of content, including documents, music, photos and videos, and access it at any time from a number of different devices, both desktop and mobile devices. Cloud computing therefore entails a move from storing and backing up content on hard disks, CD's, and DVD's to storing and backing up the same in the Cloud (Loos *et al.*, 2011).

Consumers have grown to entertain certain expectations regarding digital content, including the possibility to perform certain usages that they are already accustomed to from traditional media (Dufft *et al.*, 2005, p. 16) and to benefit from new forms of usages brought about by

<sup>40</sup> *ITV Broadcasting Ltd v. TV Catchup Ltd*, High Court of England and Wales (Patents Court) (High Court of England and Wales (Patents Court)), 18 July 2011, [2011] EWHC 1874 (Pat).

<sup>41</sup> Internet video recorder, Federal Court of Justice (Bundesgerichtshof), 22 April 2009, (I ZR 175/07), <http://www.jurpc.de/rechtspr/20090241.htm>.

<sup>42</sup> Court of Appeal of Paris, 1st ch. 14 December 2011 (*Wizgo/Metropole Television and others*); confirming Tribunal de Grande Instance, 3<sup>e</sup> ch., 1st section, 25 November 2008.

technological developments. Consumers become concerned when they experience that legal or technical constraints – a key example is Digital Rights Management (DRM) and the contractual conditions they enforce – restrict these forms of usage. Consumers expect to enjoy new forms of usages that are brought by digitisation, e.g. the ability to forward digital contents, share it electronically with friends, access digital content, use it on different devices, etc. (Dufft *et al.*, 2005, pp. 25-26).

It is often difficult for end-users to understand why the private copy that they are allowed to make on a CD, a DVD, an MP3 player or other tangible device is no longer permitted if the copy is stored in the Cloud. According to the Information Society Directive and its Dutch implementation, an exception is permissible in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned. This provision has been repeatedly interpreted as forbidding anyone from making a copy on behalf of someone else. Since the exempted copy must be for the natural person's own private use, this excludes any system based on the storage of copies on a cloud computing's server.

#### 2.2.4 Data Mining

Data mining is a rapidly upcoming technology, which according to the Hargreaves Review is 'essentially an automation of humans reading texts to find links between them' (Hargreaves, 2011, p. 34). The Review recognized that this technology encounters problems under the current regime: data mining is a type of use 'of copyright works where copying is really only carried out as part of the way the technology works'. In data mining indexing, copies need to be created for the computer to be able to analyse; the technology provides a substitute for someone reading all the documents (Hargreaves, 2011, p. 47).<sup>43</sup> The Review also mentions that: 'At present the law inhibits use of text and data analytics on pre-existing research and journal articles, i.e. copying them in order to run software seeking patterns and associations which would assist researchers, including mining for commercial or non-commercial purposes. This is a real lost opportunity to derive additional value from published research. The barrier is an inflexible copyright system which failed to envisage how old material could be exploited by new technology' (Hargreaves, 2011, p. 47). Because data mining is most probably not covered by the existing exception of transient and incidental copies, nor by any other exception or limitation under the European framework (compare Section 2.2.1 on search engine indexing), the Review put forward some options for exceptions for the UK, as EU level negotiations would take many years. Amongst other options it considered an exception for 'enabling of new research tools' to allow use of analytics for non-commercial use, thereby mentioning text mining as 'one current example of a new technology which copyright should not inhibit, but does' (Hargreaves, 2011, p. 48).

The growing attention for and importance of data mining is also mentioned in the contribution of the Finnish Research Library Association and other Research, Academic and University Libraries to the Green Paper on Copyright in the Knowledge Economy, stating: 'A growing expectation amongst researchers is that primary data should be freely available, ideally in Open

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<sup>43</sup> See also Diane McDonald, *Value and Benefits of Text Mining*, London, JISC, 14 March 2012.



Access. This will facilitate the use of data and text mining techniques and enable other researchers more readily to check the validity of research findings by having access to research data.<sup>44</sup>

### 2.2.5 Digital Classroom

Another area where a struggle is visible with the exceptions to copyright that are currently available is in the education sector. Where society as a whole becomes more and more digital, this is also the case for classrooms. The digital classroom is a phenomenon that will only continue to grow in the years to come. The Green Paper on Copyright in the Knowledge Economy stresses the importance of digital developments in the teaching and research sector, by stating that ‘dissemination of study materials through online networks can have a beneficial effect on the quality of European education and research’<sup>45</sup>. Increasing quality could also lead to increasing competitiveness for the European knowledge economy on the global level.

As the Commission Communication on Copyright in the Knowledge Economy acknowledges, ‘research and teaching establishments want more flexibility to disseminate teaching materials’.<sup>46</sup> While exceptions should leave space for certain uses such as in the educational sector, this should not take place to the detriment of the right holders who want to be rewarded for and profit from their work. Therefore, exceptions to copyright need to be formulated in a balanced way. This is also emphasized in recital 14 of the Information Society Directive, which states: ‘This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.’

The question arises whether the education sector can still rely on the existing educational exceptions or whether these are too narrow for new and increasingly digital uses of copyrighted works in education. According to Hugenholtz and Senftleben, these current educational and scholarly practices are rarely considered by the existing limitations and exceptions (Hugenholtz & Senftleben, 2011, p. 10). This complicates uses of copyrighted content ‘in PowerPoint presentations, in “digital classrooms”, on university websites or in scholarly e-mail correspondence’ (Hugenholtz & Senftleben, 2011, p. 10), while these uses are not in the least rare or uncommon, on the contrary. Interestingly, the CCIA study identifies educational institutions as an example of ‘industries’ that ‘depend on or benefit from fair use’ in the United States (Rogers *et al.*, 2010, p. 7). Furthermore, the contribution of the International Association of Music Libraries Archives and Documentation Centres to the 2006 Gowers Review illustrates the problem by stating: ‘The use of technical improvements to enhance education is hampered by out-dated laws. Technological change happens much more quickly than has been foreseen within current legislation, therefore provision should be put in place to try to ensure flexibility for the future.’<sup>47</sup>

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<sup>44</sup> Submission to the consultation on the Green Paper on Copyright in the Knowledge Economy by the Finnish Research Library Association and other Research, Academic and University Libraries.

<sup>45</sup> Green Paper on Copyright in the Knowledge Economy, p. 16.

<sup>46</sup> Commission Communication on Copyright in the Knowledge Economy (Citizens’ Summary).

<sup>47</sup> See [http://www.hm-treasury.gov.uk/d/international\\_association\\_of\\_music\\_libraries\\_428\\_106kb.pdf](http://www.hm-treasury.gov.uk/d/international_association_of_music_libraries_428_106kb.pdf) (last consulted on 19 July 2012), p. 8.



It must be emphasized, however, that the current European framework already seems to permit the introduction of distance learning exemptions across the European Union. In some Member States like Germany, the Copyright Act already permits the making available online of small parts of published works and individual articles from journals, under circumscribed conditions (Goldstein & Hugenholtz, 2010, p. 385). This is also observed by Xalabarder (2009, p. 62), who states that ‘the teaching exception in Art. 5(3)(a) EUCD is technologically neutral and clearly intended to cover both face-to-face as well as distance education, including by digital means. Recital 42 EUCD expressly includes ‘distance learning’ under the teaching exception and the Explanatory Memorandum accompanying the initial proposal of Directive further confirms its application to ‘the new electronic environment.’”

## 2.2.6 Other Transformative Uses

The last example described in this section deals with transformative uses, as best illustrated in the case of documentary filmmakers.<sup>48</sup> Documentaries are both an outlet for artists, activists and others, and an important source of information for the general public, as documentaries often deal with important issues in society. Therefore their large societal relevance is a given: it serves essential democratic purposes, since documentaries are a classic example of the freedom of expression and information in practice. Like in the case of UCC, however, reproductions and other transformative uses by documentary filmmakers and other similar creators would need to be assessed against the criteria of existing exceptions, such as the quotation and incidental use exceptions. While some of the expressive uses by documentary filmmakers and similar creators might fall within the scope of one of these exceptions, the strict interpretation commonly given by courts to these provisions would probably result in many cases in a finding of infringement. In practice, therefore, most documentary filmmakers do not rely on existing exceptions but instead seek licences for works they incorporate in their films. This imposes (sometimes high) transaction costs and may risk stifling creation and encroaching upon filmmakers’ freedom of expression.

The contribution of the European Documentary Filmmakers to the Green Paper on Copyright in the Knowledge Economy is worth mentioning here, for it is a good illustration of the issue.<sup>49</sup> It is not quite clear how a new exception for ‘creative, transformative, or derivative works’ would relate to existing limitations, such as quotations, incidental use, and parodies, which to a certain degree already permit the creation of new or derivative works. Moreover, it should be noted that the European copyright system is unfamiliar with the term ‘transformative’ use, which is borrowed from the American system. The European Initiative for the Freedom of Expression in Documentaries stressed that new technologies and international cooperation pose challenges that reach beyond current practices. Therefore, broader and more flexible approaches to copyright and exceptions are needed. The documentary filmmakers call for a more flexible regime for European filmmakers to be able to practice their profession in a European context.<sup>50</sup> According to this group of creators, flexible exceptions and limitations should be extended to all kinds of knowledge producers and not just to makers of user-created content, as users are not separated

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<sup>48</sup> See also P.B. Hugenholtz, ‘The need for flexibility in copyright law’, presentation given at the conference “Towards Flexible Copyright”, The Hague, 10 February 2012.

<sup>49</sup> The contribution is available via: [https://circabc.europa.eu/d/d/workspace/SpacesStore/3b752bb3-c305-4a19-a5cb-44a81302b2d8/european\\_documentary\\_filmmakers.pdf](https://circabc.europa.eu/d/d/workspace/SpacesStore/3b752bb3-c305-4a19-a5cb-44a81302b2d8/european_documentary_filmmakers.pdf) (last consulted on 10 May 2012).

<sup>50</sup> The contribution is available via: [https://circabc.europa.eu/d/d/workspace/SpacesStore/3b752bb3-c305-4a19-a5cb-44a81302b2d8/european\\_documentary\\_filmmakers.pdf](https://circabc.europa.eu/d/d/workspace/SpacesStore/3b752bb3-c305-4a19-a5cb-44a81302b2d8/european_documentary_filmmakers.pdf)

from creators nor are they limited to one type of market place. Creative people are often using precisely the same techniques and distribution outlets, whether they are amateurs, artists or documentary filmmakers. Drawing a distinction between user-created content and content created within defined creative communities creates legal uncertainty.

#### Box 12 Lawfulness of Incidental Use

Whether the incidental use of illustrations of a teaching method in a film constitute copyright infringement:

- **France:** The Court of Cassation ruled in a long-awaited judgment that promises to become a landmark, on the application of the incidental use principle. In this judgment, the Court of Cassation has formally recognized the theory of the “background object” or incidental use. In this case, the authors of books for young readers instituted proceedings against the producer of a documentary “Être et avoir” for infringement because of the reproduction and representation, repeatedly and without having been authorized, of illustrations of their teaching method. The Court of Appeal of Paris, May 12, 2008, rejected the application: this presentation is only incidental to the main subject of the documentary film, which is the representation of the life and the relationship between teacher and child in a class. The use of the teaching method must be regarded as incidental inclusion of a work amounting to a limitation of the author’s exclusive right. The Court came to this conclusion despite the fact that the exception or limitation was not planned but rather necessarily excluded by Article L. 122-5 of the CPI in the form adopted in the implementing law of 1 August 2006.<sup>51</sup>

#### Box 13 Lawfulness of Derivative Work

Whether a work strongly inspired by or derived from a protected work infringes the rights in the initial work:

- **Italy:** When analysing the substantiality of the reproduction of the first work into the second work, the District Court of Milan relied on the fair use doctrine, which is foreign to the Italian legal system but which in the court’s opinion offered better grounds for a ruling in this particular case. According to the court’s interpretation, fair use sees in the transformation of the original work a fundamental aspect in order to exclude infringement. Since the current work of art (a sculpture) is clearly inspired by a another famous sculpture (entitled “variation of X”) but is realized following the artistic views of the subsequent creative elaborator, no infringement can be observed. The court bases its ruling on the fact that the creative elaboration also represents a parody of the original work (concept present in Italian legislation and case law and usually interpreted restrictively). The court employs the term “transformation” which is clearly borrowed from the fair use doctrine to declare the non-infringing character of the new sculpture.<sup>52</sup>

## 2.3 Conclusion

As was shown above, a number of situations arise that do not fit well within the current set of exceptions and limitations in the copyright system. Among these uses are the activities of search engines, either for the display of thumbnails in search results or for the dissemination of news articles; the use of works in ‘user created content’; cloud computing; data mining; distance learning; and other transformative uses, such as those of documentary filmmakers. Several cases have given rise to court proceedings. The interpretation given by courts to existing exceptions and limitations like the quotation right, the exception for transient and incidental copying, the private copying exception, and the incidental use exception is usually too narrow to respond to new technological developments, or new behavioural patterns in the creation process or commercialisation models. The majority of these types of uses are considered to fall outside the scope of the narrowly defined exceptions and limitations on copyright, with the consequence that such uses either may not take place at all and if they do, their legal basis is uncertain at best. Where such new forms of uses have led to legal disputes based on claims of copyright

<sup>51</sup> Cass, 1ère civ., 12 May 2011, case N° 08-20651 (published in the Bulletin).

<sup>52</sup> Tribunale Milano Sez. Proprieta' Industriale e Intellettuale, 14 July 2011.

infringement, the outcome has been variable between the Member States both in terms of final solution and in terms of motivation. Because the system of the law is not flexible in itself, courts have increasingly come up with inventive ways to create space in the law for the uses that are not covered by the exhaustive list of exceptions, but which they felt should not be prohibited by copyright.<sup>53</sup> Although the outcome of many legal disputes may be socially desirable, the paths followed by the courts towards a solution are often open to discussion, especially if they reverse the normal burden of proof between rights owners and users, towards a regime where rights owners have to take extra measures to indicate that the rights are reserved, which may encroach upon copyright law's principle of exclusivity. In these cases the application of a well-defined open norm with specific evaluation criteria could have provided more satisfaction from a legal perspective.

Technological change is not likely to slow down. Technological developments are expected to bring about new, innovative services the success of which will be growing, or services that are still 'under construction' or have not even been invented yet. These services are potentially problem areas as well, already appearing at the horizon or still lying further in the future. Either way, it is at this point difficult to foresee how far these developments will go. Therefore, a rigid system with an exhaustive list of static exceptions will continue to create new controversies with respect to future use of copyrighted material, which may hamper innovation. An example is the development of new, innovative ways of indexing, such as audio recognition and plagiarism detection, that was mentioned by Fred von Lohmann in his presentation '© flexibilities: the old, the new & the not yet invented' at the conference 'Towards Flexible Copyright', held in The Hague on 10 February 2012. In his presentation he distinguished 'old familiar examples', 'new familiar examples' and 'tomorrow's examples'.

'Things not yet invented'<sup>54</sup> are of course hard to describe or predict. What one can predict, however, is that it is very likely that such technologies or services will struggle to develop under the current system of exceptions and limitations. This was also recognized in the Hargreaves Review, stating that the UK needs to explore 'with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today's policy makers. This latter change will need to be made at EU level, as it does not fall within the current exceptions permitted under EU law.' The Review observes that 'the alternative, a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke exception, will be a poor second best' (Hargreaves, 2011, p. 47).

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<sup>53</sup> In the same sense Hugenholtz & Senftleben 2011: "The lack of flexibility of the present system of limitations and exceptions can be demonstrated by the way courts in several Member States have in recent years struggled to, nevertheless, protect the general social, cultural and economic interest by allowing certain 'free uses' not expressly recognized in the law."

<sup>54</sup> This phrase, designating the innovative technologies of the future, is taken from Fred von Lohmann's, presentation '© flexibilities: the old, the new & the not yet invented' at the conference "Towards Flexible Copyright", The Hague, 10 February 2012.

### 3 Defining an Instrumental Open Norm for the Economic Analysis

The second research question formulated in the introduction seeks to establish the economic consequences of the introduction of an open norm in Dutch copyright law. An open norm should introduce sufficient flexibility to allow certain types of innovative uses and remove undesirable legal barriers for creative re-use and commercial exploitation and for the development of new (online) business models. As concluded in Chapter 2, by letter of the law, the current system of copyright exceptions and limitations does not seem to permit various types of socially, culturally and economically legitimate uses by search engines, digital education services and documentary filmmakers or for enabling cloud computing, data mining or user created content.

Although the lawfulness of the uses mentioned is not yet frequently challenged in court and, if it is, the courts often show flexibility by applying external legal constructs to allow certain free uses that are not explicitly permitted by copyright law, the current inflexibility of copyright exceptions and limitations undeniably creates legal problems. An ever-growing discrepancy between what is tolerated in practice and what is legally permitted entails the risk of undermining copyright law's social legitimacy, at least in the long run (Hugenholtz & Senftleben 2011, p. 10). From a legal perspective, therefore, there is sufficient reason for closing these existing discrepancies. Introducing an open norm would have the benefit of remedying the situation for current and future occasions. Once implemented, it would prevent the legislator from having to change the law each and every time it would need to accommodate a new technology or service. An obvious prerequisite is that, should an open norm be introduced, due account ought to be taken of the legitimate interests of the relevant right holders.

The question remains what the economic consequences of the introduction of an open norm would be. This requires an *a priori* concretisation of such norm. In general, an open norm can take different forms, varying from a narrow provision offering flexibility for a specific type of use to a generic open norm providing flexibility for a virtually undetermined range of uses. To be able to assess the economic consequences of an open norm in Chapter 5, therefore, the contours of what an open norm might look like must first be identified. That is the purpose of this chapter.

It must be emphasized that the open norm put forward in this chapter is not intended as the preferred model for future legislation. This study was explicitly *not* commissioned to answer the question of what type of open norm ought to be introduced to best accommodate the interests of right holders and users, given the deficiencies in the current system of exceptions and limitations. The open norm formulated here is to be regarded as an instrumental legal variable providing the necessary framework for conducting the economic analysis in Chapter 5 only.

In order to arrive at an open norm that would offer sufficient flexibility for enhancing innovation and removing undesirable legal barriers for creative re-use and commercial exploitation and for

the development of new (online) business models, a number of proposals and existing models are examined. As will be observed in Section 3.1, there are basically two ways for introducing flexibility. One option is to seek flexibility within the boundaries of the existing framework of the law. A second possibility is to introduce a new open norm at the EU level. The two scenarios are examined in Section 3.2 and Section 3.3, respectively. Section 3.4 concludes by defining the open norm for the purpose of the economic analysis.

### 3.1 Preliminary Observation

According to the *Copyright 20©20* letter of 11 April 2011<sup>55</sup> and the *Digital Agenda* of the Netherlands of 17 May 2011,<sup>56</sup> the Dutch Government wants to examine to what extent the existing international and European copyright framework leaves room for introducing an open norm in the Dutch Copyright Act and, at the same time, start a discussion in Europe about the introduction of a *fair use*-type of exception in the 2001 Information Society Directive.

These two strategies are complementary. It would be perfectly possible for the Dutch legislator, on the one hand, to optimally utilize the flexibility offered by the current framework of international and European copyright law while, on the other hand, to lobby at the EU level for the introduction of an open norm that reaches beyond what is currently permitted by European copyright law. Intrinsically these strategies do not conflict with each other.<sup>57</sup>

However, for the purpose of concretising an open norm for the economic analysis it is somewhat inconvenient that the two strategies entail entirely different legislative responses.<sup>58</sup> While the first scenario requires legislative intervention by the Dutch legislator that has to fit in the legal framework of existing EU copyright law, the second scenario calls upon the EU lawmaker to introduce a new exception in the current EU copyright law framework. As will be seen in Section 3.2, the current EU copyright law framework leaves some room for introducing more flexibility in one or another direction, but not for adopting a generic open norm offering flexibility to allow innovative uses and remove undesirable legal barriers for creative re-use and commercial exploitation and for the development of new business models for current and future occasions. Consequently, if the aim is to introduce a truly generic open norm in Dutch copyright law (and that is ultimately what this research is about), then the only way to achieve this is by adopting a model that goes beyond what is currently permitted by EU copyright law.

The open norm that is concretised in Section 3.4 indeed requires legislative intervention by the EU lawmaker. Admittedly, since changing EU law is a complex and lengthy process (Hugenholtz & Senfleben, 2011), this is not the ideal way of introducing or enhancing flexibility in today's

<sup>55</sup> See <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2011/04/11/speerpuntenbrief-auteursrecht-20-20/5692923-tk-def-2.pdf>.

<sup>56</sup> See <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/notas/2011/05/17/digitale-agenda-nl-ict-voor-innovatie-en-economische-groei/282931-e07-digitale-agenda.pdf>.

<sup>57</sup> The dual strategy proposed by the Dutch Government seems to aim at optimising flexibility in the short term, by using the existing policy space in EU copyright law, and maximising flexibility in the long term, by adopting an open norm that goes further than currently permitted by EU copyright law.

<sup>58</sup> 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, 21 maart 2012 (not yet publicly available), p. 3-4.

copyright law. However, given the existing legal framework, it is the only way in which a generic open norm can be introduced that would offer sufficient flexibility for enhancing innovation and removing legal barriers for creative re-use and commercial exploitation and for the development of new (online) business models for now and in the future. The norm that is eventually chosen for concretisation in this chapter would therefore provide the necessary instrumental legal variable for assessing the economic effects of the introduction of an open norm in Dutch copyright law in Chapter 5.

## 3.2 More Flexibility Within the Existing Framework

Under the existing civil law framework, there are a number of ways for introducing or enhancing flexibility in copyright law. This section examines three approaches. First, it would be possible for courts to test the lawfulness of contested uses against the general principles of civil law (Section 3.2.1). Second, the three-step test in copyright law could be interpreted in a more balanced way so as to bring the interests of copyright owners and those of the general public into equilibrium (Section 3.2.2). Third, the existing policy space in EU and international copyright law could be used to introduce or enhance flexibilities in national copyright law (Section 3.2.3). While all three approaches provide relief to a greater or lesser degree, this study concludes that the current legal framework does not permit the adoption of a generic open norm offering flexibility for a variety of unspecified unauthorized uses, which is the object of this study (Section 3.2.4).

### 3.2.1 Applying General Principles of Civil Law

One way to enhance flexibility in copyright law is to test the lawfulness of contested uses against the general principles of civil law. The Dutch Civil Code contains a number of open norms, such as the principle of reasonableness and fairness (*redelijkheid en billijkheid*).<sup>59</sup> As observed in Chapter 2, in various countries in Europe, the courts have applied general principles of civil law to stretch the boundaries of permitted uses of copyright protected works. It is not inconceivable that Dutch courts, should the circumstances of the case require so, would also resort to general doctrines of civil law. In the 1995 case *Dior v. Evora*, the Dutch Supreme Court (*Hoge Raad*) explicitly held that, in cases not covered by the exemptions included in the Dutch Copyright Act, the law nonetheless permits the boundaries of copyright to be determined on the basis of a balancing of interests akin to the balancing act underlying the existing system of exemptions (i.e. a balancing of the interests of right owners and the societal or economic interests of third parties or the general interest). The Court ruled that this is particularly so in cases that fit the system of the law but are not foreseen by the lawmaker.<sup>60</sup> This balancing act aims at creating room to accommodate users' interests in the light of the development of copyright as a means to protect commercial interests.

<sup>59</sup> See e.g. art. 6:2 and art. 3:12 of the Dutch Civil Code.

<sup>60</sup> Dutch Supreme Court (Hoge Raad) 20 October 1995, *Dior v. Evora*, *NJ* 1996, 682 (note J.H. Spoor), at 3.6.2: 'Wèl is in § 6 van Hoofdstuk I van de Auteurswet een aantal beperkingen van het auteursrecht opgenomen, waaraan in de regel een afweging ten grondslag ligt van de belangen van de rechthebbende op het auteursrecht tegenover de maatschappelijke of economische belangen van anderen of tegen het algemeen belang. Deze uitdrukkelijke beperkingen sluiten echter niet uit dat de grenzen van het auteursrecht ook in andere gevallen aan de hand van een vergelijkbare afweging nader moeten worden bepaald, in het bijzonder wanneer de behoefte aan de desbetreffende begrenzing door de wetgever niet is onderkend en zij past in het stelsel van de wet, zulks in het licht van de ontwikkeling van het auteursrecht als middel tot bescherming van commerciële belangen. Bij een zodanige afweging kan bij één of meer in de wet opgenomen beperkingen aansluiting worden gezocht.'



However, relying on the application by the courts of general principles of civil law is not a solid way of enhancing flexibility to stretch the boundaries of permissible uses of copyright protected works. Civil law principles are sometimes very open-ended and may lend themselves to a possibly too wide variety of legal interpretations. This would not provide sufficient legal certainty for users and right owners. For example, in 2010, the Federal Court of Justice of Germany permitted the display of thumbnails in Google search results holding that, by not blocking websites from being indexed by search engines, artists had given implied consent to any search engine to display the thumbnail images (see Box 5). By contrast, in the *Dior v. Evora* case, the Supreme Court of the Netherlands rejected the argument that, by putting perfume bottles into circulation, the producer had given implied consent to retailers to use the images of these perfume bottles in advertisements.<sup>61</sup> Accordingly, in two comparable cases, the highest courts of Germany and the Netherlands arrived at entirely different conclusions using the same civil law concept of implied consent. This shows that, while the application of general principles of civil law can bring relief in certain cases, it would not be a constructive approach to enhance flexibility in copyright law.

### 3.2.2 A Balanced Interpretation of the Three-Step Test

More flexibility would also be established by interpreting the three-step test in copyright law in a balanced way. This was proposed in the 2008 ‘Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law’, a joint project of the Max Planck Institute for Intellectual Property and the School of Law at Queen Mary, University of London (Geiger, Griffiths, & Hilty, 2008). The three-step test prescribes that exceptions or limitations to copyright ought to be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.<sup>62</sup> Instead of a restrictive reading of the test that would require exceptions and limitations to be interpreted narrowly, the 2008 Declaration suggests ‘an appropriately balanced interpretation of the Three-Step Test under which existing exceptions and limitations within domestic law are not unduly restricted and the introduction of appropriately balanced exceptions and limitations is not precluded.’<sup>63</sup> According to the drafters, exceptions and limitations ‘are to be interpreted according to their objectives and purposes’.<sup>64</sup>

The Declaration starts from the assumption that, ‘[w]hen correctly applied, the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies.’<sup>65</sup> In order to arrive at a balanced interpretation, the Declaration confers significance on each of the three steps. The first step (requiring exceptions or limitations to be confined to certain special cases) is understood to ‘not prevent legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or courts from applying existing statutory limitations and

<sup>61</sup> Dutch Supreme Court (Hoge Raad) 20 October 1995, *Dior v. Evora*, *NJ* 1996, 682 (note J.H. Spoor), at 3.7.

<sup>62</sup> The three-step test is laid down in Article 9(2) of the Berne Convention (with respect to the reproduction right), Article 13 of the TRIPS Agreement and Article 10 of the WIPO Copyright Treaty. In the context of EU copyright law, it is contained in Article 5(5) of the Information Society Directive.

<sup>63</sup> Declaration (Aims). See also Section 1 of the Declaration.

<sup>64</sup> Section 2 of the Declaration.

<sup>65</sup> See the Declaration (Considerations).

exceptions to similar factual circumstances *mutatis mutandis*; or creating further limitations or exceptions, where possible within the legal systems of which they form a part.<sup>66</sup>

Furthermore, the Declaration explains that the second step (stating that exceptions or limitations must not conflict with a normal exploitation of the work) ought to be considered as satisfied if the relevant exceptions or limitations ‘are based on important competing considerations or have the effect of countering unreasonable restraints on competition, notably on secondary markets, particularly where adequate compensation is ensured, whether or not by contractual means.’<sup>67</sup>

Lastly, it emphasizes that ‘[t]he Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development.’<sup>68</sup>

A balanced interpretation of the three-step test would indeed enhance flexibility in copyright law, as is demonstrated by the Spanish Supreme Court’s recent case law (see Box 3). However, the manner in which the three-step test is linked to the closed set of exceptions and limitations in the Information Society Directive does not seem to permit national legislatures or the courts to adopt new open-ended copyright exceptions and limitations, as the 2008 Declaration suggests.<sup>69</sup> The possibility of interpreting the steps of the three-step test in a flexible way would nevertheless make it an interesting provision to build an open norm around. This was already proposed by the Dutch Copyright Advisory Committee in 1998.<sup>70</sup> As will be seen, the three-step test will make an integral part of the open norm that is eventually concretized in Section 3.4.

### 3.2.3 Exploring the Existing Policy Space in EU Copyright Law

A third possibility would be to use the existing policy space in EU and international copyright law to introduce or enhance flexibilities in national copyright law. In the study ‘Fair use in Europe: In search of flexibilities’, Hugenholtz and Senftleben (2011) conclude that, at first sight, the policy space at the EU level seems rather limited, given the closed list of permitted exceptions and limitations under the Information Society Directive. Upon closer inspection, however, they find that in many cases the exceptions and limitations enumerated in the Directive are not precisely circumscribed, but formulated as categorically worded ‘prototypes’ that leave the national legislators considerable margins of implementation (Hugenholtz & Senftleben, 2011, p. 14 et seq.). Moreover, they observe that the right of adaptation has remained a largely unharmonised terrain of EU copyright law and that, as a result, there seems to be sufficient room for national legislators to provide for an exception or limitations permitting particular types of transformative uses, e.g., in the context of UCC (Hugenholtz & Senftleben, 2011, p. 26-27).

<sup>66</sup> Section 3 of the Declaration.

<sup>67</sup> Section 4 of the Declaration.

<sup>68</sup> Section 6 of the Declaration.

<sup>69</sup> This is not to say that courts cannot apply general principles of civil law to see whether a particular use is permissible (see Section 3.2.1). General principles of civil law can always be applied.

<sup>70</sup> Commissie Auteursrecht, *Advies over auteursrecht, naburige rechten en de nieuwe media*, augustus 1998, <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2011/03/09/advies-commissie-auteursrecht-over-auteursrecht-naburige-rechten-en-de-nieuwe-media/02-advies-nieuwe-media.pdf>>, p. 46.



Hugenholtz and Senftleben therefore conclude that one way of introducing more flexibility in national copyright law is for national legislators to explore the existing policy space under the distinct exception prototypes and/or to introduce a specific exception or limitation permitting the production and dissemination of particular types of adaptations (Hugenholtz & Senftleben, 2011, p. 2 and pp. 29-30). The Dutch Copyright Advisory Committee followed this approach in its report to the State Secretary for Security and Justice on the possibilities for introducing a flexible system for UCC in Dutch copyright law. Seeking to put the available policy space to use, the Copyright Advisory Committee advised the State Secretary, should the government want more flexibility in this area, to add a new provision to the existing quotation right set forth in article 15a of the Dutch Copyright Act. The proposed provision would permit the quotation of works in the context of UCC, provided that the various criteria for lawful quotations laid down in article 15a(1) are satisfied (Commissie Auteursrecht, 2012, pp. 15-19). Among other things this includes the criterion that the quotation be ‘commensurate with what might reasonably be accepted in accordance with social custom’.<sup>71</sup>

While an approach of the kind suggested here would certainly add flexibility to the existing regime of exceptions and limitations in national copyright law, it does not establish a truly open-ended norm. At most, it could inspire national governments, within the confines of one or more existing exceptions or limitations, to introduce a set of distinctive open norms for specific purposes or uses for which flexibility is identified as being critical.

To a greater or lesser degree, Hugenholtz and Senftleben in their report do suggest a sort of open-ended rule. This rule would be comprised of (i) the substantive elements of the distinct exception prototypes with flexible features included in the Information Society Directive, plus (ii) the last two steps of the three-step test (because the cases covered by this rule are to be regarded as ‘certain special cases’, they deemed it unnecessary to also include the first step). They formulated the provision as follows:

*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 such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the right holder.’ (Hugenholtz & Senftleben, 2011, pp. 17-18)*

As acknowledged in the report, while coming close to an open-ended defence, the proposed norm inevitably remains semi-open. That is, it cannot go beyond the express boundaries set by the closed list of permissible exceptions and limitations under current EU copyright law and, consequently, ‘can hardly empower judges to identify new use privileges on the mere basis of

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<sup>71</sup> The criteria laid down in Article 15a(1) of the Dutch Copyright Act are the following:

1. the work quoted from has been published lawfully;
2. the quotation is 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;
3. the provisions of Article 25 are observed; and
4. so far as reasonably possible the source, including the author’s name, is clearly indicated.

abstract criteria, such as those constituting the three-step test' (Hugenholtz & Senftleben, 2011, p. 17).

### 3.2.4 Conclusion

This section has revealed that, while the existing legal framework enables the legislature and the courts to introduce or enhance flexibility in copyright law in a number of ways, it does not permit them to adopt a generic open norm offering flexibility for a variety of unspecified unauthorized uses. Under the current framework of exceptions and limitations at the EU level, Member States can introduce a semi open norm at best.

As a consequence, if the Dutch legislator would want to introduce or enhance flexibility in current copyright law unilaterally (that is, without having to rely on the EU legislator), then it can only do so by exploring the existing policy space under EU law. As observed, the Copyright Advisory Committee has recently examined the possibility for introducing more flexibility for UCC. A similar exercise should be undertaken for each individual type of use that the legislator wishes to accommodate under Dutch copyright law. This would require more legal research.

The present study seeks to examine the economic consequences of the introduction of a generic open norm. Because under the current EU framework the introduction of a generic open norm is not permitted, the concretisation of the open norm must occur at a level that exceeds the existing EU legal framework. The various options for doing so are examined in the next section.

## 3.3 Towards a Generic Open Norm

There are a few models that may serve as inspiration for adopting an open norm that would enable the legislator to introduce flexibility for a variety of unspecified unauthorized uses. It must be emphasized that these models go beyond what is permitted by the current legal framework of exceptions and limitations at the EU level. Adopting such a model would thus require legislative action by the EU legislator. This section examines two types of models that exceed the existing EU legal framework. First, it looks at the option of introducing an open norm along the lines of the US fair use doctrine (Section 3.3.1). Second, it analyses the possibility of adopting an open norm as recently proposed in the Wittem Group's *European Copyright Code* (Section 3.3.2).

### 3.3.1 An Open-Ended 'Fair Use' Exemption

Proposals for introducing an open norm in the area of copyright exceptions and limitations often take as examples the existing fair use exceptions in the United States and a few other countries, including Israel (see the case study in Chapter 4), South Korea and the Philippines. The fair use doctrine was developed by US courts in the twentieth century without the aid of specific statutory guidance. In 1976 it was codified in the US Copyright Act. Later, it found its way into the copyright laws of other jurisdictions. The relevant provision of the US Copyright Act (17 U.S.C. § 107) reads as follows:

'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:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 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.'

The US fair use exception is characterized by the open-ended list of purposes for which the use of a work may be regarded as fair, marked by the words 'such as', and by the four factors set out to be considered in determining whether or not a particular use is fair.

In Europe, the fair use doctrine is often perceived as a purely American concept, very distinct from the European civil law style exhaustive enumeration of exceptions and limitations and even from the common law concept of 'fair dealing'.<sup>72</sup> The consultation on the Green Paper on Copyright in the Knowledge Economy reveals that, while some stakeholders embrace fair use as an instrument introducing flexibility to accommodate new, innovative uses in the digital environment,<sup>73</sup> others are very critical about it, stating that 'transplanting the US [fair use] system, which developed through decades of jurisprudence, would be highly problematic and run contrary to the legal traditions of most EU Member States'.<sup>74</sup> A recent consultation in Ireland shows a similar pattern of arguments (Irish Copyright Review Committee, 2012, pp. 116-118). Consequently, in Europe, proposing an open norm along the same lines as the US fair use doctrine is rather controversial.

Despite the criticism that the US fair use provision generates in Europe, the Irish Copyright Review Committee took it as a starting point when considering the introduction of an open norm to remove possible barriers to innovation in its 2012 consultation paper on 'Copyright and Innovation' (Irish Copyright Review Committee, 2012, pp. 111-123). The Committee indicated to be, as yet, unconvinced by the arguments on both sides of the fair use debate and decided to invite submissions to further discuss the possibilities for introducing a fair use clause into Irish law. Merely for the purpose of debate and without any endorsement of the doctrine, it tentatively proposed a draft provision that is based largely on the US fair use exception. The draft (Irish Copyright Review Committee, 2012, pp. 120-121) reads as follows:

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<sup>72</sup> See e.g. the submission to the consultation on the Green Paper on Copyright in the Knowledge Economy by the British Library.

<sup>73</sup> See e.g. the submissions to the consultation on the Green Paper on Copyright in the Knowledge Economy by the Deutscher Kinematheksverbund, the European Broadcasting Union (EBU-UER), Communia Thematic Network, Duke University School of Law, EuroISPA, the Computer & Communications Industry Association (CCIA) and Netcoalition.

<sup>74</sup> See FIAPF's (International Federation of Film Producers' Associations) submission to the consultation on the Green Paper on Copyright in the Knowledge Economy. See also the submission to the same consultation by Association of Commercial Television in Europe (ACT).

'48A. Fair Use.

(1) The fair use of a work is not an infringement of the rights conferred by this Part.

(2) The other acts permitted by this Part shall be regarded as examples of fair use, and, in any given case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.

(3) For the purposes of this section, the court shall, in determining whether the use made of a work in any particular case is a fair use, take into account such matters as the court considers relevant including any or all of the following:

- the extent to which the use is of a nature and extent that is analogically similar to the acts permitted by this Part,
- the purpose and character of the use, including whether such use is of a commercial or non-commercial nature,
- the nature of the copyrighted work,
- the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the copyrighted work as a whole,
- the impact of the use upon the normal exploitation of the copyrighted work, such as its age, value and potential market,
- the possibility of obtaining the copyrighted work within a reasonable time at an ordinary commercial price,
- whether the legitimate interests of the owner of the rights in the copyrighted work are unreasonably prejudiced by the use, and
- whether the use is accompanied by a sufficient acknowledgement.

(4) The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section.

(5) The Minister may, by order, make regulations for the purposes of this section:

- prescribing what constitutes a fair use in particular cases, and
- fixing the day on which this section shall come into operation.'

The proposal tries to tie as closely as possible to the existing exceptions and limitations under Irish copyright law. As emphasized by the Copyright Review Committee, before any claim of fair use can be considered, the existing exceptions and limitations should be exhausted (Irish Copyright Review Committee, 2012, p. 120). In comparison to the US fair use clause, the proposal also includes additional criteria based on the three-step test, moral rights and provisions from other countries that have adopted the fair use doctrine. Although the aim is supposedly to add safeguards to the rule, it is questionable whether the additions sufficiently accommodate the concerns raised by the critics of the fair use doctrine. Since the proposal keeps fairly close to the US fair use doctrine, both in terms of structure and terminology, introducing it may still be problematic from a political viewpoint. Moreover, from a legal perspective, it needs to be seen how the proposal would work out in practice. The list of eight factors seems overly comprehensive and is prone to interpretation. In practice, therefore, it is not unlikely that the proposed norm may cause legal complications and legal uncertainty.

### 3.3.2 An Open Norm as Formulated by the Wittem Group

One proposal that introduces a flexible open norm while keeping close to the legal traditions in Europe is the *European Copyright Code*, a model law drafted by a group of European scholars that named themselves the Wittem Group.<sup>75</sup> Chapter 5 of the Code lays down a semi-open structure of copyright exceptions and limitations. First, it explicitly enumerates the permissible exceptions and limitations and groups them by reference to their objectives and rationales, covering uses with minimal economic significance (Article 5.1), uses for the purpose of freedom of expression and information (Article 5.2), uses permitted to promote social, political and cultural objectives (Article 5.3) and uses for the purpose of enhancing competition (Article 5.4). Next, in Article 5.5, it extends the scope of these specifically enumerated exceptions and limitations by permitting any

<sup>75</sup> *European Copyright Code*, <http://www.copyrightcode.eu/>. The Drafting Committee consisted of L. Bently, T. Dreier, R. Hilty, P.B. Hugenholtz, A. Quaedvlieg, A. Strowel and D. Visser. J. Bing, R. Clark, F. Gotzen, E. Mackaay, M. Ricolfi, E. Traple, M. Vivant and R. Xalabarder were in the Advisory Board.

other use that is similar to the uses enumerated in Articles 5.1 to 5.4(1), subject to the application of the corresponding requirements of the relevant exception or limitation and the three-step test. In line with the ‘Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law’ (see Section 3.2.2), a fourth element is added, namely the requirement to take account of the legitimate interests of third parties. The provision is formulated as follows:

**‘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 right holder, taking account of the legitimate interests of third parties.’

By combining a set of clearly defined exceptions and limitations with an open-ended norm that extends the available exceptions and limitations to similar uses, the *European Copyright Code* reflects ‘a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration’.<sup>76</sup> Hence, this seems to better fit the European legal tradition than the US fair use doctrine. Moreover, the semi-open structure of exceptions and limitations suggested in the Code ‘guarantees both a level of legal security and fairness, by combining relatively precise norms with sufficient flexibility to allow a fair outcome in hard and/or unpredictable cases’ (Hugenholtz & Senftleben, 2011, p. 9). As stated in the Code, this ‘is indispensable in view of the fact that it is impossible to foresee all the situations in which a limitation could be justified’.<sup>77</sup>

At the same time, the flexibility offered is not unlimited. First, the reference to ‘comparable uses’ ensures that ‘the courts can only permit uses not expressly enumerated insofar as a certain analogy can be established with uses that are mentioned by the Code’.<sup>78</sup> This implies that uses that are permitted under the proposed Article 5.5 are not necessarily without compensation. If the use is analogous to a use permitted by a limitation that is subject to the payment of compensation, the use under the open norm would inevitably also be subject to the payment of compensation. This is the consequence of the analogy that is assumed in the open norm of Article 5.5 and the condition that the corresponding requirements of the relevant limitation must be met.

Accordingly, the various uses identified in Chapter 2 that do not fall under a specified exception or limitation would be permissible only if it can be established that they are somehow comparable with one or more expressly enumerated exemptions.<sup>79</sup> Taking the use of thumbnails by search engines as an example, the courts could permit such use under the proposed Article 5.5 if they find that there is a certain analogy with the incidental use of works (Article 5.1 under (2)), the use of works for quotations (Article 5.2(1) under d), or any other use listed in Articles 5.1 to 5.4(1). Likewise, the other uses mentioned in Chapter 2 could be put to the test of the proposed Article 5.5 provided that a certain analogy can be established with uses permitted by one of the expressly enumerated exemptions. This will depend on the particular circumstances of each case.

<sup>76</sup> *European Copyright Code*, explanatory footnote 48.

<sup>77</sup> *European Copyright Code*, explanatory footnote 48.

<sup>78</sup> *European Copyright Code*, explanatory footnote 48.

<sup>79</sup> As the explanatory footnote in the *European Copyright Code* (footnote 55) indicates, ‘art. 5.5 does not allow new limitations by blending the criteria of articles 5.1 to 5.3’.

Second, Article 5.5 would only permit comparable uses that do not conflict with the normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the author or right holder, taking account of the legitimate interests of third parties. These criteria ensure that the courts can balance the interests of stakeholders on both sides of the equation.

### 3.4 Conclusion

It can be concluded from the previous analysis that, if the aim is to arrive at an open norm that would offer flexibility for enhancing innovation and removing undesirable legal barriers for creative re-use and commercial exploitation and for the development of new business models, the model that could best be pursued is the one proposed in the Wittem Group's *European Copyright Code*. Although it would require legislative action by the EU legislator, it has several benefits over the other models examined. First, by combining a set of specifically enumerated exceptions and limitations with a generic open norm offering flexibility for any use that is comparable to the uses specifically listed, the *European Copyright Code* has prevalence over the models that national legislators are permitted to adopt under the current legal framework, which at best are semi open and therefore do not meet the minimum requirement of establishing an open norm. Second, the system proposed in the *European Copyright Code* keeps closest to the European legal traditions. Therefore, it has a better chance of getting accepted in Europe than the US-style fair use doctrine or the related provision tentatively suggested by the Irish Copyright Review Committee in its 2012 consultation paper on 'Copyright and Innovation'.

In line with the model set forth in the *European Copyright Code*, this study uses an open norm that would coexist with the specifically enumerated exceptions and limitations in the current Dutch Copyright Act. It would authorize any other use that is comparable to the uses expressly permitted under the exceptions and limitations listed in Chapter 6 of the Copyright Act, subject to the application of the corresponding requirements of the relevant exception or limitation and the operation of the three-step test. This means that all existing exceptions and limitations, such as incidental use, the quotation right, the parody exception, the private-copyright exception, and so on, would remain intact and their scope would be extended by an open-ended rule. Similar to the proposal of the Wittem Group, this rule could be formulated as follows:

*'Any other use that is comparable to the uses enumerated in Chapter 6 of this Act 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 right holder, taking account of the legitimate interests of third parties.'*

An open-ended provision of this kind seems to provide sufficient flexibility to respond to cultural and technological change (by permitting new, innovative and yet unforeseeable uses), while taking due account of the legitimate interests of authors, right holders and users. By also bringing third parties into the equation, the norm seems to be built upon a balanced interpretation of the three-step test as proposed in the 2008 Declaration initiated by the Max Planck Institute for Intellectual Property and the School of Law at Queen Mary (Section 3.2.2). If the relevant steps of the three-step test included in the proposed rule would indeed be interpreted in a balanced way, this could add to the flexibility that the open norm endorses. Moreover, it would offer guidance to the legal interpretation of the rule, thus enhancing legal certainty for all stakeholders involved.

It must be emphasised that the concretised norm does not imply that uses permitted are without compensation. If the use is comparable to a use permitted by a limitation that is subject to the payment of compensation (see Box 2 for a list of limitations in the Dutch Copyright Act that are subject to the payment of compensation), the requirement that the corresponding requirements of the relevant limitation must be met ensures that the use under the open norm would inevitably also be subject to the payment of compensation. Furthermore, to address possible right holder's concerns, it could be provided by law or duly explained in the Explanatory Memorandum accompanying the proposal that it would be the burden of the party invoking the open norm to establish why the defence should be honoured. This would be in line with the 1998 recommendations of the Dutch Copyright Advisory Committee (Commissie Auteursrecht, 1998, p. 46).

As underlined in the introduction to this chapter, the open norm that is concretised in this report is to be regarded as an instrumental legal variable providing the necessary legal framework for economic analysis in the following chapters only. It is not to be interpreted as the preferred model for future legislation. Identifying the most suitable legal model is not the object of this study.



## 4 Case Study: Economic Rationale of Fair Use in Israel

Chapter 2 placed the Dutch legal system into context and attempted to identify the areas, not presently covered by the existing exceptions and limitations, where a too strict enforcement of copyrights could hamper creative or commercial activity. The overview of the Dutch regime revealed in Section 2.1.2 above that the idea of introducing an open norm in the Copyright Act is not new and that it occupied the minds of many scholars and lawmakers during the late 1990s. The discussions of the Dutch Government regarding the possible introduction of a fair use defence that took place in the context of the implementation of the Information Society Directive are not unique: other governments have been facing the same qualms in the course of the past decade in countries like Canada, Israel, Japan, South Korea, and the United Kingdom.

In the United Kingdom, the introduction of fair use was examined and discussed in both the Gowers Review and the Hargreaves Review. Because under the current EU legal framework it is impossible for Member States to introduce a generic open norm (see Section 3.2), the two reports recommend that the UK Government could better fix its policy on introducing exceptions and limitations that are permitted under EU copyright law and that have not yet been implemented in UK copyright law, rather than on merely pursuing the idea of adopting an open norm.<sup>80</sup>

As observed in Chapter 3, the US fair use doctrine is probably the best-known example of an open-ended copyright exemption. Other countries have considered adopting a similar provision, but so far only a few countries, including Israel, South Korea and the Philippines, have taken action and enacted a fair use defence in their respective copyright act. Israel, not being part of the European Economic Area, is not bound by the European copyright law framework and could amend its copyright act in 2007 without running afoul of the Information Society Directive. Since South Korea only introduced the fair use defence in its copyright act in the past few months and the Philippines is not really comparable to the Netherlands as it is still a developing economy, the Israeli experience presents itself as the prime example to enquire about the motivations behind this legislative change. The case study of Israel is carried out with the view of gaining insight on whether any economic impact can already be derived from this legislative modification.

This chapter is divided in two sections: the first section gives an overview of the Israeli legal framework, while the second section presents the results of interviews held with stakeholders in Israel, complemented by documents study. Interviews were held with actors involved in the process leading to the 2007 Copyright Law from the Ministry of Justice, the National Library and Google Israel, as well as with a scholar involved with the negotiation process leading to the adoption of the fair use best practices for higher education.

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<sup>80</sup> See Gowers (2006, p. 61 et seq.) and Hargreaves (2011, p. 5, 8, 41-52).



## 4.1 The Israeli Copyright Framework

In November 2007, the Israeli Parliament enacted a new Copyright Act, which replaced the prior Copyright Act of 1911. The prior legislation was essentially a copy of the UK Copyright Act of 1911 that had been modified several times over the years. With respect to exceptions and limitations, the Copyright Act of 1911 followed the British model and provided for a ‘fair dealing’ defence along with a number of specific exceptions and limitations. Other exceptions concerned the recitation in public of published works, limited forms of educational use, limited forms of use of works placed in public spaces and limited forms of use of works for purposes of news reporting. The fair dealing defence appeared in article 2(1)(i) of the Copyright Act. It reads as follows:

Provided that the following acts shall not constitute the infringement of a copyright:—  
(i) any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary;

The ‘fair dealing’ defence is, in all legislations where it is recognized (UK, Ireland, Canada, Australia, etc.) much narrower than the US inspired ‘fair use’ defence. The main difference lies in the fact that the purposes for which the defence is admissible are enumerated exhaustively in the act (Pessach, 2010, pp. 189-190). Fair dealing is therefore not an open norm and the interpretation of the purposes listed in article 2(1)(i) of the former Act by the Israeli courts gave rise to some tension in the years preceding the copyright reform.

Since the amendments of 2007, the Israeli Copyright Act contains an open-ended fair use defence that can be invoked in a wide variety of cases and situations. Article 19 of the Copyright Act of 2007 is modelled after section 107 of the US Copyright Act of 1976 but contains an interesting feature in paragraph (c) according to which the Minister may make regulations prescribing conditions under which a use shall be deemed a fair use. The article reads as follows:<sup>81</sup>

### 19. Fair Use

(a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.

(b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:

- (1) The purpose and character of the use;
- (2) The character of the work used;
- (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
- (4) The impact of the use on the value of the work and its potential market.

(c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.

The amendments of 2007 were not only limited to the implementation of the fair use defence. An extensive number of additional exceptions was introduced in the Israeli Copyright Act covering the use of works in juridical or administrative procedures, the reproduction of a work deposited for public inspection, the incidental use of a work, use of works placed in public spaces, the use of computer programs (back-up copy, black-box analysis, correction of errors, maintenance and decompilation for purposes of interoperability), ephemeral recording by

<sup>81</sup> Copyright Act 2007, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=255135](http://www.wipo.int/wipolex/en/text.jsp?file_id=255135)

broadcasting organisations, transient and incidental copying, the making of additional artistic work by the author, the renovation and reconstruction of buildings, the public performance by educational institutions, permitted uses in libraries and archives, and a compulsory licence for the manufacture of sound recordings.

## 4.2 Economic Rationale and Consequences

What were the main motivations for introducing fair use in Israel? This section spells out the four main line of arguments mentioned by the interview partners.

### 4.2.1 Motivations for Change

#### **Defining exceptions and limitations conclusively is practically impossible**

Broadly speaking, four arguments have been put forward for the introduction of *fair use* in Israel. A simple and fundamental reason for introducing fair use is the complexity to define the desired exceptions and limitations conclusively. This argument was also encountered in the European perspective in Chapter 2. Exceptions and limitations are meant to balance the exclusive copyright given to copyright holders with an eye on the public interest, but a major problem is that the list is potentially endless. There are many types of use imaginable that should fall under an exception. Defining and limiting these exceptions in a correct way is practically impossible. One of the interview partners mentioned the case of a journalist who instituted proceedings against a school who used some paragraphs from a newspaper article for an exam. Although the judge stated the use was *fair* the case was won by the journalist. If the Israeli Copyright Act had contained a fair use defence, it would presumably have provided an outcome to the school's situation.<sup>82</sup>

The same interview partner drew attention to some hypothetical cases that were also discussed in debates with the Israeli Parliament. These hypothetical cases show the difficulty of defining the necessary exceptions and limitations. A book recital at school could fall within the scope of an exception for educational purposes. But what if the recital is not a school, but at a kindergarten? What if the recital takes place outside in a park with potentially everybody who is at the park as a listener? A second example is a band playing songs at a children's party. To have children sing along a copy of the lyrics may be distributed to everyone. These examples show that, in practice, it is not always easy to define the exact boundaries between the private and public space.

Defining exceptions and limitations conclusively proved to be especially cumbersome for reverse engineering and transient copying. Discussions with technology companies in an effort to come up with the necessary exceptions and limitations turned out to result in excessively technical and complex debates. According to one of the interviewees, this showed the need for an open norm rather than a closed list of clearly defined exceptions and limitations.

At the time of the legislative process, the focus of the Israeli policymakers was specifically also on aggregators, educational institutions and digital archives.

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<sup>82</sup> CC 12595/98 Ronen Bergman v. State of Israel Mag. Haifa (unpublished) (Jan. 2, 2001).

### **Defining exceptions and limitations becomes even more cumbersome when taking future technologies into account**

A second important motivation for introducing *fair use* was to create a copyright regime that stimulates innovation while keeping up with rapid technological developments. This argument was also mentioned in Chapter 2. Legislative processes take too much time to be able to quickly react to new technologies and business models. Moreover, changing the law each and every time the law must be adapted to a new technology or service would impose undesirable time burdens on Parliament and entails the possibility of rent seeking. In the words of one of the interview partners: 'We have issues of war and peace to discuss in Parliament'. The law should in other words provide general guidelines that may be applied by the court independently of technology and business models.

### **Fair use balances the interests of copyright holders and users**

Copyright gives exclusive rights to the copyright holder. Exceptions and limitations limit the legal monopoly in some well-defined areas, but according to the interviewees only the principle of fair use inherently values the interests and rights of users, such as freedom of speech, freedom of information, artistic freedom and freedom to participate in cultural life, within the copyright law itself. A fair use exemption allows the courts to balance the interests of right holders against the interests of users.

An additional argument that was put forward is that introducing *fair use* would be a practical way of soothing the rigid consequences of copyright law in those cases where the law is actually too strict (e.g. in cases of socially, culturally or economically legitimate uses that do not actually harm the legitimate interests of right holders). According to one interviewee, it is far from clear that the duration of the conferred legal monopolies actually contribute to the goals copyright was made for in the first place.

### **Fair use as an adaptation of existing practices**

A fourth motivation for introducing fair use in the Israeli Copyright Act follows from case law and legal practice. As mentioned before, the fair use defence was invoked in court cases even before the concept was introduced in the law. Kozlovski, Klinger, Yarkoni & Davidi conclude however that '[p]rior to the 2007 legislation, there was no certainty and no coherency between cases where fair use was adjudicated' (Kozlovski, Klinger, Yarkoni, & Davidi, 2010, p.163). Although the newly enacted fair use exemption in the Israeli Copyright Act does not necessarily provide certainty to stakeholders, it does bring clarity about the status of the fair use principle itself.

The adoption of the fair use defence in the Israeli Copyright Act also followed existing practices by institutions such as the National Library of Israel, which offered copying and printing services already before the fair use exemption was introduced. Fair use was nevertheless in the interest of the National Library as it provides more certainty that it is not infringing copyrights.

## **4.2.2 Impact of Change on Different Parties**

As the new copyright law has only been in existence for a few years so far, definite conclusions on consequences cannot be drawn before more jurisprudence has developed. With only one *fair*

*use* case so far before the courts,<sup>83</sup> it is not clear yet how fair use will be applied in practice by the courts. One of the interviewees argues that an important effect of the law will be that the law explicitly recognizes the rights and interest of users of copyrighted works. This will in turn lead to decisions by the courts that take better account of the public interest. An example of a case before 2007 that would most likely have had a different outcome if the current copyright law had been in place at that time is the Geva case.<sup>84</sup> David Geva used the character Donald Duck as part of a larger work as a critique on Israeli society. The court decided that his use was a copyright infringement as the use was not for the purpose of learning, research, criticism, review or journalistic reporting (Kozlovski, *et al.*, 2010, p. 147; Zemer 2011, pp. 1075-1076).

It is however important to stress that the impact of *fair use* does not solely depend on the law and its interpretation by the courts, but also on how it is used by institutions such as libraries and higher education institutions that have dissemination of information among their main goals. That is, institutions have to be willing to take certain risks in order to use the *fair use* principle in the way it was designed to function. Fair use does not contribute to disseminating and providing access to works if these risks are not taken. Higher education institutions in Israel cooperated to create fair use best practices.<sup>85</sup> Similarly, the National Library is willing to take risks in areas where they consider the use to be fair.

In this section, the consequences for right holders, aggregators, the National Library and higher education institutions will be discussed. As the interview partners indicated not to be familiar with any *ex ante* or *ex post* evaluations of the economic impact of the introduction of a fair use defence, it is unlikely that an economic impact assessment was conducted.

### Right holders

The creative industry did resist the introduction of fair use, fearing that it would become increasingly difficult to claim their rights as users could always refer to the fair use defence. This would bring uncertainty and increase the costs of defending their rights. The only case so far that has successfully invoked fair use – the Premier League case<sup>86</sup> – may be seen as proving this point. After balancing the interests of the Premier League and the interests of society as a whole, the court judged streaming of Premier League games to be fair use. Important arguments for the courts were that the games were streamed in low quality and that the streaming service therefore was no substitution for paid services.

At the same time, the interview partners do not expect a significantly negative impact for copyright holders.<sup>87</sup> The first important notion is that a copyright holder not only owns the copyright in his or her creations, but sometimes also uses materials covered by copyright of others. Interviews by Kozlovski *et al.* show that many copyright holders are not fully conscious of

<sup>83</sup> OCR (Tel Aviv) 11646/08 Premier League v. John Doe (unpublished) (July 16, 2008); (Kozlovski *et al.*, 2010, p. 169).

<sup>84</sup> CA 2687/92 Geva v. Disney, Inc. 48(1) PD 251 (1994).

<sup>85</sup> Forum of Accessible Education, 'Code of Best Practices for Use of Works in Teaching and Research', <http://weblaw.haifa.ac.il/en/AcademyInCommunity/ClinicList/tech/Documents/Code%20of%20Best%20Practices%20%5BEnglish%20Translation%5D.pdf>. See also Dotan *et al.* (2010).

<sup>86</sup> OCR (Tel Aviv) 11646/08 Premier League v. John Doe (unpublished) (July 16, 2008); (Kozlovski *et al.*, 2010, p. 169).

<sup>87</sup> It should be noted here that the interviewees were all in favour of fair use. Opponents might have come up with arguments why fair use would harm right holders.

this dual role and their dependency on the work of others. They give the example of software developers using open source applications and musicians performing cover versions of songs. Many interview partners had to be reminded that they were using copyrighted works as an input for their own work (see also Kozlovski *et al.*, 2010, p. 190). One of the respondents did answer that according to him all works are essentially derivatives, as knowledge and creativity always build on earlier works.

A second reason why the negative impacts for copyright holders were thought to be limited, is that the courts, in assessing fair use, actually take market impact into consideration. The use of insignificant parts of works does not undermine the business case of the copyright holder as the two are unlikely substitutes. Someone who wants to get hold of only a small part of a work is not very likely to be willing to buy a whole book and someone who wants to have a whole work is not very likely to substitute the whole for a part. It is even possible that someone who is initially only interested in part of the work, decides to buy the whole work after having had access to a part.

Currently, a case is pending against the Hebrew University in Jerusalem, which made a small number of pages of a Hebrew translation of Plato available to students of a course in a secure, password-protected online environment. Alternatively the students could have gone to the library to make a private copy of the work. This would produce the same effect (the students would get hold of a copy of the work), but would be much less efficient. This shows that the improved accessibility of the work does not necessarily harm the copyright holder compared to the pre-digital situation.

It should however be noted that even though market impact is one of the considerations of the court, there is no safeguard that right holders' incomes are not affected. First, the market impact may be balanced against other considerations and deemed less important by the court. Second, the existence of fair use may influence whether a user of copyrighted work buys a license or not.

### **Aggregators**

In Israel, aggregators such as Google rely on copyright exceptions and limitations, including fair use, for several purposes, such as the use of thumbnails, cache copies and services like Google Books. Google embraces fair use in the Israeli Copyright Law because, in its view, it strengthens the users' position and strikes a better balance between right holders' and users' interests. They argue that too much power for the creative industries prevents dissemination and may also be harmful for the economy.

Fair use means for Google that it has a better position and more possible defences in court cases in Israel. The impact on the services provided by Google may however be limited as the broadly interpreted fair dealing regime would probably also have permitted Google's uses of copyrighted works. In countries where neither fair use nor fair dealings exists, services as Google Books do generally exist, unless they are contrary to local law. The availability of a fair use defence may help aggregators to determine what services to offer or whether to institute geo-location blocking for a certain service. The introduction of fair use seems to have given them more certainty. In this way, fair use could contribute to the development of new services in a country. Fair use may also have favourable consequences for the future as new services and business models are developed,

although it is hard to make this tangible. The consequences for Google will, however, also strongly depend on the way fair use is applied by the courts.

### **National Library**

The National Library of Israel has a central role in collecting and preserving books, ‘manuscripts, documents, maps, music and other audio treasures, graphic creations, audiovisual creations and electronic documents, as well as other items of unique national, historic or cultural significance.’<sup>88</sup> According to the Books Law 2000 (Law no. 5761), publishers of a broad range of written material are required to send two copies of any work published in over 50 copies to the National Library. This makes it an archive of works published in Israel.

The National Library had three main interests at the time of designing the 2007 Copyright Law in Israel. These were fair use, copying for preservation purposes and legal deposit. Fair use is in the interest of the National Library as it enables it to provide wide access and services for students, researchers and the general public.

Most materials of the National Library are not intended for lending; they may be accessed at the Library itself or copies of (parts of) works may be requested.<sup>89</sup> Fair use gives the Library some elbow room to provide these services, while being sure that they are not infringing copyrights. Rare or fragile works may in some cases not be directly accessible for users. Upon request, the Library makes copies of part of these works to provide access to the work.

The National Library adheres to the prevailing copyright law, while taking steps in areas not yet fully articulated in statutory or case law, balancing the limitations of fair use against the goal of providing wide access to Library materials. One example of such a use that the Library considers fair is copying of internet sites to preserve online content.<sup>90</sup> This work is underway for websites that report on elections in Israel and is planned for online periodicals and other material. A second example is the use of music content for the Library’s music archive. Music is copied from CD’s, records and tapes to the Library’s server. Through the internet, users can access samples of the work, thumbnails and CD covers. The CD covers cannot be copied by users in a high resolution. In case a user wants to get access to the whole work, he or she is referred to the copyright holder.

The National Library extrapolates from existing case law and comparative legal systems in areas in which the range of permissible use is not clearly defined. Measures such as preventing copying in high resolutions are taken as to stay within the bounds of fair use. Taking risks in areas where the Library considers the use to be fair is part of the Library’s mission to make works as widely available as possible. The National Library is working together with legal scholars and practitioners to propose legislative amendments that will enable it to fulfil its mandate to preserve and provide access to its collections in the context of the changing realities of the information age.

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<sup>88</sup> <http://web.nli.org.il/sites/NLI/English/library/aboutus/now/Pages/about.aspx>

<sup>89</sup> The National Library lends out 10 to 20 percent of its books.

<sup>90</sup> Note however that this use is (also) legally founded in the National Library Law 2007, which grants to the National Library the explicit right to archive Internet sites, materials, electronic databases, et cetera.

### Higher Education Institutions

After the introduction of fair use in Israel, institutions for higher education cooperated to formulate best practices that clearly constitute fair use.<sup>91</sup> The main concern of the drafters is that, similar to what was already mentioned in the section on libraries, institutions have to take certain risks in relying on fair use. Among the main goals of the ‘Code of Best Practices’ is ‘to overcome the circularity of fair use’ (Dotan, Elkin-Koren, Fischman-Afori, Haramati-Alpern, 2010, p. 8). What is meant is that risk averse users might decide to buy licenses in cases where they are not sure whether a particular use is fair. This may ultimately lead to the generally accepted conduct of paying for a license. If fair use is going to mean anything for educational institutions, it is important that these institutions be willing to take some risks.

The ‘Code of Best Practices’ (Dotan *et al.*, 2010, p. 23) provides some rule of thumb for what would be obviously fair use for educational purposes:

‘The use of roughly one fifth of a work is considered fair use [...]’  
 The use of an entire article taken from a periodical or an anthology of articles is fair use.  
 The use of an entire indivisible work, such as a picture, photograph, drawing table, etc. is a fair use

These guidelines, if accepted by the courts, would give higher education institutions more leeway to use copyrighted works for educational purposes. This is best exemplified by the practices of composing course readers by universities. In a court case against the Hebrew University that was decided before the 2007 Copyright Act took effect, the court ruled that preparing a course reader without permission of the right holders constituted copyright infringement. Even so, the Hebrew University was not held liable, because the readers were made by a student association.

Given the formulation of the fair use clause, composing course readers could certainly qualify as fair use, since the clause explicitly mentions instructions given by educational institutions. A court case is currently pending in a low district court against the Hebrew University for making course readers available without compensating the right holders. The University’s conduct is in line with the guidelines laid down in the ‘Code of Best Practices’ for higher education.

Comparing the conduct of universities relating to the use of copyrighted works before and after the 2007 Copyright Act gives a mixed picture. Some universities actually feel more constrained after the introduction of the fair use clause and the design of the ‘Code of Best Practices’ for higher education institutions. Before the new Copyright Act took effect, they already relied on a flexible interpretation of the law by the courts and they now feel too much bound by the precise formulation in the ‘Code of Best Practices’. Other universities have started to make more works available and now copy one fifth of a work where they would have copied less in the past. Even though some universities maintain that they have to act stricter now than before the introduction of the fair use clause, it is unlikely that they would have actually enjoyed more flexibility under the old regime of fair dealing. As shown by the earlier case against the Hebrew University, Israeli courts did consider distributing copies an infringement, since fair dealing included use for private study, but did not include distributing copyrighted work for educational purposes.

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<sup>91</sup> Forum of Accessible Education, ‘Code of Best Practices for Use of Works in Teaching and Research’, <http://weblaw.haifa.ac.il/en/AcademyInCommunity/ClinicList/tech/Documents/Code%20of%20Best%20Practices%20%5BEnglish%20Translation%5D.pdf>.



A potential backdrop is that, in Israel, the legal uncertainties inherent to fair use may take a long time to resolve. Naturally, jurisprudence in a small country like Israel develops slower than in the United States. Fewer cases are brought to court and even less cases make it to the Supreme Court, creating a potentially large period of uncertainty as to whether a certain use of copyrighted works is allowed or not. Risk-averse institutions, such as libraries and higher education institutions, may refrain from using works during this period (chilling effect). Alternatively, they may decide to buy a license for using copyrighted works so as to avoid legal uncertainty. This practice may lead to circularity, because market impact is an important element in the court's decision on fair use. The existence of fair use may, however, still lower the prices paid for licenses as the costs of not buying a license and instead relying on fair use are lower. If a license is not bought, there is a chance that the user is infringing copyright. But if fair use may apply, a licence is likely to be less costly since the user has the option to take the risk of not acquiring the licence and relying on fair use instead.

At the same time, the similarities between the fair use provision in Israel and the United States may give actors in Israel an idea about what kind of uses will be allowed. Certainty may, however, not be derived from jurisprudence outside Israel. The Israeli Copyright Act 2007 nevertheless provides a way to increase certainty. The Minister has the authority to make regulations describing what kind of uses are fair use, thereby creating safe harbours (Dotan *et al.*, 2010, p. 10). The regulations made by the Minister could potentially also give clarity on the status of case law in the United States and its relevance to the situation in Israel.

### 4.3 Concluding Remarks

All in all, the motivations for the introduction of a fair use defence as well as its acclaimed effects are in line with the European debate outlined in Chapter two. The introduction of fair use seems to be motivated mainly by legal arguments. Unfortunately, no systematic *ex ante* or *ex post* economic evaluations of fair use in Israel are available as yet. The economic consequences of the fair use regime in Israel will become clearer in the next few years, as more information will be available on how actors change their behaviour and how courts will apply the law. What is already clear is that fair use is a fundamentally different system than a system based on a closed norm, in the sense that it explicitly recognizes the rights and interests of users of copyrighted works. Courts are given the discretion to balance the rights of copyright holders against the interests and the rights of users/consumers. This gives users/consumers more space to use copyrighted works. Aggregators, libraries and higher education institutions have more certainty that certain uses will not be considered an infringement and will therefore be able to make more (and possibly better) use of copyrighted works.

The flexibility of use relating to new technology, business models and boundary cases potentially comes at the cost of increased uncertainty of the boundaries between fair use and infringements, especially in the first years after the introduction of fair use. The development of case law is very important, because courts eventually decide which types of uses are permitted and which are not. Until then, the way uncertainty is dealt with – not in the least by users themselves – will critically determine the impact of fair use. Higher education institutions and libraries are coordinating efforts and seem to be willing to take risks when they consider a certain use to be fair. This is



crucial in avoiding chilling effects and circularity of fair use. The authority of the Minister to create guidelines and safe harbours for fair use would also limit the chilling effect.

## 5 Economic Effects of Introducing Copyright Flexibility

This chapter discusses the possible mechanisms that lead to welfare economic effects of the introduction of an open norm in Dutch copyright law, in particular in relation to commercialisation of copyright-protected works and the Dutch innovation climate. Two types of mechanisms are discussed. First the chapter analyses the effect of permitting a use that otherwise requires licensing. Second it discusses the effect of flexibility in the law to determine which uses benefit from an open norm.

### 5.1 Introduction

There is a substantial literature on the economic consequences of fair use in the United States. For instance, Rogers *et al.* (2010) estimate the economic contribution of industries in the United States that rely on fair use and related exceptions.<sup>92</sup> They conclude that in 2007 these industries are responsible for 16.2 % of total GDP in terms of value added. These industries employ some 17.5 million people, grow relatively fast and have a fast expanding export base. Many industries that rely on copyright *protection* in their business model, can also righteously be claimed to rely on fair use. Think for instance of media and entertainment industries, that rely on fair use as an input and rely on protection of their output.

However, this literature is of limited value for an assessment of the economic consequences of introducing flexible copyright within – or as an extension of – the EU system of exceptions and limitations. The reason for this is that comparing the economic value of fair use to a rigid copyright system with no exceptions or limitations is rather irrelevant. That is, the counterfactual in most fair use studies is not comparable to European copyright law with its closed list of exceptions and limitations. This was illustrated by Akker *et al.* (2010), who did a similar assessment for the economic contribution of industries in the EU that rely on exceptions and limitations to copyright. Despite the shortcoming that the required industry data for the EU were less detailed than would have been optimal, this study still finds that a large share (9.3 %) of the EU economy depends on exceptions and limitations.

Consequently, such research can shed no light on the question whether introducing an open norm *in addition to* the current system of exhaustively enumerated exceptions and limitations would generate significant economic benefits. Israel and South Korea could be interesting cases in this respect. However, as was reported in Chapter 4, no ex-post or ex-ante evaluations were performed in Israel and inquiries with an official at the Korean Ministry of Culture revealed that

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<sup>92</sup> These industries are divided into core and non-core industries. The former are industries that are wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter (Van der Noll & Poort, 2010). See Appendix I in Rogers *et al.* (2010) for their fair use industry definitions.

the economic perspective was not an important driver for Korea's recent adoption of a fair use clause.<sup>93</sup>

Hence, there is no empirical research to rely on to shed light on the generic economic consequences of the introduction of an open norm as formulated in Chapter 3. Instead, a piecemeal approach is taken in this chapter, to analyse the mechanisms by which the defined open norm may have consequences for the economy and social welfare at large.

The specification of the open norm in Chapter 3 is instrumental to the assessments of economic effects in this chapter. Firstly, current exceptions and limitations remain in place. This implies that uses that currently benefit from an exception or limitation, would continue to benefit from that exception or limitation in a system with an open norm. Secondly, a use of a work would only benefit from the open norm if it does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or right holder. This chapter discusses the economic implications of these properties.

The structure of this chapter is as follows. It starts with a brief discussion of the economic literature on copyright and the economic arguments for a fair use type of limitation on copyright protection (Section 5.2). Next, this chapter analyses economic effects insofar the open norm specified in Section 3.4 would – subject to the application by the courts on a case-by-case basis – permit uses that in the current situation require licensing. This would basically be a weakening in protection for some specific uses (Section 5.3). An open norm also offers flexibility in accommodating unforeseen uses and the effects of this open nature are discussed in Section 5.4. Section 5.5 concludes.

## 5.2 The Economics of Copyright

### Incentives for Creation...

From an economic perspective, the incentives for creative production and the commercialisation of creative output are the main rationale for the existence of copyright. The economic incentives for creation and commercialisation depend on a number of parameters that together determine whether the investment in creative work and its commercialisation are expected to be profitable.<sup>94</sup> In their seminal article on the economics of copyright, Landes and Posner (1989) show that the profit of the author depends, amongst other things, on the extent to which copies are substitutable for the original work, and the cost of making copies. They conclude that the greater the cost advantage of the creator in making copies and the lower the substitutability between the original and a copy, the less need there is for copyright protection (Landes & Posner, 1989, p. 329).

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<sup>93</sup> Rather, the issue was considered from the legal perspective. Before the introduction of the fair use defence, the Korean Copyright Act provided an exhaustive list of copyright exceptions and limitations. This sometimes led to difficulties in dealing with unexpected situations not listed as exceptions or limitations in the Copyright Act.

<sup>94</sup> Apart from these economic incentives, there are of course non-economic motivations for creative production, such as fame or the desire to express oneself. Also, there are economic but non-remunerative incentives, for instance for academic writers who publish works to improve their reputation, and hence their employability.

Copyright grants the author of a work a certain degree of monopoly power on creating and selling copies of his work or licensing its use. The rationale for this is to provide the incentive to create, publish and commercialise the work. In absence of it, a market failure would arise: without copyright protection less creative works would be produced than would be optimal. This market failure legitimizes intellectual property protection and is well understood in the literature. Akerlof *et al.* (2002, p. 4) summarize as follows:

*'The main rationale for copyright is to supply a sufficient incentive for creation. [...] An economically minded author will [...] invest in creation only if expected returns, after paying per-unit (or "marginal") costs, are larger than the up-front investment; otherwise the author would lose money overall.'*

In sum, the public problem that gives rise to copyright is that in absence of it, some creative producers would not earn sufficient returns on investment and thereby creative production would fall short of the level desired by society, causing loss of welfare.

### **...at the Expense of Dissemination of Works and Creative Re-use**

However, monopoly power comes with a disadvantage for social welfare: the use of copyrighted material e.g. in terms of copies sold or licences acquired will be lower in monopoly due to the price that is charged and the general control over the dissemination of a work. Also, it raises the costs for the creation of other works in two distinct ways. First, it limits creators' *access* to cultural products (e.g. to be inspired by them or as study material) just like access for other consumers is limited. Second, it limits creators' possibilities to *reuse* other work in their own creations. In cases where the reuse is unlicensed, copyright imposes costs that follow from a weak legal basis and the liability to copyright infringement (henceforth: legal costs).

Thus, copyright protection gives incentives for creation but at the same time monopoly rents cause both a static and a dynamic welfare loss to society. Copyright provides owners of the copyrighted material with the opportunity to earn returns. These returns must be generated at the expense of consumers.<sup>95</sup>

### **Economics of Flexibility in Copyright**

Copyright safeguards the incentive to create works, at the expense of the dissemination of works and creative re-use. The economic literature therefore discusses the optimal scope and breadth of protection. Since the open norm specified in Chapter 3 is an addition to the current system of exceptions and limitations, it can be regarded as a weakening in protection for specific uses. Three economic arguments have been provided in the literature for reducing the scope of protection:

#### *Market Power Argument*

The trade-off between creation and dissemination can be illustrated with the model by Miceli and Adelstein (2006). The authors consider the case that copying is not possible or feasible.<sup>96</sup> In that case, the monopoly price is set and some consumers with a valuation for the work that exceeds the cost of making the copy end up *not* buying it. This is the inefficiency associated with market

<sup>95</sup> See for example LECG, 2007, The economics of copyright term extension. 29 May 2007, <<http://www.ifpi.org/content/library/legc-study.pdf>>.

<sup>96</sup> It is assumed that there are no substitutes for the work available.

power.<sup>97</sup> The authors next introduce the possibility of copying and show that in equilibrium, more consumers consume the good and the authors' revenues from selling the work are lower. As long as these revenues can support the cost of creation, the latter equilibrium yields higher total welfare, despite the fact that revenues for the copyright holder will be lower. Hence, full copyright protection comes at a cost of reduced output and may be suboptimal.

#### *Transaction Cost Argument*

The doctrine of fair use can be characterized as a way to resolve market failure (Gordon (1982)). According to Gordon, a market failure arises when: (a) the user is unable to purchase the desired license through the market, (b) transferring control over the right to the user would serve the public interest and (c) the rights owner incentives would not be substantially impaired by allowing the use. Essentially, this is a transaction costs argument: it is prohibitively expensive for a user to negotiate permission with a copyright holder.<sup>98</sup> The market failure as described by Gordon also refers to positive externalities: the user's valuation of the use is lower than its true social value. Both market failures (transaction costs and externalities) prevent that copyright owners and potential users reliably engage in socially valuable market exchanges (Gordon, 2002; Moore, 2007).

However, problems related to transaction costs can also be resolved by coordination mechanisms such as collective rights management (Kretschmer, 2011, p. 60). Transaction costs are widely acknowledged as the *raison d'être* for collecting societies or collective rights management organisations (Ghafele & Gibert, 2011; Handke, 2010; Handke & Towse, 2007). Collective bargaining by organisations of rights holders, mandatory licensing arrangements or copyright exceptions that entitle rights holders to a fair compensation are alternative ways to resolve the problem of transaction costs. Note however that coordination failure may prevent rights holders from organizing themselves (for example because there is a too large number of rights holders) and in those cases transaction costs remain.

#### *Anti-commons Argument*

Another type of externality that warrants a fair use provision is known as "anti-commons": many owners have rights to exclude the use of a resource and, as a result, there may be under-use if the authors are unable to reach a coordinated agreement (Depoorter & Parisi, 2002). This situation could arise in copyright settings when a set of works owned by separate individual owners are all complements in producing a new work (as in producing e.g. an anthology or a database). Each individual author will set its price too high, because each author does not consider the externality of the price decision on the value of other authors' rights. The user may be discouraged to produce the derivative work and not contact the other authors. This creates a deadweight loss and under-use of the authors' works who also suffer from this externality. An open norm may resolve this anti-commons problem to the extent that it allows for this type of use.

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<sup>97</sup> Here we abstract from the possibility to price discriminate perfectly. When a monopolist can charge every individual consumer its full willingness to pay, the level of output would be equal to the case of perfect competition and monopoly power would not cause inefficiency.

<sup>98</sup> When transaction costs of obtaining protected works exceed their value to the individual users, markets fail to develop. Economists call these *missing markets* (Gordon, 1982).

## 5.3 Permitting Current Uses

*One category of economic effects of introducing flexibility is that for some uses, the open norm would allow unlicensed (and in some cases costless) use that would otherwise require licensing and thus would involve transaction costs and the transfer of license fees from user to right holder or the risk of infringement.*

Most of the uses that an open norm (as specified in Section 3.4) would facilitate are likely to take place in the current situation without an open norm. Chapter 2 set out a variety of unlicensed practices, which occur despite their uncertain legal status. In various instances, courts permitted these practices despite the fact that a legal basis within the current system of exceptions and limitations was uncertain. At present, these uses lack a legal basis or have another, surrogate and therefore *a priori* weaker, legal basis (legal artifices).

From the design of the open norm in Section 3.4, which coexists with the current set of exceptions and limitations, it follows that if a use is permitted in the current system, it is also permitted in the system with an open norm. Hence, copyright protection can decrease for some specific uses, but not increase. Based on the theoretical notions outlined in Section 5.2, one can deduce that a reduction in protection gives rise to three potential economic effects:

1. It may weaken the incentive to create;
2. It may facilitate creators who use protected works of others;
3. It may increase dissemination of works.

The following three sections analyse the extent to which these three effects are likely to materialise.

### 5.3.1 Dynamic Effects: How does Copyright Flexibility Affect the Incentives of Creators?

To analyse the impact of the negative effect of permitting a use on the incentive to create, one would ideally identify all those cases where due to flexibility, the net reward to a creator would decrease. Such cases would have to fulfil two conditions: (i) the use benefits from the open norm and (ii) the use currently generates (higher) rewards for the creator. Table 1 shows these two dimensions. In theory, one would want to classify all uses of copyrighted works in one of the four cells in Table 1. For example, if a use does not generate a reward in the current copyright system due to lack of compliance with copyright, it would fall in the last column. Even if the use would benefit from the open norm, there would be no reduction in the incentive to create since such incentive is absent in the current situation. It is however not possible to categorize all uses according to these two dimensions, due to lack of data on copyright transactions and due to the fact that the application of the open norm depends on a case-by-case assessment by the courts.

It is important to note that the open norm specified in Section 3.4 has clear boundaries. The application of the open norm tests for adverse effects on the commercial opportunities and legitimate interest of the rights holder (the three-step test). In case of severe adverse effects on the rights holder, the open norm does not apply. This means that the negative effect of an open norm on the reward to the creator is limited by the design of the open norm. Put differently, uses that currently (or in the future could) generate a reward to the creator are less likely to benefit from the open norm.

**Table 1** Uses that are currently licensed are less likely to benefit from the open norm

	Currently licensed use	Currently unlicensed use
Use benefits from open norm	Effect on incentive to create if license fee decreases sufficiently	No effect on incentive to create
Use does not benefit from open norm	No effect on incentive to create	No effect on incentive to create

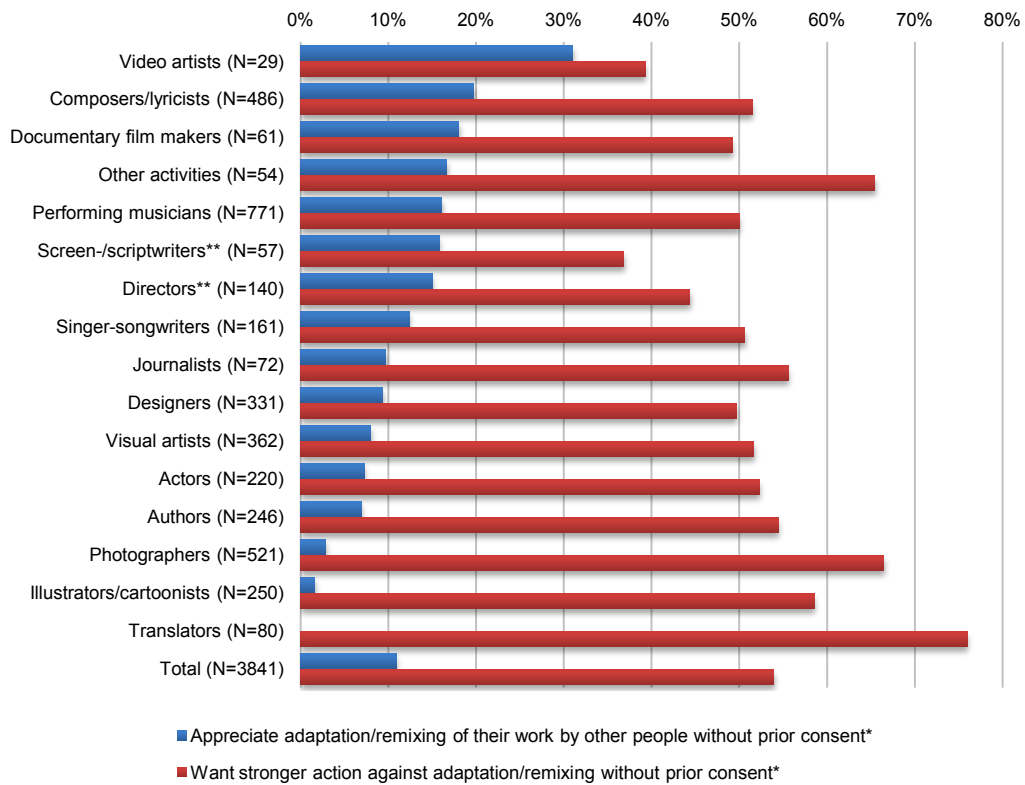
A similar argument is made by Rogers *et al.* (2010) in relation to exceptions and limitations. There is no known evidence that the three new copyright exceptions proposed by Andrew Gowers to facilitate consumer interaction – format shifting, parody and UCC – cause any kind of economic damage to rights holders, i.e., lost sales from substitution effects and/or reputational effects. They further claim that reasons for tighter copyright law or Private Copying Remuneration (PCR) systems are often built upon assessment of enhanced consumer value rather than economic damage, and that PCR systems lack theoretical or empirical economic support of damage to rights holders. In conclusion, they state that exceptions cannot reduce incentives to create new works, since such dynamic effects can only occur if there are lost sales now that affect the ability to generate new work in the future.

Conversely, the uses that are expected to benefit from an open norm currently do not generate (substantial) reward to the creator in most cases. Throughout this report (mainly Chapters 2 and 4), it was shown which uses would benefit from flexibility. As far as is known, most of these uses currently do not generate financial benefits for the relevant right holders. Basically, most uses take place without authorisation and thus without reward for the creator. The legal basis for these uses is therefore weak, giving rise to legal costs for all parties involved.

There are nonetheless cases in which collective rights management organisations currently receive financial rewards from UCC-platforms such as YouTube. It cannot be ruled out that their bargaining position towards such platforms would deteriorate due to an open norm. This could eventually result in a lower licensing fee and thus decrease the revenue flow to collective rights management organisations and right holders that are members of such organisations. In other words, it cannot be ruled out that due to a weakened bargaining position, in some cases licence fees for authors may decrease under the open norm that was specified. To the extent that such cases materialize, the total welfare effect will be limited as the primary effect is a transfer between users and authors.

The interviews with stakeholders revealed that creators generally worry that an open norm would hurt their earning capacity because they would lose (the right to) remuneration for certain uses of their work. Concurrently they argue that the benefits of an open norm when they use other protected works as an input – see Section 5.3.2 – are limited and would primarily befall publishers/producers. Survey results from Weda *et al.* (2011) confirm this concern. Figure 1 shows that most artists do not appreciate adaptation and remixing of their work by others, at least not without their prior consent. About half of them endorse stricter measures to prevent un-consented remixing and adaptation of their work.

**Figure 1 Artists and creators express little appreciation for adaptation/remixing, more appreciation for stronger copyright control**

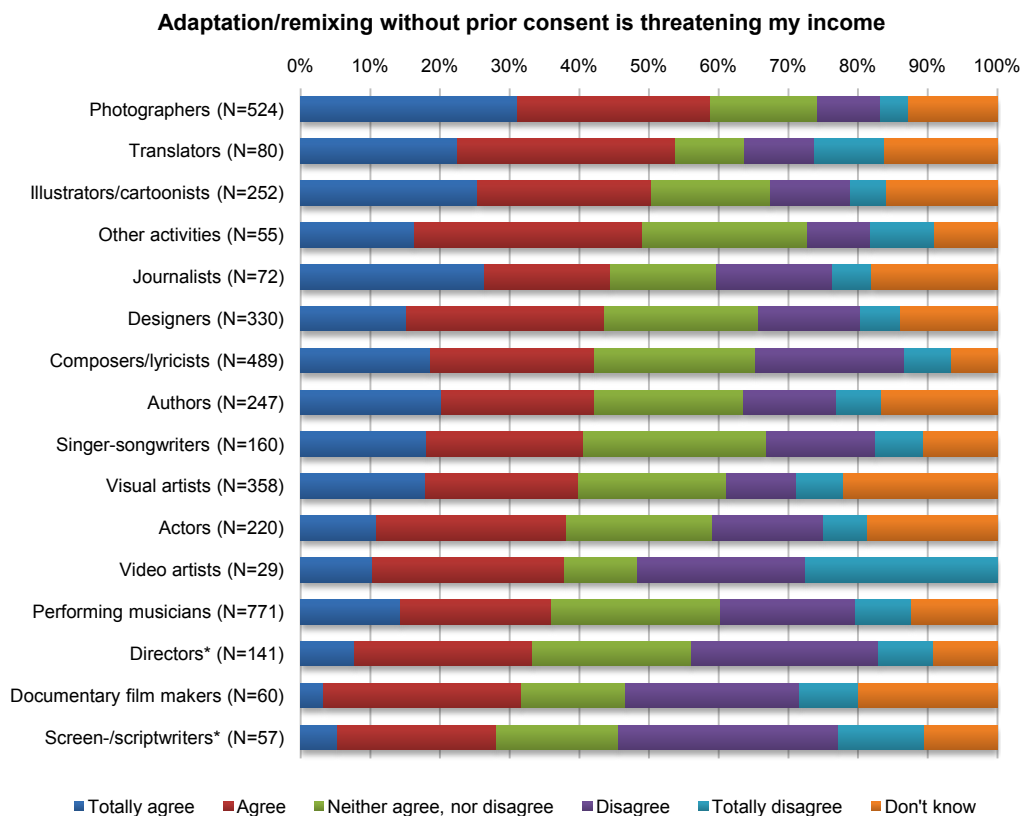


Source: SEO Economic Research; \* = Sum of 'Totally agree' and 'Agree'; \*\* = Excluding documentary filmmakers

Similarly, Figure 2 shows that 30 % to 60 % of Dutch creators feel threatened by adaptation and/or remixing of their work without authorisation.



Figure 2 30 to 60 percent of Dutch creators feels financially threatened by adaptation/remixing



Source: SEO Economic Research; \* = Excluding documentary filmmakers

A relevant question is why the uses identified in this report currently are not based on authorisation from the rights holder. In theory there are four reasons. Firstly, the user may not be willing to pay a (sufficiently high) license fee that would be acceptable for the right holder (in economic terms, the user's **willingness to pay** is below the reservation price of the right holder). Secondly, the user may not be able to find the right holder and negotiate with him or her due to **transactions costs**. This is particularly likely when a service would require licences from a very large number of copyright holders, as is the case for search engines and aggregators. Thirdly, the user may be **opposed to licensing** as a matter of principle (*e.g.* users providing information services). Fourthly, the user may be **unaware of copyright** altogether (think of consumers/hobbyists uploading a home video to YouTube). In practice, a combination of these four factors might be relevant for a user.

### 5.3.2 Costs of Producing a Work Decrease

The costs of using a protected work in inventing, creating and commercialising a new work generally consist of a mixture of licensing fees, transaction costs and costs associated with infringement liability (legal costs).<sup>99</sup> A user may vary these costs to create the 'preferred mix': the risk of infringement for example can be reduced by paying license fees. Also, transaction costs can be minimized by refraining from licensing, et cetera. Non-professional users may be unaware

<sup>99</sup> Note that these costs vary significantly between creative disciplines, depending on the number and portions of protected works a creator uses as input.

of copyright and fail to take the risk of infringement into account. It is important to distinguish these different cost components. For example, the introduction of an open norm could formally strengthen the legal position of a user and potentially lower the costs of licence fees, but in practice legal costs could rise due to the costs of building the open norm defence in court.

The effect of introducing flexibility thus materialises when these costs decrease for a creator. If the work were also produced in a situation without flexibility, the effect could be a cost saving for the producer. If the production were *chilled* in the situation without flexibility (put differently, the costs are prohibitive in the current situation), a sufficient cost decrease could trigger the production of new works. Table 2 summarizes these possibilities.

**Table 2** Use of protected works in creative production and effects of introducing flexibility

	Current use, authorised	Current use, unauthorised	Use currently chilled
Use benefits from open norm	Effect insofar user gains bargaining power in licensing, limited effect on production	Effect: improved legal position for user, limited effect on production	Effect: new production is triggered by flexibility
Use does not benefit from open norm	No effect	No effect	No effect

When a use does not benefit from an open norm, it does not stimulate producers of new works who use works as an input. When a use currently takes place already with authorisation, the effect may consist of enhanced bargaining power for the user, with limited effect on the goods and services produced.

In the remainder of this section, we consider two types of production processes: 1) aggregators/search engines who rely on large amounts of complementary inputs and analyse links between those inputs to provide information tools; and 2) creative re-users who transform creative content into new creative content.

### Aggregators/Search Engines

Professional creators that aggregate the works of a large number of different rights holders may in theory benefit from an open norm. An example would be Google's information services. Especially since the different inputs are complementary in producing information services, too strict copyright would risk creating inefficiencies (the anti-commons argument made before). For those businesses that are currently already active on the market, the benefit is an improved legal position which in the long run may result in cost savings on resources needed for legal disputes.<sup>100</sup> The question arises whether the investment and in particular the innovation decisions of businesses that provide digital products and services (such as search engines, software companies and IT consultants) are influenced by the copyright regime. Box 14 presents a survey on this topic.

<sup>100</sup> In the short run, cost savings on resources needed for legal disputes are uncertain. It is likely that establishing precedents, e.g. by means of test cases to determine the scope of the open norm, will in the short run increase rather than decrease litigation costs.

### Box 14 Effect of copyright on innovation by 'digital' small and medium enterprises

IFF Research conducted a survey among UK small and medium sized enterprises (SMEs), asking companies their views on and experiences with copyright laws and gathering evidence on whether UK SMEs are adversely affected by current copyright laws. They have special attention for 'digital technology' SMEs, such as IT businesses, since they are thought to be most affected by copyright rigidities and possible damage claims resulting from infringements.<sup>101</sup>

The survey reveals that copyright laws particularly affect the business decisions of digital SMEs: one in four digital companies has at some point decided not to pursue a product or opportunity because of the possibility of copyright problems (one in ten among all SMEs), while 15 % of digital SMEs have changed a product to avoid using copyrighted material (2 % among all SMEs).<sup>102</sup> The latter, changing a product, most often had impact on business and on the time and money spent on finding alternative material (IFF Research, 2011, p. 19).

However, although the survey shows that many digital SMEs are in favour of a fair use provision in UK copyright law similar to US fair use doctrine, they were not asked how such a provision would have altered their business decisions. In other words, it is uncertain whether a different copyright regime would result in less business chilling or less resources spent on finding alternative input material. Moreover, in contrast to the significant business chilling that is suggested by the incidence of ideas being dropped or modified, only 7 % of digital SMEs feel hampered by UK copyright laws when innovating, 5 % feels their business could perform better if it were not for UK copyright laws, and merely 4 % has considered moving their business because of UK copyright laws (IFF Research, 2011, p. 9).<sup>103</sup>

Interest groups claim that a more flexible copyright regime increases chances of attracting (economically important) high-tech companies to a country, or increases chances of such companies emerging because it would create a more attractive business climate. For instance, in the Hargreaves Review the founders of Google claimed they could not have started their company in Britain for copyright reasons (Hargreaves, 2011, p. 44). However, there is no known empirical evidence to support this hypothesis. First of all, Google was not guaranteed a warm welcome when it introduced its information services in the US. Despite the fair use doctrine, there were lawsuits against Google for Google Image Search<sup>104</sup> and Google Book Search<sup>105</sup>.

Secondly, the choice for a business' geographic location is the result of a myriad of reasons, for instance spill-over effects, the quality of human capital, path dependency and labour market regulation (Blair & Premus, 1987; Decker & Crompton, 1993; Porter, 2000; Pull, 2002). It is next to impossible to determine the 'weight' of copyright flexibility in this consideration and to establish whether more copyright flexibility in Europe would result in the emergence of geographic clusters of high-tech companies, comparable to *Silicon Valley* in the US. With reference to the most striking examples in this report, search engines and aggregators, it should be noted that such services did emerge in Europe, even in the Netherlands (e.g. search engine

<sup>101</sup> The digital SMEs include companies in remote retail, software, film & television, telecommunications, computer consultancy, other IT, data processing, news agencies, advertising and DVD rental (IFF Research, 2011, p. 3, footnote 2).

<sup>102</sup> These figures, and especially the differences between digital and all SMEs, seem primarily the result of the nature of product development by digital SMEs. Half of them use copyrighted materials by others in product development (with permission), while 'only' 16 % of *all* SMEs use copyright protected inputs.

<sup>103</sup> These percentages are likely to be even lower among *all* SMEs, for reasons discussed in footnote 102.

<sup>104</sup> *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006); [Perfect 10, Inc. v. Google, Inc.](#), No. CV 04-9484 AHM (SHx) (C.D. Cal. July 26, 2010)

<sup>105</sup> *The Authors Guild, Inc., et al. v. Google Inc.*, -- F.Supp.2d ----, 2012 WL 1951790, 102 U.S.P.Q.2d 1916, S.D.N.Y., May 31, 2012 (NO. 05 CIV. 8136 DC, 10 CIV. 2977 DC); 770 F.Supp.2d 666, 2011-1 Trade Cases P 77,387, 2011 Copr.L.Dec. P 30,057, 79 Fed.R.Serv.3d 114, 98 U.S.P.Q.2d 1229, S.D.N.Y., March 22, 2011 (NO. 05 CIV.8136(DC))

*Vindex* and *Ilse, Zoekallehuizen.nl*, et cetera) and even before Google existed. Although Dutch search engines have been marginalized by in particular Google, this cannot be attributed to legal differences in copyright systems. The claim that domestic economies benefit from copyright flexibility by attracting or stimulating the emergence of ‘internet powerhouses’ the likes of Google and Apple is, at best, speculative.

Since the products and services of search engine providers and other aggregators are not blocked by legal disputes or the risk of infringement, the effect of introducing an open norm on the services available to end users is expected to be limited. This hypothesis is supported by the fact that there are no known examples of aggregator services (e.g. search engine features) that exist in the US and not in Europe for reasons related to differences between a fair use doctrine and a system of exhaustively enumerated exceptions and limitations respectively.<sup>106</sup>

### **Creative Re-use**

Primary examples of professional creators that use works of a manageable number of rights holders include musicians, writers, documentary filmmakers and video artists. Along the lines of Table 2, there are three ways in which flexibility could facilitate their creative production:

- improve the bargaining position for uses that currently take place with authorisation;
- improve the legal basis for uses that take place currently without authorisation;
- enable uses that are chilled by copyright considerations currently, but would emerge if an open norm were introduced.

Interview partners pointed out that for substantial inputs (i.e. large parts of previous works), current practice is that creators seek authorisation. This would not be different with an open norm. Moreover, it would be unlikely that an artist’s bargaining position would improve when negotiating for a use that clearly falls outside the scope of the open norm. For rather insignificant, smaller uses (such as small samples in electronic music production), current practice is that it may occur that material is used without authorisation. Again, this would not be different with an open norm. The effect of the open norm would be that the underlying legal basis of such acts would strengthen. Lastly, it may be possible that in the current system some creators are discouraged to use certain inputs – because of high licensing fees and/or transaction costs – and that these uses would be facilitated with an open norm.

*User Created Content* relates to non-professional re-use of protected works by consumers, amateurs and hobbyists. Consumers may benefit from an open norm mainly because their legal position is strengthened. Currently they are most likely not aware of copyright compliance or do not take the risk of infringement into account. Moreover, their practices are not legally contested (rather the platforms that facilitate UCC, such as YouTube, face the risk of being legally contested; as observed in Section 2.2.2, however, in Europe license agreements have been concluded between these platforms and content providers/collecting societies). Hence, the economic effect on the creation of UCC by consumers is expected to be limited.

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<sup>106</sup> Absence of US-based internet services in Europe, e.g. content providers such as *Pandora* and *NetFlix*, is predominantly the result of licensing issues. See: Weda *et al.* (2012), *Digitale drempels. Knelpunten voor legaal digitaal aanbod in de creatieve industrie*. Amsterdam: SEO Economic Research.

### 5.3.3 Dissemination of Final Products

Theory predicts that a more permissive copyright design increases the dissemination of works. Simply put, it decreases the ‘price’ of consuming a work when certain types of use are allowed without licensing or authorisation. This leads to an increase in its consumption. Whether this effect comes into play and creates economic effects when an open norm is introduced depends on (i) the good or service that benefits from the open norm, (ii) the nature of the use that benefits from the open norm and (iii) to what extent demand increases when the ‘price’ falls (the demand curve). The price fall effect will most likely be weak, however. Basically, if currently the producer of a final product pays a price for using a work, it is unlikely that that use would pass the test of the open norm, since it is likely to conflict with the normal exploitation of the work used and therefore would not pass the three-step test.

The case of products used for learning and education might be a different one. In this respect, a number of issues are important. Firstly, current practice in the Netherlands is that actors in the education industry negotiate with publishers and other suppliers of educational material. It remains to be seen whether an open norm would increase the dissemination of materials to students, relative to the current situation. Secondly, publishers may take the copying behaviour of their customers into account and price discriminate accordingly (Liebowitz (1986)). As a result, they charge libraries higher subscription fees than individual customers. Put differently, the practice of copying would not affect the incentives for creation.

## 5.4 Flexibility in Permitting (New) Uses

*The second category of economic effects of introducing copyright flexibility relates to the legal delineation between permissible use and infringement. This provides opportunities for innovative entrepreneurs and further affects legal certainty and the burden on regulatory and legislative bodies.*

The effects of the *flexible character* of an open norm are even more difficult to foresee than the effects of a slight weakening of protection. Three effects can be distinguished. First, it provides opportunities for those entrepreneurs that innovate products and services that rely on unforeseen use of protected material. Second, flexibility may make it more difficult for economic actors to predict/ascertain the distinction between infringement and permitted use. Third, flexibility in the law affects the burden on courts and legislative bodies and policy makers involved in lawmaking.

### 5.4.1 Innovation: Unforeseen Uses

An open norm in the copyright system may permit a use that would otherwise be an infringement; this was the subject of analysis in Section 5.3. Importantly, this use is not specified in a precise, closed way. This ‘open nature’ may encourage entrepreneurs whose innovations rely on unforeseen uses of protected works. It reduces the costs associated with the risk of infringement and may thus stimulate innovation. It could be argued that current exploitation of protected works (commercialisation), as was discussed in the previous paragraph, could also be established with a new exception, while unforeseen uses by definition cannot be included in the list of exceptions and limitations.

It is claimed by Fred von Lohmann, senior copyright counsel at Google, that fair uses of copyrighted works serve as part of the “start-up capital” for technology innovators, as many innovations depend on fair use to make end products (e.g., digital video recorders and mp3 players) viable (Von Lohmann, 2008).<sup>107</sup> Furthermore, he argues that “the impact of any particular innovation may be difficult to predict on an ex ante basis” and that fair use “should permit many private copying seeds to be sown, leaving to legislators the task of weeding the garden of dangerous innovations” (Von Lohmann, 2008, p. 15). In other words: “innovate broadly first, regulate narrowly later” (Von Lohmann, 2008, p. 25).<sup>108</sup> Differentiated (strictness of) copyright protection corresponds with economic theories suggesting that the efficient level of copyright protection differs according to product characteristics, although flexibility generates greater transaction costs due to additional legal complexities (Handke, 2010).

#### 5.4.2 Legal Uncertainty

Lerner (2011; 2012) assessed what impact court rulings on (alleged) copyright infringements by cloud computing firms had on the level of venture capital investments flowing into the sector. In the US, where the Court of Appeals for the Second Circuit ruled in favour of remote storage digital video recording (the *Cablevision* case), he estimates incremental venture capital investments in cloud computing firms of \$ 730 million to \$ 1.3 billion over the two-and-a-half year after the decision (Lerner, 2011). Meanwhile in France and Germany, where court rulings were against remote storage digital video recording (the *Wizango* case in France) or ambiguous (the *Shif.tv* and *Save.tv* cases in Germany), he estimates that venture capital investments in cloud computing firms dropped with \$ 4.6 and \$ 2.8 million per quarter, respectively (Lerner, 2012). Both studies suggest that court rulings on the scope of copyright can have a significant impact on venture capital investment in the sectors in question, and therefore on innovation. Booz & Company make similar observations from a survey among venture capitalists: a large majority of them is uncomfortable investing in business models beset by regulatory ambiguity, while holding digital content intermediaries (e.g., search engines and content providers) liable for the content uploaded by users would significantly reduce the pool of interested investors (Merle, Sarma, Ahmed, & Pencavel, 2012).

These studies confirm that negative legal rulings and legal uncertainty hamper venture capital flows into a sector and therefore innovation. In itself, this is not a ground-breaking observation. How can it be translated to the difference between a closed set of exceptions and limitations and an open norm? An open norm – as would a fair use doctrine – requires jurisprudence to be established to determine what uses are and are not exempt from copyright. This case-by-case evaluation of the open norm will affect investment flows, just as court rulings on uses that do not ‘fit’ the closed set of exceptions and limitations do now. It seems unlikely that in the short run this type of capital flow volatility, resulting from court rulings (or lack thereof), will be reduced by an open norm. In the long run, however, an open norm is likely to result in a more solid legal

<sup>107</sup> Handke (2010, p. 9) makes a similar claim when stating that “[w]here the potential for industry adaptation and user innovation in markets for copyright works is ignored, there may be a bias in favour of greater copyright protection”.

<sup>108</sup> Von Lohmann claims that there are two market failures preventing sufficient incentives for innovation: established firms are unable to deploy or respond to disruptive innovation (Christensen’s (1997) “innovator’s dilemma”, making exclusive control over private copying by right holders undesirable from an innovation perspective) and some disruptive innovations are intentionally blocked by incumbents (Picker, 2002).

foundation and therefore creates more legal certainty. In the US, there is debate on the question whether fair use does indeed create legal certainty. According to some, fair use basically amounts to ‘the right to hire a lawyer’. By contrast, Sag (2012) claims that “the fair use doctrine is more rational and consistent than is commonly assumed”. He reaches this conclusion after analysing a database of 280 fair use cases decided in US district courts, from 1978 until 2011. He finds several parameters that have a significant explanatory power for the court ruling. As was also concluded in the Israeli case study, however, it takes time and parties willing to experiment for case law to emerge. Until then, flexible copyright may not yield more legal certainty. On the other hand, the absence of clear legal basis for court decisions to allow certain uses, as was seen in Chapter 2, also leads to legal uncertainty.

### 5.4.3 Burden on Regulatory and Legislative Bodies

Flexibility is likely to impact on all market actors involved, since the legal basis for a use will change, which makes it necessary to amend business processes and strategies for compliance and legal disputes. Additionally, there will be an impact on courts that will have to apply the open norm. It may be necessary to develop expertise which also involves a learning process. Insofar as lawmakers and policy makers are now spending efforts to debate revisions to exceptions and limitations, the introduction of an open norm may reduce the need for those efforts. Thus, it is likely that there are converse short-term and long term-effects on the burden on legislative bodies, other governmental bodies and policy makers (see also footnote 100).

Moreover, these costs depend on whether a European or a national open norm is established: a harmonised open norm allows pan-European precedents (case law) to develop and thus reduces the legislative/regulatory burden on individual countries.

## 5.5 Conclusion

This chapter analysed the economic effects of introducing an open norm. The economic literature on fair use generally bears little significance to the open norm in a European context, since an all-or-nothing interpretation of fair use is misleading in the context of the existing system of exceptions and limitations. The available macro studies cannot be translated to the Dutch context. The experiences of Israel and South Korea, where a fair use defence was introduced recently, have also been reviewed. Unfortunately, these countries have not produced effect studies.

In this chapter the introduction of an open norm was analysed from two angles. It constitutes for specific cases a (mild) reduction of protection, subject to the application of the open norm-test by the courts on a case-by-case basis. As such, it may give rise to a reduction in reward for creators who want to commercialise their work. This report concludes that this effect is likely to be limited, because the open norm is designed in such a way that it does not apply when it would lead to a significant decline in reward to the creator. Moreover, a large part of the uses that would benefit from the open norm are expected not to generate reward to creators in the present situation.



Therefore, the introduction of an open norm might well be a *Pareto improvement*; some actors benefit from it while nobody suffers from it. The benefit that was investigated in this report is for professionals and amateurs that use protected works to create new works. However, many of the acts that we identified as beneficiaries of an open norm seem not to be deterred by the lack of it. The chilling effect of the lack of flexibility was not supported by the available data, even though it is worth mentioning that such chilling effect are by nature hard to observe. These acts currently have a weak legal basis, but courts have in some instances found artifices to accommodate them. At first sight, the main effect of an open norm for producers of new works thus is an improved legal position. Yet, the benefits of this improved legal position may not materialise on the short run. To acquire legal certainty, actors involved must ‘try’ the open norm in court and allow for case law to develop.

Whether the effect of an open norm indeed is a Pareto improvement which leaves no party worse off in each specific case cannot be foreseen. The open norm may shift the balance in bargaining power for practices that are currently licensed, such as contracts between collective rights organisations and UCC-platforms. This effect is however limited to cases where both parties believe that the licensed use might benefit from the open norm; bargaining power is not expected to change in clearly commercial transactions. Other strategic effects that could not be assessed in this study are the externalities arising when courts start to look at other court cases to decide on the outcome. This has also been termed ‘circularity’. The risk attitudes of users then become important: When a user feels uncomfortable with relying on an open norm and buys a licence instead, this action may perhaps make it more difficult for another user to rely on an open norm in a similar case.

Thus, the main effects of introducing an open norm are of legal nature: it changes the legal position of some businesses and therefore affect the costs these businesses make to comply with copyright. These costs may only decrease on the longer run. The effect on products and services available in the market is likely to be secondary to these legal effects.





## 6 Conclusion

### Research Question

This study analyses the law and economics of introducing flexibility in the system of exceptions and limitations in Dutch copyright law. Such flexibility would exist in an open norm, on the basis of which the courts could decide whether certain uses of copyrighted material are permissible or not, instead of explicitly defining this in the law. The report assesses problem areas where current lack of flexibility creates legal disputes and potential barriers to innovation and production. Subsequently, the study analyses the economic rationale and effects of introducing flexibility in the Dutch legal order in the form of an open norm. The main research questions addressed in the study are:

*Which exceptions in current Dutch copyright law, or the absence of which exceptions, lead to bottlenecks for innovation and commercialisation?*

*What are the welfare economic consequences of the introduction of an open norm in Dutch copyright law? What would be the effect of such an open norm on commercialisation of protected works and the Dutch innovation climate?*

Innovation and commercialisation are the focal points of both research questions. This implies that both the current exhaustive list of exceptions and limitations and an alternative regime with an open norm are discussed and analysed within this context. The focus is on instances in which the absence of flexibility creates legal barriers to innovation, to creative re-use and commercial exploitation or to the development of new (online) business models. It also implies that debates on copyright exceptions that do not (directly) relate to bottlenecks for innovation and commercialisation are beyond the scope of this study. Examples are the suggestion in the Copyright 20©20 letter to treat the downloading of copyright protected material from unauthorized sources as an illegal act and the calls by some stakeholders to introduce new copyright exceptions or limitations for certain non-commercial uses (e.g., for music played in carnival parades and retirement homes).

### Bottlenecks Arising from the Current System

A number of situations arise that do not fit well within the current set of exceptions and limitations in the copyright system. Among these uses are the activities of search engines, either for the display of thumbnails in search results or for the dissemination of news articles; the use of works in ‘user created content’; cloud computing; data mining; distance learning; and other transformative uses, such as those of documentary filmmakers. Several cases have given rise to court proceedings. The interpretation given by courts to existing exceptions and limitations – like the quotation right, the exception for transient and incidental copying, the private copying exception, and the incidental use exception – is usually too narrow to respond to new technological developments or new behavioural patterns in the creation process or commercialisation models.

The majority of these types of uses are considered to fall outside the scope of the narrowly defined exceptions and limitations on copyright, with the consequence that such uses either may not take place at all and if they do, their legal basis is at best uncertain. Where such new forms of uses have led to legal disputes based on claims of copyright infringement, the outcome has been variable between the EU Member States both in terms of final solution and in terms of motivation. Because the system of the law is not flexible in itself, courts have increasingly come up with inventive ways to create space in the law for the uses that are not covered by the exhaustive list of exceptions, but which they felt should not be prohibited by copyright.

Although the outcome of many legal disputes may be socially desirable, the paths followed by the courts towards a solution are often open to discussion, especially if they reverse the normal burden of proof between rights owners and users, towards a regime where rights owners have to take extra measures to indicate that the rights are reserved, which may encroach upon copyright law's principle of exclusivity. In these cases the application of a well-defined open norm with specific evaluation criteria could have provided more satisfaction from a legal perspective.

In this respect, it must be emphasised that the identification of the key problem areas in this report does not purport to pass judgement on the question whether these situations would – or should – be exempted under an open norm. This decision would have to be made by a judge on a case-by-case basis according to a concrete open norm that is yet to be defined.

Technological change is not likely to slow down. Technological developments are expected to bring about new, innovative services, or services that are still 'under construction' or have not even been invented yet. These services are potentially problem areas as well, already appearing at the horizon or still lying further in the future. Either way, it is at this point difficult to foresee how far these developments will go. Therefore, a rigid system with an exhaustive list of static exceptions will continue to create new controversies with respect to future use of copyrighted material, which may hamper innovation.

Such future technologies and applications of copyrighted material are, of course, hard to describe or predict. What one can predict, however, is that it is very likely that such technologies or services will struggle to develop under the current system of exceptions and limitations.

### **Welfare Economic Effects: Three Steps**

To analyse the economic effects of an open norm, this report builds on three steps: specifying an open norm, a case study of fair use in Israel and analysis of economic effects.

#### **Specifying an open norm**

To answer the second main research question – the effects of an open norm – it is necessary to operationalise such an open norm. As it currently does not exist, this report defines an open norm. Although it is not to be seen as the preferential model for future legislation, it is specified according to some evaluation criteria. Among these criteria are (i) removing undesirable legal barriers for creative re-use and commercial exploitation, while taking due account of the legitimate interests of authors, right holders and third parties; (ii) offering guidance to the legal interpretation of the rule, thus enhancing legal certainty for all stakeholders involved; and (iii) stay

close to European legal traditions. Inspired by the European Copyright Code, developed by the Wittem Group, this results in the following specification of an open norm:

*'Any other use that is comparable to the uses enumerated in Chapter 6 of this Act [i.e., the Dutch Copyright Act] 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 right holder, taking account of the legitimate interests of third parties.'*

This open norm would coexist with the specifically enumerated exceptions and limitations in the current Dutch Copyright Act. It would authorize any other use that is comparable to the uses expressly permitted under the exceptions and limitations listed in Chapter 6 of the Copyright Act, subject to the application of the corresponding requirements of the relevant exception or limitation and the operation of the three-step test. This means that all existing exceptions and limitations, such as incidental use, the quotation right, the parody exception, the private-copyright exception, and so on, would remain intact and their scope would be extended by an open-ended rule.

Although it would require legislative action by the EU legislator, it has several benefits over the other models examined. First, by combining a set of specifically enumerated exceptions and limitations with a generic open norm offering flexibility for any use that is comparable to the uses specifically listed, the European Copyright Code has prevalence over the models that national legislators are permitted to adopt under the current legal framework, which at best are semi open. Second, the system proposed in the European Copyright Code keeps closest to the European legal traditions.

It must be emphasised that the concretised norm does not imply that uses permitted are without compensation. If the use is comparable to a use permitted by a limitation that is subject to the payment of compensation, the requirement that the corresponding requirements of the relevant limitation must be met ensures that the use under the open norm would inevitably also be subject to the payment of compensation.

#### **Economic rationale for fair use in Israel**

In Israel, a fair use defence was introduced into the Copyright Act in 2007. All in all, the motivations for this, as well as its acclaimed effects, are in line with the European debate. The introduction of fair use seems to be motivated mainly by legal arguments. No systematic ex ante or ex post economic evaluations of fair use in Israel are available. The economic consequences of the fair use regime in Israel will become clearer in the next few years, as more information will be available on how actors change their behaviour and how courts apply the law.

What is already clear is that fair use is a fundamentally different system than a system based on a closed norm, in the sense that it explicitly recognizes the rights and interests of users of copyrighted works. Courts are given the discretion to balance the rights of copyright holders against the interests and the rights of users/consumers. This gives users/consumers more space to use copyrighted works. Aggregators, libraries and higher education institutions have more certainty that certain uses will not be considered an infringement and will therefore be able to make more (and possibly better) use of copyrighted works.

The flexibility of use relating to new technology, business models and boundary cases potentially comes at the cost of increased uncertainty concerning the boundaries between fair use and infringement, especially in the first years after the introduction of fair use. The development of case law is very important, because courts eventually decide which types of uses are permitted and which are not. Until then, the way uncertainty is dealt with – not in the least by users themselves – will critically determine the impact of fair use. Higher education institutions and libraries are coordinating efforts and seem to be willing to take risks when they consider a certain use to be fair. This is crucial in avoiding chilling effects and circularity of fair use. The authority of the Minister to create guidelines and safe harbours for fair use would also limit the chilling effect.

### **Incentives to create and commercialise works**

The specified open norm constitutes for specific cases a (mild) reduction of protection, subject to the application of the open norm test by the courts on a case-by-case basis. In welfare economic terms, this potentially lowers both the input costs (when works of others are being used) and the commercial returns of creative production. The available data on the magnitude of these opposing effects was reviewed but did not allow for a conclusion on specific markets.

However, the reduction in commercial returns is likely to be limited, because the open norm is designed in such a way that it does not apply when it would lead to a significant decline in reward to the creator. Moreover, a large part of the uses that would benefit from the open norm are expected not to generate reward to creators in the present situation. The reduced protection of works may benefit professionals and amateurs that use protected works to create new works. However, many of the acts that were identified as beneficiaries of an open norm seem not to be deterred by the lack of it. The chilling effect of the lack of flexibility was not supported by the available data, even though it is worth mentioning that such a chilling effect is by nature hard to observe. These acts currently have a weak legal basis, but courts have in some instances found artifices to accommodate them.

### **Overall conclusion on welfare economic effects**

At first sight, the main effect of an open norm for producers of new works thus is an improved legal position. Yet, the benefits of this improved legal position may not materialise in the short run. To acquire legal certainty, actors involved must ‘try’ the open norm in court and allow for case law to develop. Whether the effect of an open norm is a Pareto improvement, which leaves no party worse off in each specific case, cannot be foreseen. The open norm may shift the balance in bargaining power for practices that are currently licensed, such as contracts between collective rights organisations and UCC-platforms. This effect is, however, limited to cases where both parties believe that the licensed use might benefit from the open norm; bargaining power is not expected to change in clearly commercial transactions.

Thus, the main effects of introducing an open norm are of a legal nature: it changes the legal position of some businesses and therefore affects the costs these businesses make to comply with copyright. These costs may only decrease in the longer run. The effect on products and services available in the market is likely to be secondary to these legal effects.

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## Appendix A List of Interview Partners

<b>Organisation</b>	<b>Interview partner(s)</b>
Buma/Stermra	Robbert Baruch Anja Kroeze
Dutch Directors Guild	Monique Ruinen
Google Inc.	Simon Morrison
Google Israel Ltd.*	Keren Be'er
Ministry of Justice Israel*	Amit Ashkenazi
National Library Israel*	Risa Zoll Rivka Shveiky
NVPI	Paul Solleveld Wouter Rutten
Platform Makers	Erwin Angad-Gaur Janne Rijkers
University of Haifa, Faculty of Law*	Niva Elkin-Koren Dalit Ken-Dror

\* = Case study Israel (Chapter 3)



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