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Why Cherry-Picking Never Leads to Harmonisation

The Case of the Limitations on Copyright under Directive 2001/29/EC

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Abstract: The article examines whether the norms laid down in the Directive in relation to the exceptions and limitations on copyright and related rights can be conducive to a sensible degree of harmonisation across the European Union. Before discussing the degree of harmonisation achieved so far by the Directive, the first part gives a short overview of the main characteristics of the list of exceptions and limitations contained in Article 5 of the Directive. A comprehensive review of the implementation of each limitation by the Member States is beyond the scope of this article. The following section takes a closer look at three examples of limitations that have led to legislative changes at the Member State level as express measures towards the implementation of

the Information Society Directive, that is, the limitations for the benefit of libraries, for teaching and research, and for persons with a disability. These exceptions and limitations were later on also identified by the European Commission as key elements in the deployment of a digital knowledge economy. The analysis will show that the implementation of the provisions on limitations in the Information Society Directive did not, and probably cannot, yield the expected level of harmonisation across the European Union and that, as a consequence, there still exists a significant degree of uncertainty for the stakeholders regarding the extent of permissible acts with respect to copyright protected works.

Keywords: Copyright, Exceptions, Limitations, Three-Step Test, Information Society Directive, Harmonisation

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A. Introduction¹

1 Nine years after the adoption of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society,² the full harmonisation of the exceptions and limitations on copyright and related rights across Europe still seems as distant as ever. From the very start of the legislative process towards the adoption of the Directive, the harmonisation of this area of copyright law 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

was a daunting task for the drafters of the Information Society Directive. The hesitations of the European lawmaker were reflected in the final version of the Directive, which leaves Member States tremendous leeway in the implementation of the norms laid down in the Directive. This explains in large part the delay experienced not only in the adoption of the Directive itself, but also in its implementation by the Member States.³

2 The regime 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.⁴ 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.⁵ Moreover, instead of simply reproducing the wording of the Directive, most Member States have also chosen to interpret the limitations contained in the Directive according to their own traditions. 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. What's more, the search for the proper balance of interests between rights owners and users in the digital age is a continuously ongoing process; Member States are still fine-tuning the provisions on exceptions and limitations in their copyright act.

- 3 In the following pages, I will examine whether the norms laid down in the Directive in relation to the exceptions and limitations on copyright and related rights can be conducive to a sensible degree of harmonisation across the European Union. Before discussing the degree of harmonisation achieved so far by the Directive, I shall first give a short overview of the main characteristics of the list of exceptions and limitations contained in Article 5 of the Directive. A comprehensive review of the implementation of each limitation by the Member States is beyond the scope of this article. I will therefore take, in the following section, three examples of limitations that have led to legislative changes at the Member State level as express measures towards the implementation of the Information Society Directive, that is, on the limitations for the benefit of libraries, for teaching and research, and for persons with a disability. These exceptions and limitations were later also identified by the European Commission as key elements in the deployment of a digital knowledge economy.⁶ The analysis will show that the implementation of the provisions on limitations in the Information Society Directive did not, and probably cannot, yield the expected degree of harmonisation across the European Union and that, as a consequence, there still exists some uncertainty for the stakeholders regarding the extent of permissible acts with respect to copyright protected works.

B. Article 5 of Directive 2001/29/EC

- 4 Article 5 of the Directive is divided into five paragraphs: a first paragraph concerns a mandatory exception regarding transient and incidental acts of

reproduction; a second contains five optional limitations to the right of reproduction; a third paragraph sets out fifteen optional limitations to the rights of reproduction and communication to the public; a fourth paragraph allows Member States, where they provide for a limitation to the right of reproduction, to provide for a similar limitation to the right of distribution; and a fifth paragraph codifies the rule otherwise known as the “three-step test”. Hence, Member States are allowed to adopt limitations on the rights of reproduction and communication to the public. However, the current landscape of limitations on copyright and related rights in Europe suffers from several inconsistencies and faces important challenges with respect to the proper functioning of the copyright system in a digital knowledge economy. As described in more detail below, the main source of legal uncertainty derives to a large extent from the structure and content of the Information Society Directive, namely from the fact that the list of exceptions and limitations is exhaustive, that the vast majority of these are optional, and that there are no clear guidelines regarding the contractual overridability of limitations.

I. Exhaustive list of limitations

- 5 A first source of uncertainty lies in the question of whether the system of limitations on copyright and related rights as laid down in the Directive is open or closed. In other words, does the system of limitations on copyright and related rights allow Member States to adopt other limitations in their national legal order than those mentioned in the Directive? Opinions in the literature are strongly divided on this point. Some firmly believe that the regime of limitations set out in the European legislation indeed forms a closed system,⁷ while others see a possibility for Member States to adopt, either through legislation or by judicial interpretation, other limitations that do not appear in the texts of the directives.
- 6 The Information Society Directive does not unequivocally provide for a closed list of limitations. Although Recital 32 of the Information Society Directive specifies that the list of limitations on copyright and related rights provided in Article 5 is exhaustive, Member States are allowed, pursuant to Article 5(3) o), to provide for limitations for certain uses of minor importance where limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community. Clearly, the “grandfather clause” of Article 5(3)o) reflects the principles of subsidiarity and proportionality, and removes some of the rigidity inherent to an exhaustive list of limitations.⁸

- 7 The European legislator's apparent decision to restrict the 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 against the use of an exhaustive list. First, as the Legal Advisory Board (LAB) already pointed out early on, harmonisation does not necessarily mean uniformity.⁹ According to the LAB, rules at the EC level should allow distinctive features found in national legislations to subsist as long as they do not hinder the internal market.
- 8 Second, previous efforts at the international level to come up with an exhaustive catalogue of limitations on copyright and related rights 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) 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 remuneration, 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 remuneration, which would have been more prejudicial to the rights owners.¹⁰
- 9 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 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.¹¹
- 10 There could be no clearer illustration of the need for a flexible regime of exceptions and limitations in the digital environment than the recent case involving the Google Image Search service.¹² An artist, who had uploaded photos of her work to her own website, brought against Google a copyright infringement case before the German courts for displaying the resized images (thumbnails) as part of the image search results. While the display of the images constitutes an act of making available to the public pursuant to Article 19a of the German Copyright Act, no exception or limitation contained in the Act directly covers Google's situation. For instance, the exception of quotation does not apply in this case, because the images in the Google 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 in the Act.
- 11 According to the German Federal Supreme Court, however, there is no infringement of copyright where the use is authorized by the author herself. 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's crawling programme, Googlebot, is designed to ignore the images disallowed by webowners. Since the artist made no use of this possibility, the Googlebot did not ignore the images in dispute. The Court decided that by showing these images, Google was not in breach of copyright because, although the artist had not explicitly consented to the use of the images, she had not blocked her website from being indexed by search engines, thus giving an implicit permission to any search engine to display the thumbnail images.
- 12 This decision guarantees that showing thumbnail images within search results is legitimate so as to allow millions of users in Germany to benefit from being able to discover visual information at the click of a mouse. While this is probably the most desirable result in terms of the public's interest in accessing information, the legal reasoning on which it is based puts the integrity of the copyright regime under strain. The idea that by failing to technically prevent the reproduction and/or communication to the public of his work the rights owner gives implicit permission to others to do so puts the copyright rule on its head. It is the equivalent of making the application of technological protection measures mandatory for rights owners as a pre-requisite to copyright protection. This is a formality in disguise, which is contrary to Article 5(2) of the Berne Convention. That the German Copyright Act did not foresee this type of activity under the list of exceptions and limitations is not surprising: technology evolves at a too rapid pace for the law to keep track. This reinforces the argument that a list of exceptions and limitations on copyright should not be set in stone but should rather be built so as to ensure some flexibility in its application, for example by introducing a "fair use" type of defence to a copyright infringement claim.

II. Optional character of the limitations

- 13 The vast majority of the limitations listed in Article 5 of the Information Society Directive is optional. While Member States arguably may not provide for any exceptions other than those enumerated in Ar-

title 5, one can have serious doubts as to the harmonising effect of an optional list of limitations on copyright and related rights, from which Member States may pick and choose at will.¹³ Although some measure of harmonisation has been achieved, because lawmakers in some Member States selected limitations from the European menu that they would not otherwise have considered, the harmonising effect is very modest at best. In practice, not only are Member States free to implement the limitations they want from the list, but they are also free to decide how they will implement each limitation. In addition, Articles 5(2) to 5(5) of the Directive contain two types of norms: one set of specific but 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. In other words, the Directive generally lacks concrete guidelines that Member States are to follow in order to determine the scope and conditions of application of the limitations. Since in many cases, simply reproducing the wording of the Directive was not an option, most Member States have chosen to interpret the limitations contained in the Directive according to their own traditions. As a consequence, stakeholders are confronted, in regard to similar situations, with different norms applicable across the Member States.

14 The European legislator's decision to opt for a list of broadly worded optional limitations is all the more surprising given that the possible consequences of a lack of harmonisation for the functioning of the Internal Market were already known. The provision allowing Member States to permit the reproduction by reprographic means is but one example of this paradox (Art. 5(2a)). In the Explanatory Memorandum, the Commission stressed that the exemption allowing the implementation of reprography regimes was left as an option in the Proposal, "despite existing differences between Member States that provide for such exemptions, as their effects are in practice rather similar". The Commission then went on to say that "the Internal Market is far less affected by these minor differences than by the existence of schemes in some Member States and their inexistence in others" and that "those Member States that already provide for a remuneration should remain free to maintain it, but this proposal does not oblige other Member States to follow this approach".¹⁴ As could be expected, the Member States that did not have a reprography regime before the adoption of the Directive have not put one in place since then, and the existing regimes in the majority of other Member States have not been streamlined.

15 Moreover, the Information Society Directive foresees the possibility to pay remuneration to the right holder for certain of the uses covered by the limitations of Article 5. As finally adopted, the Direc-

tive provides for a right to "fair compensation" in three instances: for reprographic reproduction (Art. 5.2(a)), for private copying (Art. 5.2(b)), and for reproduction of broadcast programs by social institutions (Art. 5.2(e)). Apart from these three limitations, Recital 36 states that the Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations, which do not require such compensation. According to Recital 35, the level of "fair compensation" – an unfamiliar notion in copyright law – can be related to the possible harm to the right holders resulting from the act in question. In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. By introducing the notion of "fair compensation" the framers of the Directive have attempted to bridge the gap between those (continental European) Member States having a levy system that provides for "equitable remuneration", and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether.¹⁵

16 The result is that Member States have implemented Articles 5(2) and 5(3) very differently, selecting such exceptions as they saw fit, and implementing specific categories in diverse ways. In some Member States' laws, the limitations on copyright have received a much narrower scope than those of the Information Society Directive. This can be explained by the "homing" tendency of the Member States' legislatures when translating provisions of the Directive into national law, preserving as much as possible the old formulations and adding further specifications.¹⁶ Even where a specific limitation has been implemented in roughly similar terms in the different Member States, there is a risk that the national courts will give this limitation a diverging interpretation, thereby contributing to the legal uncertainty in respect of the use of copyright-protected works and other subject matter. 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, constitutes a serious impediment to the establishment of cross-border services. The level of knowledge required for the conclusion of the necessary licensing agreements per territory is too high and costly to make the effort worthwhile.

III. Contractual overridability of limitations

17 As information and entertainment products and services are increasingly distributed on-line, contractual relations between right holders or their intermediaries and (end) users proliferate. Particular

categories of users, including cultural heritage institutions, educational institutions, and consumers are emerging as the weaker party in online transactions with content providers relating to the use of copyright and related rights protected material. It is not uncommon for right holders to wield their bargaining power to arrive at contractual terms that purport to set aside the privileges that the law grants users pursuant to the limitations on copyright. To restore the balance of interests inside online contractual agreements, some limitations on copyright and related rights could be declared imperative. Wherever the European legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, private parties should be prevented from unilaterally derogating from the legislator's intent. At the European level, the Computer Programmes Directive and the Database Directive both specify that exemptions provided therein may not be circumvented by contractual agreement.

18 The Information Society Directive contains very few provisions referring to the conclusion of contractual licences as a means to determine the conditions of use of copyright protected works and other subject matter. At most, the Directive contains a few statements encouraging parties to conclude contracts for certain uses of protected material. Recital 45 declares that “[t]he exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law”. The text of this Recital gives rise to interpretation. Some commentators believe that, according to Recital 45, the limitations of Articles 5(2) to 5(4) can be overridden by contractual agreements.¹⁷ Others consider that, pursuant to this Recital, the ability to perform legitimate uses that do not require the authorisation of right holders is a factor that can be considered in the context of contractual agreements about the price. Whether the requirement that a contractual agreement must have the goal to secure the fair compensation of right holders means that contractual agreements with the purpose to override legitimate uses are impermissible is, according to these authors, questionable.¹⁸

19 The emphasis put by the European legislator on the conclusion of contracts as an instrument to set the conditions of use of protected works is particularly evident when reading Article 6(4), fourth paragraph, of the Directive. This article states that

the provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may

access them from a place and at a time individually chosen by them.

20 The term “agreed contractual terms” in this provision could be interpreted as requiring the negotiation of a licence of use. However, this interpretation may not reflect reality, since standard form contracts, rather than negotiated contracts, actually govern the vast majority of transactions relating to information in the digital networked environment.

21 While Article 6(4), fourth paragraph, of the Directive establishes a rule of precedence between the use of contractual arrangements and the application of technological protection measures, no rule has been established anywhere in the Directive concerning the priority between contractual arrangements and the exercise of limitations on rights. The absence of any such rule was considered briefly during the legislative process leading to the adoption of the Directive. In a second reading of the Proposal for a Directive, Amendment 156 was tabled for the introduction of a new Article 5(6) to the effect that “[n]o contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5”.¹⁹ This amendment was rejected by the Commission, however, and therefore never made it into the Common Position. As a result, nothing in the Information Society Directive seems to preclude rights owners from setting aside by contract the limitations on copyright and related rights. At the national level, Portugal is the only Member State to have adopted a measure to prevent the use of standard form contracts excluding the exercise of limitations on copyright to the detriment of the user. Following these models, a provision could be introduced in the copyright legislation according to which any unilateral contractual clause deviating from the limitations on copyright and related rights would be declared null and void.

C. Actual Harmonisation of the Exceptions and Limitations

22 The previous section has shown that the structure of Article 5 of the Information Society Directive coupled with the lack of appropriate guidelines regarding the scope of each exception and limitation constitute major obstacles to their harmonisation across the Member States. Important differences can indeed be observed in the way Member States have implemented these provisions.²⁰ Moreover, some Member States, like the United Kingdom and Germany, are still struggling to define exceptions and limitations that fall within the boundaries set by each exception in Article 5 and within the bounds of the three-step test of paragraph 5 of the same provision. Balancing the interests of rights owners and users by

means of exceptions and limitations has become an act of gymnastics on a high wire, especially considering the pace at which technology, market conditions, and user needs evolve.

- 23 The European Commission is not indifferent to this state of affairs. With the Green Paper on Copyright in the Knowledge Economy, the Commission started a round of consultations among stakeholders to discuss whether an approach based on a list of non-mandatory exceptions was still adequate in the light of evolving Internet technologies and the prevalent economic and social expectations.²¹ This consultation resulted in the publication of a Communication to the European Parliament and the Council on Copyright in the Knowledge Economy.²² As the Green Paper that preceded it, the Communication addresses several aspects of copyright in the knowledge economy, but puts particular emphasis on the exceptions for the benefit of libraries and archives, including the issue of orphan works, teaching and research, persons with disabilities, and user-created content (UCC). It is unclear what the outcome of the Communication will be, for the chance that the Information Society Directive will be re-opened to amend the text of Article 5 is rather slim.
- 24 In the following pages, I will focus on these three main categories of exceptions and limitations, that is, those adopted for the benefit of libraries and archives, for teaching and research, and for persons with a disability. I will examine how, on the basis of the provisions of the Directive, these limitations have been implemented in some of the Member States, highlighting the main differences and the most poignant difficulties. Of course, I will also take account of the most recent discussions carried out in the context of the European Commission's stakeholder consultation, as well as of the legislative debates at the national level, namely in the United Kingdom and Germany. Since neither the issue of orphan works or user-created content was part of the Information Society Directive, I will not dwell on them further in this article, despite the fact that each question would deserve a study of its own.²³

I. Libraries and archives

- 25 The digitisation and online accessibility of cultural material and digital preservation by libraries and archives has received a lot of attention recently, especially in connection with the "i2010 initiative" of the European Commission. In the context of this European initiative, the European Commission conducted a public consultation during the year 2005, which was followed by the simultaneous publication of an Impact Assessment report,²⁴ a Communication,²⁵ and a Recommendation on the digitisation and online

accessibility of cultural material and digital preservation.²⁶ The objective of the initiative is to develop digitised material from libraries, archives, and museums, as well as to give citizens throughout Europe access to its cultural heritage, by making it searchable and usable on the Internet. The achievement of these goals inevitably raises copyright issues. As noted in Recital 10 of the Recommendation, only part of the material held by libraries, archives, and museums is in the public domain, while the rest is protected by intellectual property rights. To what extent do the limitations included in the Information Society Directive allow libraries, archives, and museums to comply with these objectives?

- 26 Article 5(2)c) allows Member States to adopt a limitation on the reproduction right in regard to specific acts of reproduction made by publicly accessible libraries, educational establishments, or museums, or by archives, which are not for direct or indirect economic or commercial advantage. This provision must be read in conjunction with Recital 40 of the Directive, which specifies that such limitations should not cover uses made in the context of on-line delivery of protected works or other subject matter. Therefore, the conclusion of specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.
- 27 As the Explanatory Memorandum to the Proposal for a Directive specifies, this does not mean that libraries and equivalent institutions should not engage in on-line service delivery. However, it is the Commission's opinion that "such uses can and should be managed on a contractual basis, whether individually or on the basis of collective agreements".²⁷ While acts of electronic delivery are excluded from the scope of this limitation, the making of digital reproductions of works in a library's collection for purposes of preservation clearly falls within the ambit of this provision, since it does not per se involve an act of communication to the public.²⁸
- 28 Not all Member States have implemented this optional limitation. And those that did have often chosen different ways to do it, subjecting the act of reproduction to different conditions of application and requirements. Some Member States only allow reproductions to be made in analogue format; others restrict the digitisation to certain types of works, while yet other Member States allow all categories of works to be reproduced in both analogue and digital form.²⁹ In addition, Member States have identified different beneficiaries of this limitation. Some have simply replicated the wording of Article 5(2) b), while others have limited its application to public libraries and archives to the exclusion of educational institutions. The prevailing legal uncertainty

regarding the manner in which digitised material may be used and reproduced is likely to constitute a disincentive to digitisation. This militates especially against cross-border exchange of material, and may discourage cross-border cooperation.³⁰ However, as already mentioned in the Staff Working Paper of 2004, libraries face another problem by the fact that pursuant to Article 1(2) of the Directive, which leaves the provisions of earlier directives unaffected, the limitation of Article 5(2)c) of the Information Society Directive does not apply to databases.³¹ This may create severe practical obstacles for the daily operations of libraries.

- 29 The 2008 Green Paper notes on the subject of libraries and other similar establishments that two core issues have arisen: the production of digital copies of materials held in the libraries' collections and the electronic delivery of these copies to users.³² Regarding both aspects of the digitization issue, the European consultation reveals that views of public libraries and archives on the one hand, and of publishers and collective rights management societies on the other, are as far apart from each other as ever. The relevant exception is limited to specific acts of reproduction for non-commercial purposes. The digitisation of library collections therefore requires prior authorisation from the right holders. Libraries argue that this system of "prior authorisation" entails considerable transactional burdens. Public interest establishments also want to make their collections accessible online, particularly works that are commercially unavailable, and argue that this should not be limited solely to access on the physical premises.
- 30 For their part, publishers and collective rights management societies see no reason to broaden the current exceptions on preservation and making available for libraries and archives: the existing system of licensing schemes and contractual agreements to digitise and increase online access to works should simply be maintained. In their opinion, to relax the current exception to allow libraries, archives, and teaching establishments to provide online services to users would undermine the position of right holders, create unfair competition to publishers, and discourage them from investing in new business models. In view of the findings of the consultation, the European Commission committed in its Communication to further pursue its work on these matters, addressing, *inter alia*, the clarification of the legal implications of mass-scale digitisation and possible solutions for the issue of transaction costs for right clearance.³³
- 31 This issue of digitisation and electronic delivery of library and archival collections was also discussed at the Member State level, for example in Germany and the United Kingdom. In Germany, a rather controversial provision was introduced in Article 53a of

the Copyright Act as part of the revision of the "second basket", which entered into force on January 1, 2008.³⁴ This limitation allows the reproduction of articles from newspapers and periodicals and their communication to public library patrons for their own private purposes, provided that the digital reproduction and the electronic delivery occur exclusively as graphic data, and not as an interactive service. In addition, equitable remuneration must be paid to the rights owners for the reproduction and the communication of their works. The transmission of copies to users located in Germany in the context of a document delivery service located outside Germany is also covered by the obligation to pay equitable remuneration, so as to guarantee that the provision will not be circumvented by the relocation of the document delivery service in a foreign country. This provision may be revisited in the near future, as discussions around a "third basket" of copyright reforms have just started off in June 2010.³⁵ Scholarly societies in Germany have put the argument forward that libraries should be given the possibility to send documents in at least image-scan format, and to do so for indirect commercial purposes as well.³⁶ This debate will no doubt be as heated as it was two years ago.

- 32 The scope of limitations in favour of public libraries, museums, and archives has been a hotly debated issue for several years already in the United Kingdom. Until this day, the UK Copyright, Designs and Patents Act of 1988 (CDPA) only permits the copying of books and other writings and does not permit copying of sound, television programmes, and film items for preservation, as a result of which the United Kingdom is losing a large part of its recorded culture. The argument was heard in 2006 by the Gowers Review of Intellectual Property committee, which included a recommendation in its report, according to which section 42 of the CDPA should be amended to permit libraries to copy the master copy of all classes of works in their permanent collection for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear. In addition, Gowers also recommended that libraries and archives be permitted to format shift archival copies to ensure that records did not become obsolete.³⁷ The recommendations made in the Gowers report were put to consultation by the stakeholders. Both of these recommendations were generally accepted by the respondents.³⁸
- 33 Nevertheless, as a result of the persisting uncertainty left by copyright law, copyright owners are increasingly resorting to contractual terms and conditions in order to more clearly delineate the scope of what libraries and archives purchasing or licensing the copyright material may do with the works in their collections. Libraries are increasingly confronted with contractual restrictions dictated by the right hol-

ders in what they can do with the content, although certain copyright limitations would normally apply. The statutory limitations are in many cases overridden by contract law. To summarise, the lack of clarity with regard to the limitations on copyright and related rights leads to a multitude of different individual initiatives from the sides of right holders, libraries, and publishers. This contradicts the value proposition of digital libraries, i.e. to make knowledge broadly and easily available over the Internet.

II. Teaching and research

34 Article 5(3)a) of the Information Society Directive allows the use of works for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved. As is the case of most, if not all, optional limitations contained in Articles 5(2) and 5(3) of the Information Society Directive, this provision has been implemented, if at all, quite differently from one Member State to the next. The limitation has been implemented in some Member States as an exemption; while in others, the use of works for educational or research purposes is subject to the payment of a fair compensation to the right holders. In some Member States, the limitation to the benefit of educational institutions is worded in very narrow terms. In yet other Member States, like the Netherlands, the law authorises educational institutions, under specific conditions, to make course packs (*bloemlezingen*) and anthologies for teaching purposes. Sharp variations exist in national laws regarding the length of the excerpts that educational institutions are permitted to reproduce from articles and books, and regarding the possibility to make this material available to students through distance learning networks.³⁹

35 As an illustration of the vastly diverging ways these provisions could be implemented, let me mention the highly criticised Article 52a of the German Copyright Act.⁴⁰ Germany implemented Article 5(3)a) of the Directive by granting an exemption from copyright, for specified non-profit purposes, to "privileged institutions", meaning schools, higher-education institutions, and public research organizations. According to the first paragraph of this provision, only "small parts" of copyrighted material or single articles from newspaper or periodicals may be used strictly as illustration for teaching purposes in non-commercial privileged institutions involving "a defined, limited, and small" number of students or researchers. The second paragraph of this article subjects the use of works that are created for educational purposes and of cinematographic works to the prior authorisation of the right holder, and in

the last case only after the expiration of two years from the date of the first exploitation of the film in the theatres. Fair compensation must be paid to the rights owners. German academics argue that this provision gives them the same rights over copyrighted material in digital form as they already have over such material in printed form. Because this provision was highly contested at the time of its adoption, Article 52a of the German Copyright Act was subject to a so-called "sunset" clause through which the provision would be repealed as of a specific date. Until now, however, the sunset clause has been extended twice and now remains in force until 31 December 2012.⁴¹

36 With the implementation of the Information Society Directive, the French legislator ceased in the last stage of the adoption process the chance to introduce an entirely new limitation in the Intellectual Property Code with regard to educational uses. Until then all attempts to accommodate the needs of educational establishments in copyright matters had always met strong resistance from rights owners, who found support in the legal commentaries according to which such a limitation would have gone against the French *droit d'auteur* tradition.⁴² As of 1 January 2009, this statutory provision took precedence over the contractual regime that had only recently been set up as a result of rather difficult negotiations between representatives of rights owners on the one side, and of the Ministry of Education on the other side. Article L. 122-5, 3° e) of the Code allows the reproduction and the communication to the public of "small parts" of copyrighted material or single articles from newspaper or periodicals exclusively as illustration for teaching purposes in non-commercial privileged institutions involving a public composed primarily of students, teachers, or researchers who are directly concerned. This provision excludes works created for educational purposes and foresees the payment of fair compensation to the right holder.

37 In the UK, the Gowers report highlights the need to ensure that the limitations provided under the CPDA allow educational establishments to take advantage of new technology to educate pupils regardless of their location. As the report explains:

In 2003 the exception was modified so that educational establishments could allow students on the premises to see the programme in their own time. However, the exception does not extend to situations where students are not on the premises of the educational establishment. This means that distance learners are at a disadvantage compared with those based on campus and thus these constraints disproportionately impact on students with disabilities who may work from remote locations.⁴³

38 Indeed, in the December 2009 report following the consultation on copyright exceptions, the committee proposes to extend the educational exceptions to permit certain broadcasts and study material to be transmitted outside the institutional campus for the purposes of distance learning but only via secure networks and to extend the exception relating to small excerpts so that it covers film and sound recordings to the exclusion of artistic works. The committee also proposes to retain existing provisos so that the exception will apply only to the extent that licensing schemes are not in place.⁴⁴

39 The ongoing discussions around the scope of the limitations on educational use in the Member States illustrate that the line between what is permissible and what is not is difficult to draw on the basis of the current wording of the national provisions transposing the Directive. The question also arises whether the legal framework is capable of adapting to the constant technological developments so as to allow educational institutions to step into the 21st century and engage in distance education programs. As Ernst and Haeusermann put it, a “sclerotic regime would have great potential to compromise the quality of higher education in Europe and elsewhere, and therefore be contradictory to the official policy of the EU”.⁴⁵ In this sense, the 2009 Communication points out,

teaching, learning and research is becoming increasingly international and cross-border, enabled by modern information and communication technologies. Access and use of information is no longer limited to physical space. Therefore limiting teaching and research to a specific location is considered to be contrary to the realities of modern life.⁴⁶

40 However, the Commission at this stage merely commits to monitoring the evolution of an integrated European space for cross-border distance learning, and if need be, to consider adopting further measures to accompany such a European space.⁴⁷

III. People with a disability

41 Although the limitation on copyright to the benefit of physically impaired individuals has not generated much public debate, its application in practice leads to certain difficulties in some Member States. Blind and partially sighted people need to be able to modify the way in which information is presented in order to access it. This may involve enlarging text or graphics, turning text into speech, describing graphical material, or producing a tactile output. People suffering from dyslexia may need to have text put into speech, while the hearing impaired may need audiovisual works to be sub-titled. Article 5(3)b) of

the Information Society Directive allows Member States to adopt a limitation on the rights of reproduction and communication to the public in respect of “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”.

42 The European legislator was not very loquacious regarding the possible shape of a limitation concerning the disabled. As long as the limitation meets the requirements of the three-step test and provided that the use is non-commercial in nature and directly linked to the disability, the limitation may take any form that the national legislator will give it.

43 In fact, Article 5(3)b) of the Information Society Directive has been transposed in a wide range of different ways. Several Member States have incorporated the provision of the Directive almost word-by-word into their national legislation. For example, Article 15i of the Dutch Copyright Act declares that “reproduction and publication of a literary, scientific or artistic work exclusively intended for handicapped individuals, provided it is directly related to the handicap, is not of a commercial nature and is necessary because of the handicap, shall not be regarded as an infringement of copyright”. This provision foresees the payment of fair compensation to the right holders. Article 45a of the German Copyright Act is essentially to the same effect.

44 By contrast, other Member States have attached very strict conditions of exercise to this limitation. Article L. 122-5, 7^o of the French Intellectual Property Code is a good illustration of this legislative approach, for it grants persons suffering from a range of disabilities (“*des personnes atteintes d’une ou de plusieurs déficiences des fonctions motrices, physiques, sensorielles, mentales, cognitives ou psychiques*”) the right to “consult” works for private purposes only in the premises of “authorised” legal entities or publicly accessible establishments, like libraries, museums, and archives. This provision is further subject to extensive requirements of evidence and control regarding the extent of the handicap of the individual claiming the application of the limitation, as well as effectiveness of the measures put in place by the establishment offering individuals the means to benefit from the limitation. On the other hand, the French Act expressly applies this limitation to databases.⁴⁸ This provision is completed by Article L. 311-8, 3^o of the Code which provides for a reimbursement to the benefit of disabled persons of the remuneration paid for acts of private copying. However, the French Code foresees no payment of fair compensation to the rights owners. In comparison to the French Act, Articles 31A and B of the Copyright Act of the UK recognise a limitation only to the benefit of the visually impaired.⁴⁹

45 In view of the vagueness of the terms used in Article 5(3b) of the Directive, national implementing provisions not only end up setting out diverging conditions of application, but also being addressed to different individuals or entities. Some legislative regimes designate particular organisations as beneficiaries of exceptions. For instance, it is not entirely clear from the Dutch and German provisions whether they are directed to the physically impaired themselves or to any other legal or physical person engaged in the reproduction and publication of works for disabled persons, provided that they meet the criteria of the law. On the other hand, the French provision would seem to be directed primarily at the disabled individuals themselves, via the institutions that make the works available on their own premises and subject to the strict conditions of application. These divergences in the national legislation are not likely to be conducive to the development of viable business models aimed at the production and distribution of digital content that can cater to the needs of the physically impaired, for neither the rights owners nor the beneficiaries know where they stand regarding the boundaries set by this limitation. The emphasis should be on the non-commercial nature of the activity – and on its compliance with the “three-step test” – rather than on the status of the person or entity carrying it out.

46 In the absence of any useful parameter in the Directive, the schemes put in place by the Member States end up accommodating different addressees, e.g. the disabled persons themselves, a competent institution, or a content provider. In some states, the schemes cover all types of disabilities, e.g. physical or mental disability. In other states, the limitation is restricted only to certain physical disabilities, like blindness and deafness, or to certain categories of works, excluding databases for example. The diversity of ways that this limitation has been transposed in the Member States is bound to give rise to differences in treatment between citizens of different countries, which could be contrary to the principle of non-discrimination laid down in the EC Treaty. For example, a person suffering from a wide range of disabilities would benefit from a limitation on copyright and related rights in France, but certainly not in the UK, where only the visually impaired may invoke the benefit of a limitation. There is no justification for such a difference in treatment between EU citizens.

47 More crucially, however, the cross-border transfer of the already limited supply of material is hampered by the territorial limitation of exceptions under national legislation. Technological protection measures have been cited as an additional impediment, as they prevent the conversion into accessible formats of legally acquired works by organisations or individuals. As promised in its December 2009 Commu-

nication, the European Commission will organise a stakeholder forum concerning the needs of disabled persons in order “to consider the range of issues facing persons with disabilities and possible policy responses”, and “look at possible ways to encourage the unencumbered export of a converted work to another Member State while ensuring that right-holders are adequately remunerated for the use of their work”.⁵⁰

D. Concluding Remarks

48 In short, the norms laid down in the Directive in relation to the exceptions and limitations on copyright and related rights are not conducive to any sensible degree of harmonisation across the European Union. The main reason for this is that the Directive lacks concrete guidelines that Member States are to follow in order to determine the scope and conditions of application of the limitations. Moreover, because of the optional character of the list of limitations contained in Articles 5(2) to 5(5) of the Directive, not only are Member States free to implement the limitations they want from the list, but they are also free to decide how they will implement each limitation. In some Member States’ laws, the limitations on copyright have received a much narrower scope than those of the Information Society Directive. This can be explained by the “homing” tendency of the Member States’ legislatures when translating provisions of the Directive into national law, preserving as much as possible the old formulations and adding further specifications.⁵¹ Moreover, even where a specific limitation has been implemented in roughly similar terms in the different Member States, there is a risk that the national courts will give this limitation a diverging interpretation, thereby contributing to the legal uncertainty in regard to the use of copyright-protected works and other subject matter.

49 The question also arises whether the legal framework is capable of adapting to the constant technological developments so as to allow educational institutions to step into the 21st century and engage in distance education programs and libraries and archives to proceed to the digitisation of their collection. The sustainability of the list of limitations included in Articles 5(2) to 5(5) of the Directive is seriously affected by the exhaustive character of the list of limitations. One of the main arguments against the establishment of an exhaustive list of limitations is that a fixed list of limitations lacks sufficient flexibility to take account of future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework as the Google Thumbnails case so aptly demonstrates. While an exhaustive list obviously gives more legal security to established right holders

and content providers, it also hinders the emergence of new services and business models.

- 50 In the absence of clear guidelines in the law, the temptation is big for rights owners to determine the extent to which the dissemination of knowledge can take place exclusively through contractual arrangements, which restrict the acts normally allowed under the statutory exceptions and limitations. Limitations and exceptions are reflections of the public interest at large. Their scope and application should not therefore be determined solely by those parties directly addressed by these provisions.

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