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# The Dutch case for flexibility

— Bernt Hugenholtz

Bernt Hugenholtz is professor of intellectual property law and director of the Institute for Information Law of the University of Amsterdam.

Everyone agrees that copyright in the European Union is in a state of crisis.<sup>1</sup> But there is disagreement on what caused it and what to do about it. Rights holders generally complain that copyright law has left them defenceless against mass-scale infringement over digital networks, and call for enhanced copyright enforcement mechanisms. Authors lament that the law does little to protect their right to receive fair compensation from the copyright industries and the users of their works alike. Users and consumers accuse the copyright industries of abusing copyright, and using it as an instrument to conserve monopoly power and sustain outdated business models.



Nevertheless, all stakeholders agree that the current crisis in copyright is essentially an issue of social legitimacy. Whereas the idea and ideals of copyright were largely uncontroversial until the end of the last millennium, with the rise of the Internet and the more recent emergence of the social media, copyright law is rapidly losing the support of the general public.

A major cause of this loss of faith in copyright is the increasing gap between the rules of the law and the social norms that have been shaped by technology. Of course, technological development has *always* outpaced the process of law making, but with the spectacular advances of information technology in recent years, the law–norm gap in copyright has become so wide that the system is now almost at the breaking point. In the EU, this problem is exacerbated by two additional factors. One is the complexity of EU law making, which requires up to 10 years for a harmonisation directive to be adopted or revised. The other is the general lack of flexibility in copyright law in the EU and its member states, which – unlike the United States – do not generally permit “fair use” and thus allow little leeway for new uses not foreseen by the legislature.

Consequently, there is an increasing mismatch between copyright law and emerging social norms in the EU. Examples abound. Whereas social media has become an essential tool of social and cultural communication, current copyright law leaves little room for sharing “user-generated content” that builds upon pre-existing works.<sup>2</sup> By the same token, the law in most EU member states fails to take into account emerging educational and scholarly practices, such as the use of copyright-protected content in PowerPoint presentations, in digital classrooms, on Blackboard sites, or in scholarly e-mail correspondence.<sup>3</sup> Copyright law in the EU also makes it hard to accommodate information location tools, such as search engines and aggregation sites. By obstructing these and other uses that many believe should remain outside the reach of copyright protection (and would probably qualify as “fair use” in the US), the law impedes cultural, social, and economic progress and undermines the social legitimacy of copyright law.

The need for more flexibility in copyright law is particularly pressing as regards the limitations and exceptions to copyright. Copyright laws in EU member states traditionally provide for “closed lists” of limitations and exceptions that enumerate uses of works that are permitted without the authorisation of copyright holders. Examples of such uses are: quotation, private copying, library privileges, and uses by the media. More often than not these exceptions are highly



detailed and connected to specific states of technology, and therefore easily outdated. To make matters worse, the legal framework leaves EU member states little room to update or expand existing limitations and exceptions. The Copyright in the Information Society Directive of 2001 lists some 21 limitations and exceptions that member states may provide for in their national laws, but does not allow exceptions beyond this “shopping list.”

The good news is that the idea of introducing a measure of flexibility in the European system of circumscribed limitations and exceptions is now gradually taking shape. Already in 2006, the Gowers review in the United Kingdom recommended that an exception be created for “creative, transformative or derivative works,” particularly in the context of user-generated content.<sup>4</sup> In 2008, the European Commission took this suggestion on board in its Green Paper on Copyright in the Knowledge Economy.<sup>5</sup> The Dutch government has repeatedly stated its commitment to initiate a discussion at the European political level on a European-style fair use rule.<sup>6</sup> In May 2011 the Hargreaves review in the United Kingdom recommended “that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners.”<sup>7</sup> The UK government’s response to the review underscored the need for more flexibility in EU copyright law.<sup>8</sup> Most recently, in Ireland, the Copyright Review Committee has advised the Irish government to consider the introduction of a general fair use rule.<sup>9</sup>



‘There is an increasing mismatch between copyright law and emerging social norms in the EU.’

Clearly, the time is ripe for a critical assessment of the EU’s closed list of permitted limitations and exceptions to copyright. The Directive of 2001, which sought to deal with the early challenges of the digital environment, is now more than 10 years old, but has never been properly reviewed by the European Commission.<sup>10</sup> Revising the Directive’s structure of strictly enumerated, optional exceptions and limitations should feature very high on the EU’s legislative agenda. A straightforward way to do this would be to allow member states to provide for *other* (non-enumerated) limitations and exceptions permitting unauthorised uses, subject to the application of the “three-step test” used in a number of treaties, requiring that such uses not conflict with the normal exploitation of copyright works and not otherwise unreasonably affect the interests of authors and copyright holders. The three-step test, which is part of the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and various other international treaties, is already incorporated in the Directive (Article 5.5) as an overarching rule preventing member states from introducing overly broad copyright limitations. By combining the present system of enumerated exceptions with an open norm that would allow other fair uses, a revised Directive would much better serve the combined goals of copyright harmonisation and the promotion of innovation. An example of such a semi-open structure of limitations can be found in the proposed European copyright code released by a group of leading European copyright scholars (the “Wittem Group”) in April 2001.<sup>11</sup>

However, any revision of the 2001 Directive will take many years to achieve. In the meantime, member states are faced with a dilemma. Should they refer calls for increased flexibility to the

EU legislature and wait – possibly for many years? This would require a stoic attitude that not all national lawmakers are able to afford. Or should member states simply take concrete steps to enhance flexibility, regardless of what transpires in Brussels?

A closer look at the legal framework suggests that EU member states actually have more regulatory flexibility than the Directive *prima facie* suggests. In the first place, some of the limitations and exceptions listed in the Directive leave member states more room to move than is sometimes believed. For example, a rather loosely drafted Article 5(3) (a) of the Directive seems to allow member states to exempt a much wider range of educational and scientific uses than many national laws presently permit. The quotation right set forth in Article 5(3)(d) might arguably leave room for an exception permitting the fair use of copyright protected material for the purposes of search engines and other reference tools. And Article 5(3)(i), which allows the “incidental inclusion of a work or other subject-matter in other material” apparently leaves room for a whole range of unspecified “incidental” uses.

In the second place, it is often overlooked that the Directive does not harmonise the entire spectrum of economic rights that copyright holders normally enjoy. The Directive only harmonises the rights of reproduction, communication to the public, and distribution. The Directive does not deal with a right of adaptation that allows rights holders to control transformative uses of works, such as film versions, translations, and other “derivative works.” By implication, the Directive’s list of permitted limitations and exceptions does not concern this right. Member states remain free to provide for limitations and exceptions to the right of adaptation at their own discretion, subject only to the “three-step test.”

Using the policy space left by the Directive, member states remain free to provide for limitations and exceptions permitting, for instance, fair (i.e. non-commercial) transformative uses in the context of user-generated content. Such an exception could, for example, be modelled on a proposal currently before the Canadian parliament.<sup>12</sup> Another more recent example comes from the Netherlands. The Dutch Copyright Committee that advises the Ministry of Justice on matters of copyright law and policy proposes to legally permit the use of user-generated content by way of integrating such uses in any one of two limitations that currently exist in Dutch copyright law – the parody exemption and the quotation right.<sup>13</sup> In its report, the Committee endorses the analysis of the Hugenholtz /Senftleben study.<sup>14</sup> The proposed legislative solution would seem to be well within the discretion left by the EU legislature to the member states. **IP<sub>21</sub>**

## Notes

### Ian Hargreaves

- 1 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 2 *Ibid.*.
- 3 For more information, visit the Google Book Search Copyright Class Action Settlement website at <http://www.googlebooksettlement.com/index.html>.
- 4 Vince Cable, George Osborne and Jeremy Hunt, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 5 *Ibid.*.
- 6 Richard Hooper, *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of the Digital Copyright Exchange Feasibility Study* (Newport: Intellectual Property Office, 2012).
- 7 *Ibid.*.
- 8 Richard Hooper and Ros Lynch, *Copyright Works: Streamlining Copyright Licensing for the Digital Age* (London: Intellectual Property Office, 2012).
- 9 Visit [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org) for more.
- 10 Ann Mettler and Anthony D. Williams, *Wired for Growth and Innovation: How Digital Technologies are Reshaping Small- and Medium-Sized Businesses and Empowering Entrepreneurs* (Brussels: Lisbon Council, 2012).
- 11 European Policy Centre and Copenhagen Economics, *The Economic Impact of a European Digital Single Market* (Brussels: EPC, 2010).
- 12 Matthieu Pélassié du Rausas et al., *Internet Matters: The Net's Sweeping Impact on Growth, Jobs and Prosperity* (San Francisco: McKinsey, 2011).
- 13 European Commission, *A Single Market for Intellectual Property Rights. Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, Communication COM(2011) 287 final (Brussels: European Commission, 2011).

### Jeff Lynn

- 1 There were certainly exceptions, such as in music composition. Long before “sampling” became commonplace among rap artists, rules were established as to how many bars of a piece could be borrowed for another piece. But by and large, when we think of pre-digital copyright violations, we think of a dodgy man with a printing press running off pirated word-for-word copies of a popular novel.
- 2 The video went viral on the Internet in the summer of 2010 but was quickly removed from YouTube when a music label claimed copyright infringement.

### Paul Klimpel

- 1 The *Gowers Review of Intellectual Property*, a study prepared for then Prime Minister Gordon Brown by then *Financial Times* Editor Andrew Gowers, clearly disapproved of an extended term of protection for related rights. See Gowers et al., *Gowers Review of Intellectual Property* (London: HM Treasury, 2006).
- 2 Internet and Society Co:llaboratory, *Regelungssysteme für informationelle Güter* (Berlin: Co:llaboratory, 2011).

### Nico Perez

- 1 Gordon Moore, founder of Intel, once suggested that central processing unit power would double every 18 months. This prediction has proven to be astonishingly accurate over the last four decades.
- 2 The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement governing copyright, which was first accepted in Bern, Switzerland in 1886.
- 3 Last.fm is a successful Internet radio service based in London. It was acquired by CBS in 2007.
- 4 Ian Hargreaves: *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).

- 5 Pandora is an Internet radio provider based in Oakland, California. It recently went public and floated on the New York Stock Exchange for \$1.6 billion.
- 6 See Vice-President Reding's comments at the launch of the eYouGuide in “Consumer Rights: Commission Wants Consumers to Surf the Web without Borders,” *IP/09/702* (Brussels: European Commission, 2009). At the time, Vice-President Reding was commissioner for information society and media.
- 7 Hargreaves, *op. cit.*.
- 8 Francis Gurry, director general of the World Intellectual Property Organisation, described a global repertoire database as “an idea whose time has come” in November 2010.
- 9 The challenging state of pan-European licensing has clearly been heard and understood by Brussels. And the proposed solution is similar in many regards to the “new solutions” I propose in this essay, and will undoubtedly help new online operators like Mixcloud grow across Europe within a framework that provides more certainty and fewer barriers to entry. However, the proposal only addresses the author's rights and not the sound recording rights, and this is in stark contrast to the US where SoundExchange was created by Congress to administer statutory licensing of these rights. Also, while the proposed directive looks good on paper, it is worth considering that the Commission's past proposal to simplify pan-European licensing was not particularly effective. Ultimately, the effectiveness of this new proposal will rely on the legislation passing through the EU Parliament and being adopted by member states for it to make an impact.

### Till Kreutzer

- 1 People nowadays pay not for content but for convenience and – maybe – for a good conscience. The task for market players in the online world is to offer intangibles that cannot be copied, i.e., to provide the consumer added value to the content. According to Kevin Kelly, such intangibles can be immediacy, personalisation, authenticity, accessibility, embodiment (like vinyl records, live performances), patronage, and findability. See Kevin Kelly, *Better than Free: How Value is Generated in a Free Copy World* (New York: Edge, 2008).
- 2 Already, the social consensus around copyright protection seems to be receding. Just recently, two efforts to create stronger copyright protections for the Internet era failed in the face of massive public protests. The Stop Online Piracy Act (SOPA) and the Prevent Internet Piracy Act (PIPA) in the US were killed suddenly on 18 January 2012 when 115,000 websites (among them Wikipedia and Mozilla) closed down for the whole day, displaying information about the legislative initiatives or redirecting their users to online petitions against them. More than one billion users were blocked trying to reach one of the shut down websites and more than 10 million people signed petitions against the implementation of SOPA and PIPA. A few weeks later, a mass protest against the Anti-Counterfeiting Trade Agreement (ACTA) broke out in Europe. Tens of thousands of people took to the streets to demonstrate against the ratification of the multilateral treaty on Intellectual Property Rights by the European Union. As a result, numerous European and national politicians hastened to state that a ratification of ACTA by the EU or the member states needed further evaluation.
- 3 Internet and Society Co:llaboratory, *Regelungssysteme für informationelle Güter* (Berlin: Co:llaboratory, 2011).
- 4 For the complete list of participants, visit <http://collaboratory.de>.
- 5 To encourage uninhibited thinking, the group deliberately decided *inter alia* not to use the terms copyright or authors' right for the regulatory approach. Another reason for this decision was that the alternative regulatory system acknowledges and balances a great variety of interests and aspects on a coequal basis (no main focus or emphasis on the interest of the author or the user or specific kinds of use like copying).
- 6 This system became part of the European “acquis communautaire” through the so-called “InfoSoc Directive.” See *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (Brussels: European Commission, 2001).

- 7 This finding applies even more when the implementation or modification of the limitations is severely restricted by a supra-national closed-shop catalogue such as Art. 5 of the InfoSoc Directive – a combination that leads to a degree of inflexibility that makes it impossible either to react in time to the degree of change generated in a highly dynamic information society or to maintain a permanent fair balance of interests. Despite the obvious reticence of the European regulator to acknowledge this fact and act accordingly, this seems self-evident. See also P. Bernt Hugenholtz and Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* (Amsterdam: IViR, 2011): “The need for more openness in copyright law is almost self-evident in this information society of highly dynamic and unpredictable change.”
- 8 Prosumer is a term derived from the words “producer” and “consumer” describing that the roles of producers and consumers merge under the influence of information technology. This perception is not new. Marshall McLuhan and Barrington Nevitt anticipated that transition for the information society already in 1972. The Web 2.0 is proof that they were right. See McLuhan and Nevitt, *Take Today, the Executive as Dropout* (San Diego: Harcourt Brace Jovanovich, 1972).
- 9 Certainly, this argument is limited when it comes to orphan works. However, the problem can be solved easily with an adequate exception from the obligation to name the author in case they are unknown or undiscoverable.
- 10 We came to this result despite our common sense that standardised rules have certain obvious benefits (especially in terms of predictability).
- 11 Another option we considered to protect the interests of creators and producers is a possibility to extend the exclusive rights for a certain time through registration. See the reasons for this consideration on page 17 of the Co:laboratory guidelines.

#### Lilian Edwards

- 1 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 2 Nate Anderson “IFPI: ‘Three Strikes’ Efforts Hit Worldwide Home Run,” *Ars Technica* 2008.
- 3 Christopher Williams, “E-books Drive Older Women to Piracy,” *The Telegraph*, 17 May 2011.
- 4 Agustino Fontevicchia, “Zynga Reveals Profit and Revenues as It Looks to Raise \$500 Million,” *Forbes*, 02 March 2011.
- 5 Katie Scott, “Monty Python’s Terry Jones Crowdfunds Funding for Book,” *Wired*, 05 August 2011.
- 6 Richard Hooper, *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of the Digital Copyright Exchange Feasibility Study* (Newport: Intellectual Property Office, 2012).
- 7 Lawrence Kaye, “Hargreaves and ‘Text Mining’: Digging Up Copyright?,” 22 September 2011, at <http://laurencekaye.typepad.com>.

#### Michel Vivant

- 1 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 2 Michel Vivant, “Droit d’auteur et théorie de l’accessoire: et si l’accessoire révélait l’essentiel?” *La semaine juridique Edition Générale* n° 28, 2011.
- 3 A 2009 French law intended to combat online piracy.
- 4 ACTA is a multinational treaty signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States. Currently over 30 countries have signed the agreement, but so far none has ratified it.

#### Reto Hilty

- 1 Fritz Machlup, *Economic Review of the Patent System* (Washington DC: US Government Printing Office, 1958).
- 2 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Oxford: Routledge, 1996).
- 3 A grant-back clause is a provision in a licensing agreement under which the licensee is required to disclose and transfer all improvements made (including related know-how acquired) in the licensed technology during the licensing period.

#### Bernt Hugenholtz

- 1 This essay is partly based on P. Bernt Hugenholtz and Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* (Amsterdam: IViR, 2011).
- 2 OECD, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking*, Document DSTI/ICCP/IE(2006)7/Final (2007) (Paris: OECD, 2007).
- 3 For other examples, see J. Tehranian, “Infringement Nation: Copyright Reform and the Law/Norm Gap,” *Utah Law Review*, Vol. 2007.
- 4 See recommendation 11 in Andrew Gowers et al., *Gowers Review of Intellectual Property* (London: HM Treasury, 2006).
- 5 European Commission, *Green Paper on Copyright in the Knowledge Economy*, Communication COM (2008) 466/3 (Brussels: European Commission, 2008).
- 6 Parliamentary Record 21501-34, no. 155. (The Hague: House of Representatives, 2011).
- 7 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 8 Vince Cable, George Osborne and Jeremy Hunt, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 9 Copyright Review Committee, *Copyright and Innovation. A Consultation Paper* (Dublin: Copyright Review Committee, 2012).
- 10 Lucie Guibault et al., *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Report to the European Commission* (Amsterdam: IViR, 2007).
- 11 For more information about European Copyright Code, visit [www.copyrightcode.eu](http://www.copyrightcode.eu).
- 12 Bill C-11 (formerly C-32) (*Copyright Modernization Act*), Article 29.21, available at <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/home>. The Canadian proposal reads: “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 authorisation, a member of their household – to use the new work or other subject matter or to authorise an intermediary to disseminate it, if (a) the use of, or the authorisation to disseminate, the new work or other subject matter is done solely for noncommercial 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 authorisation 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.” For more information, read G. Reynolds, “Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression,” in M. Geist (ed.), *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010).
- 13 Dutch Copyright Committee, Report to the Minister of Justice, not yet published.
- 14 See footnote 1 above.