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The Dutch case for flexibility
— Bernt Hugenholtz

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Everyone agrees that copyright in the European Union is in a state of crisis. 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the copyright industries of abusing copyright, and using it as an instrument to conserve monopoly power and sustain outdated business models.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. 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. 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. In 2008, the European Commission took this suggestion on board in its Green Paper on Copyright in the Knowledge Economy. The Dutch government has repeatedly stated its commitment to initiate a discussion at the European political level on a European-style fair use rule. 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.” The UK government’s response to the review underscored the need for more flexibility in EU copyright law. Most recently, in Ireland, the Copyright Review Committee has advised the Irish government to consider the introduction of a general fair use rule.
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. 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.

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. 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. In its report, the Committee endorses the analysis of the Hugenholtz /Senftleben study. The proposed legislative solution would seem to be well within the discretion left by the EU legislature to the member states.
Notes

Ian Hargreaves

2. Ibid.
3. For more information, visit the Google Book Search Copyright Class Action Settlement website at http://www.googlebooksettlement.com/index.html.
5. Ibid.
7. Ibid.

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

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.

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.
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).
7 This finding applies even more when the implementation or modification of Richard Hooper, Rights and Wrongs: The Copyright Licensing Fit for Purpose for the Digital Age! The First Report of the Digital Copyright Exchange Feasibility Study (Newport: Intellectual Property Office, 2012).  

Michel Vivant

3 Christopher Williams, “E-books Drive Older Women to Piracy,” The Telegraph, 17 May 2011.
4 Agostino Fontecchia, “Zynga Reveals Profit and Revenues as it Looks to Raise $500 Million,” Forbes, 02 March 2011.
5 Katie Scott, “Monty Python’s Terry Jones Crowdsources Funding for Book,” Wired, 05 August 2011.

Reto Hilty

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. Ssentfleben, Fair Use in Europe. In Search of Flexibilities (Amsterdam: IVIR, 2011).
9 For more information about European Copyright Code, visit www.copyrightcode.eu.
11 For more information about European Copyright Code, visit www.copyrightcode.eu.

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 subject – 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 is 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.