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The relations between copyright law and consumers' rights from a European perspective

NOTE

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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The relations between copyright law and consumers' rights from a European perspective

NOTE

Abstract

Consumers are considered as key stakeholders in debates and discussions surrounding copyright law. This note analyses the current relations between copyright law and consumers' rights in the European Union, in particularly whether consumers' interests are taken into account by EU and Member States copyright legislation. Recommendations are proposed to better integrate consumers' concerns in future revision of copyright law at EU level.

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CONTENTS

Executive SUMMARY 4

INTRODUCTION 8

Chapter 1. The consumer as a member of the public 11

1.1. Copyright territoriality 11

1.2. Access to information and culture 12

1.3. Copyright exceptions 13

1.4. User-created content 15

Chapter 2. The consumer as an end-user 17

2.1. The private copy 17

2.1.1. Evolution of the private copy 17

2.1.2. Lack of harmonisation 18

2.1.3. The relationship between private copy and the three-step test 18

2.1.4. The lawful origin of the private copy 20

2.1.5. The nature of private copy 20

2.1.6. Private copy levies 21

2.2. The lawful user 23

2.3. Mandatory nature of copyright exceptions 24

2.4. The rule of exhaustion and its digital application 26

2.5.The consumer and the technological measures of protection 27

2.5.1. Technological measures of protection and copyright exceptions 27

2.5.2. Other issues in Technological measures 29

Policy recommendations 31

References 33

EXECUTIVE SUMMARY

Background

Consumers are normally not concerned by copyright. Indeed, copyright is about exploitation of works, i.e. making available the works to a potential public, through direct communication or distribution of copies. Conversely, the end-use of a work, its acquisition and consumption (its reading, viewing or playing) has traditionally not been covered by copyright control and enforcement.

Until recently, consumers' interests were thus equal to that of the general public, save for the private copy, that was the only copyright exception tailored to their needs. Their concerns aimed at ensuring a balanced copyright regime that could secure access to knowledge and culture.

The digital evolution has however brought the consumer within the copyright realm. The main reason thereof is the extension of the reproduction right over temporary acts of copying that potentially covers any use of a work in a digital format. Contrary to over-the-counter sales, the provision of digital content on-line is generally made under end-user licensing agreements that define strictly what the consumer can do with its acquisition. The end-user being increasingly governed by copyright rules and licensing contracts, European copyright framework had to cater to the needs and expectations of consumers.

Chapter 1 – The consumer as a member of the public

As a member of the public, consumers have a strong interest in an effective and limited copyright protection, ensuring the access to a vast range of digital content and guaranteeing their fundamental rights to expression and access to information and culture.

A first obstacle in the provision of digital content to consumers has been recently put forward by scholarship and the European Commission: the territorial application of copyright appears to hamper the development of cross-border provision of digital services to the frustration of consumers. The lack of harmonisation of copyright regime in the European Union, and particularly of its exceptions, can also be explained by the territoriality governing copyright. Incomplete harmonisation makes unequal he European consumers confronted to some uses of copyrighted works but also prevents some valuable services (e.g. distance learning) from developing across the borders.

This would add to the increasing expectation of consumers for an extensive access to information, culture and content, perceived as a basic right in the digital information society. Though the right of access to information can certainly not be claimed as such to get a free access to copyright works, it justifies to achieve a balance, within copyright regime, between owners and users rights, between protection of creation and limitations to that protection. To the extent the digital development has induced a strengthening of the rights of copyright owners, their impact of consumers', and more generally on public's access to culture and knowledge should be systematically accessed and the balance restored when needed.

Copyright exceptions play a key role in that balance, particularly in the field of education, research and access to culture. The European *acquis communautaire* provides exceptions for libraries, museums, educational institutions, and people with disabilities to that effect. However, their transposition into national laws of the Member States is optional and has led to diverging scope and conditions. The fragmentation of copyright exceptions in the Internal market is prejudicial for the consumer who does not enjoy an equal access to culture depending on its place of residence. This is particularly worrisome for consumers

with special needs who have to depend on different modalities to get an access to works adapted to their specific disabilities.
Consumers' rights would be better accommodated by copyright exceptions whose transposition in Member States would be mandatory and uniform.
Consumers have also taken the opportunity given by digital technologies to manipulate and adapt copyrighted works to their own creation. So-called user-created content takes a major part in web 2.0. but still lacks a clear copyright regime, specially concerning the possible exemption of such derived amateur creation from copyright enforcement or, conversely, concerning a possible attenuation of copyright clearance rules. Consumers wait for some certainty in that regard.

Chapter 2 – Consumers as end-users

Digital technology gives copyright owners an increasing possibility to charge for every use of their works or to restrict and control the consumption and final use of the works by consumers. Copyright laws have been adapted somewhat to accommodate this new means of enforcement, restricting the private copy or its conditions, submitting some exceptions to the condition of a prior lawful use, or encouraging and protecting the recourse to technological means of protection. That places consumers in a weakened position and gives a renewed importance to his rights and interests to counteract such expansion of copyright control.

Private copy
A primary concern of the consumer lies in the private copying. Generally recognised as an exception in most (but not all) copyright laws, the reproduction for personal use has gained some impetus in the digital environment due to the ease of its making and the unprecedented quality of the copies obtained. Private copying also occurs more frequently to enable the consumer to enjoy the digital content he acquires. Indeed, most often, the consumer literally "makes" the tangible embodiment of the work he downloads and subsequent copies might be increasingly necessary to allow for using the work in different platforms, applications and formats, as each digital use might technically require a further copy. This has changed the scope and justification of the private copy. One consequence of that shift might be that, when compensating the copyright owners for the harm suffered from the making of private copying (the levies system), such copies, required by the digital format and whose harm is minimal or even non-existent, should not imply compensation. As such device-shifting or format-shifting are fundamental expectations of consumers of digital content, such copying should not be restricted in any way by copyright owners.
As private copying now encompass copies that are technically required for consumers to be able to enjoy digital content, it should be further harmonised within the European Union and gives all European consumers the same scope and level of certainty.
Certainty of the private copy can be endangered by a too broad application of the three-step test. This provision, included in the Information Society directive, limits the enactment of copyright exceptions to (1) certain special cases (2) which do not conflict with a normal exploitation of the work or other subject-matter and (3) do not unreasonably prejudice the legitimate interests of the rights holders. National courts have sometimes applied the three-step test to the private copy when in practice, it seemed that the admissibility of making a digital copy would harm the normal exploitation of the work. It is difficult to understand how a single act of copying would counter the normal exploitation of a work, and submitting the exception to that further condition would create legal uncertainty for the consumer, particularly since the criteria of the test have never been defined in the European legislation or case law.

The three-step test should be limited to a tool for lawmakers when adapting copyright exceptions and incidentally to courts to interpret the exact scope of an unclear legal provision, but it should not add supplementary conditions to copyright exceptions.
Another source for uncertainty for the consumer is the requirement, existing in some Member States, of a lawful source for the private copy: the copy would be exempted under an exception only if it is made from a non counterfeited work. That requirement aims particularly to prevent the application of the private copy exception in illegal peer-to-peer file-sharing when users download works whose communication in such networks have not been authorised by copyright owners. The situation of the lawful source for the private copy, as well as for other exceptions, should be clarified. Conditioning each exception to the evidence of such source would constitute too great a burden for the consumer who might not have, in most cases, have the means to prove that the copy she has used in conformity of an exception was itself authorised. Other means could be found to fight piracy in peer-to-peer networks.
Claims of consumers to acknowledge their genuine right to a private copy have been asserted before some national courts to no avail so far. Answers to the legal nature of the private copy are not easy and will differ from a Member State to another depending on their legal traditions. The intervention of the European lawmaker does not seem necessary on that point. Rather, the effective benefit of the private copy, particularly against attempts of copyright owners to restrain it by contract or technological locks, should trigger legal mechanisms to safeguard the exception in favour of the consumers, as will be developed below.
A last point regarding the private copy exception relates to the levies system, designed in many countries to compensate the copyright and related rights owners for that use of their works and performances. Despite many recent attempts, the levies have not been harmonised, which unnecessarily fragments the Internal Market for reproductive technologies and devices and makes consumers unequal. A recent decision of the European Court of Justice justifies the collection of levies on any equipment sold to natural persons, whatever the purpose they will make thereof, but also implicitly calls for more harmonisation in that field. To cater to the concerns of consumers, the levies system should at the minimum assess the damage suffered by the copyright owners by the private copying to calculate an adequate compensation. Some private copying rendered necessary by digital technologies might be considered as being *de minimis* and lead to no compensation.

The lawful user
The expansion of contracts governing provision of digital content has added a condition to the benefit some copyright exceptions, particularly to software and databases: in some cases, only the lawful user of a work is entitled to exercise copyright exceptions. That condition of the lawful user, that also conditions the enforceability of exceptions against technological measures in the Information Society directive, can unduly restrain the rights of consumers depending on its definition. When defined as the sole licensee of the work, the lawful user will not apply to all consumers acquiring digital goods, who will then be deprived of some fundamental privileges of use. A better definition would be to link the lawful use with the lawful possession of a copyrighted work, even though it would require some evidence of that legitimacy from the consumer. The definition given by the Information Society to the lawful use is the broadest as it encompasses all uses authorised by the rightholder or not restricted by law. The notion of the lawful user should be restricted to limited situations as it potentially reduces the benefit of copyright exceptions for consumers and should be uniformly defined by the European copyright regime

Mandatory nature of copyright exceptions

The emergence of electronic licensing binding any consumer of a copyrighted work has also prompted a new issue related to the copyright exceptions: are those mandatory or can they be contracted out ? In the Software and Database directives, the European lawmaker has answered by making some exceptions of an imperative nature. Surprisingly in the Information Society directive, no provisions prevent copyright exceptions from being overridden by contract, and some elements of the directive even suggests the prevalence of contract over the exceptions. In the online provision of informational goods, non-negotiated and standard form contracts increasingly bind the consumers and grants limited rights of use, disrespectfully of copyright exceptions.

A better protection of consumers' interests would require declaring copyright exceptions non-overridable, as in some Member States, or at least those exceptions conveying fundamental rights or public interests. Even the private copy should be made mandatory, as it has become a legitimate expectation of the consumers.

The rule of exhaustion and its digital application

The principle of exhaustion permits the further distribution or sale of tangible copies of a copyrighted work, once the distribution of such copies has been made within the European Union with the consent of the rightholders. It is not applicable to digital products provided online which creates a divergence that might not be understood by the consumer. A digital exhaustion could however be applied online, provided that the consumer effectively transfers the good and deletes any subsisting copy. It should be provided that the rule of exhaustion is of a mandatory nature and cannot be contracted out

The consumer and the technological measures of protection

The deployment of technological measures of protection (TPM) to protect digital works against unauthorised access and use has further restricted the rights of consumers. The Information Society directive has provided for a mandate for Member States to make some copyright exceptions enforceable against TPM, but this solution is rather limited and difficult to apply. The private copy exception is only covered by this mechanism if the Member States wish so, and the provision of works made available on-line on demand does not need to comply with copyright exceptions.

TPM are also likely to raise issues of playability and interoperability for consumers, as they might interfere with the normal use of devices used by the consumer or not be compatible with them. Member States have provided fragmented answers to such issues, sometimes mandating a proper information on the application and effect of TPM by content providers. Consumers' interests would be better protected if European copyright regulatory framework specifically address such issues and encourage digital content providers to develop consumer-friendly TPM, complying with copyright exceptions, and notably the needs of disabled consumers, privacy and legitimate expectations of consumers related to transparency, security, playability and interoperability.

INTRODUCTION

The relation between copyright law[1] and consumers' rights is not easy or evident. Mainly because the consumer has in principle no role to play in copyright law. Though provoking that affirmation might be, it can be explained by the traditional focus of copyright on the exploitation of protected works or related subject-matter. As aptly said by B. Hugenholtz and N. Helberger, in the analogue environment, « consumers remained largely off copyright law's radar screen. Copyright and consumer law operated on different planes »[2].

Indeed, copyright is about exploitation of works, encompassing activities of communicating the work to the public, either directly or by means of copies (reproduction but also distribution, lending and rental)[3]. Traditionally, copyright mainly intervened in the relationship between copyright owners and public exploiters of works, i.e. the persons selling copies of works, publicly performing, broadcasting, distributing or communicating works in any way. Acquiring a copy of the work, reading or viewing the work does not require in principle the authorisation of the copyright holders. When acquiring a work in a physical carrier, consumers only enter into a sales contract. Subsequent consumptive use of the work, its intellectual enjoyment, escapes to the copyright control. As an example, when a consumer buys a music CD in a shop or a ticket to go and see a movie in a cinema, she enters into a sales contract with the seller of the CD or benefit from a service provision from the movie theatre. Their relationship is governed by the rules of such contracts with no copyright involved, as no act of public exploitation or copy has taken place for the consumer. The effect of copyright in that scheme is only indirect, as the copyright royalties paid by the commercial users of works will certainly be passed on in the price charged for making the work available to consumers.

To put it more simply, copyright governs the relationship between creators and their producers or publishers, as well as the relationship between the latter and other providers of copyrighted works. Independently, consumer protection law operates only in the relationship between the providers of goods and services, irrespective of their protection by copyright, and consumers.

Private and consumptive use is touched upon by copyright only incidentally: it is generally exempted, as the communication right does not extend to private acts of communication within the family circle, and an exception is provided, in most countries, to exempt acts of reproduction carried out for personal use.

The consumer is therefore not mentioned by copyright laws (not even in the private copy exception), but merged into the broader notion of the 'public', that is the real counterpart of copyright holders. Indeed the public has a twofold interest in copyright law. First, the public is the natural recipient of copyrighted works and is hence concerned by an adequate protection of copyright, ensuring creation and dissemination thereof in the public sphere. In that sense, the public interest rejoices that of the copyright owners. On the second hand,

[1] Copyright is used throughout this note to refer both to copyright in literary and artistic works and to related rights in performances, productions of phonograms and films, and broadcastings. This merge between copyright and neighbouring rights is justified on the ground that, for the purpose of that note, no significant difference can be established between both regimes of intellectual property. However, should a difference be relevant, it will be underlined and both regimes will be clearly distinguished.

[2] B. Hugenholtz & N. Helberger, "No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law", 22 Berkeley Technology Law Journal 1061 [2007], at 1077.

[3] J.-G. Renauld, "Les destinées récentes du droit de reproduction mécanique et le droit d'auteur", commentary of Cass. (1ère ch.) , 19 January 1956, *Revue Critique de Jurisprudence Belge*, 1956, p. 196 (« les différentes facultés du droit d'auteur ne sont pas de simples pouvoirs d'exploitation, strictement limités à l'utilisation de tel ou tel procédé, mais tendent à assurer, chacun dans leur domaine, la maîtrise de l'auteur sur la communication ou la diffusion de son œuvre»).

the public also wish for a limited copyright, as its access to culture, knowledge and information can be granted by the necessary boundaries of literary and artistic property. Key principles of copyright aim at such public interest of a limited protection: the duration limited in time, the idea/expression dichotomy, or the copyright exceptions. As members of the public, consumers, associated with representatives of civil society and public interest (that have recently emerged in copyright debates) can voice their concern for a balanced copyright law, whose limitations can contribute to access to culture and information.

However, the interests of consumers cannot be equated anymore solely with that of the public in copyright law. With the digital advent, the consumer has taken a more central role in copyright, as the mere use of a work has now entered into the copyright realm[4]. This radical change comes from many reasons. The first and primary one is rather technical: the digital format implies that each use of digital content amounts to an act of reproduction. That technical shift has for consequence that the end-user, when simply reading, viewing or using a copyrighted work in a digital form, necessarily makes multiple copies of such work, even unknowingly. When formerly out of copyright realm, her consumptive use of protected content now potentially steps into the sphere of control of copyright and related rights owners. From the software directive[5] to the directive on copyright in the information society[6], the right of reproduction was hence stretched to cover the mere use of the work, under the guise of the notion of temporary reproduction. The reason for such an extension of the notion of reproduction right was primarily technical, as any act of use or transfer in a digital form implies a technical act of copy[7]. But it was also the ground for controlling how many persons could get access to the same copy of a computer program: using the program could indeed occur simply by accessing to a temporary copy of the software.
Both justifications have explained the now definitive inclusion of the provisional copy within the reproduction right. It is worthwhile to note that an exception, provided by the Information Society Directive, exempts transitory reproductions created during web browsing or copies created in the RAM memory of a computer. But the principle of the reproduction right covering such copies is now enshrined in copyright law.
The digital evolution also enables a direct relationship between the copyright owner and the consumer. Rather than buying physical carriers containing copyrighted works, like CDs or DVDs, the consumer can acquire them through digital online provision, with the help of licensing contracts and technological measures of protection. Contracts and technology are the door through which copyright can now directly govern the use of the work so downloaded.
This expansive definition of the reproduction right and the possibility of a direct contract with the consumer have enabled the control of the copyright owner over the mere use of the work, and the deployment of licensing contracts governing such use.
End-user licensing agreements (EULA) are frequently agreed upon by consumers on-line, often in an automatic gesture and without any real awareness or consent. In a first stage, such licenses were only applied to computer programs, before being affixed to any piece of digital content or services. In the digital environment, licensing contracts have replaced outrights sales and increasingly bind users' access to and use of digital content[8].

[4] B. Hugenholtz & N. Helberger, *op. cit.,* p. 1066-1067.
[5] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (hereafter the Software directive).
[6] 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 (hereafter the Information Society directive). See also the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (hereafter the Database directive)
[7] G. Mazziotti, *EU Digital Copyright Law and the End-User*, Springer, 2008, p.58.
[8] See generally, L. Guibault, *Copyright limitations and contracts : An analysis of the contractual overridability of limitations on copyright*, Kluwer Law International, 2002

Relationships between copyright owners and end-users, inexistent in the analogue environment, are more and more subject to contract in the digital world. Such a contractualisation of copyright places the consumers in a new and fragile position as their rights and privileges can be decided or restrained by copyright owners through the use of contracts and technical locks[9].

In conclusion, the consumer plays a twofold role in copyright law. On the first hand, the consumer is a member of the public, that is the normal recipient of copyrighted works, and as such, is concerned by an adequate balance between protection and limitations thereto, a balance that ensures access to information and culture. Consumers also want to be provided with attractive legal offers and access to a wide range of copyrighted content, which can only be achieved if copyright regime works in an efficient way. The consideration of the consumer as a part of the public will be assessed in Chapter I of the present note.
On the other hand, the consumer as an end-user of copyrighted works has increasingly steeped into the copyright regulatory framework, which raises new issues, which will be dealt with in Chapter II of the note.

[9] M. Kretschmer, E. Derclaye, M. Favale & R. Watt, *The relationship between copyright and contract law*, Report commissioned by the UK Strategic Advisory Board for Intellectual Property, July 2010, available at http://www.ipo.gov.uk/ipresearch-relation-201007.pdf.

CHAPTER 1. THE CONSUMER AS A MEMBER OF THE PUBLIC

As members of the public, consumers have a strong interest in an effective and limited copyright protection, ensuring the access to a vast range of digital content and guaranteeing their fundamental rights to expression and access to information and culture.
As the advent of the Internet has accustomed the users to extensive access to information, culture and content, that has also fuelled new claims for access to culture and knowledge (part 1.2.).
Secondly, copyright exceptions, even tough not drafted specifically for consumers (save for the private copy, analysed below), ultimately benefit to the public, for they enable some communication or reproduction of works in the public interest. For that reason, consumers have an interest in the adequate and effective working of copyright exceptions (Part 1.3.)
Finally, the consumers have taken a new role in the creation and dissemination of creative content. Digital technologies and networks have enabled the end-user to easily copy, adapt, communicate the work. The public of copyrighted works is now accustomed to "rip, mix and burn" to quote a famous ad for an MP3 player, leading to challenges to copyright law involving the consumer in an unprecedented way. This note will not address the illegal file-sharing that has transformed some members of the public into "pirates", at least as dubbed by the industry that is faced with the rather unknown difficulty to enforce copyright against potential customers.
Conversely, as users have the tools to mix, adapt and make derivative creation out of copyrighted work, they increasingly transformed themselves into amateur creators and produce what is now called "user-generated content". This might lead to potential situations of copyright infringements and call for some legal answer (Part 1.4.).
A preliminary part will be devoted to the application of the territoriality principle in copyright and to its perception by consumers, as it will be a pervasive elements in the following developments (Part 1.1.).

1.1. Copyright territoriality

Copyright has a territorial application. This principle has recently been denounced by copyright scholars[10] and by the European Commission[11] as being guilty of hampering the development of an Internal Market for digital economy and the success of the harmonisation of copyright laws. This "structural impediment to the free movement of goods and (particularly) services"[12] constitutes mainly an obstacle to providers of content but has also an indirect effect on consumers. To the extent that the former have to struggle with national disparities in the definition of rights and exceptions and with the process of clearing copyright in all the Member States (particularly dealing with collective management societies still largely operating on a national basis), the provision of cross-borders goods or services might be made more difficult and slower, hence less available to consumers.
Consumers wish to access to a wide choice of creative, cultural and informational content at any time and at any place within the European Union. In its recent Reflection document on the Digital Single Market, the European Commission mentions some petitions from consumers to the European Parliament complaining about the lack of availability of audiovisual media services in some Member States[13]. Other studies also refer to

[10] IVIR Study, *The Recasting of Copyright and Related Rights for the Knowledge Economy,* November 2006, Study Commissioned by the European Commission, particularly p.21-30.
[11] *Creative Content in a European Digital Single Market : Challenges for the Future*, A reflection Document of DG INFSO and DG MARKT, 22 October 2009,p. 9-13.
[12] IVIR Study, *The Recasting of Copyright…, op. cit.,* p. 22.
[13] *Creative Content in a European Digital Single Market …, op. cit.*, p. 9, footnote 32.

consumers' unhappiness and frustration with the limited legal offer and territorial restrictions for online content in Europe[14].
As a result, the territoriality principle has now become a key point for discussion for the achievement of an effective digital Single Market. Alternative legislative approaches are considered by the European Commission[15], such as the application of the rule of the country of emission, as known in the Satellite and Cable Directive[16], a pan-European one-stop shop for copyright clearance or proposals dealing with collective management of copyright, purporting to make it more effective and less territory-based. Such progress would indirectly benefit the consumers.
The principle of territoriality also encumbers the many attempts of the European lawmaker to foster the development of the Internal market by harmonising copyright laws of the Member States. Such lack of harmonisation can have a detrimental effect on consumers, as far as copyright exceptions are concerned. It will be discussed below on several points.

RECOMMENDATIONS

- Legislative proposals or adaptations enhancing a uniform cross-border application of copyright law and copyright clearance, as well as pan-European and/or multi-territory licensing, should be further elaborated.
- Harmonisation of copyright laws should be further enhanced, namely by imposing the transposition of some provisions when necessary to ensure an Internal market for cross-border digital goods and services.

1.2. Access to information and culture

The right of freedom of expression, including the right of access to information, is provided in all international or European human rights legal texts, from the Universal Declaration for Human Rights, the International Covenant on Civil and Political Rights, to the European Convention on Human Rights and, more recently, in the Charter of Fundamental Rights of the European Union. It has however to be reconciled with another fundamental right, that of having his creation protected, that can be found in article 27 of the Universal Declaration of Human Rights[17]. The EU Charter of Fundamental Rights even more directly protects intellectual property under the right to property[18].
WIPO Treaties of 1996 expressly accommodates the two fundamental rights in their Preamble, which insists on "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention"[19].

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Cross-Border Business to Consumer e-Commerce in the EU, 22 October 2009, COM(2009) 557.
[15] *Ibidem*. See also the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act for a highly competitive social market economy,* 27 October 2010, COM(2010) 608 final, particularly p. 8.
[16] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15. See on that point, IVIR STudy, *The Recasting of Copyright…*, *op. cit.*, p. 26-30.
[17] See also the article 15 of the International Covenant on Economic, Social and Cultural Rights
[18] article 17(2) of the Charter (« Intellectual property shall be protected. »).
[19] WIPO Treaty on Copyright, 20 December 1996.

Users of copyrighted works have regularly invoked the right of access to information to see their interests acknowledged in copyright law. As such, the right of access to information cannot go as far as to justify getting an access to copyrighted works for free and without the authorisation of the copyright owners. Besides, no case law recognise such rights as such to deny copyright protection or the prerogatives of copyright owners[20]. Generally, courts consider that freedom of expression and right of access to information are already conveyed in many features of copyright law, such as the idea/expression dichotomy, the requirement of originality, the limited duration of the copyright and the list of exceptions[21]. For instance the Belgian Court of Cassation has systematically refused to legitimate the use of a work on the sole ground of the freedom of expression, considering that such fundamental right was sufficiently taken into account in the copyright exceptions granted by the law[22]. Other countries have sometimes been more welcoming to the argument of access to information and freedom of expression[23], but such case law is rather limited to exceptional circumstances.

Advancing the recognition of freedom of expression and access to culture and information in copyright will serve consumers' interests, maybe not directly, for it will not grant them an immediate access to works, but as a key element to strike an adequate balance in copyright law. That explains why consumers have always supported, in copyright debates, the view of a balance between rights and limitations, and have sometimes argued against extension of the rights of the copyright owners or their duration, adding their voice to that of the civil society's lobbies, still nascent in the copyright debate.

Promoting the interest of consumers in getting access to culture thus commands to achieve an equilibrium between an adequate protection of copyright, that is a prerequisite for the circulation of copyrighted works and cultural development, and proper limitations to such protection, to cater to the rights and interests of the public. When copyright regulation lacks a sufficient balance and is exceedingly tilted towards the protection of the copyright owners, freedom of expression and access to information could justify an attenuation of protection to restore the balance. That will provide ground to assess any strengthening of copyright and related rights protection under the prism of its impact on consumers' access to culture. Such an impact assessment should be applied to new definitions of rights, extensions of duration, or means of enforcement.

RECOMMENDATIONS

- The impact of any extension of copyright and related rights, and their means of enforcement, on consumers should be assessed.

1.3. Copyright exceptions

In the quest for that balance, copyright exceptions play a key role. I will see later the particular importance of the private copy exception for the consumers, for it is the only

[20] See C. Geiger, *Droit d'auteur et droit du public à l'information – Approche de droit comparé*, Paris, Litec, 2004.

[21] P. Akester, "The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture", *European Intellectual Property Review,* 2010, p. 372.

[22] Cass., 25 September 2003, *Auteurs & Media,* 2004, p. 29, note H. VANHEES.

[23] In France, see Paris District Court, 23 February 1999, *Utrillo*, 2001 GRUR Int. 252, note C. Geiger (reversed in appeal); in the Netherlands, *see* Gravenhage Court of Appeals, 4 September 2003, 10 Mediaforum 337 (2003), note D. Visser*;* in Austria, *see* Supreme Court, 12 June 2001, 2002 GRUR Int. 341 ; In Germany, *see* Federal Constitutional Court, 29 June 2000, *Germania 3*, 2001 GRUR 149.

exception whose beneficiaries can be equated to the consumers acting for their personal use. But other exceptions are relevant to consumers as they can foster the dissemination of copyrighted works to the general public, for instance by libraries, in education contexts, hereby enhancing access to culture and knowledge. Where libraries benefit from balanced privileges to reproduce, archive and make available copyrighted works to the public, without harming the normal exploitation of works, it fosters access to knowledge by citizens. The same is true for exceptions in the frame of educational activities.

Those exceptions are provided for in the Information Society directive[24] and allow for a relative manoeuvre of libraries, museums, archives and teaching institutions. The importance of such exceptions has been acknowledged by the recent Communication of the European Commission on the Copyright in the Knowledge Economy[25], that also announced its plan to address the legal implications of mass-scale digitisation[26], distance learning services and possible solutions for a better rights clearance for libraries.

From the perspective of the consumer, who is also a potential user of libraries and educational services, another issue might have more direct implications, i.e. the lack of harmonisation of such exceptions throughout the European Union[27]. The Information Society directive leaves ample discretion to Member States to implement the exceptions it provides, for the latter are optional and the directive does not prescribe detailed conditions and modalities of each exception it provides. Consequently, education and library exceptions are appearing in the Member States' regulatory frameworks in a diverse and fragmented way[28]. In some cases, Member States' have given to exceptions a much narrower scope than in the Information Society Directive. Consumers are hence not treated equally within the European Union as far as their access to knowledge and culture through libraries and education is concerned. More particularly, the development of a cross-border environment for distance learning might be impeded by the fragmentation of copyright exceptions for education. Consumers residing in one country might not get access to valuable learning services and activities, on the sole ground that their country does not allow sufficient exceptions for those activities to deploy.

The lack of harmonisation of library and education exceptions should be dealt with. As proposed by the study evaluating the Information Society directive[29], such exceptions, as they reflect fundamental right to get access to knowledge and information (and incidentally as they have a significant impact on the Internal Market), should be further harmonised: their transposition should be at least mandatory for the Member States in a way that would not differ too much from the definition of the exceptions at the European level. Harmonising and making some exceptions mandatory is an option that has been recently considered by the European Commission itself[30].

[24] Article 5 of the Information Society Directive.

[25] Communication of the European Commission, *Copyright in the Knowledge Economy,* 19 October 2009, COM(2009) 532 final.

[26] See also the European Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation.

[27] See L. Guibault, "Why Cherry Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC", *Journal of Intellectual Property, Information Technologies and E-Commerce Law*, 2010-2, p. 55-66 (available at http://www.jipitec.eu/).

[28] For a complete analysis of the situation in the 27 Member States, see *IVIR 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*, Feb. 2007, p. 46-50; G. Westkamp*, The Implementation of Directive 2001/29/EC in the Member States*, Part II of the Study on the implementation of Directive 2001/29/EC, Ivir, 2007, p 22-23 & 32-34. (both available at http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm)

[29] *IVIR Study on the Implementation of Directive 2001/29/EC*, *op. cit.,*p. 65-66.

[30] See the Communication on Copyright in the Knowledge Economy, *op. cit. ;* also, *Creative Content in a European Digital Single Market*, *op. cit.*, p.15.

Another exception is of paramount importance in a democratic society and can directly apply to some categories of consumers: it is the exception provided by the article 5(3)b) of the Information Society directive allowing reproduction of communication of protected works for the benefit of people with a disability. Similarly to libraries and education exceptions, one can only deplore the lack of harmonisation in the national transposition of that exception[31]. This creates a huge inequality for handicapped consumers in the European Union, which has an even greater impact on their right to get access to culture and knowledge. In parallel to the endeavours of the European Commission to encourage the deployment of business models and practical solutions to provide works in readable or audible format for persons with disabilities[32], the exception should be made mandatory for the Member States in a similar wording and scope[33].
The cross-border delivery of works adapted to the special needs of persons with disabilities in conformity with an exception in a Member State, should be allowed with no need to further comply with the copyright regime of each Member State in which such content is made available. That would mitigate the territorial application of copyright exceptions in favour of the better circulation of adapted works for disabled people.

RECOMMENDATIONS

- Member States should transpose the exceptions for libraries, education and research, and persons with a disability provided for in the Information Society Directive.
- Endeavours of the copyright industry to provide for content made accessible for persons with a disability should be supported and encouraged.
- The cross-border delivery of works adapted to the special needs of persons with disabilities in conformity with an exception in a Member State should be authorised in other Member States.

1.4. User-created content

User-generated content or user-created content is the outcome of the increasing involvement of the user in web 2.0 applications, such as blogs, podcasts, wiki, file or video sharing. Individuals can now easily produce and share digital created, sometimes made from existing copyrighted content. The issue is not anecdotal as many business models build on user-generated content.
User-created content, when amateur and derived from existing creations by third parties, has an ambiguous scope and status[34]. It is unclear whether such creation can benefit from existing exceptions such as quotations for criticism, parody or incidental use. Amateur creators who wish to clear copyright in the material they used for their creation, face

[31] G. Westkamp, *The Implementation of Directive 2001/29/EC, op. cit.*, p. 35-37.
[32] Communication of the European Commission, *Copyright in the Knowledge Economy,* 19 October 2009, COM(2009) 532 final, p.9.
[33] See also, IVIR Study, *op. cit.*, p. 51-52 (analysis of the exception and its transposition) and p. 65 (recommendations).
[34] On the issue of user-created content, see IVIR, TNO, IDATE, *User-Created-Content: Supporting a participative Information Society - Final Report*, December 2008, available at http://www.ivir.nl/publications/helberger/User_created_content.pdf.

intricate rules that are not fit to such type of amateur and limited exploitation[35]. Consumers wish to be better informed as to whether their creation complies with copyright possibly held by third parties, and to enjoy more freedom of creation in the digital environment. In the recent Communication on Copyright in the Knowledge Economy[36], the European Commission has envisaged the possible introduction of a new exception to cater for creative, transformative and derivative works, but has considered it premature to rule on that matter and called instead for new research in that area.

Another issue comes from the contractual rules of websites hosting or making available such content, that sometimes impose a complete transfer of copyright in such user-created content to their sole profit. Consumers, as amateur creators, are not well-equipped to resist such transfer of rights. A French consumers association has recently managed to cancel before courts the policy of the on-line bookshop Amazon that systematically provided for such a transfer of copyrights in the user-created content it hosted[37]. It has succeeded on consumer laws provision and not on copyright ones, which might be explained by the legal impossibility for a consumers association to initiate legal proceedings for collective redress based on copyright laws.

RECOMMENDATIONS

- Based on further research, the introduction of a copyright exception or the adaptation of existing ones to cover to some extent user-created content, as well as a simplification of copyright clearance in that context, should be envisaged.

[35] *Creative Content in a European Digital Single Market, op. cit.,* p. 10.
[36] Communication on Copyright in the Knowledge Economy, *op. cit.*, p. 9.
[37] Paris District Court, 28 October 2008, available at http://www.foruminternet.org/specialistes/veille-juridique/jurisprudence/tribunal-de-grande-instance-de-paris-1re-chambre-section-sociale-28-octobre-2008-2814.html.

CHAPTER 2. THE CONSUMER AS AN END-USER

The consumer being increasingly the counterpart of copyright owners in the provision of digital content, copyright laws have been adapted to take into account both the development of contract governing the mere use of the work and the concerns of the consumers. This attention explains some recent rules of copyright regimes.
Though anterior to the digital development, the private copy, as the only exception tailored to the needs of consumers, is still one key interest of the consumers, but is facing challenges resulting from the irruption of contract and technology in copyright control (part 2.1.).
Beyond the private copy, other issues relevant for the consumers emerge from the contract-copyright link, such as the definition of the lawful user (2.2.), the overridability of copyright exceptions (2.3), the digital exhaustion (2.4.), and the consumer protection related to the technological measures of protection (2.5).

2.1. The private copy

2.1.1. Evolution of the private copy

The private copy exception has been the first copyright provision directly dealing with consumers' interests. It allows for reproduction of copyrighted works without the authorisation of the copyright owners when such copy is strictly made for the personal use of the copier. Its importance has grown with the digital evolution and the consumers are more aware of the possibility to make private copies, also made easier and cheaper with digital reproduction technologies. Hence they tend to consider the private copy as a real right they should not be deprived of.
This unprecedented quality of the copy and the technical possibility to prohibit copying a digital work could have led to the suppression of the exception altogether, as was done for software and databases. Although some proposals to that effect were made in the adoption process of the Information Society directive, its article 5(2) finally maintains an optional private copying exception, encompassing both analogue and private copying. Such a preservation of the private copy proves its importance, as a balancing tool between the rightholders' and the users' interests, as well as a limitation of copyright enforcement partially justified by privacy considerations.
Other reasons might continue to justify the private copy of digital content. Consumers now expect to be able to use the work in different places and at different times, on their computer, phone, MP3 player, car radio. Private copying enables such format-shifting or device-shifting. This portability is also generally acknowledged by digital content provision services that allows for a certain number of copies to be made on a limited set of devices.
Private copy is further needed for a more basic function. For digital content is now increasingly acquired on line as a file containing digital bytes, the consumer will eventually materialize the work so downloaded into a tangible copy, whether on a CD, on a hard disk or on a MP3 player. Contrary to the acquisition of an analogue work where a hard copy is provided to the user, as far as provision of digital work is concerned, the user has to make her own copy of the work. Technically this act of first fixation is a reproduction in the copyright sense, but one that is authorised by the copyright holder and included in the overall price paid by the acquirer to get access to the work. The consumer literally "makes" the tangible embodiment of the work she has bought. This certainly holds true for many first fixations of works acquired in electronic communication networks, but it can also be the case for subsequent copies when those are indispensable to normally enjoy the work. While the possession of a musical CD enables the user to listen to that CD on many

devices, a work acquired on-line will necessitate the making of different copies, on the many devices in which it can be played.
Therefore, the private copy, rather than being simply justified by time-shifting purposes or acting as a secondary copy for another use, time or place, can now be part of the act of acquisition itself[38]. Moving content between players and applications and convert content to an appropriate format should be allowed under the private copy privileges as they belong to the legitimate expectations of the consumer of digital goods.
It should have some consequences on the justification and regime of the private copy. Let me cite only two of them.
The first one concerns the justification of the private copy exception, traditionally based on the market failure resulting from the unfeasible transaction between the author and the user as to the private copy. Nowadays, when private copies are part of the on-line acquisition of the work, whether as the making of the first tangible copy of the acquired content or as the making of secondary copies for device-shifting or format-shifting, they might enter in the contractual sphere and are thus likely to be a matter for licensing, hence open to contractual constraints. Consumers should nevertheless not be precluded from making such copies, either by law or by contract.
The second consequence relates to the compensation of the harm normally suffered by the copyright owners due to the making of copies for personal use, which justifies the setting up of a levy system in many Member States (see *infra)*. Again, when the copy takes part to the operation of acquiring a work, the harm to copyright owners might be minimal, or even be inexistent, for the price of acquisition has normally been paid by the consumer. This reduction of the harm should logically have an impact on the compensation to be paid to the rightholders.

2.1.2. Lack of harmonisation

The private copy is recognised as an admissible exception by the Information Society directive. However, as the other exceptions, it is only optional for the Member States. As a consequence, private copy does not exist in all Member States (the notable exception being the United Kingdom[39] and Ireland). When it exists, its conditions might also be slightly different[40]. Differences concern the ambit of the private use (domestic use or personal use, th latter being broader), the limitation of the number of copies allowed, the classes of works concerned (sometimes restricted to sound and audiovisual works), the possibility to make the copy by third parties. Such discrepancies negate the wish for harmonisation that was pursued by the Information Society directive and has the effect to treat the European consumers differently depending on the country in which they copy for their personal use. This lack of harmonisation is troublesome for the consumer who does not have a clear picture of his right.

2.1.3. The relationship between private copy and the three-step test

The three-step test has been borrowed by the European lawmaker from the Berne Convention and the TRIPS Agreement and has been introduced in the directive 2001/29 on the copyright in the information society as a standard to legitimate the enactment of

[38] S. Dusollier & C. Ker, "Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics", in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Edgar Elgar, 2008. p.349-372.
[39] The United Kingdom admits however the reproduction of broadcasts for private time-shifting purpose, see section 70 of the Copyright, Design and Patents Act of 1988. The UK Prime Minister has announced at the end of October 2010, its intention to introduce a private copying exception into UK Copyright law.
[40] For a complete analysis, see G. Westkamp*, The Implementation of Directive 2001/29/EC, op. cit.*, p. 17, and the table at p. 84.

copyright exceptions. It provides that exceptions are only admissible (1) in certain special cases (2) which do not conflict with a normal exploitation of the work or other subject-matter and (3) do not unreasonably prejudice the legitimate interests of the rightholder.
This principle is considered as an overall scrutiny applicable to all copyright exceptions to assess their compatibility and their proportionality in regards to the copyright protection. As far as consumers' interests are concerned, the three-step test raises some issues, particularly regarding the private copy.
A first question relates to the possible application of the test by a judge that could infirm the legitimacy of a defence based on an exception, namely the private copy. The three-step test was generally deemed to act as a tool for the lawmakers to assess the reasonableness of limiting copyright protection by an exception, which shall only be allowed in limited cases and insofar as the economic exploitation of the work an the legitimate interests of the copyright owners would not be unduly harmed. But the article 5(5) of the Information Society directive, that mentions the three-step test, has raised some uncertainty as it provides that "the exceptions and limitations (…) shall only be *applied* in certain special cases (…)"[41], which seems to indicate that a court can have recourse to the test when applying an exception in the course of a copyright infringement case. Should that be the case, it would raise legal uncertainty for the consumer. Indeed, even if the consumer makes a personal copy of the work within the limits and conditions ascribed by the applicable law, such an application of the test by the judge could add further requirements to the benefit of the private copy, i.e. the fact that the copy does not run counter the normal exploitation.
There have been some cases in the European Union where the three-step test has been used by national courts to decide upon the legitimacy of a use, even though such use was in principle covered by an exception in the national law. In France, the so-called Mulholland Drive case, concerned the private copy exception and gave rise to a number of court decisions in France[42]. One consumer wanted to make a private copy of a film from a DVD to an analogue format. Since such a copy was prevented from the technical lock embedded in the DVD, he asked the court to make him benefit effectively from his private copy. The many courts that had to decide the case had recourse to the three-step test to assess the legality of the private copy requested by the plaintiff. The first court decision[43] by the Tribunal of Paris has namely held that the making of such a copy would harm the normal exploitation of the film as the sale of the film in DVD format was a key market for the film industry.
Though disputable as to its findings[44], this decision demonstrates that leaving the three-step test to the courts to assess the legitimacy of the private copy, would add a supplementary condition to the exception, whose contours would be vague and indefinite for the consumer, as it would change over time and depend of an economic analysis out of reach of the average consumer.
The three steps of the test would also merit further explanation[45]. A WTO Panel decision set aside[46], there is no definition of the meaning of each condition, and particularly of the

[41] I underline.
[42] Paris District Court, 30 April 2004, *semaine Juridique*, 2004, II, p. 1583, note C. GEIGER ; Paris Court of Appeals, 22 April 2005, *Revue du Droit des Technologies de l'Information.*, 2005, n°23, p. 57, note S. DUSOLLIER; Cass. fr., 28 February 2006, *Auteurs & Media*, 2006, p. 178, note Dusollier ; Paris Court of Appeal, 4 April 2007, *Auteurs & Media*, 2007, p. 348, note Dusollier.
[43] See Paris District Court, 30 April 1994, *op. cit.*
[44] For a critical overview see S. Dusollier, "L'encadrement des exceptions au droit d'auteur par le test des trois étapes", *Intellectuele Rechten-Droits Intellectuels*, 2005, p. 213-223.
[45] C. Geiger, "The Answer to the Machine Should Not be the Machine: Safeguarding the Private Copy Exception in the Digital environment", *European Intellectual Property Review*, 2008, p.121.
[46] WTO Panel Report, 15 June 2000, *US — Section 110(5) Copyright Act* (this report does not settle definitively the meaning of the three-step test, as it has been pronounced in a dispute involving two States and has occurred in the WTO context, whose approach is more economic).

"normal economic exploitation" referred to by the second step. A preliminary question had been deferred to the European Court of Justice, about the meaning of the test[47]. Unfortunately, this question has been dismissed by the Court. The same question has been recently asked again to the Court in the same case[48]. As the three-step test is a key provision applicable to copyright exceptions, it would be useful to clarify both its meaning (and particularly the meaning of the 'normal exploitation of the work', as it is usually the cornerstone of the test) and its normal recipient, the lawmaker and/or the courts[49].

2.1.4. The lawful origin of the private copy

An interesting question has arisen at the occasion of copyright infringement proceedings dealing with peer-to-peer file sharing. For some courts decisions, namely in France first admitted the defence of private copy from users who had only downloaded musical works without authorisation[50], plaintiffs have started to claim that the private copy should only be admitted when made from a lawful source, i.e. from a work whose copy or communication had been duly authorised by the copyright holders[51].

Even though it seems to be a good strategy to counter the application of the private copy to piracy in peer-to-peer networks, requiring a lawful source for the benefit of copyright exceptions seems far-reaching. Setting it as an overall principle to all copyright exceptions would mean that the consumer would bear the burden of proving, when relying upon a copyright exception, that the copy was based on a non-infringing copy. Consumers might not have the sufficient knowledge to prove it. Would it mean that the consumer would have to keep all receipts or invoices from the cultural goods he bought in shops or on-line? Would it mean that broadcasting a work without the proper authorisation would invalidate the copy a consumer could carry out for time-shifting purpose? As for the three-step test, it would add to the benefit of exception a condition that the consumer might not have the capacity to assess.

The requirement of a lawful source for the private copy is not addressed in the Information Society Directive, but has been imposed by some Member States[52], as in Finland, Norway, Portugal and Sweden. Germany has introduced a attenuated version of such a condition when transposing the directive: the article 53 of the German copyright act now requires the private copy to be done from a source that is obviously not illicit. Such a formulation clearly avoids the application of the private copy for downloading in peer-to-peer networks without imposing a too strict proof to be provided by the consumer.

2.1.5. The nature of private copy

Consumers often feel that they are entitled to make private copying. This perception has sometimes resulted in legal proceedings aiming at acknowledging that the private copy should be considered as a genuine right. Two notable cases dealt with that claim in

[47] ECJ, 16 July 2009, *Infopaq* International, C-5/08.

[48] Reference for a preliminary ruling from the Højesteret (Denmark), lodged on 18 June 2010 – Infopaq International A/S v Danske Dagblades Forening, C-302/10.

[49] See the Declaration for a Balanced Application of the « Three-Step Test » in Copyright Law, signed by many European academics, at http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm.

[50] Rodez District Court, 13 October 2004, *Communications commerce électronique 2004*, comm. n° 152, note Ch. CARON, *upheld in appeal,* Montpellier Court of Appeals, 10 March 2005, *Communications commerce électronique*, Mai 2005, note CH. CARON; Meaux District Court, 21 April 2005, available at http://www.juriscom.net. See also L. THOUMYRE, "Peer-to-peer : l'exception pour copie privée s'applique bien au téléchargement ", *Revue Lamy droit de l'immatériel*, July-August 2005, p. 13.

[51] Cass. Crim. Fr., 30 May 2006, available at http://www.juriscom.net/jpt/visu.php?ID=830 (this court decision is sometimes quoted as having required a lawful source for the private copy. However, the court of cassation only requires the court of appeals to consider that question, as raised by the plaintiffs in their arguments).

[52] See G. Westkamp*, The Implementation of Directive 2001/29/EC, op. cit.*, p. 20-21.

France[53] and in Belgium[54]. In both cases, a consumer, supported by a consumers' association, tried to invoke a right to the private copy to thwart the operation of anti-copy technical protection.
The ensuing court decisions have rejected that claim, holding that a copyright exception is only a defence to copyright enforcement, a 'legal immunity' against infringement, not a genuine right in that private copy. Since then, the issue of the status of the exception and of the private copy against technological measures of protection was partially dealt with by the article 6(4) of the Information Society directive (see *infra*).
In Germany, the federal Constitutional Court likewise rejected an application for a constitutional complaint invoking a violation of a constitutional right in the private copy by the legal protection of technological measures[55]. The complaint asserted more generally that the affixing of technical locks on CDs and DVDs violated the right to freely receive information and the right to property in the physical carrier. Interestingly, the *Bundesverfassungsgericht* has considered that the private copy exception does not amount to a constitutionally protected right and that the lawmaker could also prohibit the private copying of works altogether.
In all those court decisions, claiming the private copy as a right mainly reflects the concern of consumers that they might be deprived of such copying by contract or technological measures of protection.
The legal nature of copyright exceptions (whether a right or not) should be left to Member States, whose legal traditions and systems might differ as far as categories of different legal entitlements are concerned. However, consumers' concern about the effectivity of the private copy exception can be dealt with by addressing the relationship between private copy and contract or technological measure, which will be done below.

2.1.6. Private copy levies

In the recent European directive on copyright in the information society, the Member States that provide for the private copy exception are required to organise a fair compensation for such copies that can take the form of a levy system[56]. Beyond that reference and suggestion, the levy systems for private copy are not harmonised at the EU level despite some attempts to that effect[57]. The basis of the levy (copying devices and/or media on which it is levied), its amount, the person who has to pay the levy, as well as the distribution keys and methods, differ from one country to another[58].
A very recent decision of the European Court of Justice has confirmed the legality of the levy for private copying to compensate the prejudice of the private copying to rightholders[59] and its collection on digital reproduction equipment, devices and media. It has held that there should be "a necessary link between the application of the private copying levy to the digital reproduction equipment, devices and media and their use for

[53] See the Mulholland Drive case, *supra,* note 42.
[54] Prés. Bruxelles (cess.), 25 May 2004, *Auteurs & Médias*, 2004/4, p.338-345, note Dusollier; Brussels Court of Appeals, 9 September 2005, *Revue du Droit des Technologies de l'Information,* 2005, n°23, p. 71.
[55] BVerfG, 1 BvR 2182/04, 25 July 2005, available at http://www.bverfg.de/entscheidungen/rk20050725_1bvr218204.html.
[56] S. Bechtold, "Directive on the harmonisation of certain aspects of copyright and related rights in the information society", in T. Dreier & B. Hugenholtz (eds.), *Concise European Copyright*, Kluwer Law International, 2006, p. 373.
[57] See the webpage of the DG-MARKT dedicated to that issue, http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm.
[58] For a comparative analysis of existing systems of levies in national laws, see S. Martin, "Summary of the national reports on the questions concerning the regime of private copying in the analog domain", in *Creators' rights in the information society*, Proceedings of the ALAI Congress, September 2003, Budapest, KJK-Kerszov Legal and Business Publishers Ltd., 2004, p. 206 ; W. Wanrooij, "Remuneration Systems for Private Copying", *ibidem*, p. 371.
[59] ECJ, 21 October 2010, *Padawan v. SGAE*, C-367/08.

private copying"[60] even though the establishment of such a link does not go as far as requiring "to show that [the natural persons acquiring such equipment] have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work"[61]. The fact that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users.

This decision thus justifies the system of the levy and its 'rough justice' nature as it could indiscriminately apply to all equipments made available to consumers, whether they actually use it for private copy or not.

Harmonisation of the levy system in the European Union could nevertheless be pursued, and it is implicit in the ECJ decision, in order to better satisfy the needs of consumers and to curb the development of a grey market in Europe for equipment exempted from levies, depending on the country in which they are marketed.

In the frame of such harmonisation process, the harm suffered by the copyright owners due to the making of copying for personal purposes should be better estimated. Personal copies required by the digital format, for instance for enabling format-shifting or portability of the work to different playing devices, as well as the possible application of anti-copying mechanisms should be taken into account[62] as they might infer no or minimal harm[63], that could not require a compensation, in conformity with the recital 35 of the Information Society Directive[64]. We have already underlined the consequence that the new purposes of private copying in the digital environment might have on the levy systems (see *supra*, point 2.1.1.)

RECOMMENDATIONS

- Private copy exceptions should be further harmonised in the European Union. It should encompass copying for time-shifting, device or application-shifting and format-shifting.
- It should be made clear that the three-step test can only be used by the courts to interpret an unclear copyright exception, not to add further conditions to its benefit.
- Lawful source should not be required as a condition for private copy or only when the copy is made from a source that appears to the user as being evidently illegal.
- Harmonisation of the private copying levies should be pursued. It should include an assessment of the harm suffered by copyright owners due to the making of private copying, where new purposes of copies made by individuals (eg for format-shifting, device-portability, making of the tangible embodiment of a downloaded work) should be taken into account.

[60] Ibidem at 52.
[61] Ibidem, at 53.
[62] For an analysis of this consideration by the levy system, see S. Dusollier & C. Ker, *op. cit.*
[63] L. Guibault & N. Helberger, *Copyright Law and Consumer Protection,* Policy conclusions of the European Consumer Law Group, February 2005, p.6-7.
[64] "the level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise".

2.2. The lawful user

The lawful user is a new character in the copyright story, introduced as the chapter of the digital evolution unfolded. Without much notice, it has progressively acquired a key importance for consumers' interests in copyright law[65].

He first appeared in the Software Directive that limits the benefit of copyright exceptions on the computer program to the lawful acquirer (exception for the normal use of the program), to the person having a right to use the computer program (back-up copy), to the person having a right to use a copy of a computer program (observation, study and test), and to the licensee or by another person having a right to use a copy of a program (reverse engineering)[66].

The lawful user comes back in the directive 1996/9/EC on the protection of databases: the exceptions to the copyright and the sui generis right in the database are equally reserved to the lawful user[67]. The following exceptions are encompassed: the access and normal use of the content of the database (article 6, (1)), the exception for the extraction and re-use of non substantial parts of the database (art. 8(1)), as well as the more traditional copyright exceptions that Member States are allowed to apply to the sui generis right (art. 9).

In the Information Society directive of 2001, it seems to have disappeared: being a legitimate user of a copyrighted work or other subject matter does not condition the enjoyment of copyright exceptions. However the legitimate use of a work is still a prerequisite in two cases: the exception for temporary copy and the effective benefit of a copyright exception that would be impeded by the operation of a technological measure of protection[68]. The choice of the European lawmaker, not to require the lawful user as a general condition for copyright exceptions, demonstrates that the lawful user is a figure justified and needed mainly for the specific cases of software and databases, that are works mainly provided in a digital format and on contractual terms.

Conditioning the benefit of copyright exceptions of software or database, or their benefit against technological measures of protection, upon being a lawful user might have a variable effect, depending on the way that notion is defined. The definition of the lawful user in the Software and Database directives or of the lawful use in the Information Society Directive is neither uniform nor stable. The stricter definition, that seems to be that of the database directive[69], equates the lawful user to the licensee. Under such a definition, consumers having bought the work in a physical carrier with no license contract, or having acquired a copy of the work in the second-hand market, would not be considered as lawfully using the work and would be barred from enjoying copyright exceptions limited by that principle. Should this definition be accepted, the copyright exceptions, at least concerning software and database, would be strictly defined by contracts concluded with copyright owners, which would weaken the position of consumers.

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[65] S. Dusollier, "L'utilisation légitime de l'œuvre : un nouveau sésame pour le bénéfice des exceptions en droit d'auteur ?", *Communications – Commerce Electronique*, November 2005, p. 17-20.

[66] Software directive, articles 5 & 6.

[67] Database directive, articles 6 & 8. See also, V. Vanovermeire, "The concept of the lawful user in the database directive", *International Review of Industrial Property and Copyright,* 2000, Vol. 3, p. 64.

[68] See the Information Society directive, articles 5(1) (*Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use, of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2*) and 6(4) (*in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation (…) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned*) (I underline).

[69] See the articles 6 and 8 of the directive as well as the recital 34 that seems to be inclined towards the license-based definition. See also V. Vanovermeire, *op. cit.*

Another definition extends the lawful user from license contracts to any case where the user is in a lawful possession of a copy of the work (through acquisition for example). Such an extension permits to encompass most cases where the consumer uses a copyrighted work. However it might induce that the consumer would need to prove the legitimacy of his possession of a copy of the copyrighted work before benefiting from the exceptions limited by this condition of lawful use.
The European Commission confirmed, in its revision of the Software directive, that this was the notion of lawful user that should be preferred. This document also suggests that this definition applies to the similar notion used in the database directive[70].
A broadest definition could also cover uses of a copyrighted work in the framework of a legal authorisation, for example under an exception. That would be the case of a user of a work under the public lending right. The exception for public lending would legitimate the making available of the work to the consumer who would then be considered as a lawful user and would benefit from the exceptions for which such a condition applies.
An adequate and uniform definition of the lawful user throughout all these directives would better secure the consumers interests. In order to encompass all cases where the consumer has a lawful access to the work (as a licensee, an acquirer of a copy of the work by a sale or a online download as well as the consumer using a copy of the work in the frame of the provision of the work legitimised by an exception), the broader definition of the lawful user, that appears in the recital 33 of the Information Society directive[71], should be preferred. It is also the only definition that aligns itself with the contours of copyright scope, without requiring a contractual relationship with the rightholders or the proof by the consumer of his acquisition of the work[72].
More generally, the requirement of the lawful user as a general precondition for copyright exceptions, should be kept limited to the software and database cases.

RECOMMENDATIONS

- The notion of lawful user appearing in the Software and Database directives, and incidentally in the Information Society Directive, should be clarified and defined in an uniform way. The definition that would better accommodate the needs of the consumer should not limit the lawful user to the license contract or to the lawful acquisition of a work, but should include any situation where the use is authorised by the copyright owners or by the law.

2.3. Mandatory nature of copyright exceptions

The emergence of electronic licensing binding any consumer of a copyrighted work has also prompted a new issue related to the copyright exceptions: are those mandatory or can they be contracted out ? In the online provision of informational goods, standard form contract prevail. End-user licensing agreements are generally determined by the copyright owners and leave no room for negotiation to the consumer, who is confronted with a leave-it or take-it choice. It is not uncommon that such licences restrict the freedoms normally

[70] Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, 10 April 2000, COM(2000) 199 final, p. 12.
[71] Recital 33 of the Information Society directive defines the lawful use required by the exception for temporary copy as follows : « A use should be considered lawful where it is authorised by the rightholder or not restricted by law ».
[72] S. Dusollier, "L'utilisation légitime de l'œuvre …", *op. cit.,* p. 17-20.

granted by copyright law to the users, limiting the use of the work so acquired to a strict personal use (leaving out all other exceptions)[73] or limiting the possibility to make copies, even for personal use.

A classical way to protect the consumer in non-negotiated, standard form contracts is to make her rights mandatory and non-overridable by contract. The European lawmaker has introduced such privileged status to some copyright exceptions in the Software and Database directives, as a counterpart to the extension of the capacity of copyright owners to license the mere use of the works (see *supra*)[74]. In the Software directive, the exceptions for back-up copy, study and testing of the program, for normal use (allowing however the contract to organise the exercise of this exception), as well as for reverse engineering, can not be contracted out. The same is true in the Database directive for the normal use of the database (copyright exception) and for the extraction right related to non-substantial parts of the database (exception to the sui generis right).

Surprisingly, the Information Society directive does not say a word about the mandatory nature of copyright exceptions[75], even though the provision of digital content is increasingly bound with restrictive end-user licenses that might limit the privileges of consumers. Despite the silence of the directive on that point[76], one can infer from literal provisions or recitals of the directive that the European lawmaker did not intend to make the exceptions of a mandatory nature[77].

Three member States have expressly made all their exceptions mandatory with no distinction[78]: Belgium, Ireland and Portugal[79].

Providing that the copyright exceptions cannot be overridden by contract, or at least those that are grounded in fundamental rights or public interest (as the parody, the educational or library exceptions, the exception benefiting to people with disabilities), as well as the private copy, would immunize the users' privileges against non-negotiated contracts and would better protect the interests of the consumers. It would restore the balance in favour of consumers, compensating the imbalance brought by the increasing use of end-user license agreements in the digital provision of copyrighted works. Declaring copyright exceptions mandatory and non-overridable would not be contrary to the *acquis communautaire* as it was a key feature of the first directives related to digital products, the Software and Database directives.

[73] See the examples given in the IVIR study on implementation of Directive 2001/29/EC, *op. cit.*, p. 155 ; M. Kretschmer, E. Derclaye, M. Favale & R. Watt, *The relationship between copyright and contract law*, *op. cit.,* p. 116-120.

[74] On the overall issue of the mandatory exceptions in those directives, see L. Guibault, *Copyright limitations and contracts : An analysis of the contractual overridability of limitations on copyright*, Kluwer Law International, 2002.

[75] B. Hugenholtz, "Why the copyright directive is unimportant and possibly invalid", *European Intellectual Property Review*, 2000, p. 500.

[76] B. Hugenholtz & N. Helberger, *op. cit.*, p. 1074-1075.

[77] See for instance the articles 9, 6(4)(4) of the directive, and its recitals 35 and 45, which seem to indicate a favour given to the contract over the exceptions. In the process of enactment of the Information Society directive, an amendment of the European Parliament stating that "no contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5" was rejected by the Council.

[78] M. Kretschmer, E. Derclaye, M. Favale & R. Watt, *The relationship between copyright and contract law*, *op. cit.,* particularly p. 97-104.

[79] About Belgium, see S. Dusollier, "La contractualisation de l'utilisation des œuvres et l'expérience belge des exceptions imperatives", *Propriétés Intellectuelles*, October 2007, p. 443-452; about Portugal, see P. Akester, "Implementation of the Information Society Directive in Portugal", *Entertainment Law Review,* 2005/16, p.10.

RECOMMENDATIONS

- The mandatory nature of copyright exceptions should be further analysed. At least the exceptions conveying fundamental freedoms or public interests, as well as the private copy, should not be contracted out.
- Standard contracts or codes of best practices for digital provision of copyrighted works could be drafted and proposed to information society service providers. Such contracts would comply with copyright exceptions.

2.4. The rule of exhaustion and its digital application

The principle of exhaustion permits the further distribution or sale of tangible copies of a copyrighted work, once the distribution of such copies has been made within the European Union with the consent of the rightholders. Its first consequence is to authorise parallel import and to guarantee the free circulation of goods in the Internal Market, mitigating hereby the principle of territoriality in copyright laws.

Another effect of the exhaustion rule is to allow the resale of works on second-hand markets. Consumers can thus resell copyrighted goods they have in their possession. Such a "first sale" rule preserves the right to ownership of consumers but also plays a role in fostering a greater access to works by the public and the circulation of culture.

However, this exhaustion only applies to tangible goods[80], as repeated by the Information Society directive whose recital 29 states that "the question of exhaustion does not arise in the case of services and on-line services in particular. (…) Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides".

Applying exhaustion to the resale of digital content bought on-line comes up against the fact than transferring the ownership of a digital file to another person will only make a copy of such file, while keeping the original in the computer of the transmitter. The rationale of the exhaustion applied to tangible items, i.e. the possibility to transfer one's property, is thus absent in the case of digital content. However, consumers might not understand the difference when they increasingly buy music or films on-line and transform them into tangible goods by burning a CD or DVD. Why would they not be allowed to resell such CD or DVD, as they can do when they buy the same content in a physical shop?

A revision of the exhaustion principle could be imagined, based on further research, to accommodate what would be a digital first sale doctrine for e-goods, specially when the downloading of a digital version of a work is a substitute for the sale of physical copy. The consumer would then be allowed to transfer a CD or DVD into which he has burned a digital work, provided that he simultaneously deletes the initial copy from his computer. A German court has admitted the application of the exhaustion principle to a downloaded software transferred for permanent possession to another user[81], by considering that exhaustion applies in case of a sale, whatever the means of acquiring the work.

Another issue related to the exhaustion principle, as applied to tangible gods, is the fact that nothing in the European copyright *acquis* provides that it cannot be contracted out. Whereas many licenses, particularly in software, forbid the consumer to transfer or resell the work to another person, hereby restricting the possibility of transferring digital products

[80] ECJ, 18 March 1980, *Coditel I*, C-62/79, E.C.R., 881.
[81] LG Hamburg, 29 June 2006, 315 O 343/06, mentioned in G. Westkamp, *op. cit.*, p.9.

to third parties with the sale of the tangible support on which it is stored, beyond what copyright law prohibits. Such restrictions, at least when not justified by copyright law, unduly limit the property right in the digital good.
In Belgium, a recent court decision has considered that the principle of exhaustion could not be overridden by contract as it conveys a key principle of the right in ownership[82]. This decision concerned a commercial user bound by a software license but it could be applied likewise to consumers who would be contractually restricted to resell the work embodied in a tangible asset.

RECOMMENDATIONS

- The application of a principle of exhaustion to digital goods, bought online, should be the object of further research.
- It should be provided that the rule of exhaustion is of a mandatory nature and cannot be contracted out.

2.5.The consumer and the technological measures of protection

2.5.1. Technological measures of protection and copyright exceptions

Technological measures of protection, also known as Digital Rights Management (DRM) have been increasingly used to prevent copying, getting an unauthorised access or controlling uses of digital works[83]. They allow rights holders to control under which conditions a use of a work can occur and often reinforce licensing contracts concluded by the users. These technical means of enforcing copyright have been further protected by the law, as the Information Society directive has requested from Member States to prohibit the circumvention of such technical protection and the trafficking in devices enabling such circumvention[84].
At the time of adoption of the directive, there was a great concern that the enactment of legal provisions prohibiting the circumvention of technological measures protecting copyrighted works and other subject-matter would prevent the consumers from exercising private copy (and more generally would prevent the public from benefiting from copyright exceptions). As a consequence, a safeguarding mechanism was set up in the directive to try to safeguard copyright exceptions. Article 6(4) of the directive imposes to Member States to "take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned". This solution only applies in the absence of any voluntary measure put in place by the right holders themselves[85].

[82] Gent District court, 23 September 2009, *Auteurs & Media*, 2010, p. 42. The same solution has been upheld in the decision of Hamburg court, mentioned in the precedent note.
[83] On technological measures and their effect in copyright law, see S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres*, Bruxelles, Larcier, 2005.
[84] See the article 6 of the directive.
[85] Such voluntary measures could be the provision of a supplementary copy to the beneficiaries of exceptions, the removal of technological measures at the justified request of the beneficiary of an exception, …

Member States have offered to the beneficiaries of the exceptions concerned a wide range of solutions, from the introduction of a mediation or arbitration proceedings to recourse to the courts or to specific administrative proceedings[86]. Some Members States have even not implemented the article 6(4) of the directive.

The exceptions benefiting from this privileged status are limited to some exceptions listed in the directive (e.g., exceptions for libraries, persons with disabilities, educational exceptions, …). The exception in favour of persons with disabilities merits a special treatment. Technological measures could prevent some functions of reading or playing devices that help handicapped consumers to access to works. The current development of e-books, generally made available in DRM-protected format, might constitute a risk that such books will not be readable aloud or visible in big letters. As the market for e-books is still in an early stage, it is still time to intervene to impose to digital books providers to design their DRM and services in a way that respond to the special needs of some consumers and that does not conflict with legitimate rights and interests of consumers.

The private copy exception is not comprised in the list of the exceptions whose benefit should be effective. The directive allows however for Member States to take action in respect of the private copy. Only a few Member States (France, Italy, the Netherlands and Spain) have rendered the private copy enforceable against technological measures and have done so to a various extent[87]. In France, consumers may seize an administrative body (the Autorité de Régulation des Mesures Techniques, merged in 2009 in a new administration, the HADOPI authority) to complain about their difficulty in making a personal copy out of a technically locked work. Italian and Spanish consumers can find redress against copy protection mechanisms before courts.

In consequence, the enjoyment of the private copy is still not guaranteed at the European level due to lack of harmonisation in the implementation of the article 6(4) of the 2001 Directive. In those member States having not acted to protect the private copy, consumers might still complain that they are prevented to enjoy the private copy granted by copyright law and the question subsists as to the legitimacy of an unilateral technical lock to prohibit personal copying, hereby extending the prerogatives of the copyright owners beyond the contours of the law.

Even in countries that endeavour to safeguard the private copy, the means of redress, whether judiciary or through mediation, does 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", according to article 6(4)(4) of the Information Society directive. This is a further indication that the European lawmaker has given more value to contract than to the balance established by copyright law between rights and exceptions. For the consumers, it will mean that the works available on-line, in an on-demand service (which constitute most of the current legal offers of digital content) can be wrapped by technical means preventing private copying or any other use, irrespective of the existence of copyright exceptions covering such uses[88]. Rightholders do not even need to put in place voluntary measures to accommodate the benefit of exceptions. The limitation of the safeguarding solution of the article 6(4) is thus potentially very broad.

The immunity so conferred to business models making works available on-line has no justifiable explanation. For consumers, it might be difficult to understand why they would be able to claim the benefit of private copying and other exceptions as to a digital file bought in a shop but not as to the same file bought on-line. It could even turn them away from legal offers of digital content if they feel that the exceptions they can normally enjoy

[86] See, G. Westkamp*, The Implementation of Directive 2001/29/EC, op. cit.,* p. 67 and the table p. 95.

[87] IVIR Study on the Implementation of Directive 2001/29/EC, *op. cit.* p. 111.

[88] S. Dusollier, "Exceptions and Technological Measures in the European Copyright Directive of 2001", *International Review of Industrial Property and Copyright Law,* 2003, p.62-83.

will be reduced by licensing contracts and DRM.
For these reasons, one can say that consumers' interests are not sufficiently taken into account by the *acquis communautaire* related to technological measures of protection.

2.5.2. Other issues in Technological measures

Consumers have also experienced other issues related to the deployment of technological measures protecting copyrighted works[89]. National case laws abound of examples of consumers complaining about a lack of information about the presence and effects of a technical mechanism in a digital content. French case law has sanctioned content providers for insufficient notice, but mainly on the basis of consumer laws protection[90]. Conversely the German lawmaker has inserted in its Copyright Act an obligation to disclose the scope and features of the technological measures of protection[91]. This obligation made to content providers explicitly purports to protect consumers. Failure to mark the recourse to copy control mechanisms on carriers could also lead to the rescinding of contracts.
Technical lock-up devices can also result in problems of playability and/or interoperability. The first ones have been experienced mainly in the early development of DRM: music CDs were sometimes unreadable on some devices, such as car radios, due to the presence of such technological protection. French courts have rescinded the sale of those CDs according to general civil code provisions[92], which does not completely satisfies the consumer as it does not solve the issue of playability. The Belgian lawmaker has been more daring as it has imposed to the content providers to make their DRM compatible with the normal use of the work[93]. Failure to do so opens the possibility of a judicial redress for the consumers (and their representatives associations). No case has been brought so far before Belgian courts on that ground. Normal use can refer to consumptive use, such as the ability to listen to, read, or watch digital products.
As to interoperability, it can be hampered when the technological measure of protection is part of a more general scheme and business model linking the content provided to specific brands of devices or software. This restriction to interoperability has been sometimes applied by digital content providers. Due to the dissatisfaction of consumers faced with such models, this type of technical restriction has now largely been abandoned, at least for music downloading, but it could reappear for e-books.
Competition law may provide for some solution to such interoperability issue, as well as regulatory provisions, such as the obligation to provide for interoperable DRM, imposed by the French Copyright law[94]. However, both legal solutions cannot be directly employed by the consumers.
In Norway, the Ombudsman for Consumer Rights has successfully applied consumer laws to impose a limitation of interoperability restriction put in place by a major provider of digital content.
This shows a very fragmented approach across the Member States to the issues of interoperability and playability of technological measures of protection and the division of the solutions between copyright law and consumer law. Consumers' interests might be better protected if copyright law provisions specifically address this issue. Digital content providers should be encouraged to develop consumer-friendly technological measures of

[89] *Consumer's guide to Digital Rights Management*, INDICARE Project, 2006, available at http://www.indicare.org.
[90] Nanterre District Court, 15 December 2006 ; Paris District Court, 10 January 2006, Court of Appeals of Versailles, 30 September 2004, all available at http://www.juriscom.net.
[91] Article 95a of the German Copyright Act.
[92] Nanterre District Court, 2 September 2003, available at http://www.legalis.net/breves-article.php3?id_article=33; Paris District Court, 10 January 2006, available at http://www.legalis.net/breves-article.php3?id_article-=1567.
[93] Article 79*bis* §4 of the Belgian Copyright Act.
[94] French Code de la Propriété Intellectuelle, article L. 331-5 to L. 331-7.

protection, which should include, beyond the accommodation of copyright exceptions and the making of private copying, the respect of privacy of the consumers and the legitimate expectations of consumers, encompassing security, transparency, usability and interoperability[95].

RECOMMENDATIONS

- The relationship between the copyright exceptions, particularly the private copying, and the application of technological measures should be reassessed, which could lead to a possible revision of article 6(4) of the Information Society Directive.
- The impact of the technological measures of protection on copyright exceptions and consumers' rights would be better monitored at the European level (than at the national level in the frame of the implementation of article 6(4) of the Information Society directive). An European body could be entrusted with such a monitoring and could propose measures to better accommodate copyright exceptions and encourage the design of consumer-friendly digital right management systems. Most importantly, DRM should not hinder the access to works by consumers with disabilities.
- Technological measures of protection should be designed to accommodate the making of private copies.
- The limitation of the safeguarding provision of exceptions of the Information Society Directive provided in the article 6(4)(4) and excluding works made available on demand should be suppressed. Users should not be precluded from relying upon copyright exceptions whatever the means of provision of copyrighted works.
- Content providers using technological protection measures should be mandated to provide information to consumers about the use of TM and its effect on playability and interoperability.

[95] L. Guibault & N. Helberger*, op. cit.,* p. 17-19.

POLICY RECOMMENDATIONS

Copyright law should certainly integrate consumers' rights and interests. A primary reason for such an integration would be to achieve a necessary balance within copyright law, without which the acceptance of copyright by consumers will inevitably diminish. A second reason, and not the least, results from the expansion over use of the works that copyright control has gained in the last two decades. Protecting consumers' rights is a most needed counterpart to the copyright provisions, induced by digital development, that aims at governing and licensing any use of the work, with the help of technological devices.
Recommendations have been proposed to better cater to the needs and issues of consumers at the successive stages of the present note. This final part will put forward the most important policy recommendations that could enhance the consumer protection in copyright law and practice.

RECOMMENDATIONS

- Harmonisation of copyright laws should be further enhanced, namely by imposing the transposition of some provisions when necessary to ensure an Internal market for cross-border digital goods and services.
- The impact on consumers of any extension of copyright and related rights, and their means of enforcement, should be assessed.
- Member States should transpose the exceptions for libraries, education and research, and persons with a disability provided for in the Information Society Directive.
- The cross-border delivery of works adapted to the special needs of persons with disabilities in conformity with an exception in a Member State should be authorised in other Member States.
- Private copy exceptions should be further harmonised in the European Union. It should encompass copying for time-shifting, device or application-shifting and format-shifting.
- Harmonisation of the private copying levies should be pursued.
- The notion of lawful user appearing in the Software and Database directives, and incidentally in the Information Society Directive, should be clarified and defined as including any situation where the use is authorised by the copyright owners or by the law.
- The mandatory nature of copyright exceptions should be further analysed. At least the exceptions conveying fundamental freedoms or public interests, as well as the private copy, should not be contracted out.
- The application of a principle of exhaustion to digital goods, bought online, should be the object of further research.

- The relationship between the copyright exceptions, particularly the private copying, and the application of technological measures should be reassessed, which could lead to a possible revision of article 6(4) of the Information Society Directive.
- The impact of the technological measures of protection on copyright exceptions and consumers' rights would be better monitored at the European level.
- Technological measures of protection should be designed to accommodate the making of private copies should not hinder the access to works by consumers with disabilities.
- The limitation of the safeguarding provision of exceptions of the Information Society Directive provided in the article 6(4)(4) and excluding works made available on demand should be suppressed. Users should not be precluded from relying upon copyright exceptions whatever the means of provision of copyrighted works.
- Content providers using technological protection measures should be mandated to provide information to consumers about the use of TM and its effect on playability and interoperability.

REFERENCES

Articles, Books and Reports

- P. Akester, *Technological accommodation of conflicts between freedom of expression and DRM : The first empirical assessment,* Cambridge, CIPIL, May 2009, available at http://www.law.cam.ac.uk/faculty-ressources/download/technological-accomodation-of-conflicts-between-freedom-of-expression-and-drm-the-first-empirical-assessment/6286/pdf.

- P. Akester, « The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture », *European Intellectual Property Review,* 2010, p. 372.

- S. Bechtold, 'Directive on the harmonisation of certain aspects of copyright and related rights in the information society', in T. Dreier & B. Hugenholtz (eds.), *Concise European Copyright*, Kluwer Law International, 2006, p. 373.

- Declaration for a Balanced Application of the « Three-Step Test » in Copyright Law, signed by many European academics, at http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm

- E. Derclaye, "Copyright Contracts, Public Policy and Competition: Can Adhesion Contracts Override Copyright Limits ? The Answer Lies within Copyright itself", in C. Heath and K. Liu (eds.), *Copyright Law and the Information Society in Asia,* IIC Studies, Oxford, Hart Publishing, 2006, p. 167-211.

- T. Dreier, "Contracting out of copyright in the information society: The impact on Freedom of Expression", in J. Griffiths & U. Suthersanen (eds.), *The Legal Protection of Databases Copyright and Free Speech – Comparative and International Analyses*, Oxford University Press, p. 385-400.

- N. Dufft, A. Stiehler, D. Vogeley, Th. Wichmann, *Digital Music Usage and DRM – results from an European Consumer Survey,* Report of the Indicare Project, 2005, available at http://www.indicare.org.

- S. Dusollier, Y. Poullet & M. Buydens, *Copyright and Access to Information in the Digital Environment*, Study commissioned for UNESCO, Infoethics Congress, Paris, 2000, *Copyright Bulletin*, oct.-nov. 2001, p. 4-43.

- S. Dusollier, «Exceptions and Technological Measures in the European Copyright Directive of 2001», *International Review of Industrial Property and Copyright Law,* 2003, p.62-83.

- S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres*, Bruxelles, Larcier, 2005

- S. Dusollier, « L'utilisation légitime de l'œuvre : un nouveau sésame pour le bénéfice des exceptions en droit d'auteur ? », *Communications – Commerce Electronique*, November 2005, p. 17-20

- S. Dusollier, «Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work», *European Intellectual Property Review,* 2005, p. 201-204

- S. Dusollier, « La contractualisation de l'utilisation des œuvres et l'expérience belge des exceptions impératives », *Propriétés Intellectuelles*, October 2007, p. 443-452

- S. Dusollier, « The Role of the Lawmaker and of the Judge in the Conflict between Copyright Exception, Freedom of Expression and Technological Measures », in *Copyright and Freedom of Expression*, ALAI 2006 Barcelona, Huygens Editorial, 2008, p. 569-578.

- Dusollier & C. Ker, « Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics », in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Edgar Elgar, 2008. p.349-372

- M. Favale, "Fine-Tuning European Copyright Law to Strike a Balance Between the Rights of Owners and Users", *European Law Review*, 2008, p.687-708.

- U. Gasser & S. Ernst, *Best Practice Guide – Implementing the EU Copyright Directive in the Digital Age,* Open Society Institute, December 2006.

- C. Geiger, *Droit d'auteur et droit du public à l'information – Approche de droit comparé*, Paris, Litec, 2004

- C. Geiger, "The Answer to the Machine Should Not be the Machine: Safeguarding the Private Copy Exception in the Digital environment", *European Intellectual Property Review*, 2008, p.121.

- L. Guibault, *Copyright limitations and contracts : An analysis of the contractual overridability of limitations on copyright*, Kluwer Law International, 2002

- L. Guibault & N. Helberger, *Copyright Law and Consumer Protection,* Policy conclusions of the European Consumer Law Group, February 2005, available at http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf.

- L. Guibault, "Why Cherry Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC", *Journal of Intellectual Property, Information Technologies and E-Commerce*, 2010-2, p. 55-66

- N. Helberger, "Digital Rights Management from a Consumer's perspective", *IRiS Plus*, 2005/8, p. 1-8.

- B. Hugenholtz, "Why the copyright directive is unimportant and possibly invalid", *European Intellectual Property Review*, 2000, p. 500

- B. Hugenholtz & N. Helberger, "No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law", 22 *Berkeley Technology Law Journal* 1061 [2007].

- IVIR Study, *The Recasting of Copyright and Related Rights for the Knowledge Economy,* November 2006, Study Commissioned by the European Commission, particularly p.21-30.

- *IVIR 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*, Feb. 2007, available at http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm

- IVIR, TNO, IDATE, *User-Created-Content: Supporting a participative Information Society - Final Report*, December 2008, available at http://www.ivir.nl/publications/helberger/User_created_content.pdf.

- M. Kretschmer, E. Derclaye, M. Favale & R. Watt, *The relationship between copyright and contract law*, Report commissioned by the UK Strategic Advisory Borad for Intellectual Property, July 2010, available at http://www.ipo.gov.uk/ipresearch-relation-201007.pdf

- S. Martin, "Summary of the national reports on the questions concerning the regime of private copying in the analog domain", in *Creators' rights in the information society*, Proceedings of the ALAI Congress, September 2003, Budapest, KJK-Kerszov Legal and Business Publishers Ltd., 2004, p. 206.

- G. Mazziotti, *EU Digital Copyright Law and the End-User*, Springer, 2008.

- M. Senftleben, *Copyright, Limitations and the three-step test – An analysis of the three-step test in international and EC copyright law*, Kluwer Law International, 2004.

- V. Vanovermeire, « The concept of the lawful user in the database directive », *International Review of Industrial Property and Copyright,* 2000, Vol. 3, p. 64.

- G. Westkamp*, The Implementation of Directive 2001/29/EC in the Member States*, Part II of the Study on the implementation of Directive 2001/29/EC, IVIR, 2007.

Legislative documents

- European Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation.

- Communication of the European Commission, *Copyright in the Knowledge Economy,* 19.10.2009, COM(2009) 532 final.

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Cross-Border Business to Consumer e-Commerce in the EU, 22 October 2009, COM(2009) 557

- *Creative Content in a European Digital Single Market : Challenges for the Future*, A reflection Document of DG INFSO and DG MARKT, 22 October 2009.

- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *towards a Single Market Act for a highly competitive social market economy,* 27 October 2010, COM(2010) 608 final.

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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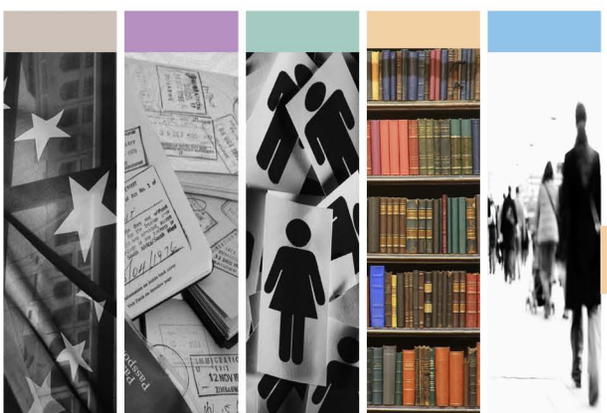

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