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Copyright Exceptions and Limitations within the Scope of the Review of the EU Copyright Framework

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Plenary Session I

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MAX-PLANCK-GESELLSCHAFT

1. The EU legislative framework for exceptions and limitations

- Different directives include E&L: in particular Computer Programs, Databases, Orphan works; here only: Information Society Directive

- National law background of Art. 5 InfoSoc Directive
  - National law-E&L: highly diverse traditions, legal provisions
    - Anglo-saxon (copyright) system: fair dealing in certain well defined cases, plus very detailed E&L, no remuneration rights
    - Continental European (authors' rights) system: specific E&L
      - Differences in scope and detail of regulation of E&L (eg France, Germany)
      - Differences as regards connected remuneration rights (hardly any – some – many)

1. The EU legislative framework for exceptions and limitations

- Historical background and aim of Art. 5 InfoSoc Directive
  - InfoSoc: initially only selected, facultative E&L
  - When clear that closed list: addition of any E&Ls that Member States wanted to keep (aim: no full harmonization but being able to keep E&Ls)
  - deliberate choice to harmonize only frame/outer limits of permitted E&Ls (no full harmonization wanted, see Rec. 31)
  - Therefore chosen concept (not 'failure'): partial harmonization
  - Accordingly, possible choices of Member States:
    - no E&L;
    - E&L more restrictive than permitted
    - E&L making full use of outer frame

1. The EU legislative framework for exceptions and limitations

- Structure of Art. 5 InfoSoc Directive
  - Art 5(1): the only mandatory E&L (temporary reproductions)
  - All others: facultative; if E&L is applied: mandatory outer limits
    - Art. 5(2) regarding reproduction right
    - Art. 5(3) regarding reproduction right and communication right
    - Art. 5(4) regarding distribution right
  - Art. 5(5): three-step test as mandatory outer limit for all E&L
- Consequence: flexibility for EU Member States in respect of most E&Ls within the mandatory outer framework

2. Case law of the Court of Justice

- In general: Varied use of different methods of interpretation
  - In particular: wording, systematic context, objective; autonomous and uniform interpretation; broad principle vs narrow exceptions; effet utile; principles established in all IP directives; underlying fundamental rights, and international law
- Not always predictable results
- Sometimes audacious, arguably cutting into competence of legislature (eg, Infopaq), with consequences for interpretation
- Sometimes different ways of interpretation of decisions by national courts possible
- Art. 5 InfoSoc Directive may be understood as applying only where internal market is at stake

2. Case law of the Court of Justice

- Decisions should be understood taking account of the concept of Art. 5 InfoSocDirective
  - Eg: DR/TV2 Danmark vs NCB: ephemeral recording by broadcaster's own facilities (Art 5(2)d), Rec. 41): including any third party's facilities on behalf of it: = outer limit (stricter implementation possible)
  - Eg: Parody (Deckmyn): "not subject to…conditions" (as outer limit; but may be made subject to such conditions by national law)
- Sometimes case law is arguably not in compliance with underlying international law
  - Carve-outs from communication right by conditions of "new public" and "for-profit", arguably in violation of minimum rights of international law
  - Carve-out from communication right by applying exhaustion (Used-Soft)

2. Case law of the Court of Justice

- Some conclusions regarding case law with a view to future EU legislation:
  - Where certain issues or definitions of terms are to be reserved for determination by Member States/national law, this should be clearly stated, no longer just implicitly expressed
  - Where the Court's case law is likely to contravene international law, the legislature should remedy the situation by clarifying law
  - The more precise EU legislature defines terms and rules, the better (more predictable) the results by the Court (which is not a copyright expert court); too much flexibility for judges would lead to a tsunami of cases, very long and costly court proceedings, less legal certainty, no possibility of remuneration rights

3. Claims to modify EU law on E&Ls

- Mainly ISPs and other users claim in particular:
  - Overall review of InfoSoc Directive, in particular:
  - mandatory E&Ls/more harmonization (probably only if broad E&Ls are chosen)
  - Even in form of a single unitary title (but only if broad E&Ls are chosen)
  - More flexible clauses for E&Ls/only three-step test (already rejected in 2001) (“importation” of fair use idea)
  - Carve-outs from exclusive rights (like claim 1996 in context of WIPO Treaties, rejected then, pointing at solutions via liability rules)
  - But no counterbalance through amendment of e-commerce Directive of 2001 (though such updating would seem necessary)

4. What to take into account regarding such claims

- However,
  - For EU harmonization: need to ascertain obstacles to free movement (EU competence); but often:
    - local acts only; local “markets”, such as for school books/education
    - Need to ascertain extent of impact on internal market (eg, how much cross-border lending vs domestic lending?)
  - Need to respect principles of proportionality, subsidiarity; better regulation
  - Need to respect cultural diversity (esp. as regards education, culture-related institutions)
  - Flexible clauses will mean
    - less legal certainty (and problems regarding criminal law)

4. What to take into account regarding such claims

- However,
  - Flexible clauses will mean (ct'd)
    - Problems for related remuneration rights
    - Long reactions to technical changes (years of legal proceedings, high transaction costs, likely to take longer than legislation, and only related to narrow, individual questions)
    - Judicial system on Continent; art of drafting legislation (abstract so as to be often adaptable to new technical developments; representing fundamental decisions on inherent, remaining values)
    - Problematic regarding division of powers between democratically elected legislature and judges (eg. Art. 14 German Constitution)
    - Powerful users will most benefit from such flexibility, not small ones

4. What to take into account regarding such claims

- However,
  - Even if competence (internal market relevance) is ascertained:
    - E&Ls are not the only possible answer (other options, eg: individual or collective licensing; even just exclusive right (eg rental right))
    - Harmonized E&Ls could be explicitly limited to cross-border situations
    - Not any reason justifies necessarily an E&L (eg: fun; new business models, innovation as such (no value as such – their effects matter); 'no possibility to enforce exclusive rights'),
    - But particular policy reasons (eg, education, research, news reporting) needed to show that the property right of author needs to be limited in favour of the public

5. Conclusions

- Big visions or reforms are not working for authors‘ rights harmonization
- Assess whether at all and to what extent a revision is absolutely necessary
- Don‘t give too much „food“ for a non-copyright experts‘ Court (pro focussed legislative measures)

- Especially in field of E&L (with high diversity of laws, culture and markets):
  - act on basis of thorough analysis of markets
  - address problems only where internal market is considerably affected
  - take into account above principles
  - avoid destroying well-working systems and markets

Good luck!