

# Exceptions tomorrow: what for ? To what extent ?

Valérie Laure Benabou  
Prof. Univ. Versailles

1. Competence and the acquis : how they can show us a way forward ?

2. Assess the « need for exception » and possible legal response (see S. Dusollier)

- Legitimacy of the claim
- Social interests
- Market failure (refusal to license, transactional costs)
- Exception and three step test

### 3. Delineating the « proper » exception system

- Reinforce the consistency of the acquis as to exceptions
- Provide exceptions that can be enforced by users
  - As regards DRM
  - As regards contracts
  - As regards format
- Clarify the distinction between exceptions and limitations (VG Wort/CopyDan)

# Why are we here ? (as regards exceptions)

- Historical background
  - Reluctance of the UE to intervene in the field of copyright
  - No cultural dimension of the Treaty of Rome
  - No specific provision but the expression “industrial property” (article 36) (as exception to the free movement of goods)
- Status of property
  - Article 345 (ex Article 295 TEC) : The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

# Which competence for the EU today ?

## Exclusive competence ?

- Article 3

1. The Union shall have exclusive competence in the following areas:

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

# Which competence for the EU today ?

## Exclusive competence ?

- Article 207(1) TFEU,

The **common commercial policy** shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, **and the commercial aspects of intellectual property**, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade ... The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

# Which competence for the EU today

## Shared competence ?

- Article 2 TFEU

1. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence.

# Which competence for the EU today

## Shared competence ?

- Article 2 TFEU

Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (f) consumer protection;
- (h) trans-European networks;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

# Which competence for the EU today ?

## Article 6

- The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:
  - (a) protection and improvement of human health;
  - (b) industry;
  - (c) culture;
  - (d) tourism;
  - (e) education, vocational training, youth and sport;
  - (f) civil protection;
  - (g) administrative cooperation.

# Which competence for the EU today ?

- Article 118
- In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.
- No unitary copyright title so far...

# TRIPS Compliance and competence ?

JUDGMENT OF THE COURT (Grand Chamber) 18 July 2013 Daiichi Sankyo Co. Ltd, Case C-414/1 (Patent)

In accordance with Article 207(1) TFEU, the common commercial policy, which under Article 3(1)(e) TFEU falls within the exclusive competence of the European Union, relates inter alia to ‘the commercial aspects of intellectual property’.

But, that policy relates to trade with non-member countries, not to trade in the internal market. Only those with a specific link to international trade are capable of falling within the concept of ‘commercial aspects of intellectual property’ in Article 207(1) TFEU and hence the field of the common commercial policy.

- 59 Admittedly, it remains altogether open to the European Union, after the entry into force of the FEU Treaty, to legislate on the subject of intellectual property rights by virtue of competence relating to the field of the internal market. However, acts adopted on that basis and intended to have validity specifically for the European Union will have to comply with the rules concerning the availability, scope and use of intellectual property rights in the TRIPs Agreement, as those rules are still, as previously, intended to standardise certain rules on the subject at world level and thereby to facilitate international trade.

# What does the TRIPS say about exceptions ?

## *Article 6 / Exhaustion*

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

## *Article 7/ Objectives*

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

# What does the TRIPS say about exceptions ?

## *Article 8 / Principles*

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

## *Article 13 / Limitations and Exceptions*

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

# TRIPS Compliance and exclusive competence ?

- Are all/some exceptions to copyright part « of the rules adopted by the European Union in the field of intellectual property (...) with a specific link to international trade (...) capable of falling within the concept of ‘commercial aspects of intellectual property’ in Article 207(1) TFEU and hence the field of the common commercial policy ?

# Competence, subsidiarity, proportionality

- The capacity of EU legislator to answer in a better manner to a problem for EU
- The adequate answer is limited to what is needed and cannot otherwise be solved properly

# Conclusion on competence

- According to the competence system
  - Need for intervention at the EU level when the provision is linked to **commercial aspects** of copyright and has an impact on international trade (common commercial policy) and when the exception would amount to **establishing competition rules necessary for the functioning of the internal market**
- Possibility of intervention of the EU within shared competence
  - Internal market; consumer protection; trans-European networks; area of freedom, security and justice

# Conclusion on competence

- Possibility to support, coordinate or supplement the actions of the Member States in the field of
  - (b) industry;
  - (c) culture;
  - (e) education, vocational training, youth and sport;
  - (g) administrative cooperation.
- Help to establish a hierarchy as to whether it is necessary or relevant or only optional to deliver an exception at the EU level

# EU level exception/national level exception

- EU level for exceptions related to commercial aspects of copyright and international trade : example 5.1 / Data mining ?
- EU level for exceptions having an impact on the internal market : defining the cross-border dimension of the exception / elaborating a rule for the mechanism of compensation when the exception has a cross-border effect (International private law like in the cable-satellite directive but for designating the debtor of the compensation) : example cross-border learning / e-lending ?
- EU level for exceptions when need for cooperation between the member States : quotation / press/disable

# Exceptions and the acquis

- Infosoc directive establishes a limited list of facultative exceptions
- **Within the scope of the directive ? In general ?**
- ECJ Infopaq : Infosoc directive is the common rule for copyright / or do we stick to distributive approach ?
- Exception for parody : is it applicable to multimedia works ?
- **Need for clarification of the scope of application of the exceptions as regards protected subject matter**

# Competence for exceptions and the acquis

- Infosoc directive establishes a **limited list** of voluntary exceptions
- No possibility for Member States to maintain or create exceptions out of the list : minimum standard of harmonization of the exceptions
- Shall we stick to this principle ? **Or introduce National Flexibility ?**
  - let the Member States willing to introduce more exceptions the possibility for new uses to do so ?
  - suppress some exceptions from the Infosoc list because they are not relevant at the EU level ?

# Competence for exceptions and the acquis

- Introduce National Flexibility ?
- Suppressing some exception from the list (example (l) use in connection with the demonstration or repair of equipment) and broaden the scope of the actual (o) paragraph : use in certain other cases of minor importance ~~where exceptions or limitations already exist under national law, provided that they only concern analogue uses and~~ do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

# Exceptions and the acquis

- Infosoc directive establishes a limited list of **voluntary** exceptions
- Possibility for Member States **to choose between** the exceptions
- Shall we stick to this principle ?
  - No choice for member States ?
  - Every exception for everyone ?
  - Possible discussion on a block of mandatory common exceptions/ remaining facultative exceptions

# ECJ and exceptions

- Defining the respective « margin of manœuvre » of the Member States and of the EU in the interpretation of exceptions
- Exceptions as being autonomous concept of EU law (quotation, parody, equitable compensation for private copying)
- Weird situation for Member States : free to choose exceptions in the list of article 5 (except for 5.1) but not free to interpret the scope of the exception in a manner that would not be consistent with the past (and forthcoming) interpretation of the ECJ

# Court of Justice and exceptions

- What happens when the scope of the national exception is somewhere in the middle between two exceptions of the list (see combination of private copying and reprography in VG Wort) ?
- Coordination between Member States : refund of undue private copy levy for cross-border purchase of device (ECJ Opus)/ The threshold for de minimis rule (ECJ Copydan)
- Limits of the directive system

# Exceptions : a way forward ?

- Unification of the exceptions for all kind of works (unless precised)
- Short list of mandatory exceptions with a precise wording (« maximum harmonization »)
- Definition of the concept of cross-border effect of the exception /quantitative thresold/centralisation of compensation
- Clause for national exceptions subject to the condition the national exceptions are not overlapping with EU mandatory exceptions, do not conflict with free movement of goods and services principle, and are consistent with the three-step-test (National flexibility)

## 2. What are the incentive to change the exceptions ?

- On-going pressure to implement new exceptions or a “fair use” clause to balance the rightholders’ protection with other various conflicting interests : digital libraries, disabilities, data mining, transformative works/use, panorama ...
- Using Freedom of expression as a motto, some of those intermediaries advocate for more flexibility in order to enhance innovation.

# How to deal with these claims ?

- answer to the legitimate requests of the citizens based on public interests
- Without naivety and not create exceptions that would merely reinforce the position of commercial entities using the screen of exceptions to alleviate the charges of their business models

# Need for exception ?

- Market failure? Do exclusive rights effectively hinder digital cross-border market? If so, is the free exception the proper answer or shall we implement compulsory licensing, mandatory collective management solutions? Compensation?
- Access to knowledge/to culture? Shall rightholders bare the cost thereof despite the recognition of their right to monetize the access to their works? Do access to knowledge include sharing contents freely? Shall we consider specific exceptions for “amateurs”, non-commercial uses?
- Freedom of expression? How to implement digital right to quotation or equivalent?

# « Transformative uses »

- Transformative use for UGC ?
- Can we rely on existing exceptions : Quotation ? Educational purpose ? Parody ?
- What will be the scope of the exception ? Any use ?
  - Will conflict with the Three-Step-Test
  - Shall be restricted to certain cases : creation of a work deriving from a mass of previous works that are not by themselves the subject of the UGC ?
- What will be the scope of the exception ? Any user ?
  - Who is displaying the content ? E-commerce directive impediment ?
  - Is Commercial/non-commercial distinction relevant ?
    - The possibility to get incomes from advertising in the platforms
- What about compensation ?

# Transformative use

- If there is an exception for the User without compensation : loss of a market for the right holder if commercial entities are involved (Youtube, Dailymotion...)
- If the UGC is posted on such a platform : GCU shall include a mandate given to the platform to get the proper authorization for the communication of the UGC on this platform (centralization of the authorization and provides a legal basis for negotiation)

# 3. Effectiveness of the « exception »

- Defining user's rights outside the scope of copyright ?
  - If there is a “right” to access to culture. It has no effectiveness if it only relies on copyright exceptions : panorama (property on buildings may impede the use of photos even if we make an exception for architecture work)
  - Directive on the intellectual public domain ?
- Submitting any rule which reduces the existence or the exercise of an IP right to the TST notwithstanding the designation of the rule

# 3. Effectiveness of the « exception »

- Shaping the exception so that it allows effectively the user to benefit from the exception (see 6.4)
  - Clarify the distinction between limitation and exceptions (if there is one) after VG Wort mess
  - Defining clearly if the exception is compulsory/public order or not (confusing with the software directive exceptions and the a contrario possible interpretation) (CopyDan mess)
  - Forbid “the price for the copy + compensation” system
  - Recast the balance between exceptions and TPM : whenever the exception is granted, access to work and making the acts necessary to achieve the exceptions must be possible
  - No possibility of further control through TPM by the platforms (platforms geo-blocking, interoperability...)