

# Guiding principles for review of copyright exceptions

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# Outline

- Revising Economic rights
- Simplifying and limiting the art. 5 list
- Unifying exceptions
- An objective-based approach
- Addressing cross-border issue

# Revising Economic rights

- Technical definition of economic rights
  - Reproduction: any technical fixation
    - Need for art. 5(1)
  - Communication: transmission / making available
- Uses now digital
  - Ex. text and data mining
  - Ex. on-site consultation in libraries

# Revising Economic rights

- Focus on exploitation of work
  - Economic approach ?
  - Infringement in relation to function of copyright, not to technical accidents
- Ancillary acts of reproduction
  - Ex. digitisation or copies to make a work available

# Simplification

- Harmonisation limited to exceptions with effect on internal market
- or with fundamental right or European public interest
- Mandatory exceptions
- Other exceptions:
  - Competence of Member States

- 1. Temporary acts of reproduction ...
- 2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
  - (a) in respect of reproductions on paper or any similar medium...;
  - (b) in respect of reproductions on any medium made by a natural person for private use ...;
  - (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, ....
  - ~~• (d) in respect of ephemeral recordings of works made by broadcasting organisations ...;~~
  - ~~• (e) in respect of reproductions of broadcasts made by social institutions.~~
- 3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
  - (a) use for the sole purpose of illustration for teaching or scientific research,;
  - (b) uses, for the benefit of people with a disability,;
  - (c) reporting of current events...;
  - (d) quotations for purposes such as criticism or review,... ;

- ~~(e) use for the purposes of public security ...;~~
- ~~(f) use of political speeches as well as extracts of public lectures ...;~~
- ~~(g) use during religious celebrations or official celebrations ...;~~
- ~~(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;~~
- ~~(i) incidental inclusion of a work or other subject matter in other material;~~
- ~~(j) use for the purpose of advertising the public exhibition or sale of artistic works...;~~
- (k) use for the purpose of caricature, parody or pastiche;
- ~~(l) use in connection with the demonstration or repair of equipment;~~
- ~~(m) use of an artistic work in the form of a building or a drawing or plan of a building ...;~~
- ~~(n) use by communication ... by dedicated terminals on the premises ...;~~
- (o) 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.

# Unifying exceptions

- Exceptions differ for copyrighted works and related rights subject matter, databases (copyright and sui generis), software
- Objects protected by many rights
  - Databases (CJEU, Ryanair)
  - Software split into code protected as software and other elements protected by copyright 'de droit commun' (CJEU, from BSA to Nintendo)



# Unifying exceptions

- Exceptions for all
  - Educational use, libraries preservation, public lending...
  - Even if of no use: parody
- Private copy ?
- Specific exceptions
  - Back up copy, Decompilation : for all if needed (digital is not anymore only for software)
  - Insubstantial parts of DB, use for study (SF): non infringements

# The objective of exceptions

- Exceptions defined by
  - Permitted use
  - Beneficiary
  - Conditions and limitations
- No flexibility as uses evolve to pursue same ends
  - Ex. libraries' uses
  - CJEU, Technische Univ. Darmstad: the new creature (Senftleben)

# The objective of exceptions

- Start from the needs of beneficiaries
  - Objectives, public (or private) interest and practices
  - Add a measure of reasonableness
  - ... two spoons of no economic significance /harm
    - Ex: uses in libraries justified by their public mission of preserving cultural heritage and making it visible to the public
- Purpose-defined exceptions
  - Ex. Use for the illustration of teaching
- Flexibility and dynamism in each exception
  - Margin of appreciation for the judge
- Mandatory exceptions as to their objective
  - Ex. e-learning

# The objective of exceptions

- Example: public lending
  - Access to works through
    - Market
    - Second hand market
    - Non-market mediated places (libraries, private exchanges)
- Going digital
  - Access to works through
    - Market
    - No digital exhaustion
    - No e-lending

## Exception for e-lending

- Justified by the objective of preserving a third avenue to get access to works
- adapted to digital possibilities and risks

# Cross-border dimension

- Objective of Dir 2001/29: functioning of internal market
- Territoriality issue
  - Fragmented national exceptions
  - CJUE, Pinckney & Pez Hejduk: availability of content ? (jurisdiction cases)
  - Unclear application of exceptions to cross-border uses
    - Distribution of a tangible object
      - CJEU, Donner: distribution in several MS
      - CJEU, Laserdisken: exceptions irrelevant for exhaustion
    - Online access
      - Localisation of making available ?

# Cross-border dimension

- Unitary European copyright ?
- Mandatory exceptions
  - Existence of an exception
  - Or their conditions ?
- Cross-border effect of exceptions
  - Art. 5 Marrakesh Treaty: *“Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party”*
  - Fair compensation: identification of a unique debtor
    - Ex. e-learning programmes

# Conclusion

Is it the cooking, the magic or the alchemy of exceptions ?

Secret  
ingredient  
or magic  
formula ?

