

COPYRIGHT AND THE RIGHT TO FREEDOM OF EXPRESSION IN THE KNOWLEDGE SOCIETY

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Abstract

From the emergence of the first copyright legislations, European copyright has undergone tremendous changes.

Whereas the first modern copyright systems conceived a wise balance between property and freedom, the wave of technological advances that took place in the late 20th and early 21st century determined a constant increase in the level of protection awarded to intellectual property under copyright regulations, often at the expense of the right to freedom of expression and information.

Case-law from various national courts across Europe, and, since the beginning of 2013, that of the European Court of Human Rights, reflects a growing tendency towards recognizing external limitations to copyright protection, as an effort to preserve the balance that was lost at the normative level.

The aim of this article is to uncover the main areas in which the conflict between the copyright and the freedom of expression arises under the current European copyright legislation.

Based on our findings, we shall argue that a reconciliation between the two rights at the regulatory level would not only help the copyright system overcome the crisis of legitimacy it is currently facing but that it might also have a positive impact on the overall wellbeing of the European community in the age of knowledge.

Keywords: European Convention on Human Rights, Berne Convention of Literary and Artistic Works, Information Society Directive 2001/29/EC, exceptions and limitations, three-step test, technical protection measures, public domain

Introduction

1. In the age of knowledge, where information is mainly exchanged by means of technology, copyright law is rapidly becoming one of the main driving forces to shape our society. Considering the dynamics and unpredictability of technological innovation, the need for a more flexible copyright system, one that balances the interests of both copyright holders and the general public, is self-evident.

In order to prove that adding more flexibility to the current framework would be perfectly in line with the underlying rationales of the copyright system, we need to point out that the first modern copyright law, the Statute of Anne of 1710, arose in a context of general discontent towards the established copyright monopoly, which at the time provided the infrastructure for controlling the publication of heretical and seditious materials. Conceived under the values of Enlightenment, modern copyright had the aim of reforming the existing dogma and of steering its purposes away from censorship and

towards the principles of freedom of expression¹. Following the French Revolution of 1789, the first continental laws on copyright were adopted in 1791 and 1793².

Common to both systems was the fact that they conceived a wise balance between property and freedom; the former, in the individualist approach of the age, was considered the means of ensuring the latter, with the overall aim of ensuring the common good – a dose of property to enable the author to live from his works and a dose of freedom to allow creators to build on what already existed in order to create something new.

Concepts

2. Although the need for a modern copyright system arose in both countries out of similar considerations, the concept has evolved differently under the two different legal philosophies. Although Intellectual Property justifications are outside the scope of this paper³, in the absence of an exact definition of copyright, a brief overview is required.

Jeremy Bentham identified the will of the legislator as the source of authority of the law⁴. As a consequence of this characteristic, laws in the common law system find their justification in their utility and copyright law makes no exception. In the utilitarian doctrine, the purpose of copyright law is to provide incentives for creators, whom in turn bring their contribution to social development.

Unlike the common law system, French copyright law is based on the natural law doctrine. In the naturalist view, authors' rights are not created by law, but always existed in the legal consciousness of man. Basically, the *droit d'auteur* doctrine sees copyright as an essentially unrestricted natural right reflecting the bond between the author and his personal creation⁵.

Even though utilitarian justifications are frequently deployed in today's European copyright⁶, it should be noted that continental European copyright has developed mainly on personality-based justifications, as French copyright laws were the source of inspiration for all other civil law jurisdictions as well as for the Berne Convention of Literary and Artistic Works of 1886⁷.

The Berne Convention doesn't explicitly define copyright. In exchange, the concept of copyright is defined in terms of the exclusive rights granted to the authors of qualifying works. Through its Articles 8, 9 and 12, the Convention confers authors an

¹ Samuelson, Pamela. 2002-2003. "Copyright and Freedom of Expression in Historical Perspective." *J. Intell. Prop.* 10.: 324.

² *Loi Le Chapelier*, 13-19 January 1791 and *Loi Le Canal*, 19-24 July 1793; see also Ginsburg, Jane C. 1988. "French Copyright Law: A Comparative Overview." *Journal, Copyright Society of the U.S.A.* 36.: 270.

³ For a comprehensive analysis See e.g.: Hettinger, Edwin C. "Justifying Intellectual Property." *Philosophy & Public Affairs.* 18.1 (1989): 31-52. Print.

⁴ See: Golding, Martin P., and William A. Edmundson (eds.), 2008. *The Blackwell guide to the philosophy of law and legal theory.* Vol. 18. Oxford: Wiley-Blackwell.

⁵ Hugenholtz, P. Bernt. 2000. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age.* Oxford: Oxford University Press, p. 2.

⁶ See e.g.: Recital 2 of the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs.

⁷ Ginsburg, Jane C. 1988. "French Copyright Law: A Comparative Overview." *Journal, Copyright Society of the U.S.A.* 36.: 270.

exclusive right to authorize the reproduction of their work in any manner and form, and to authorize the translation of their works throughout the term of protection of their rights in the original works.

Independent from the "economic" rights, the Convention provides certain "moral rights" for the author to enjoy, namely the right to claim authorship of the works and to object to any distortion, mutilation, modification or other derogatory action in relation to their works which would bring prejudice to the author's honour or reputation⁸. Furthermore, the Convention provides that moral rights can be enforced after the death of the author by those responsible for the enforcement of copyright protection⁹, which means that the safeguarding of such rights is left to the legislation of the contracting states.

The Convention also provides that, in respect of original works of art and manuscripts of writers and composers, the creator shall enjoy the inalienable right to an "interest" (pecuniary and not moral) in any resale of the work subsequent to the first transfer by the creator¹⁰.

In view of the balance between copyright and freedom of expression, the most important provision of the Convention is that enshrined in Article 9(2). According to it, contracting states may permit certain exceptions to the exclusive right of reproduction conferred on the author, but they may only do so subject to what has become known as the "three-step" test. Under the test, exceptions to liability for copyright infringement are permissible as long as they are confined to certain special cases; they do not conflict with a normal exploitation of the work; and they do not unreasonably prejudice the legitimate interest of the author.

These provisions of the Berne Convention are what lay at the core of the rights of reproduction, making available to the public and distribution granted under copyright protection today, as well as to their exceptions.

3. Following the Declaration of the rights of Man and of the Citizen, a right to enjoy freedom of expression and information has been embodied in various international treaties and instruments. From an European perspective, Article 10 of the European Convention on Human Rights (ECHR)¹¹ is, by far, the most relevant.

Freedom of expression and information protected under Article 10 ECHR consists of the right to foster opinions, as well as to impart, distribute and receive information without government interference in all Member States that belong to the Council of Europe.

We must note that after the recognition of the binding character of the ECHR was embodied in Article 6 of the Treaty on the European Union¹² and was reiterated in the

⁸ Art. 6bis(1) Berne Convention.

⁹ Art. 6bis(2) Berne Convention.

¹⁰ Tritton, Guy, et al. 2008. *Intellectual Property in Europe*. 3rd ed. London: Sweet & Maxwell.

¹¹ As well as Article 11 of the Charter of Fundamental Rights of the European Union of 7 December 2000.

¹² "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law".

Treaty of Lisbon¹³, the provisions of the ECHR or of the Charter may be invoked directly before courts of the Member States, subject to review by the European Court of Human Rights (ECtHR).

Article 10 ECHR is intended to be interpreted broadly. It is phrased in media-neutral terms, applying to old and new media alike. The term "information" includes, at the very least, the communication of facts, news, knowledge and scientific information¹⁴. Whether or not, and to what extent, the protection conferred by Article 10 extends to commercial speech, has, in fact, been the subject of a number of decisions of the ECtHR¹⁵.

The second paragraph of Article 10 ECHR provides that the exercise of the freedom of expression and information may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the rights of others. Some legal authors have interpreted the idiom "rights of others" as referring only to the fundamental rights recognized by the Convention itself. The argument for this interpretation is that, if human rights and freedoms could be overridden by any random subjective right, the meaning of the convention would be diluted. However, doctrine and case law have never accepted this view. Instead, the "rights of others" have been held to include a wide range of subjective rights and interests, certainly including the rights protected under copyright.

As it follows, rather than an absolute prohibition to regulate speech, the right to freedom of expression and information as enshrined in Article 10 ECHR of Article 11 of the Charter constitutes a presumption against state interference.

The justifications of the right to freedom of speech are threefold. First, there is the epistemic value of expression. As John Stuart Mill put it, free speech allows for a free market of ideas most conducive to truth. Secondly, free speech allows the expansion of diverse political opinions and the good functioning of democracy. The third argument is rooted in its intrinsic value as a fundamental human right. Freedom of expression is valued because it shows respect for the reasoning powers of each individual¹⁶.

The relationship between copyright and the right to freedom of expression

4. Having determined the concepts, a quick inquiry into the nature of the relationship between copyright and freedom of expression is needed.

It is beyond doubt the copyright system of the pre-modern era played an important role in the dissemination of works. However, it was by no means an instrument for promoting free speech, but rather the opposite.

¹³ Article 6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

¹⁴ Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age*. Oxford: Oxford University Press, 2000. 5. Print.

¹⁵ See e.g. *Case Mouvement Raelien Suisse v. Switzerland*, ECtHR, 13 July 2012; and *Case of Hertel v. Switzerland*, ECtHR, 25 August 1998.

¹⁶ Couto, Alexandra. 2008. "Copyright and Freedom of Expression: a Philosophical Map". In A. Gosseries, A. Marciano & A. Strowel (eds.), *Intellectual Property and Theories of Justice*. Palgrave, pp. 163-164.

Modern copyright¹⁷, on the other hand, came out as the result of reconciliation between diverging interests. Access to information and copyright fully converged regarding both the rationale and the principles involved.

The principle of striking a balance between the different interests involved is reflected in the very essence of copyright. In principle, copyright does not prevent access to information. The exclusive right is in fact subject to a number of limitations, the main or subsidiary aim of which is to ensure free access to information and subsequently, to secure the dissemination of intellectual works¹⁸.

However, since the Berne Convention of 1886, a number of international agreements were concluded, and not less than twelve directives concerning copyright and related rights were adopted in Europe. Unfortunately, due to the size constraints of this paper, an overview of the entire evolution of European copyright is impossible. Nevertheless, it is enough to say that while rights were extended, new rights were created, new actors were introduced and the range of works that qualify for protection grew, neither the European legislator, nor the international lawmakers seem to have spent as much effort as the drafters of the first copyright laws to preserve the balance between the diverging interests in the copyright system.

To substantiate the above, we will continue with a short discussion on the current state of the balance between copyright and the right to freedom of expression, mostly with the aid of the Information Society Directive, the first and only horizontal copyright directive that was adopted so far¹⁹. Three main aspects need to be stressed upon considering the aim of this paper, and those are the Information Society Directive's provisions regarding exceptions and limitations to copyright protection, technical protection measures and the three-step test.

Before this, however, a fundamental aspect needs to be addressed, namely the expansion of the term of protection.

Although the Statute of Anne of 1710 introduced a limited term of protection, it was not until 1774 that the idea of a perpetual copyright was rejected for the first time in history²⁰. The moment represents the emergence of the public domain. Simply put, from this point on, booksellers were no longer in a position to control the development of culture. Accordingly, the public domain became an essential part of the copyright philosophy in what concerns the balance between protection and the values embodied in Article 10 ECHR, as it contributes to a great extent to enabling access to information and thus insuring future creativity²¹.

Considering that the French copyright laws which inspired the Berne Convention provided for a 5 year long term of protection post mortem auctoris while the latter provided for a 50 years term, to which the Term Directive of 1993 added another 20, a

¹⁷ The copyright system that followed the passing of the Statute of Anne in 1710.

¹⁸ See Geiger, Christophe. 2009-2010. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law.* 12.3: 524.

¹⁹ Horizontal in that it brings its application to all substantive aspects of the copyright law of Member States.

²⁰ *Donaldson v Beckett*, 1774, 2 *Brown's Parl. Cases* 129, 1 *Eng. Rep.* 837; 4 *Burr.* 2408, 98 *Eng. Rep.* 257; 17 *Cobbett's Parl. Hist.* 953 [1813].

²¹ Geiger, Christophe. 2009. "The Extension of the Term of Copyright and Certain Neighbouring Rights – A Never-Ending Story?." *IIC – international review of intellectual property and competition law.* 40.1: 82.

major balance shift becomes quickly noticeable, obviously to the detriment of the right to freedom of expression and information.

Proceeding to the issue of exceptions and limitations to copyright protection, we need to consider that the wave of technological developments that occurred in the early 21st century has prompted fundamental changes in the function and effectiveness of copyright law. Needless to say, the advent of the digital environment has brought additional stress in the relationship between the two rights.

Article 5 of the Information Society Directive introduced limitations and exceptions to the digital environment.

The Community harmonization effort in the field of limitations of exceptions has been widely perceived as a failure²², with Article 5 merely providing an exhaustive and optional list of exceptions, from which national legislators could pick the ones that suited, with the additional possibility to adopt a more restrictive wording. However, most critiques were concerned with the fact that the Directive failed to provide any legal tool to preserve the effective enforcement of copyright exceptions in the digital society²³.

In response, the Commission adopted in 2008 a Green Paper on Copyright in the Knowledge Economy, in order to "foster a debate on how knowledge for research, science and education can be best disseminated in the online environment"²⁴. On this occasion, the Commission acknowledged that it is exceptions and limitations that ensure the dissemination of knowledge within copyright law and which are the key to the balance to be sought by Community legislation²⁵.

However, at least three limitations that are vital to the accommodation of freedom of speech within the copyright framework were not addressed in the Green Paper, namely the exception for quotation, the private copy exception and the exception to the right over transformative uses. We are going to address the latter further in the paper.

Regarding the first, which is essential for democratic debate and free criticism, it was held that the optional character of the exception led to uneven implementation in Member States and, in effect, both its content and its scope vary widely from state to state²⁶. Actually, the fact that national provisions seemed insufficient as a satisfactory guarantee of the freedom to create was one of the main reasons for national courts in Europe to resort to applying external limitations in copyright enforcement cases.

Concerning the limitation for private copying, it was argued that in spite of granting a powerful new right to the right-holders, the Information Society Directive does not clearly define the legal status of the private copying exception, nor does it refer to private copying for transformative uses. Moreover, as in the case of the exception for quotation,

²² The Commission itself agrees; See: "Creative content in a European digital single market: challenges for the future", a reflection document of DG INFSO and DG MARKT. 2009. p. 15.

²³ See e.g.: Mazziotti, Giuseppe. 2008. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer.

²⁴ Green Paper of the Commission of the European Communities on "Copyright in the knowledge economy", Brussels, COM (2008) 466/3.

²⁵ Communication from the Commission, 19 October 2009, "Copyright in the knowledge economy" COM (2009) 532 final., p. 10.

²⁶ Geiger, Christophe, Franck Macrez, Adrien Bouvel, Stephanie Carre, Theo Hassler, and Joanna Schmidt-Szalewski. 2009. "What Limitations to Copyright in the Information Society? A Comment on the European Commission's Green Paper" *Copyright in the Knowledge Economy*." *IIC – international review of intellectual property and competition law*. 40.4: 412-433.

the Directive leaves the Member States complete discretion regarding the implementation of the exception²⁷. This led to varied implementation among Member States and thus, to uncertainty regarding the actual application of the limitation.

As it was emphasized, economic arguments have been used both to justify and to limit private copying and associated levy schemes in Europe. The "market failure" inherent in the absence of practicable licensing and enforcement mechanisms vis-a-vis consumers of copyright works has been a powerful argument in favor of statutory licenses permitting private copying. Nevertheless, the emergence of digital rights management technologies that allow copyright holders to engage in individual end-user licensing has cast into doubt the survival of private copying exemptions²⁸.

This leads us to the next point of discussion, namely the Directive's provisions regarding technical protection measures.

The advent of the networked environment has certainly raised new threats to copyright protection. However, it was soon that the potential of technology to provide new tools and means to protect copyrighted works in the digital environment was understood²⁹.

Consequently, the WCT introduced the obligation for the contracting parties to provide in their national legislations measures against the circumvention of effective technical measures, as well as to provide remedies against infringers³⁰. The anti-circumvention provisions were introduced at the European level by means of Article 6 and 7 of the Information Society Directive, which provides a wide definition of the technical measures to be protected.

Moreover, the definition of technical devices protected against circumvention refers not to the exclusive rights of the copyright owner, but to what the copyright owner is able to protect through technology. Consequently, limitations and exceptions do not even apply to this new scope of copyright protection. As it follows, the legitimacy, under copyright law, of making a private copy, a parody, or educational research, is merely relevant as soon as a technical protection measure is able to inhibit such a use or copy of the work. Simply put, copyright holders are granted some legitimacy in controlling, through technology, acts of use traditionally exempted by copyright law³¹.

Moreover, it was argued that the transposition of these provisions in the Information Society Directive is in open violation of Article 11 of the WIPO Copyright Treaty, as the former failed to immunize copyright exceptions from the operation of access and copy-control mechanisms³².

Indeed, the Information Society Directive implies that the circumvention of a digital rights management device is unlawful, regardless of whether it is carried out for the purpose of infringing copyright³³. As a result, the act of defeating a technical protection measure in order to engage in acts permitted by law would, in any case, attract liability.

²⁷ Art. 5(2)b Information Society Directive.

²⁸ Helberger, Natali, and P. Bernt Hugenholtz. 2007. "No place like home for making a copy: private copying in European copyright law and consumer law." *Berkeley Technology Law Journal* 22.3.

²⁹ Dusollier, Severine. 2012. "DRM at the intersection of copyright law and technology: a case study for regulation" In E. Brousseau & M. Merzouki (eds.), *Governance, Regulations and Powers on the Internet*. Cambridge University Press, p. 298.

³⁰ Art. 11 and 12 WIPO Copyright Treaty.

³¹ *Id.* 29, p. 299-309.

³² Mazziotti, Giuseppe. 2008. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer.

³³ Art. 6 and 7 Information Society Directive.

As a matter of fact, despite the attempt of Article 6(4) to rectify the potential difficulty for exceptions to operate where the right-holder has in place a technical protection measure, the vast majority of defenses can be rendered ineffective by copy protection technology, since most of them are not mentioned in the text of paragr. (4)³⁴.

What is more, due to these restrictions of legal access, judges may not always be able to review *ex post* the legality of unauthorized uses since these uses could prove to be *a priori* entrenched. This, in turn, renders the newly introduced three-step test inapplicable, and consequently, the possibility for the user to be excused at times when access to the work is effectively restricted by a DRM measure and the user is forced to circumvent this measure in order to carry out one of the above-mentioned privileged uses³⁵.

Lastly, before moving on to discuss the three-step test, we need to point out that TPMs continue to prevent the work from entering the public domain even after the fulfillment of the term of protection, thus contributing to the decline of the public domain in much the same way a perpetual term of protection would.

Since the introduction of the three-step test at the European level, concerns were expressed regarding the impact of this decision on the law of copyright. As previously argued, the scope of this legal instrument has been steadily extended. Whereas the Berne Convention only provided for the test to be applied in relation to the author's right of reproduction, the TRIPS Agreement and the WIPO Treaties provided for the application of the test to the full range of authors' and related rights³⁶.

According to Article 5(5) of the Information Society Directive, exceptions and limitations "shall only be applied in certain special cases, which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder". The test in the directive appears, thus, to have an even broader scope since it seems to be addressed not only to the national legislature but also to national judges³⁷. Needless to say, this approach has brought a risk of arbitrariness when the test is applied on a case-by-case basis³⁸.

Moreover, whereas the catalogue of exceptions provided in the first part of Article 5 suggests that the drafters opted for the *droit d'auteur* model of narrow, pre-defined copyright exceptions, this understanding stands in contradiction with provision of paragr. (5) which introduces the three-step test at the European level³⁹. Regarding this decision of the European legislator, it was argued that the technical accommodation of free uses is hindered by the ambiguous model of copyright exceptions set out by the Directive. Although the test has established an effective means of preventing the excessive

³⁴ In spite of Recital 39 of the Directive which states that the right to private copy should not inhibit the use of technological measures or their enforcement against circumvention.

³⁵ *Id.* 33, p. 186.

³⁶ Geiger, Christophe, Reto Hilty, and Jonathan Griffiths. 2008. "Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law." *IIC – international review of intellectual property and competition law* 39.6: 707.

³⁷ Geiger, Christophe. 2006. "The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment." *IIC – international review of intellectual property and competition law* 37.1: 74-81.

³⁸ Geiger, Christophe. 2006. "The Three-Step Test, a Threat to a Balanced Copyright Law?." *IIC – international review of intellectual property and competition law* 37.6: 692.

³⁹ *Id.* 33, p. 183.

application of limitations and exceptions, the Directive failed to provide a complementary mechanism prohibiting an unduly narrow or restrictive approach.

To conclude, we must emphasize that the public interest is not well served if the copyright framework fails to accommodate the more general interest of individuals and groups in society when establishing incentives for right-holders. Furthermore, the public interest is particularly clear in the case of those values that underpin fundamental rights. Considering the above, it appears that these values must be given special consideration when applying the three-step test⁴⁰.

5. In view of our aims, only those aspects which are essential to understanding the difficulty of preserving the initial balance in the digital age have been addressed in this paper.

However, it was long ago that courts across Europe have acknowledged the loss of flexibility at the normative level. In order to preserve the lost balance, courts have often resorted to applying external doctrines to copyright, such as the right to freedom of expression and information.

For instance, as early as the 1960s, German courts have decided on a number of copyright cases in which free speech limitations have been recognized.

The first case regarded an unauthorized re-broadcasting by a West German television of news produced in the German Democratic Republic. The court allowed it, on the grounds that the freedom of expression guaranteed by Article 5 of the Federal Constitution provided an extra-statutory justification⁴¹.

In a later case⁴², another German court held that copyright law should be interpreted in the light of the right to free speech⁴³.

Eventually, in a decision from 1985 the German Supreme Court has recognized that "under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding statutory limitations may be taken into consideration"⁴⁴.

Dutch courts were also among the first to consider the application of Article 10 ECHR in copyright cases. In a case concerning the publication of a photograph by a newspaper⁴⁵, the Court found that under certain circumstances copyright may conflict with Article 10. Later, the same reasoning was adopted by the Dutch Supreme Court⁴⁶.

A notorious Dutch case⁴⁷ concerned the publication on the Internet of a number of court documents used previously in an American federal case⁴⁸, containing criticisms towards the Church of Scientology. After a ten year long trial, the case arrived in front of

⁴⁰ Id., 37, p. 708-709.

⁴¹ Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age*. Oxford: Oxford University Press, 2000. 9. Print.

⁴² Bild Zeitung Case, Berlin Court of Appeal, 26 November 1968, [1969] UFITA 296.

⁴³ Id. 42, p. 10

⁴⁴ Pelzversand Case, German Federal Supreme Court 10 January 1968, [1968] GRUR 465.

⁴⁵ Boogschutter Case, District Court of Amsterdam, 19 January 1994, [1994] Informatierecht/AMI 51.

⁴⁶ Dior v. Evora Case, Dutch Supreme Court, 20 August 1995, [1996] Informatierecht/AMI 51.

⁴⁷ Scientology vs. XS4ALL RB et al Case, The Hague Court, 9 June 1999, [1999] Informatierecht/AMI august/september 1999, p. 113-115.

⁴⁸ Church of Scientology International v. Fishman and Geertz Case, U.S. District Court for the Central District of California. 1993. Case No. CV 91-6426 HLH (Tx).

the Dutch Supreme Court which did not issue a judgment following the withdrawal of the claim by the Church. However, the judgment of the lower court, which held that Article 10 of the ECHR prevails in front of the Dutch national legislation on copyright, became final.

French courts, in spite of their prolonged reluctance to apply free speech defenses in copyright cases, were the first to apply Article 10 of the ECHR directly. In the judgment issued in the case of Maurice Utrillo, the Paris Court of First Instance emphasized that Article 10 of the ECHR is superior to the national law, including the law of copyright, and concluded that, in light of Article 10, the right of the public to be informed of important cultural events should prevail over the interests of copyright owners⁴⁹. However, the decision was eventually overruled by the French Supreme Court, which held that the argument based on the violation of Article 10 was "invalid"⁵⁰.

To the contrary, the Austrian Supreme Court held, in a similar case, that the use of copyright with the sole objective of hindering criticism cannot justify any restriction to freedom of expression in a democratic society. Consequently, the Court found that the reproduction of newspaper articles on a website belonging to the person the articles were about was covered by freedom of expression under Article 10 of the ECHR⁵¹.

However diverse outcomes they had, such decisions issued by national courts were welcomed in the literature; indeed, they opened the discussion on the adaptation of copyright limitations to the new social context prompted by the ever-increasing use of technology⁵².

Nevertheless, the conflict between copyright and freedom of expression started to receive even more attention after the adoption of the Information Society Directive.

The Mulholland Drive case⁵³ concerned the limitation through technical protection measures of the private copy exception. As the Information Society Directive was not yet implemented by the French legislature, the law did not provide any solution for this conflict. Faced with this gap in the legislation, the judges in the first instance held that the beneficiary of the legal limitations did not enjoy a right of action and dismissed the user's petition.

Overruling the previous decision, the Paris Court of Appeal went further and noted that even though the user did not benefit from a "right to the private copy" since this was a legal exception to copyright, such an exception could only be limited under the conditions specified by the legislative texts. The Court went on and analyzed the legitimacy of the exception under the three-step test provided by Article 5(5) of the Directive, and found that the conditions for a restriction to the exception were not satisfied in this specific case.

⁴⁹ Case 98/7053, Court of First Instance Paris, 23 February 1999, (unpublished).

⁵⁰ Maurice Utrillo Case, French Supreme Court, 1st Civil Chamber, 13 September 2003, [2004] 35 IIC 716.

⁵¹ Medienprofessor Case, Austrian Supreme Court 12 June 2001, [2002] GRUR Int. 341, 33 IIC 994.

⁵² Geiger, Christophe. 2006. "'Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union." IIC – international review of intellectual property and competition law. 37.4: 381.

⁵³ Case Perequin and UFC Que Choisir v. SA Films Alain Sarde, Ste Universal Pictures video France et al., Paris District Court, 30 April 2004, [2005] 36 IIC 148.

Nevertheless, by holding that the exception for the private copy cannot be "disabled" by technical protection measures, the Court recognized its imperative nature, thus making an important statement in the subject matter⁵⁴.

However, this second decision was later overruled by the French Supreme Court⁵⁵, which illustrated the tendency of most national courts in Europe to read the three-step test through the prism of the exploitation of the work and from the point of view of the interests of the right holders, rather than a legal instrument that guarantees a fair balance between diverging interests.

A particularly innovative approach on copyright limitations was put forward by the Swiss Supreme Court⁵⁶. In its interpretation of the three-step test, the Court noted that the wording of the third step in the TRIPS Agreement departs from the original version provided by the Berne Convention, by replacing the word "author" with "right-holder". The Court then noted that, as the interests of the authors do not always coincide with those of the right-holders, the test serves to protect the author's interests at least as much as those of the exploiters. Consequently, the Court concluded that the test must under no circumstances be interpreted solely in the light of the latter's interests⁵⁷.

Back at European level, while the European Court of Human Rights has delivered in the past few years several judgments in which it asserted that the Internet has become one of the principal means of exercising the right to freedom of expression and information⁵⁸, the decision in the case of *Ashby Donald and others v. France*⁵⁹ was the first decision of the ECtHR on the matters in a case concerning the enforcement of copyright on the Internet and Article 10 of the ECHR.

In its judgment, the Court has emphasized a number of important aspects.

First of all, it explicitly recognized the applicability of Article 10 in the case, hereby confirming its approach that while freedom of expression is subject to exceptions, these must be narrowly construed and convincingly established.

Secondly, the Court stated that a wide margin of appreciation is to be given to the domestic authorities in this case, since the publication of such pictures was not related to an issue of general interest for society but was merely a form of "commercial speech"⁶⁰.

Thirdly, the Court held that in cases that require a balance to be struck between two fundamental rights, such as the right to property provided by Article 1 of the First Protocol to the Convention⁶¹, and the right to freedom of expression enshrined in Article 10, national authorities enjoy an even wider margin of appreciation.

⁵⁴ Id. 37, p. 74.

⁵⁵ Case DVD Copy III, French Supreme Court, 1st Civil Division, 28 February 2006, [2006], DVD Copy III, 37 IIC 760.

⁵⁶ Swiss Federal Supreme Court, 1st Civil Division, 26 June 2007, [2007] GRUR Int. 1046, IIC 990

⁵⁷ Geiger, Christophe. 2008. "Rethinking Copyright Limitations in the Information Society – The Swiss Supreme Court Leads the Way." IIC – international review of intellectual property and competition law. 39.8: 943-946.

⁵⁸ See e.g. *Times Newspapers Ltd. v. United Kingdom*, ECtHR, 10 March 2009; *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, ECtHR, 5 May 2011; *Ahmet Yildirim v. Turkey*, ECtHR, 18 December 2012.

⁵⁹ Case *Ashby Donald and Others v. France*, ECtHR, 10 January 2013.

⁶⁰ See e.g. *Case Mouvement Raelien Suisse v. Switzerland*, ECtHR, 13 July 2012; and *Hertel v. Switzerland*, ECtHR, 25 August 1998.

⁶¹ The ECtHR had previously decided that Article 1 of the First Protocol is applicable to intellectual property; see e.g. *Case Melnychuk v. Ukraine*, ECtHR, 7 July 2005; and *Case Anheuser-Busch Incl. v. Portugal*, ECtHR, 11 January 2007.

In the present case, the ECtHR found no reason to consider that the national authorities exceeded their margin of appreciation and consequently did not find the need to undertake itself the balancing exercise. Reiterating the decision of the Paris Court of Appeal, the ECtHR found the conviction justified in that the applicants had knowingly disseminated the pictures in question without permission from the copyright holders and were therefore guilty of forgery under French copyright law. At last, the Court held that the fines and the substantial awards of damages were not disproportionate to the legitimate aim pursued.

Nevertheless, the Court has confirmed in this case that copyright enforcement, restrictions on the use of copyright protected works and sanctions based on copyright law can ultimately be regarded as interferences with the right to freedom of expression and information.

Just several weeks later, in the "Pirate Bay" case, the two co-founders of the famous file-sharing service complained before the ECtHR that their conviction for complicity to commit crimes in violation of the Swedish copyright law had breached their right to freedom of expression and information⁶².

Before the ECtHR, the judgment followed largely the same pattern as in the case of *Ashby v. France*. Even though the Court found file-sharing to be covered by the right to receive and impart information enshrined in Article 10 ECHR, it once again acknowledged the wide margin of appreciation of the national authorities in striking a fair balance between fundamental rights, and as it found that the domestic courts had properly undertook the balancing exercise, the Court dismissed the application as manifestly ill-founded.

The examples from jurisprudence discussed above imply good reasons to re-introduce a measure of flexibility in the European copyright system. While the historic perspective we acquired suggests that the system lost a good degree of flexibility over the course of the last century, the need for more openness in copyright law is almost self-evident in this information society of highly dynamic and unpredictable change⁶³.

Conclusion

6. To bring this article to an end, we will reiterate the idea that a reconciliation between the two rights within the boundaries of the copyright system would not only help it overcome the crisis of legitimacy it is currently facing, but that it might also be the most fruitful and democratic path to take.

What needs to be stressed upon first of all is the fact that the European copyright aquis leaves considerably more room for flexibilities than its closed list of permitted limitations and exceptions suggests. As it was observed, the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation⁶⁴.

⁶² Case of Fredrik Neij and Peter Sunde Kolmisoppi (*The Pirate Bay*) v. Sweden, ECtHR, 19 February 2013.

⁶³ Hugenholtz, P. B. and Senftleben, Martin. 2011. "Fair Use in Europe: In Search of Flexibilities". Available at SSRN: <http://ssrn.com/abstract=1959554>.

⁶⁴ *Id.* 63.

Secondly, as already mentioned, the Commission failed to address in its Green Paper one very important exception for the accommodation of the right enshrined in Article 10 ECHR in the copyright system, namely the exception to the right of adaptation. However, at the time this right is still unharmonized. Through the prism of the pressing need to reconcile the European copyright system with the values embodied in the right to freedom of expression and information, this lack of harmonization could be interpreted as an opportunity for Member States to proceed in this direction.

Considering the length of the European legislative cycle, we argue that a far better option for achieving this end would be for Member States to take advantage of this policy space and develop national models of limitations and exceptions permitting fair transformative uses that can be first tested in practice⁶⁵. The most effective features of these systems could then become the premises for the reconciliation of the two rights as the European Union level as well.

Of course, some might argue that in the digital age, a developed society such as the European Union is highly dependent on strong protection of intellectual property in order to preserve its position in the global context⁶⁶, and that a concession in favour of the right to freedom of speech might render weaker copyright protection.

Without arguing that strong property rights are the foundation of a stable and predictable society, we will nevertheless state the conviction that, rather than construing copyright legislation solely based on economic theories, the main care of the legislator should be to ensure the possibility for future generations to be creative. However profound and insightful economic theories might be, a society that lacks the necessary creativity to overcome the obstacles that ceaselessly arise is deemed to fall.

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⁶⁵ For instance, in the context of producing and disseminating user-generated content online.

⁶⁶ Although there is room for debate upon whether copyright should be considered property.

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