Ministry of Security and Justice

Towards *flexible* copyright?

International conference

Friday February 10th, The Hague

Ministry of Security and Justice

Welcome

Opening by the chairwoman

Arda Gerkens

Former member of the
Dutch House of Representatives for the
Socialist Party

Fred Teeven

State Secretary
for
Security and Justice

Maria Martin-Prat

Head of Unit D-I Copyright

DG Internal Market
European Commission

Ministry of Security and Justice

Coffee and Tea

Bernt Hugenholtz

Professor of Copyright Law
University of Amsterdam

Member of the Netherlands State Committee on Copyright Law

The Need for Flexibility in Copyright

Prof. P. Bernt Hugenholtz

Conference 'Towards flexible copyright?'

Ministry of Justice

10 February 2012, The Hague

FAIR USE IN EUROPE. IN SEARCH OF FLEXIBILITIES

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Institute for Information Law
University of Amsterdam

Prof. Dr. Martin Senftleben
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AMSTERDAM, OCTOBER 2012

Background: Limitations and Exceptions

- EU member states: ‘closed’ list of L&E’s
  - Enumeration of circumscribed permitted uses
- United States, Israel: *Fair use*
  - Open norm allowing spectrum of ‘fair’ uses
- Extensive copyright harmonization in EU
  - Information Society Directive (2001): exhaustive list of permitted limitations and exceptions

Copyright Law Used to be (More) Flexible

- Open/abstract norms in *author's rights* law
- Precise norms in *copyright* law systems
  - US: *fair use* (later codified)
- Loss of flexibility due to:
  - Technological development → media/tech specific rules
  - Rule of narrow construction of 'exceptions'
  - Property rights discourse
  - Implementation of EU Directives

Increased Need for Flexible, Open Norms

- Accelerating pace of technological change
- Legislature cannot respond, must anticipate
  - Need for more abstract norms
- EU harmonization requires extra cycle of law making
  - Total legislative cycle > 10 years!
- Principle of technological neutrality

Where Flexibility is Needed: Examples

- User-generated content: creative remixing

BLR | BAD LIP READING

- HOME
- EMAIL
- YOUTUBE
- FACEBOOK
- TWITTER
- ITUNES
- APPAREL
- ARCHIVE
- QUESTIONS?
- SUBMIT

Search

"NEWT GINGRICH" — A BLR Soundbite

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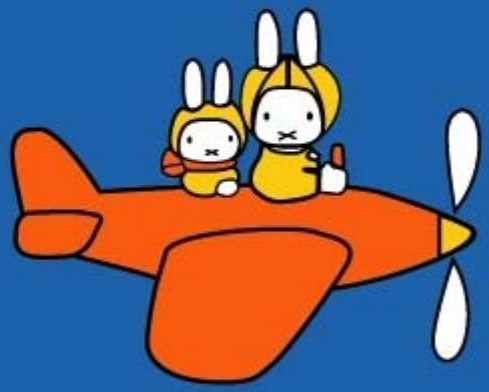
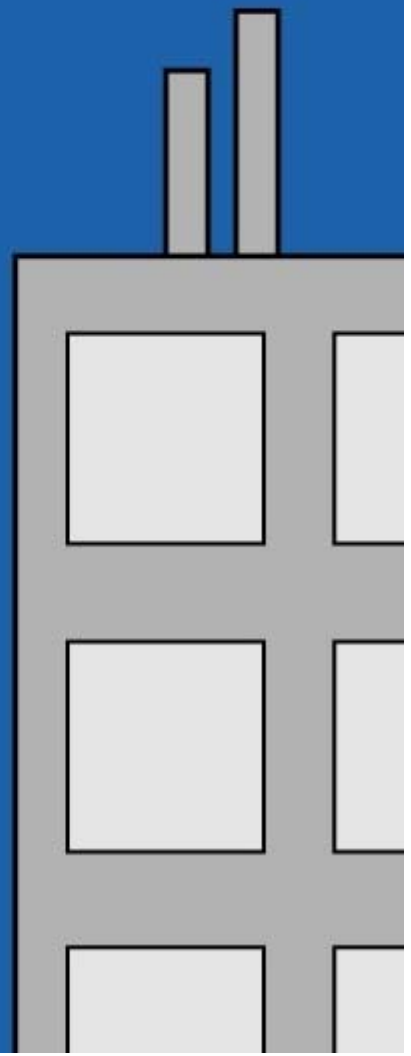
nijn - eleven





Where Flexibility is Needed: Examples

- User-generated content
  - Parody or quotation exceptions may be too narrow

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
  - Cache: transient copying exception may not apply
  - Search results: quotation exception may not apply

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom


Planetary Rotation
Place planets in their location and label.

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
  - PPT, Blackboard, e-boards, etc. not (always) covered by educational exceptions

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making

Where Flexibility is Needed: Example

- User-generated content
- Information location tools
- Digital classroom
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Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making
  - Media reporting & current events exceptions too narrow

Why Flexibility is Needed: Goals

- Promoting creation (transformative use)
- Promoting technological innovation
- Promoting education
- Promoting freedom of expression

National Courts Pulling at the Chains of L&E's

- *Dior/Evora* (NL): application of L&E by analogy
- *Bildersuche* (Ger): theory of implied consent
- *SAIF/Google France* (Fr): application by analogy of ISP safe harbours to search engines
- *Scientology* (NL): direct application of freedom of speech

So What about Legal Security?

- Trade-off between flexibility and predictability
- Flexible rules will require (more) interpretation by courts
- But: references to ‘fair practice’ in cop. law
- And: civil law system is built on open norms, e.g. reasonableness, fairness, care, etc.

What Kinds of Flexibilities?

- General open norm (*fair use*)?

What Kinds of Flexibilities?

- General open norm (*fair use*)?
- Create flexibilities *inside* circumscribed L&E’s

Art. 15 Dutch Copyright Act

- “It shall not be regarded as an infringement of copyright in a literary, scientific or artistic work to adopt news reports, miscellaneous reports or articles concerning current economic, political or religious topics or works of the same nature that have been published in a daily or weekly newspaper or weekly or other periodical, radio or television program or other medium fulfilling the same purpose, if […]”

What Kinds of Flexibilities?

- General open norm (*fair use*)?
- Create flexibilities *inside* circumscribed L&E's
- Create flexibility *alongside* circumscribed L&E's

European Copyright Code (Wittem Group)

- **Art. 5.5 – Further limitations**
- Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.[55]

EUROPEAN COPYRIGHT CODE

Introduction

The *European Copyright Code* is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The project has its roots in an International Network Program run by three Dutch universities (Radboud University of Nijmegen, University of Amsterdam and Leiden University), and sponsored by the government-funded Dutch ITeR Program.

The aim of the Wittem Project and this Code is to promote transparency and consistency in European copyright law. The members of the Wittem Group share a concern that the process of copyright law making at the European level lacks transparency and that the voice of academia all too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Nevertheless, the Group does not take a position on the desirability as such of introducing a unified European legal framework.

The Code was drafted by a Drafting Committee composed of seven members. Each chapter of the Code was originally drafted by one or two members of the Drafting Committee, acting as rapporteurs. The rapporteurs for each chapter were: Prof. Quaedvlieg (Chapter 1: Works), Prof. Hugenholtz (Chapter 2: Authorship and ownership), Prof. Strowel (Chapter 3: Moral rights), Prof. Visser (Chapter 4: Economic rights) and Professors Dreier and Hilty (Chapter 5: Limitations).

Each draft Chapter, accompanied by an explanatory memorandum, was discussed in a plenary session with the members of the Wittem Advisory Board and other experts that were invited ad hoc. The proceedings of these plenary sessions were fed into the second versions of each chapter, and thereafter redacted and integrated into a final consolidated version by the Drafting Committee. Although discussions with the Advisory Board and experts have greatly influenced the final product, responsibility for the Code lies solely with the Drafting Committee.

While drafted in the form of a legislative instrument and thereby exceeding the level of detail normally associated with common principles of law, this Code is not comprehensive. It concentrates on the main elements of any codification of copyright: subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4) and limitations (Chapter 5). The Code does not, for instance, treat such remuneration rights as public lending right and droit de suite, nor does it deal with the legal protection of technical measures. Also, the Code does not contain rules on copyright liability or enforcement, nor does it touch upon neighbouring (related) rights and database right.

This Code is not a recodification of EU copyright law *tabula rasa*. Since European copyright law must

WITTEM
INTERNATIONAL NETWORK PROJECT ON A EUROPEAN COPYRIGHT CODE

Edmund Quilty

Director Copyright and IP Enforcement Directorate
Intellectual Property Office
United Kingdom

Reaction by
Marietje Schaake

Member of the European Parliament
for the Democratic Party D66 (ALDE)

DISCUSSION

Ministry of Security and Justice

LUNCH

Martin Senftleben

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Towards Flexible Copyright?
The Hague, 10/02/2012

Flexibility and EU Acquis

Prof. Dr. Martin Senftleben
VU University Amsterdam
Bird & Bird, The Hague

Flexibility for which purpose?

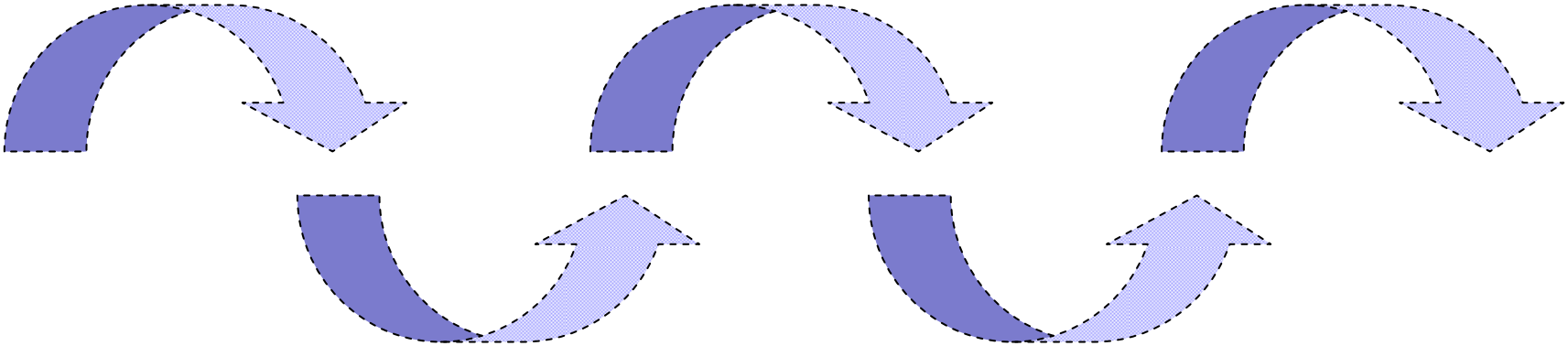
Not for ruining the business of publishers

Not for legitimizing P2P filesharing

But for transformative use

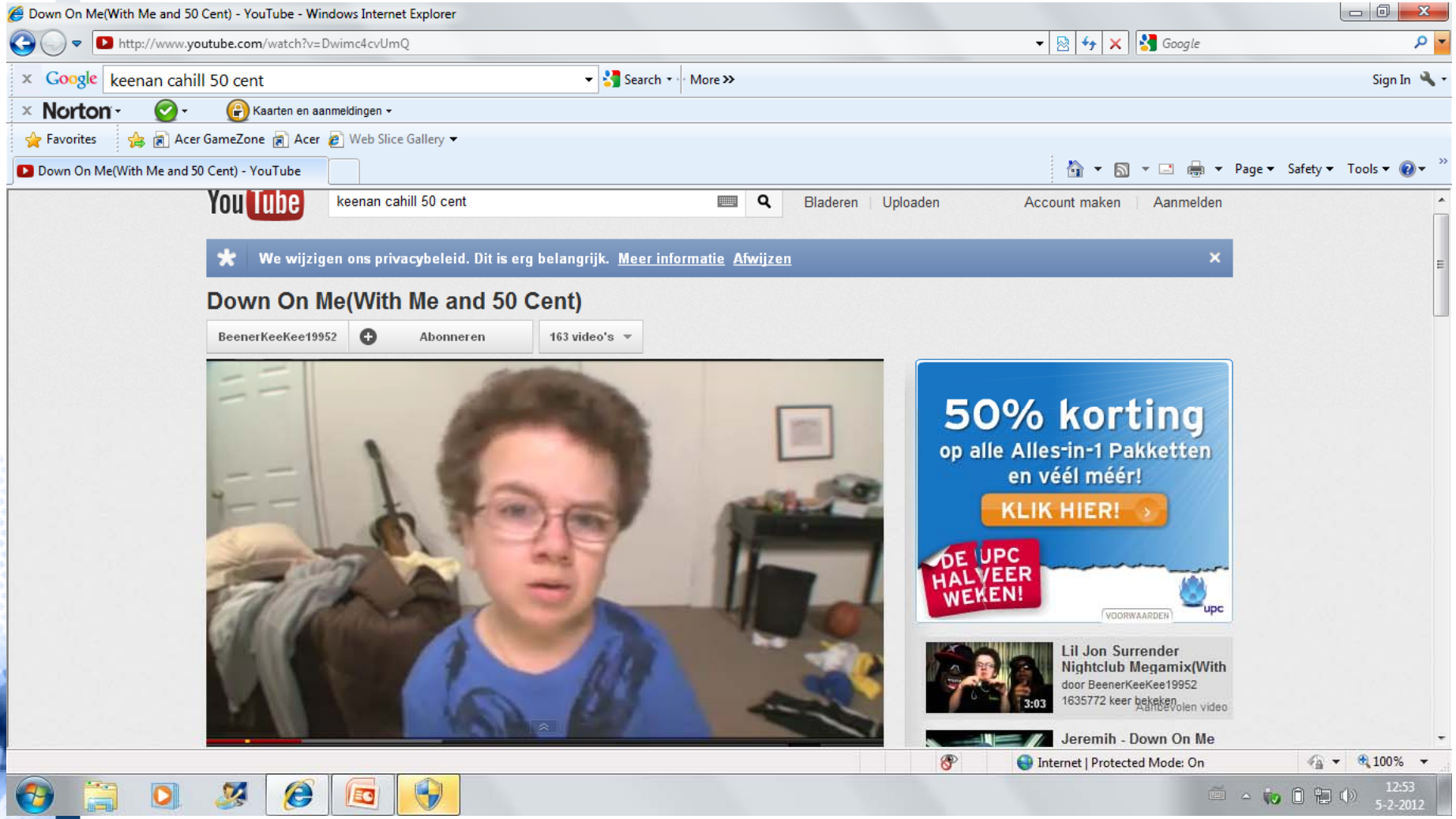
- productive remix/reuse of existing material
- adding new meanings, new contexts
- enrichment of the cultural landscape

creation I



creation II

For instance user-generated content



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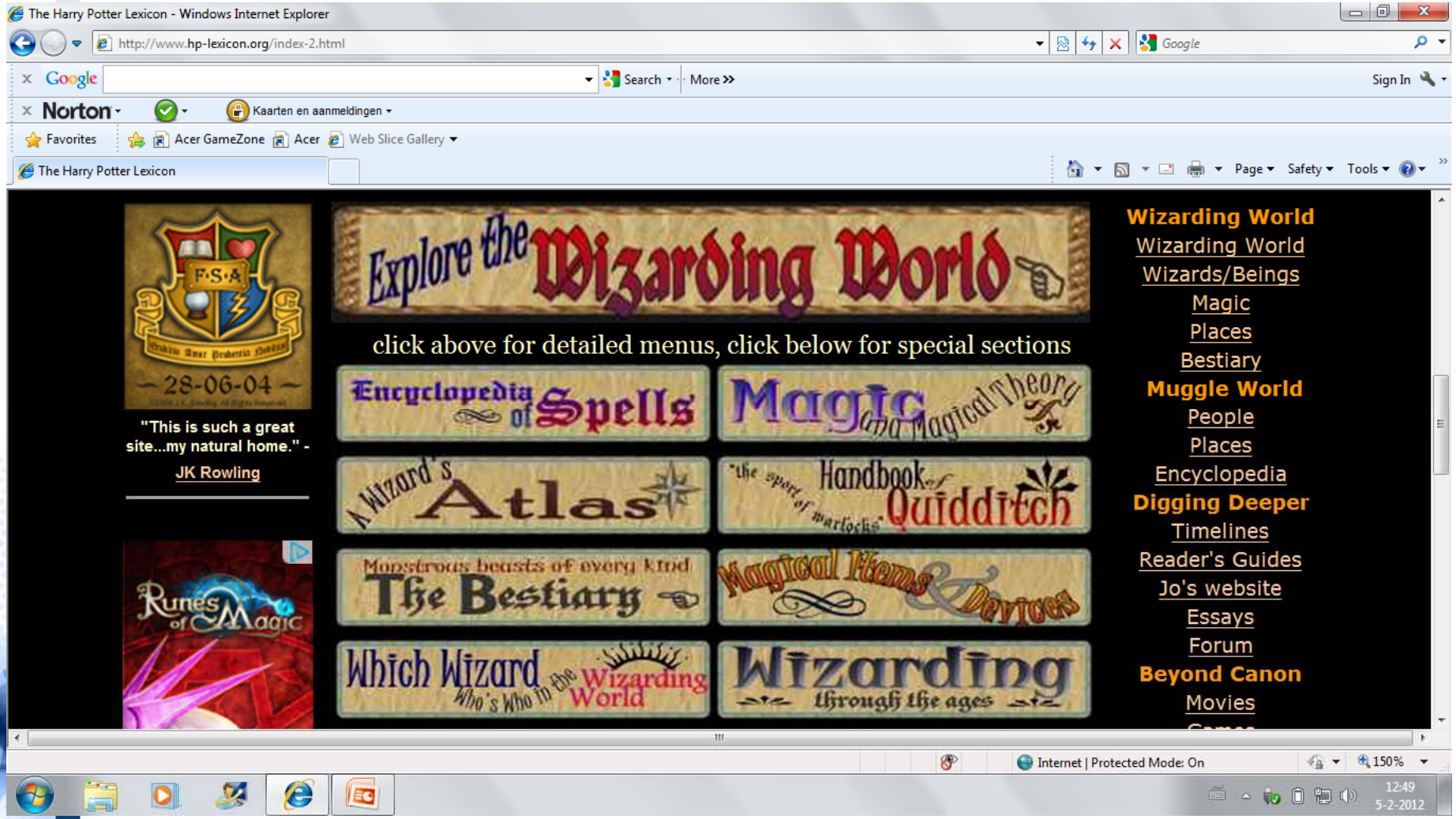


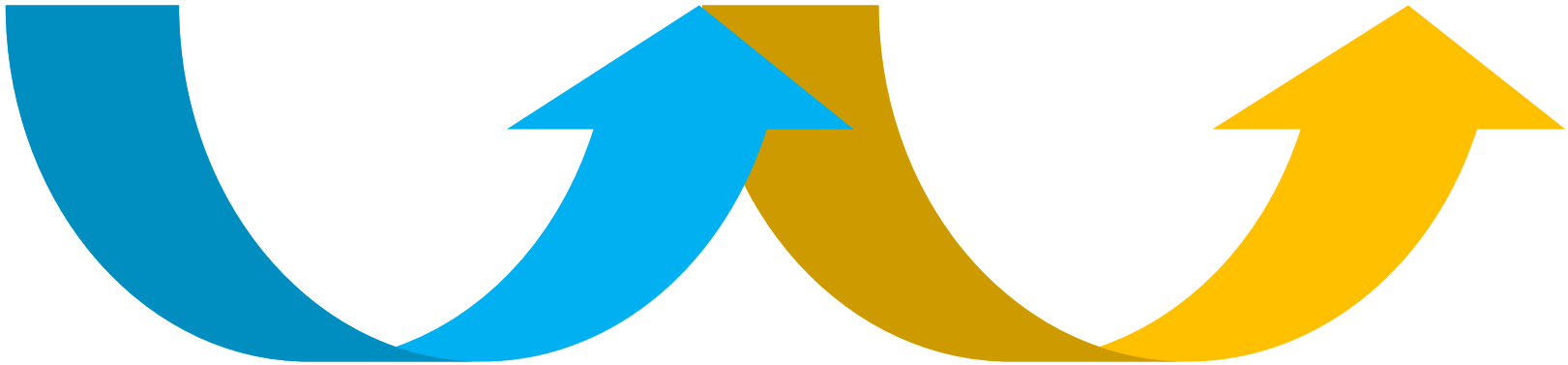
EU acquis

EU acquis (InfoSoc Directive)

broad exclusive rights

exhaustive enumeration of exceptions

three-step test



Art. 5(5) InfoSoc Directive

‘The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

CJEU, Infopaq

‘…that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly […]. This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.’ (para. 56-57)

CJEU, Infopaq

‘This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’ (para. 58)

Restrictive approach

fundamental freedoms

definition of exceptions

three-step test

Still flexibility?

CJEU, FA Premier League

‘In accordance with its objective, [the exemption of temporary copying under Article 5(1) of Directive 2001/29] must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.’ (para. 164)

CJEU, Eva-Maria Painer

‘Article 5(3)(d) of Directive 2001/29 [= right of quotation] is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.’ (para. 134)

Precisely-defined exceptions?

exception prototypes at EU level

Art. 5(3)(a) InfoSoc Directive

‘…use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;…’

Art. 5(3)(c) InfoSoc Directive

‘…use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;…’

Art. 5(3)(d) InfoSoc Directive

‘…quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;…’

Art. 5(3)(i) InfoSoc Directive

‘… incidental inclusion of a work or other subject-matter in other material;…’

Art. 5(3)(k) InfoSoc Directive

‘… use for the purpose of caricature, parody or pastiche;…’

Three-step test as a straitjacket?

reference to flexible international acquis

Recital 44 InfoSoc Directive

‘When applying exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter.’

Family picture

Article 9(2) BC

Article 13 TRIPS

Article 10 WCT

Agreed Statement Art. 10 WCT

‘It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.’

‘Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.’

For example…

‘It does not constitute an infringement to use a work or other subject-matter for non-commercial scientific research or illustrations for teaching, for the reporting of current events, for criticism or review of material that has already been lawfully made available to the public, or quotations from such material serving comparable purposes, for caricature, parody or pastiche, or the incidental inclusion in other material, provided that…’

For example…

‘…such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder.’

- to avoid unreasonable prejudice
- provide for the payment of fair compensation

But several preconditions

re-implementation

re-definition three-step test

approval of the Court of Justice EU

Flexibility outside the EU acquis?

Not all rights harmonized

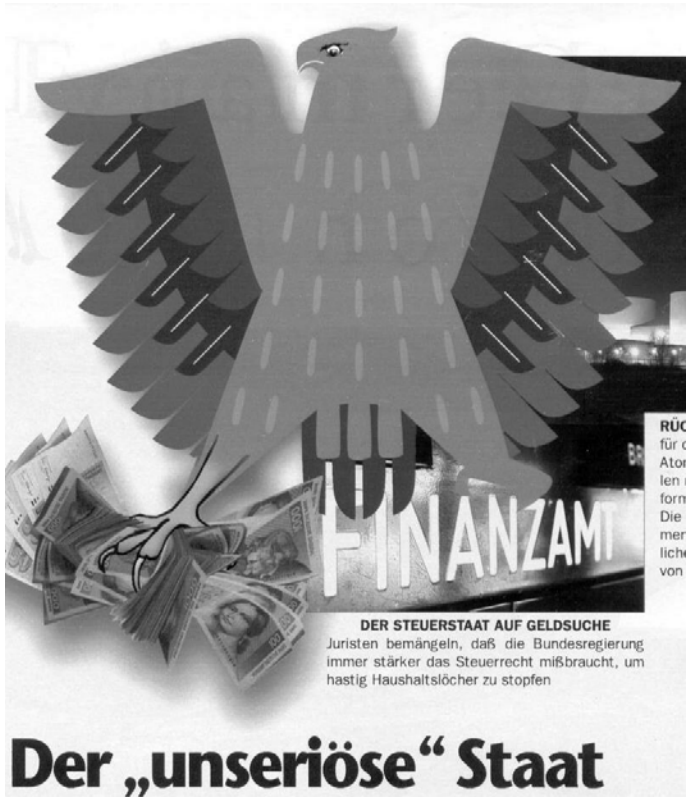
- HARMONIZED: right of reproduction
- NOT HARMONIZED: right of adaptation

- boundary line?
- making literal copies = reproduction
- transformations = adaptation

National free adaptation rules

- Austria: § 5(2) Copyright Act
  - requirement of '...constituting an independent, new work in comparison with the original work.'
- Germany: § 24 Copyright Act
  - requirement of '...new features of its own that make the individual features of the original work fade away…'
- Netherlands: Art. 13 Copyright Act
  - requirement of '…constituting a new, original work…'

Field of application



Considerable flexibility

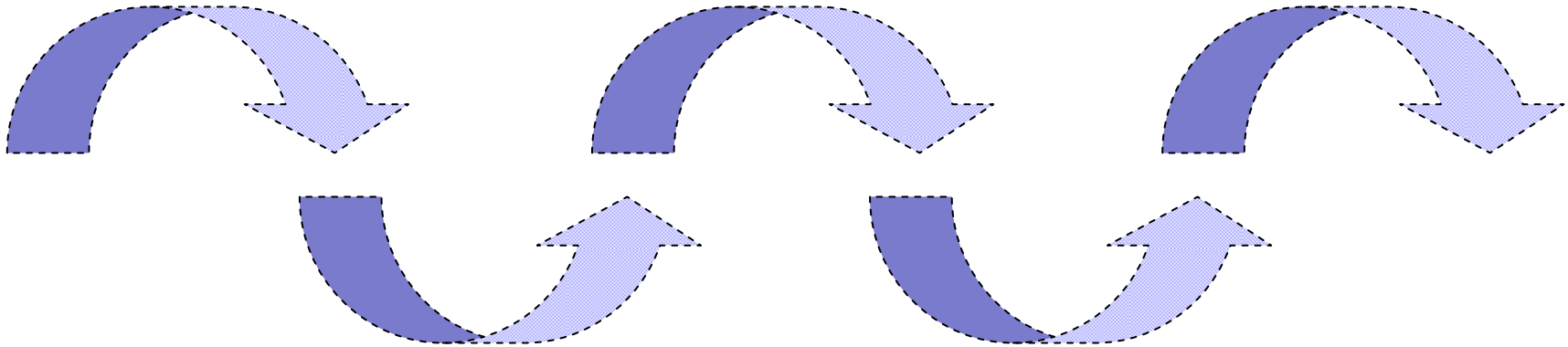
inner distance can be sufficient (Germany)

Conclusion

Flexibilities for transformative use

- broader use of exception prototypes
- relaxation of the three-step test
- low threshold for free adaptations

creation I



creation II

The end. Thank you!

For publications, search for 'senftleben' on www.ssrn.com.

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FLEXIBILITY ? A CRITICAL (BUT CONSTRUCTIVE) POINT OF VIEW

Valérie Laure Benabou

Prof. Univ Versailles

Director of the DANTE

FLEXIBILITY

GENUINE AMBIGUITY

- According to Collins dictionary “Flexible” means :
  - A flexible object or material can be bent easily without breaking.
  - Something or someone that is flexible is able to change easily and adapt to different conditions and circumstances as they occur
- Seeking for a copyright system that would be more adaptable but without breaking?

BENT WITHOUT BREAKING

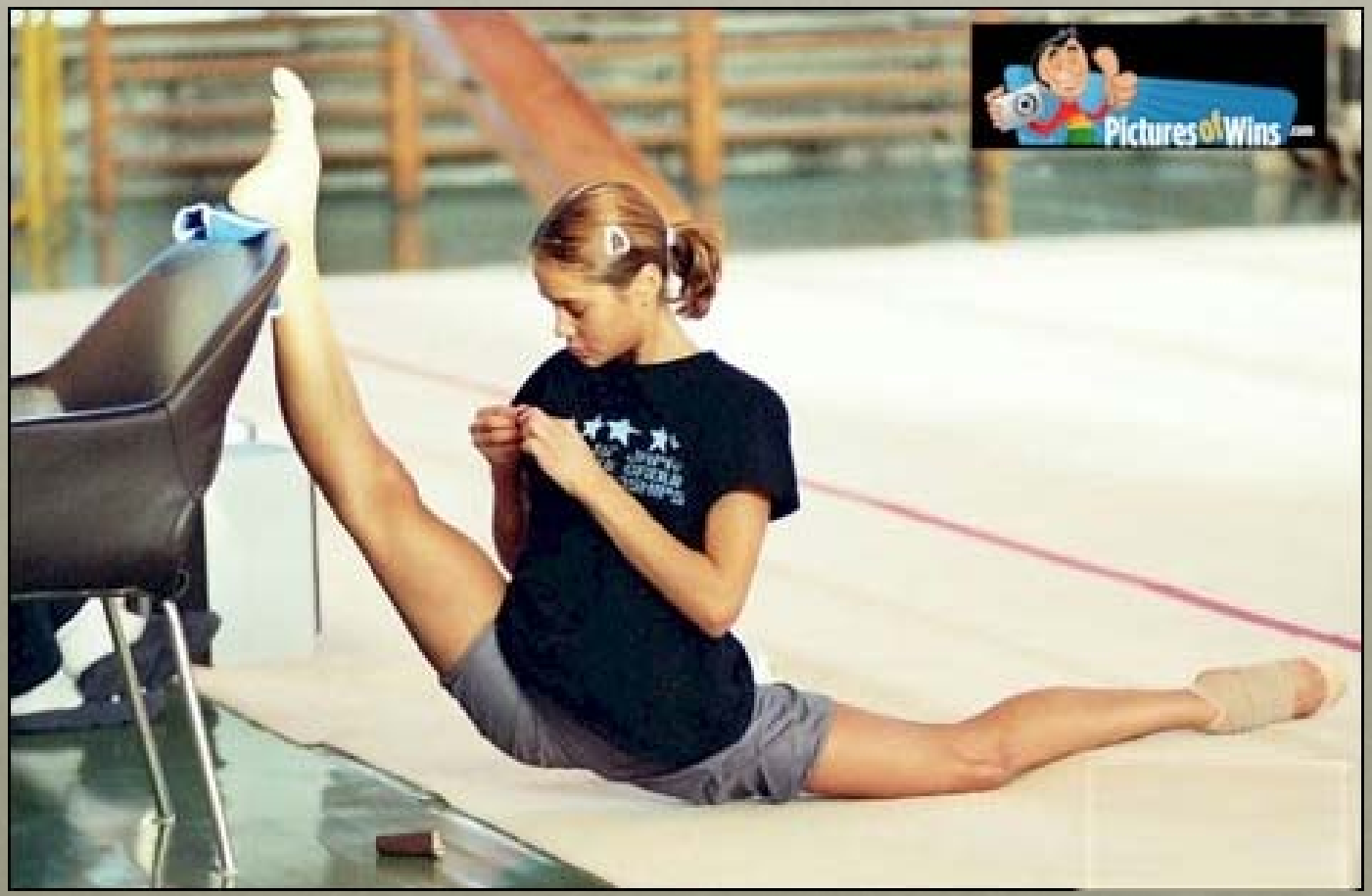
GENUINE AMBIGUITY

- The title of the conference : Flexible Copyright ?
- Flexibility of Copyright means a possibility to extend and/or reduce the field of Copyright, namely the field of the exclusive right
- If we think of “flexibility” in general, it means that the borders of the Copyright system may vary on diverse occasions in different directions : not only the exceptions but also the scope of protection, duration, exclusive rights content, moral right, and enforcement policy…

FLEXIBILITY IS IN THE AIR

- Copyright protection in Europe is already very "flexible" as regards the level of harmonization
- General wording for the definitions within the directives : originality BUT very flexible one ; exclusive rights
- No limited list of copyrighted works at European level : competence of the member States/diversity of situations
- Non-mandatory exceptions, except article 5.1.
- Exception 5.o : de minimis ? for analogical world

FLEXILITY IS IN THE AIR



FLEXIBILITY : WHAT FOR ?

- Provide guidance for the stakeholders without necessarily waiting for an authority (legislator/judge) to “say” the law
- Automatically include the new phenomenon without preliminary intervention of the law and/or the judge to determine whether or not the situation is subject to the application of copyright law
- Increase/decrease legal security ?

FLEXIBILITY : WHAT FOR ?

- The purpose of this conference is certainly not to plead for an extension of Copyright but to scrutinize the need for more flexibility within copyright law in order allow and/or enhance new types of use of the works.
- Allow more space for “transformative uses”
- This is a one-size and one-sense view of “flexibility”

IS FLEXIBILITY THE RIGHT WORD ?

Difficulty to combine the flexible definition of exclusive rights and flexible exceptions

- Two different interests are opposed, each one of them claiming for “flexibility” in order to increase its own scope of rights or freedom…
- If the aim is to provide more “freedom” for the users, this will not be achieved through a general “flexible” system of exceptions because of the antagonisms of the stakeholders

FLEXIBLE BALANCE ?

IS FLEXIBILITY THE RIGHT WORD ?

- If the scope of the exception is unclear, the methods of interpretation will tend to limit it in favor of exclusive right according to :
  - **The principle of restrictive interpretation of the exceptions**
- Infopaq II Order of the Court (Third Chamber)17 January 2012
- 27 Secondly, it is apparent from the Court's case-law that the conditions listed above must be interpreted strictly because Article 5(1) of that directive is a derogation from the general principle established by that directive, namely the requirement that the rightholder authorise any reproduction of a protected work (see *Infopaq International, paragraphs 56 and 57, and Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-0000, paragraph 162).*

IS FLEXIBILITY THE RIGHT WORD ?

- If the scope of the exception is unclear, the methods of interpretation will tend to limit it in favor of exclusive right according to :
  - the principle of restrictive interpretation of the exceptions
  - **the principle of harmonization a maxima (for exclusive rights) versus harmonization a minima (for exceptions)**
  - Recital (21) Infosoc Directive This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries.(…). A broad definition of these acts is needed to ensure legal certainty within the internal market

IS FLEXIBILITY THE RIGHT WORD ?

- In a context of the harmonization by directives, the lack of precision of the exception may be interpreted like an indication that Member States remain free to determine the content thereof
- Limits of harmonization will increase/not reduce the risks for users, mostly for on-line exploitations
- In the presence of “flexible” definition of the exclusive right, the only way to provide more “flexibility” for users is to recognize and secure their freedom of use : flexible use ≠ flexible exceptions

THE "LTM"

- Enhancing new uses does not necessarily require new exceptions or general provisions to enlarge the scope thereof
- Different solutions depending on the situation
  - Interpretation of the judge from former exceptions
  - Competition law, abuse of right
  - Exhaustion of rights
  - Definition of the work or limited defintion of the right

  Benefit from the copyright flexibility to open new kind of uses

THE « LTM »

- Adopt the « LTM » i.e. the Less Troublesome Method
- Take in consideration the history and internal coherence of the acquis communautaire
  - Respect the prevalence of the exclusive right
- Use the room of manouvre in the principles of interpretation
- See ECJ Maria-Eva Painer
  - “Effet utile” of the provision
  - Proportionality
    - Twofold : positive-necessity/less restrictive impact

RELAXATION OF THE TST ?

- Even the “reverse” interpretation of the three-step test + general clause + analogy will not ensure wider freedom of use
- Example : criticism, parody / three step test
- The use of the work is justified by the goal, which is to enhance freedom of speech and shall not be subject to the test of “normal exploitation”, because criticism shall take whatever economic consequence on the exploitation of the genuine work.
- The economic balance must not prevail on the interests justifying the exception

EVALUATION OF THE TST

- Inclusion of the three step test within a general clause only slightly increase the legal security of the user : because the balance has to been done by the judge : feeble forseeability
- The Three Step Test is an *ex post* instrument while there is a need for an *ex ante* solution
- Three difficulties
  - No system of precedent = the decision of the judge won't have any extra pares effect = appreciation in concreto / not compatible with the system of analogy
  - Burden of proof ? Who has to demonstrate that the new use use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rightholder ?
  - The "copyright" judges don't want to enter into this considerations (poor case-law)

EVALUATION OF THE TST

- No precedent system : hard to extrapolate from one case to another
  - ECJ may provide such guidelines BUT problem of the legitimacy of such rule-making power
- Burden of proof ?
  - On the rightholder as claimant ?
  - On the user as raising TST as a defense ?
- The “copyright” judges don’t want to enter into this considerations
  - What is a “normal exploitation” (WTO criteria?) in presence of new services ? Actual and/or potential markets ?
  - Legitimate interests ? Moral rights ?

ERADICATION OF THE TST ?

- Infopaq II = if the conditions of the exceptions are fulfilled no need to test the three steps !
- 56 In that regard, suffice it to note that if those acts of reproduction fulfil all the conditions of Article 5(1) of Directive 2001/29, as interpreted by the case-law of the Court, it must be held that they do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder (*Football Association Premier League and Others, paragraph 181).*

LIMITS OF ANALOGY

- Example of the “TPM”
- Exceptions BUT chilled by the effects of the TPM.
- Article 6.4 Infosoc Directive BUT not for the on-line exploitations.
- If we open the scope of the exceptions without determining precisely the substance thereof then article 6.4 will not allow any conciliation between exceptions and TPM.
- Modification of the list only useful if article 6.4 is extended to new flexible cases and to on-line distribution (realistic ?)

LIMITS OF ANALOGY
REMOTE TV RECORDING

- New service "Cloud computing
- Remote TV recorder
- Remote operator copies the TV stream on behalf of the client. When the client wants to see the film, he downloads it from the remote "space" to the device with which he wants to watch the film (TV, computer, mobile phone, tablets…) wherever he is (home, work, holidays).
- Is copyright authorization needed ?

LIMITS OF ANALOGY REMOTE TV RECORDING

- Analogy ?
- First hypothesis : comparable to private copying ? (much alike for the user)
- No need for authorization
- But need for compensation (article 5.3 directive)
- What kind of compensation ? Copyright levies on the server ? on the stream ? on the device of the user ?
- Compensation for each secondary copy ?

LIMITS OF ANALOGY
REMOTE TV RECORDING

- Second hypothesis
- Transient copy ?
- No need for authorization
- No need for compensation (article 5.1 directive)
- Mandatory exception (same solution within EU)

LIMITS OF ANALOGY
REMOTE TV RECORDING

FRANCE	US
Wizzgo case CA Paris December 2011 No private copying (because the person who makes the copy must be the same as the one who enjoys the work and here the copy is made by the remote operator). No transient copy (because of the possibility to keep a permanent copy of the work for the client and significant economical …). Exclusive right	Cablevision US (07-1480, 07-1511), 2nd district, 4 August 2008 No Fair Use defense BUT **Absence of communication to the public** Service allowed without authorization of copyright owners

LTM
REMOTE TV RECORDING

- Who sues ? Broadcasters because they don't want this competition with their catch-up TV services = refusal to grant a license
- Do they provide similar services ? Yes
- Is it normal that someone gets money for a service where he doesn't pay copyright fees whereas another one has to pay and ask for authorization ?
- Do they provide similar services ? No
- Because the remote operator provides copies of the programs on various channels whereas the catch-up TV service is specific to the program of a/ a bunch of broadcasters

NOT THE EXCEPTION…. BUT ABUSE ?

- LTM ?
- Magill case : when the Broadcaster doesn't allow the development of a new services for which there is a potential demand from the consumers, the refusal to grant a license may amount to an abuse of dominant position.
- Requires to have an examination of criteria as regards competition rules : is it the same market ? are the services substitutable ? Is there a justification for the refusal….
- Exclusive right is preserved as far as the copyright owner offers the new service himself …
- Pb of the length/ What is a reasonable period of time for the rightholder to provide the service ?

TRANSFORMATIVE USE ? SEARCH ENGINES

- New services, most of which don't compete with the normal exploitation of the work : pointing a work who is on-line with the authorization of the rightholder is not threatening the exclusive right as far as the search engine is mere providing information over the work
- BUT difficulties when the information over the work encompasses all or part of the work itself because the consultation of the work on its page of origin may not be necessary anymore.

TRANSFORMATIVE USE ? SEARCH ENGINES

US	FRANCE	BELGIUM	SPAIN	GERMANY
Google Image PERFECT **Fed. Court District of California, 17 feb 2006** (416 F. Supp. 2nd 828, C.D. Cal. 2008) (also Kelly Arribba) Fair Use : Highly ransformative use	Google/SAIF CA Paris 26 January 2011 Caching (E-commerce directive) + Fluency of the network + opt out, use has to be tolerated Not based on transformative use	Google Press TGI Brussels 2007/ CA Brussels 5 may 2011 Copie Press No exception for caching as copy deprives rightholders from their incomes) Not based on transformative use	Google Image Audiencia Provincial de Barcelona Oct. 2008 Fair use analogy "uso social tolerado", reproducción tácitamente aceptado No direct reference to transformative use	Google Image BGH Urteil vom 29 April 2010, I ZR 69/08) Voluntary indexation from the righthoder Sort of estoppel ? Not based on transformative use

IMPLIED CONSENT ?

- So far = Three models
  - Exclusive right = preliminary authorization and possible remuneration
  - Exceptions = no authorization and possible remuneration/compensation
  - Right to remuneration = no authorization but remuneration is granted
- A fourth one ? *Opt out* ?
  - No preliminary authorization and possible withdrawal of the content at first demand
- Similar to some propositions of regimes for orphan works

IMPLIED CONSENT ?

- Social benefit but also a benefit for the search engine
  - Not a sufficient argument (TV broadcasting also !)
- Transformative use : rather unclear notion (transformation of the work itself ? No. Modification of the context ? Yes)
  - Not sufficient (is a snippet or a thumbnail transformative ?)
- Increase the visibility of the work, which is the normal goal of the rightholder
- Analogy with the **exhaustion of right** principle (implied license) ? preliminary consent to display the work on the internet implies the possibility for the third parties to reproduce it for the purpose of indexation
  - Free movement of works prevails (see ECJ Dior Evora Case)
- BUT Judge Chin US decision = the Google Book settlement is not appropriate to generalize the opt out system : it is up to the legislator and not the judge to do so.

COMPETITION ISSUES

- No one wants to ask for permission and no one wants to pay copyright fees unless he is forced to!
- Therefore any new service will try to rely on the flexible exceptions in order to avoid copyright impediment…
- The intrans will systematically try to claim the benefit of the general clause even though the service is substitutable with another one for which the protection of copyright applies
- Opt out system may hinder sources of incomes deriving from commercial exploitation of the work (Copie Presse)
- In an opt-out system the intrans prevails versus rightholder
- If the righthoder doesn't exploit : obligation to do so ?

CONTENT FARMS

- New uses ? New scale = high number of works
- Authorization system work per work is not economically possible : high transaction costs
- Old answers : collective management societies : access to the whole repertoire, lump sum
  - pb of allocation but downstream question
- Special need for flexibility ?
  - LTM ? Increase efficiency of the CMS/mandatory collective authorization

MASH-UP

- Transformative uses
- Pb of the non-status of derivative work/adaptation right
- No suitable for “dynamic” digitized works, opened to many different interventions : press websites, creative mash-up….
- Need to challenge the traditional vision of works as well-defined and immovable
- Need to address the problem of the vast plurality of authors, creating simultaneously or successively

MASH-UP

- LTM ?
- No problem when
  - the consent is expressed
  - Systematization of the consent through open licenses
  - the added value is poor of the genuine work is poor (does not meet the standard of originality)
  - The work is in the public domain
- Possibility of extension
  - Incitement to deliver information on the status of the rights
  - Appraisal of the counterfeiting in light of the added value cf Infopaq I, the reproduction in part of a former work in a new one is not prohibited as far as the part is not per se original or confers the originality of the secondary work
- New regime
  - Build a formal relinquishment of the copyright (official declaration/ deposit, irreversible, paternity right always respected) : renouncement to any form of exclusivity from the genuine rightholder and for every user

"UGC"

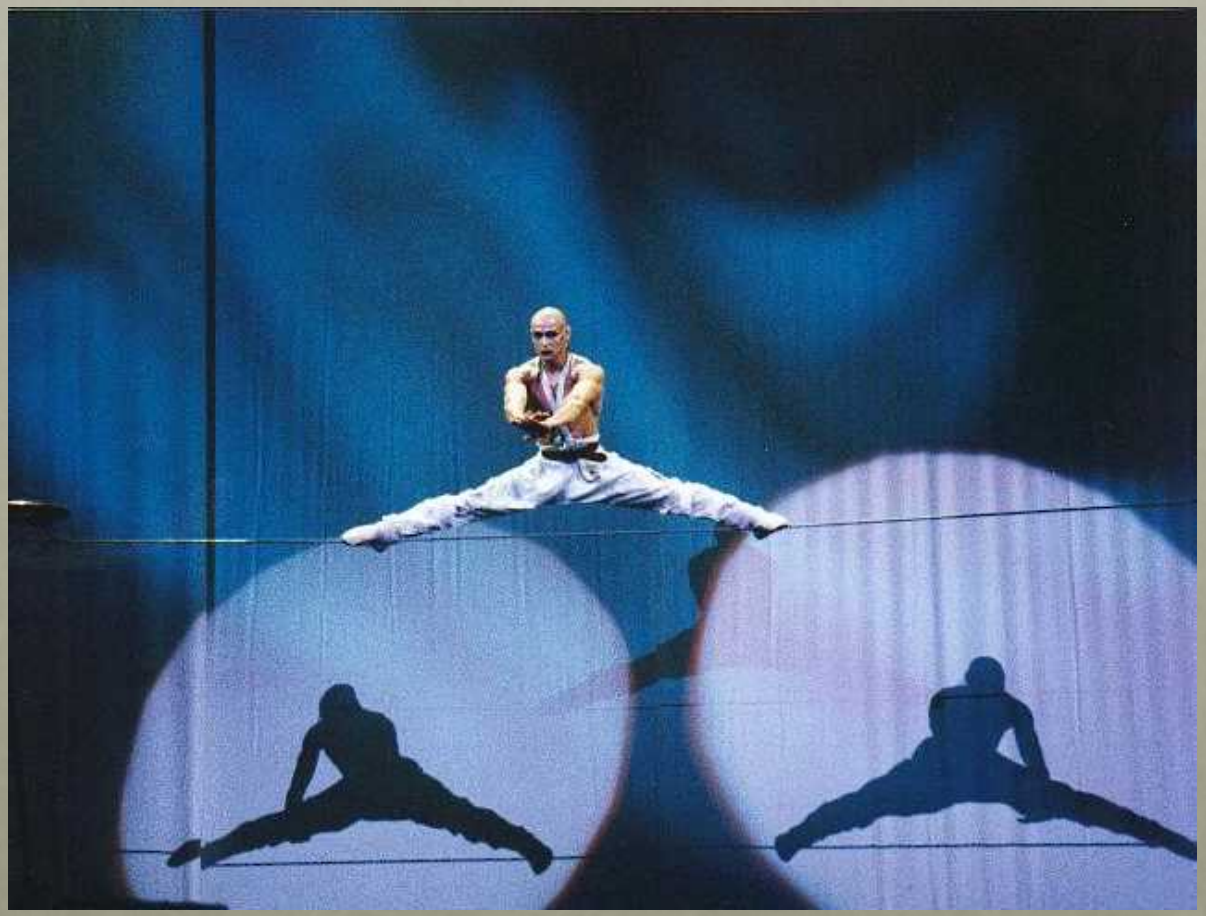
- Pb of the non-commercial use but non-commercial is not defined and very contingent (what if there is a source of remuneration by advertising on the website where the UGC is posted)
- See for example the attempt of CC to explain their NC clause !
- Pb of the status of the "amateur" but the status of the author is not limited to the professionals
- Huge difficulties to draw clear borders on this question
- Pragmatic solution : high litigation costs for the right holders if they sue the individuals : limited risks if no incomes and no denaturation of the work
- Possibility to use the "mash-up" LTM + the indexation LTM + the farm content LTM = standard of originality, consented public domain, exhaustion of right for indexation, easy and price-efficient access to the repertoire

USE ON SOCIAL NETWORKS

- If mere linking towards legal content : no problem even if deep-linking/framing
- If reproducing a work without autorisation within a mash-up/UCG) (see above)
- Analogy with the notion of « familly circle » : what are the relevant criteria ?
  - the nature of the link between individuals (familly, friends people within a community of interests)
  - the number of the persons,
  - the absence of paiement,
  - the fact of sharing a single (material/virtual) space ?

  Burden of remuneration : Platform ? User ? Both ?

FLEXIBILITY TO AVOID COPYRIGHT COLLAPSE



BUT NO CHANGE OF PARADIGM

- 16. Competition between Members States
- Mandatory flexible exceptions ?
- Optional flexible exceptions ?
- If optional = no more harmonization than the time being
- If mandatory = every country will have to be in line with the interpretation of the Court of Justice

- Recitals of Infosoc Directive ..(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the acquis communautaire. A broad definition of these acts is needed to ensure legal certainty within the internal market.(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works....(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...

FRAGILITY OF FLEXIBILITY

- Example of the Public Domain: no positive definition of the public domain
- Extension of the copyright protection/neighboring right = hold up on public domain: no general principle for protection of the public domain, subject to many kinds of “re-appropriation”
- Solution ? Exclusion of exclusivity for elements in the public domain

Jonathan Griffiths

Senior Lecturer Intellectual Property Law
Queen Mary University London

“Towards flexible copyright? - The relationship between European copyright law and fundamental rights”

Jonathan Griffiths
Queen Mary, University of London

The Hague, 10th February 2012

The plan

- Background - Fundamental rights in European copyright law
- Argument - need to secure fundamental rights militates in favour of:
  - (a) flexibly framed exceptions; and
  - (b) flexible doctrines of interpretation
- Argument - Art 17(2), EU Charter does not preclude flexibility

European copyright and fundamental rights – an acknowledged relationship

Promusicae [68]:

"…Member States must…take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order…"

Copyright and fundamental rights – more than just a rhetorical obligation

(C-70/10) *Scarlet Extended SA v SABAM*
(Court of Justice, 24th November 2011)

What will be the impact of the EU Charter's fundamental rights?

- Relevant rights
  - Private life (Art 7) and personal data (Art 8)
  - Freedom of expression and information (Art 11)
  - Freedom to conduct a business (Art 16)
  - Right to intellectual property (Art 17(2))

What will be the impact of fundamental rights?

- Different forms of impact:
  - In some instances, a prohibition on application of certain rules in copyright law (*Scarlet Extended*)
  - In others, a guide in the exercise of policy choices
- Importance of understanding fundamental rights law in detail

Need to comply with fundamental rights favours flexibility

- Accommodation of an alternative set of norms

- ECHR / EU Charter - “living instruments”

Compatibility through flexibility

- Examples (relating to freedom of expression/creativity):
  - *Germania 3* (2000, Germany)
  - *SA Plon v Hugo* (2007, France)
  - *Suntrust Bank v Houghton Mifflin Co* (2001, US)

The difficulties of securing fundamental rights without flexibility

- The United Kingdom as an example
- Exceptions under the CDPA 1988 – highly detailed and largely inflexible
- “Fair dealing” exceptions

The difficulties of securing fundamental rights without flexibility

- "Fair dealing with a work for the purpose of criticism or review, *of that or another work* or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public."

(s 30(1), CDPA 1988, UK)

Interpretation of exceptions and limitations

- Strict interpretation incompatible with need to accommodate fundamental rights
- But adopted as doctrine by CJ:
  - *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16 (paras [56]-[58])
  - *Stichting de Thuiskopie* (C-462/09), 16th June 2011 (ECJ)

More flexible interpretation

- *FA Premier League Ltd* (C-403/08 & 429/08), 4th October 2011 (ECJ):

  "[162] It is clear from the case-law that the conditions set out above must be interpreted strictly…

  [163] None the less, the interpretation of those conditions must enable the effectiveness of the exception… to be safeguarded and permit observance of the exception's purpose…

Eva-Maria Painer (C-145/10)

- Question of application of Art 5(3)(d) ("quotations for purposes such as criticism or review")
- Court notes obligation to interpret exception strictly (*Infopaq*)
- but also "effectively" (*FA Premier League*)

Eva-Maria Painer (C-145/10)

"Article 5(3)(d) of Directive 2001/29 is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors." [134]

Infopaq II

- *Infopaq International A/S v DDF* (C-302/10):
  - "…[I]t is apparent from the Court's case-law that the conditions listed above must be interpreted strictly because Art 5(1) of that directive is a derogation from the general principle established by that directive…"

(17th January, 2012)

Fundamental rights as a prohibition on flexibility?

- Article 17(2):

  "Intellectual property shall be protected"

Fundamental rights as a prohibition on flexibility?

- An argument against flexibility?
  - "[I]n weighing the various proposals, it should be borne in mind that copyright is a fundamental right..."

    (Submission of Motion Pictures Association to Gowers Consultation on Reform of Exceptions, UK)

A careful look at Art 17(2), EU Charter

- Confirms that right of property applies to IPR
- Relatively relaxed standard of review
- In *framing* exceptions, a broad margin of appreciation available to serve the general interest
- *Interpretation* of exceptions untouched unless arbitrary or manifestly disproportionate

Ministry of Security and Justice

Coffee and Tea

© flexibilities: the old, the new, & the not yet invented

Fred von Lohmann
Senior Copyright Counsel
Feb. 10, 2012

Google

Old familiar examples

Old familiar examples

- parody, satire, news, criticism, quotation, education, archiving, visually impaired, etc.

New familiar examples

New familiar examples

search engines,
space shifting,
ephemeral copies,
remix culture, etc.

Tomorrow's examples

Tomorrow's examples

- Things not yet invented

Tomorrow's examples

- example #1: indexing
  - plagiarism detection, audio recognition

Tomorrow's examples

example #2: competition reverse engineering, iPhone jailbreaking

Tomorrow's examples

example #3: cloud computing

Tomorrow's examples

© is innovation policy

Tomorrow's examples

"permission first, innovate later"?

and...

Intermediary
Liability
Remedies

Thank you

Panel discussion with Fred von Lohmann and Mark Seeley

For it not to lose support, copyright has to be applied restrictively.

A flexible exception that leaves some discretion to the judge is to be preferred above a closed system of exceptions.

Remuneration rights are a better way to stimulate innovation than prohibition rights.

Creative use of copyrighted works by private parties must be possible without these parties being charged. Those who facilitate the distribution of user generated content should be obliged to remunerate the makers.

A pan-European system of flexible exceptions is to be preferred above a national solutions

Reaction by
Marietje Schaake

Member of the European Parliament
for the Democratic Party D66 (ALDE)

Discussion

Synthesis and closure

by the chairwoman

Arda Gerkens


Towards flexible copyright?
Towards flexible copyright?
Towards flexible copyright?