



FAIR USE IN EUROPE. IN SEARCH OF FLEXIBILITIES

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EXECUTIVE SUMMARY

This study examines copyright flexibilities from the perspective of EU, international and national law. Why is there a need for flexibilities in copyright law today and to what extent are open norms compatible with the copyright system? Does the EU and international legal framework leave Member States discretion to adopt in their national laws open ‘fair use’ style limitations and exceptions to copyright? What kinds of flexibility presently exist in national copyright law?

There appear to be good reasons and ample opportunity to (re)introduce a measure of flexibility in the national copyright systems of Europe. The need for more openness in copyright law is almost self-evident in this information society of highly dynamic and unpredictable change. A historic perspective also suggests that copyright law, particularly in the civil law jurisdictions of Europe, has lost much of its flexibility in the course of the past century. By contrast, with the accelerating pace of technological change in the 21st Century, and in view of the complex process of law making in the EU, the need for flexible copyright norms both at the EU and the national level is now greater than ever.

Whereas legal doctrines external to copyright, such as freedom of expression and information, and abuse of right, may on occasion provide ‘first aid’, the authors of this study believe that a measure of flexibility should be available inside the system of copyright proper. But this need not imply the introduction into European copyright law of an American-style general *fair use* provision. There are drawbacks and risks associated with establishing a completely open norm into copyright systems that, like those of the author’s right tradition in most Member States, traditionally provide for circumscribed limitations and exceptions that offer a good deal of predictability and legal security. We would therefore recommend to introduce a measure of flexibility alongside the existing structure of limitations and exceptions, and thus combine the advantages of enhanced flexibility with legal security and technological neutrality.

The EU copyright *acquis* leaves considerably more room for flexibilities than its closed list of permitted limitations and exceptions suggests. In the first place, the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation. In the second place, the EU *acquis* leaves ample unregulated space with regard to the right of adaptation that has so far remained largely unharmonized. A Member State desiring to take full advantage of all policy space available under the Information Society Directive, might achieve this by literally transposing the Directive’s entire catalogue of exception prototypes into national law. In combination with the three-step test, this would effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States. For less ambitious Member States seeking to enhance flexibility while keeping its existing structure of limitations and exceptions largely intact, we recommend exploring the policy space left by distinct exception prototypes. In addition, the unharmonized status of the adaptation right would leave Member States free to provide for limitations and exceptions permitting, for example, fair transformative uses in the context of producing and disseminating user-generated content.

Member States aspiring to introduce flexible copyright norms are advised to take advantage of the policy space that presently exists in EU law, and not wait until initiatives to introduce flexibilities at the EU level materialize. In this way, national models can be developed and tested in practice that may serve as a basis for more flexible future law making at EU level.

PREFACE

This study examines flexibilities in copyright law from the perspective of EU, international and national law. It was written jointly by Prof. Dr. P. Bernt Hugenholtz (University of Amsterdam) and Prof. Dr. Martin R.F. Senftleben (VU University Amsterdam). A draft was circulated among participants to an academic expert's workshop that was organized in Amsterdam on September 17, 2011.¹ The authors of this study are very grateful for all comments and other feedback received from the workshop participants.

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¹ Participants included Prof. Valérie-Laure Bénabou, Prof. Thomas Dreier, Prof. Christophe Geiger, Prof. Frank Gotzen, Prof. Jonathan Griffiths, Prof. Marie-Christine Janssens, Dr. Giuseppe Mazziotti, Prof. Gerard Spindler, Prof. Alain Strowel, Prof. Antoon Quaedvlieg, and Prof. Raquel Xalabarder Plantada.

1. INTRODUCTION

While fair use in Europe is often regarded as an oxymoron or even a taboo in classic author's rights doctrine, the idea of introducing a measure of flexibility in the European system of circumscribed limitations and exceptions is gradually taking shape. Maintaining a closed list of copyright exceptions is increasingly difficult in a world of rapid and unpredictable technological development, and hard to reconcile with a generally recognized need to create technologically neutral copyright norms. Already in 2006 the Gowers Review in the United Kingdom recommended that an exception be created for 'creative, transformative or derivative works' (particularly in the context of user-generated content), within the confines of the Berne Convention (BC) three-step test.² In 2008 the European Commission took this suggestion on board in its Green Paper on Copyright in the Knowledge Economy.³ The Dutch Government has repeatedly confirmed its commitment to initiate a discussion at the European political level on a fair use rule European-style.⁴ In April 2010 a group of European academics released a draft of a European Copyright Code that includes a structure of flexible limitations and exceptions.⁵ In May 2011 the Hargreaves Review in the United Kingdom, while considering that "importing Fair Use wholesale was unlikely to be legally feasible in Europe", recommended "that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners."⁶ The UK Government's response to the Review⁷ also underscores the need for flexibility in EU copyright law.

This study looks at copyright flexibilities from the perspective of EU, international and national law. Why is there a need for flexibilities in copyright law today and to what extent are open norms compatible with the copyright system? Does the EU and international legal framework leave Member States, in particular those states that subscribe to the tradition of *droit d'auteur*, discretion to adopt in their national laws open 'fair use' style limitations and exceptions to copyright? What kinds of flexibility presently exist in national copyright law?

The primary aim of this study is to examine the policy space that Member States aspiring to introduce or enhance flexibilities in national copyright law currently enjoy within the confines of the EU and international framework. Whereas good arguments can be made in favour of amending, for example, the EU Information Society Directive that provides for a closed list of enumerated exceptions (a revision that might take more than a decade to accomplish), the purpose of this study is not to propose 'ideal' solutions, but – much less ambitiously – to examine whether flexibilities at the national level can co-exist with the European and international *acquis*. The main focus of this study is on Member States of the *droit d'auteur* (author's right) tradition, such as Germany, France and the Netherlands, where exceptions are enumerated in an exhaustive fashion, and the law of copyright does not provide for an overriding rule of fairness.

This study is structured as follows. Chapter 2 provides a general discussion of open norms in copyright regimes, and seeks to explain why copyright law has lost its flexibility, particularly in author's right regimes. Chapter 3 examines and illustrates the need for enhanced flexibility in

² Gowers Review of Intellectual Property (December 2006), Recommendation 11, available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>.

³ European Commission, 'Green Paper on copyright in the knowledge economy Brussels', COM(2008) 466/3 (16.07.2008), p. 19-20.

⁴ Kamerstuk (Parliamentary Record) 21501-34, no. 155; see <http://www.boek9.nl/%%Kabinet%3A+discussie+starten+over+een+uitzondering+voor+fair+use///27678/>.

⁵ See the 'Wittem' code, available at www.copyrightcode.eu.

⁶ I. Hargreaves, 'Digital opportunity. A Review of Intellectual Property and Growth', May 2011, p. 5, available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

⁷ <http://www.ipo.gov.uk/ipresponse-full.pdf>.

copyright, by referring to recent court decisions. Chapter 4, the *pièce de résistance* of this report, explores the policy space that the European legal framework, in particular the Information Society Directive, leaves to Member States aspiring to introduce flexible copyright exceptions. This chapter also scrutinizes the three-step test, and looks for breathing space beyond the EU *acquis* in the form of exceptions to the (unharmonized) right of adaptation. Chapter 5 offers conclusions.

2. COPYRIGHT, DROIT D'AUTEUR AND OPEN NORMS

Copyright is not absolute, but a right that is confined by a subtle structure of limits and limitations. In the ideal copyright system these limits and limitations are essential balancing tools, calibrated to allow users of copyright works sufficient freedoms to interact with these works without unduly undermining copyright's multiple rationales. While the general limits of copyright define the subject matter, scope of protection and duration of the exclusive rights, the statutory limitations (or 'limitations and exceptions' as they are often called) accommodate more specifically a variety of cultural, social, informational, economic and political needs and purposes. Flexibilities may be found in all elements of this structure. For example, the notion of 'originality' and the idea/expression dichotomy allow courts considerable *ad hoc* freedoms to decide what is and what is not copyright protected. By the same token, the rules on copyright infringement leave courts discretion, particularly in jurisdictions where the scope of copyright protection is determined by the (level of) originality of the appropriated portion of the work. Flexibilities are also implicit in the 'substantial part' infringement analysis in common law jurisdictions, such as the United Kingdom.⁸ Regardless of the relative fluidity of these and other core concepts of copyright law, limitations and exceptions are obviously the main instruments of flexibility. This study will therefore focus on limitations and exceptions in copyright.

Like any other structure of rulemaking, copyright law must mediate between the maxims of legal security, which favors precisely defined legal provisions that provide optimal predictability *ex post*, and of fairness, which favors open and flexible legal concepts that allow a wide margin of judicial appreciation *ad hoc*. In civil law this compromise between legal security and fairness is achieved by codifying relatively abstract and open legal provisions that spell out the general rules without impeding civil courts to apply general normative principles, such as 'reasonableness and fairness' (in Dutch: *redelijkheid en billijkheid*; in German: *Treu und Glauben*), to arrive at fair judgments. In common law, by contrast, codified norms tend to be more precise and extensive, since they constrict rather than empower the court's mandate to apply the common law to distinct cases. Moreover, while civil law codifications seek to set out the general principles of the law, in common law jurisdictions, where the law primarily serves to overrule, correct or clarify the principles of common law already established by the courts, such legal principles are usually absent from the written law.⁹

In copyright law, these conflicting traditions of codification are still visible today in the relatively concise, abstractly phrased codes of the *droit d'auteur* tradition, and the much more voluminous and detailed codifications of Anglo-American copyright law. Whereas, for example, the Dutch Copyright Act at latest count comprises some 75 provisions laid down in a mere 20 pages, the volume of the US Copyright Act presently exceeds 200 pages.

These systemic differences to some extent explain why general rules of fairness are mostly absent from the laws of the *droit d'auteur* tradition. The flexibility that civil law traditionally provided by way of a structure of abstract and fairly open norms never required codification of a general rule of fairness. By contrast, such a rule – originally developed by the US courts in the course of more than a century of common law jurisprudence – eventually did find its way into the US Copyright Act.¹⁰

⁸ See e.g. *Baigent v Random House* [2007] EWCA Civ 247 (CA) (holding that there was no copyright infringement despite the proven copying of a factual historical work).

⁹ A. Strowel, *Droit d'auteur et copyright* (1993), p. 147.

¹⁰ U.S. Copyright Act, S 107, provides that uses for such purposes as criticism, comment, news reporting, teaching, scholarship and research are fair and non-infringing depending on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount appropriated from the copyrighted work; and the effect of the use upon the potential market for or value of the copyrighted work.

An example of a fairly open – but not general – exception commonly found in laws of the authors' right tradition is the quotation right, which will be discussed in more detail elsewhere in this report.¹¹ Article 10(1) BC requires Contracting States to provide for copyright limitations that permit quotations subject to certain conditions 'provided that their making is compatible with *fair practice*'. The corresponding provision of Article 5(3)(d) of the Information Society Directive similarly refers to 'fair practice', whereas its implementation into Dutch law (Article 15(a) of the Dutch Copyright Act) requires the quotation be 'commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved'. References to fair practice also appear in several other limitations and exceptions in civil law jurisdictions. For example, the French parody exemption that has inspired the inclusion of parody in the Information Society's 'shopping list' of limitations, refers to 'the rules of the genre'.¹²

Unfortunately, as Prof. Strowel has explained¹³, *droit d'auteur* codifications have lost much of their flexibility in the course of the 20th Century, as copyright laws were updated ever more frequently to accommodate the needs of a changing society, so as to respond to technological development and to implement the dictates of European harmonization. Consequently, much of the original conciseness, elegance and openness of the laws following the *droit d'auteur* tradition has been lost.

A possibly more important reason why laws of the author's rights tradition are less tolerant of unauthorized but 'fair' uses, lies in the natural rights rationale that underpins the author's rights paradigm. If protecting author's rights is essentially a matter of fairness, limitations to this right must remain 'exceptions'. Following this line of reasoning, courts in *droit d'auteur* jurisdictions have developed a rule of restrictive interpretation of copyright limitations.¹⁴ A somewhat similar rule of narrow construction, based however on principles of EU law, has been embraced by the EU Court of Justice in its *Infopaq* decision.¹⁵ By contrast, the US copyright system that has its main justification in utilitarian considerations ('to promote the progress of science and useful arts'¹⁶), more easily absorbs 'fair' uses that are in line with its main goal of optimizing the production and dissemination of creative works.

In parallel with this tendency towards 'closure', and inspired by economic theories (and powerful lobbies) that posit copyright as (intellectual) 'property', the economic rights that the law grants to copyright owners are increasingly perceived, by courts, politicians and some scholars alike, as absolute. According to these theories, just as property rights in tangible goods warrant complete and perpetual control, making unauthorized uses unlawful as a matter of principle, copyright should ideally become a perpetual and absolute right that tolerates few or no 'free' uses.¹⁷

Paradoxically, as *droit d'auteur* has gradually lost its openness, the need for flexibility in copyright law has greatly increased. Whereas legislatures of the 19th and early 20th Century could still anticipate and adequately respond to the main technological changes that required modification of the law, the accelerating pace of technological change in the early 21st Century no longer allows such legislative foresight. Conversely, the length of the legislative cycle in copyright has become ever longer, as copyright law is no longer perceived as a mostly 'technical' legal matter but has become highly politicized. Making matters worse, the European harmonization machinery has added an additional, complex and lengthy legislative cycle. As a result the total legislative response

¹¹ See § 4.1.

¹² Intellectual Property Code (France), Article L122-5 (4).

¹³ A. Strowel, *ibid.*, p. 149.

¹⁴ A. & H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 3rd ed., Paris (2006), p. 259-260.

¹⁵ CJEU, 16 July 2009, case C-5/08, *Infopaq International/Danske Dagblades Forening*, para. 56-57.

¹⁶ Article I, Section 8 of the U.S. Constitution.

¹⁷ C. Geiger, 'Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law', 39 *International Review of Intellectual Property and Competition Law* 178 (2008).

time to a new technological development may well exceed ten years.¹⁸

All in all, the call for restoring (or introducing) a measure of flexibility in the law of copyright, in particular in author's rights legislation in the European Union, should come as no surprise. This call, as is apparent by the title of this report and the corresponding research project, often goes by the name of 'fair use'.¹⁹ While fair use is indeed an appealing concept and its political potential undeniable – who would dare disagree with 'fair'? – there are conceptual and systemic dangers looming here. The doctrine of fair use has its origin in the common law of the United States. Simply transplanting this doctrine into civil law-based droit d'auteur might lead to unintended consequences and ultimately systemic rejection.²⁰

More generally, there are obvious risks and drawbacks to a legal structure of open norms, such as fair use. There is a vast scholarly literature that analyzes the pro's and con's of 'vague norms' from various perspectives such as legal philosophy,²¹ law and economics²² and legal practice,²³ which will not be rehearsed here. The main arguments against overly open or vague norms relate to the tradeoff between precise lawmaking by the legislature and ad hoc adjudication by the courts. While vague norms allow justice to be served more fairly in concrete cases – something that civil courts are generally well accustomed to – this enhanced fairness comes at the price of reduced legal security. Rules are generally more efficient than vague standards given that they better inform citizens of their rights and obligations upfront, and allow those seeking justice to assess their legal position without needing to resort to the courts. Admittedly, vague norms may eventually become more predictable as sufficient precedents (jurisprudence) are created by the courts, but this process may take many years or even decades to yield results.²⁴ Moreover, an obvious constitutional objection against vague norms is that political decisions are effectively delegated from the legislator to the courts without the necessary democratic checks and balances. While open norms may thus be 'easy' and relatively inexpensive for lawmakers to produce, the costs of the lawmaking process are shifted to the judicial apparatus, and to those seeking justice at the courts. Conversely, vague standards are generally more efficient, and will lead to fairer outcomes, in hard (marginal) cases and in situations that lawmakers can not predict.

¹⁸ Mireille van Eechoud a.o., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, Kluwer Law International, 2009. p. 298.

¹⁹ See, for example, the Dutch Government's letter to the Parliament confirming its commitment to initiate a discussion at the European political level on a European-style fair use rule; Kamerstuk (Parliamentary Record) 21501-34, no. 155; see <http://www.boek9.nl/?/Kabinet%3A+discussie+starten+over+een+uitzondering+voor+fair+use/>.

²⁰ Nonetheless, this step has been proposed by J. Griffiths, 'The 'Three-Step Test' in European Copyright Law – Problems and Solutions, *Intellectual Property Quarterly* 2009, 489, online available at <http://ssrn.com/abstract=1476968>. With regard to the introduction of fair use in Israel, see O. Fischman Afori, 'An Open Standard 'Fair Use' Doctrine: A Welcome Israeli Initiative', *European Intellectual Property Review* 2008, 85; G. Pessach, 'The New Israeli Copyright Act – A Case-Study in Reverse Comparative Law', *International Review of Intellectual Property and Competition Law* 41 (2010), 187.

²¹ F. Schauer, *Playing by the rules: a philosophical examination of rule-based decision-making in law and in life*, Clarendon Press (1993).

²² L. Kaplow, 'Rules versus standards', 42 *Duke L.J.* 557 (1992),.

²³ See e.g. J.M. Barendrecht, *Recht als model van rechtvaardigheid: Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming*. Deventer: Kluwer (1992).

²⁴ With regard to the evolution of the fair use factor analysis in the US, see P. Samuelson, 'Unbundling Fair Uses', 77 *Fordham Law Review* 2537 (2009); B. Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005', 156 *Un. of Pennsylvania Law Review* 549 (2008); P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105; J. Litman, 'Reforming Information Law in Copyright's Image', *University of Dayton Law Review* 22 (1997), p. 588. For critical comments on the predictability and consistency of US fair use decisions, see D. Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use', *Duke University Law Journal* 66 (2003), p. 263; H. Cohen Jehoram, 'Fair use – die ferne Geliebte', *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 1998, p. 174.

For these reasons the rule of fair use as it presently exists and is applied in the United States has always attracted criticism, particularly for its presumed lack of predictability.²⁵ While empirical research into fair use case law suggests that the fair use rule as it is applied by the lower federal courts actually provides considerably more legal security than is sometimes assumed,²⁶ some commentators in the U.S. have argued for making U.S. copyright law more predictable by making the rule more precise, by adding more exceptions or by making the various policies underlying fair use more transparent.²⁷ We would therefore not recommend simply replacing the existing structure of circumscribed limitations and exceptions commonly found in the copyright law of the Member States by a single overriding open norm, such as fair use.

On the other hand, the advantage of legal security that is usually ascribed to the European system of precisely defined exceptions should not be overstated. In the first place, as will be explained below, courts unhappy with the literal application of a precise norm in a given case will often find solace in overriding (and usually vague) norms external to the law of copyright. In the second place, the introduction into the fabric of EU law of the ‘three-step test’²⁸, and its literal implementation in several laws of the Member States, has considerably reduced legal security, since courts are now invited to examine and (re)interpret statutory exceptions in the light of this entirely open-ended norm. The permission to use a work without prior authorization given by the national law maker can ultimately be withdrawn by the court on the grounds that the use at issue supposedly conflicts with the three-step test of the Information Society Directive.²⁹ As a result, the legal security that a structure of circumscribed limitations and exceptions might offer is severely undermined.³⁰

In conclusion, what copyright laws in Europe ideally need today is a statutory system of limitations and exceptions that guarantees both a level of legal security and fairness, by combining relatively precise norms with sufficient flexibility to allow a fair outcome in hard and/or unpredictable cases.³¹ An example of such a semi-open structure of limitations and exceptions can be found in the *European Copyright Code* that was drafted as a model law by a group of European scholars.³² Article 5.5. of the Code permits the application by analogy of all limitations and exceptions specifically enumerated in the Code – both compensated and uncompensated – subject to the application of the three-step test.

²⁵ See e.g. J.P. Liu, ‘Regulatory Copyright’, 83 *North Carolina Law Review* 87 (2004).

²⁶ B. Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions (1978-2005)’, 156 *Un. of Pennsylvania Law Review* 549 (2008).

²⁷ P. Samuelson, ‘Unbundling fair uses’. 77 *Fordham Law Review* 2537 (2009).

²⁸ Information Society Directive, Article 5.5.

²⁹ For an overview of the application of the three-step test by national judges, see J. Griffiths, ‘The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions, *Intellectual Property Quarterly* 2009, 489, online available at <http://ssrn.com/abstract=1476968>; M.R.F. Senftleben, ‘Bridging the Differences between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine’, *Journal of the Copyright Society of the U.S.A.* 57, No. 3 (2010), p. 521, available at <http://ssrn.com/abstract=1723902>. The Court of Justice EU itself referred to the three-step test in CJEU, 16 July 2009, case C-5/08, Infopaq International/Danske Dagblades Forening, para. 58; CJEU, 4 October 2011, cases C-403/08 and C-429/08, Football Association Premier League/QC Leisure, para. 181.

³⁰ Cf. M.R.F. Senftleben, ‘Fair Use in the Netherlands: A Renaissance?’, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2009, p. 1, online available at <http://ssrn.com/abstract=1563986>.

³¹ See Senftleben, *supra* note 28. For a detailed discussion of different implementation strategies, see A. Förster, *Fair Use*, Tübingen: Mohr Siebeck 2008.

³² Wittem Group, European Copyright Code, available at www.copyrightcode.eu.

3. WHY COPYRIGHT NEEDS TO BE FLEXIBLE

The current lack of flexibility in copyright law undermines the very fundamental freedoms, societal interests and economic goals that copyright law traditionally aims to protect and advance. This is the case particularly in the area of limitations and exceptions – an area where more than elsewhere in the law of copyright rules have become detailed, rigid and connected to specific states of technology. Examples abound. Whereas social media have in recent times become an essential means of social and cultural communication,³³ current copyright law leaves little or no room for sharing ‘user-generated content’ that builds upon pre-existing works.³⁴ By the same token, current limitations and exceptions rarely take into consideration current educational and scholarly practices, such as the use of copyright protected content in Powerpoint presentations, in ‘digital classrooms’, on university websites or in scholarly e-mail correspondence.³⁵ Existing limitations and exceptions in many Member States’ copyright laws also find it hard to accommodate such essential information tools as search engines.³⁶ By impeding these and other uses that should arguably remain outside the reach of copyright protection, the law’s overly rigorous structure impedes not only cultural, social and economic progress, but also undermines the social legitimacy of copyright law proper.

The lack of flexibility of the present system of limitations and exceptions can be demonstrated by the way courts in several Member States have in recent years struggled to, nevertheless, protect the general social, cultural and economic interest by allowing certain ‘free uses’ not expressly recognized in the law. As the following exemplary cases reveal, courts have resorted to the application of a variety of – sometimes rather implausible – legal doctrines to create ad hoc leeway in the law of copyright.

Dior v. Evora

Where civil courts are generally reluctant to construe ‘unwritten’ exemptions, or even to apply existing exemptions by analogy,³⁷ the Dutch Supreme Court (Hoge Raad), not impressed by the maxim that exceptions are to be narrowly construed, has on one occasion held that there must be room to draw the borderlines of copyright *outside* the existing system of exemptions, on the basis of a balancing of interests similar to the rational underlying the existing exemption(s). The *Dior v. Evora* case involved the reproduction of copyrighted perfume bottles in advertisements by a retailer offering parallel-imported goods for sale. Having concluded that no statutory copyright exemption applied to the facts of the case, the Court accepted there was room to move *outside* the existing system of exemptions, on the basis of a balancing of interests similar to the rationale underlying the existing exemptions.³⁸ According to some Dutch commentators, the judgment has opened the door to an American-style ‘fair use’ defense. Others much more cautiously interpret the Court’s decision merely as a form of reasoning by analogy well known in other areas of law.³⁹ Anyway, the *Dior* decision has inspired the Dutch Copyright Committee, an advisory body to the Ministry of Justice,

³³ OECD, ‘Participative Web: User-Created Content’, document DSTI/ICCP/IE(2006)7/Final, dated April 12, 2007, online available at http://www.oecd.org/document/40/0,3746,en_2649_34223_39428648_1_1_1_1,00.html.

³⁴ Cf. E. Lee, ‘Warming Up to User-Generated Content’, *University of Illinois Law Review* 2008 (5), p. 1459, available online at <http://ssrn.com/abstract=1116671>; M. Knopp, ‘Fanfiction – nutzergenerierte Inhalte und das Urheberrecht’, *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 28; N. Helberger/L. Guibault/E.H. Janssen/N.A.N.M. van Eijk/C. Angelopoulos/J.V.J. van Hoboken, *Legal Aspects of User Created Content*, Amsterdam: IViR 2009, available online at <http://ssrn.com/abstract=1499333>.

³⁵ See for other examples J. Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’, *Utah Law Review*, Vol. 2007, p. 537, 2007; T. Wu, ‘Tolerated Use’, p. 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132247.

³⁶ See L. Guibault, ‘Why Cherry-Picking Never Leads to Harmonisation’, *JIPITEC* 2010, Vol. 1, p. 57.

³⁷ Cf. *Manifest*, Supreme Court of Sweden (Högsta Domstolen) 23 December 1985, *Gewerblicher Rechtsschutz und Urheberrecht Int.* 1986, p. 739 (even if infringing use were justifiable, courts are not allowed to overrule legislature).

³⁸ *Dior v. Evora*, Dutch Supreme Court (Hoge Raad) 20 October 1995, [1996] *Nederlandse Jurisprudentie* 682.

³⁹ F.W. Grosheide, ‘De commercialisering van het auteursrecht’, *Informatierecht/AMI* 1996, p. 43.

to propose – already in 1998 – the adoption of an open, fair-use type provision in copyright law.⁴⁰ The provision would allow for a variety of unspecified unauthorized uses, subject to a ‘three-step test’ consistent with Article 9(2) BC.⁴¹

Germania 3

National courts in Europe occasionally find normative inspiration in fundamental freedoms, such as freedom of expression, artistic freedom and the right to privacy. While most courts will shy away from directly overriding the rules of copyright, interpreting rights and limitations ‘in conformity’ with fundamental freedoms may lead to additional flexibilities.⁴² Surely the most spectacular example of such a normative interpretation comes from the Federal Constitutional Court of Germany. Its landmark *Germania 3* decision concerned a play that contained extensive quotations, for a total of four pages, from a pair of Berthold Brecht plays. The quotations did not meet the stringent test of the statutory quotation right. The Court, however, held that in light of the freedom of artistic expression embedded in Article 5(3) of the Constitution, the quotation right deserves broad application with respect to artistic works. Authors must, to a certain degree, accept that works of art gradually enter the public domain. Copyright exemptions should be interpreted accordingly, and reflect a balancing of relevant interests. In the case at hand, the Court considered, the commercial interests of the copyright owner should give way to the user’s interest in providing artistic commentary.⁴³

Scientology v. XS4ALL

In rare cases courts invoke fundamental freedoms, such as freedom of expression and right to privacy, to directly override the rules of copyright.⁴⁴ In a decision concerning the publication of semi-secret documents of the infamous Church of Scientology, the Court of Appeal of the Hague ruled that journalist Karin Spaink, who had posted the documents on her website, had not committed copyright infringement.⁴⁵ Whereas Spaink could not rely on the quotation right enshrined in Dutch copyright law (article 15a of the Dutch Copyright Act), because the documents had never been lawfully published, Spaink successfully invoked direct application of article 10 of the European Convention on Human Rights, which guarantees freedom of expression. According to the Court, in the case at hand extensively quoting from these documents was a legitimate form of publicly criticizing Scientology’s questionable ideas and behaviour.

⁴⁰ Commissie Auteursrecht, *Advies over auteursrecht, naburige rechten en de nieuwe media*, The Hague, 18 August 1998.

⁴¹ Article 9(2) BC reads: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

⁴² See a.o. P.B. Hugenholtz, ‘Copyright and Freedom of Expression in Europe’, in: N. Elkin-Koren & N.W. Netanel (eds.), *The Commodification of Information*, Information Law Series, Vol. 11, The Hague/London/New York: Kluwer Law International 2002, p. 239-263; Ch. Geiger, ‘Die Schranken des Urheberrechts im Lichte der Grundrechte - Zur Rechtsnatur der Beschränkungen des Urheberrechts’, in: R.M. Hilty & A. Peukert (eds.), *Interessenausgleich im Urheberrecht*, 1, p. 43 (Baden-Baden, Nomos, 2004).

⁴³ *Germania 3 Gespenster am toten Mann*, Federal Constitutional Court 29 June 2000, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 2000, p. 867.

⁴⁴ For example, Cour de Cassation (France), 2 October 2007, 214 R.I.D.A. 338 (2007) (HFA v. FIFA), found conflict with freedom of expression when the world football organization FIFA invoked copyright protection for the design of the FIFA World Cup against a newspaper publisher who had used a picture of the Cup for a photomontage on the cover of a football magazine. According to the Court, the trophy “symbolizes every professional footballer’s dream”, and is therefore “inseparable from the act of informing the public on the course of this major news event”, as guaranteed by the freedom of expression and information enshrined in Article 10 ECHR.

⁴⁵ Court of Appeal The Hague, 4 September 2003 (Scientology/Spaink), *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2003, p. 217-223.

Google Bildersuche

The decision of the German Federal Supreme Court in the *Google thumbnails* ('Bildersuche') case provides yet another illustration of the way courts constricted by the closed system of limitations and exceptions look for flexibilities outside copyright law.⁴⁶ Recognizing that the right of quotation in German copyright law does not allow the reproduction and making available to the public of copyright protected pictures in 'thumbnail' form by the Google Image Search engine,⁴⁷ the German Court found comfort for defendant, Google, by application of a doctrine of implied consent. While the Court refrained from inferring an implicit contractual license for search engine purposes from the mere act of making content available on the Internet,⁴⁸ the Court held that Google's use of the pictures was not unlawful because the copyright owner had consented implicitly to use of her material in the image search service by making her works available online without employing technical means to block the automatic indexing and displaying of online content by search engines.⁴⁹

Saif v. Google France

The Google Image Search engine has also led to fascinating case law in France. After the Court of Paris saw fit to apply the law of the United States (i.e. fair use) to the allegedly infringing thumbnails being generated by the Google service, the Paris Court of Appeals found refuge for Google in the application by analogy of the safe harbour available under French law (in conformity with the EU E-Commerce Directive) to passive internet service providers.⁵⁰ In this context the Court noted that the owners of copyright in the images at issue had failed to notify Google of the URL's of the works that they wished to remove from the search engine's index.

In other, equally rare cases courts in search of flexibility have resorted to the doctrines of misuse (in common law) or abuse (in civil law) of copyright. While such doctrines may on occasion offer users of copyright works a measure of comfort, these doctrines remain controversial in theory and are rarely applied by the courts in practice.⁵¹

What all these cases demonstrate and have in common is that national courts in the EU recognize that copyright law currently lacks the capacity to accommodate certain free uses of copyright works that the courts find desirable for social, cultural, economic or other reasons. While the courts' judicial resourcefulness deserves applause, these cases are therefore symptomatic of a legal system that lacks an appropriate escape valve. Flexibility should ideally be found *inside* the system of copyright proper.⁵²

⁴⁶ See L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation', *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), p. 55 (57), available at <http://www.jipitec.eu>.

⁴⁷ See discussion below in § 4.1

⁴⁸ Bundesgerichtshof, April 29, 2010, case I ZR 69/08, p. 14-15, online available in German at www.bundesgerichtshof.de.

⁴⁹ Bundesgerichtshof, *ibid.*, 15-19.

⁵⁰ Cour d'Appel de Paris, 26 January 2011 (SAIF v. Google France), available at <http://juriscom.net/jpt/visu.php?ID=1285>.

⁵¹ C. Caron, 'Abuse of Rights and Author's Rights', 176 *R.I.D.A.* 2, 4 (1998); A. van Rooijen, 'Liever misbruikt dan misplaatst auteursrecht: Het doelcriterium ingezet tegen oneigenlijk auteursrechtgebruik', *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2006, p. 45-51.

⁵² For a discussion of internal and external balancing, see Th. Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?', in: R. Dreyfuss/D. Leenheer-Zimmerman/H. First (eds.), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy*, Oxford: Oxford University Press 2001, p. 295.

4. FLEXIBILITIES INSIDE AND OUTSIDE THE EU ACQUIS

Given the need for enhanced flexibility, the time is ripe to explore the policy space offered by current copyright legislation in the EU. To provide a comprehensive overview, it is necessary to explore breathing space both inside and outside the copyright *acquis*. On the one hand, the traditional perception of the EU infrastructure for copyright limitations tends to neglect flexibilities by wrongly focusing on restrictions and constraints following from the exhaustive enumeration of permissible exceptions and the inclusion of the three-step test in the Information Society Directive. An alternative approach to the current EU framework, however, brings to light largely unexplored resources for more flexible national law making (4.1). On the other hand, considerable flexibility lies outside the *acquis communautaire*. In respect of forms of use not covered by harmonized copyright law, EU Member States enjoy far-reaching freedom to establish an alternative, more flexible system of limitations (4.2).

4.1 Flexibilities Inside the EU Acquis

The centerpiece of the *acquis communautaire* in the field of copyright and neighbouring rights – the 2001 Information Society Directive (ISD) – sets forth a closed list⁵³ of exceptions and limitations to the harmonized rights of reproduction and communication to the public.⁵⁴ While the exemption of certain acts of temporary reproduction in Article 5(1) ISD is mandatory, Member States are free to make an individual choice from the optional exceptions in Article 5(2) and (3) ISD.

These optional exceptions relate to diverse purposes, including private copying; use of copyrighted material by libraries, museums and archives; ephemeral recordings; reproductions of broadcasts made by hospitals and prisons; illustrations for teaching; use for scientific research; use for the benefit of people with a disability; press privileges; use for the purpose of quotations, caricature, parody and pastiche; use for the purposes of public security and for the proper performance or reporting of administrative, parliamentary or judicial proceedings; use of political speeches and public lectures; use during religious or official celebrations; use of architectural works located permanently in public places; incidental inclusions of a work in other material; use for the purpose of advertising the public exhibition or sale of artistic works; use in connection with the demonstration or repair of equipment; use for the reconstruction of buildings; and additional cases of use having minor importance.

To ensure compliance with international obligations,⁵⁵ particularly those resulting from the WIPO Internet Treaties,⁵⁶ the mandatory and optional exceptions and limitations recognized in the Information Society Directive shall only be applied in accordance with the three-step test set forth in Article 5(5) ISD. This three-step test corresponds to the international provisions with the same criteria – ‘certain special cases’ (step 1), ‘no conflict with a normal exploitation’ (step 2) and ‘no unreasonable prejudice to legitimate interests’ (step 3) – in Article 9(2) BC, Article 13 TRIPS and Article 10 WCT.

⁵³ Recital 32 of the Information Society Directive refers to an ‘exhaustive enumeration of exceptions and limitations to the right of reproduction and the right of communication to the public’.

⁵⁴ Article 2 and 3 ISD.

⁵⁵ Referring to the three-step test laid down in Article 5(5) ISD, Recital 44 stresses the need of exceptions and limitations being ‘exercised in accordance with international obligations’.

⁵⁶ As stated in Recital 15, the Information Society Directive ‘serves to implement a number of the new international obligations’ under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Flexibility Inherent in Exception Prototypes

While certain features of this harmonized regulatory framework – the enumeration is closed, exceptions can additionally be scrutinized in the light of the three-step test – give rise to concerns about insufficient flexibility, it must not be overlooked that the list included in the Information Society Directive covers a wide variety of use privileges reflecting the diversity of national copyright traditions in EU Member States.⁵⁷ A closer analysis of the individual elements of the enumeration, moreover, shows that many exceptions listed in Article 5 ISD constitute prototypes for national law making rather than precisely circumscribed exceptions with no inherent flexibility:⁵⁸

- Article 5(2)(b) ISD permits reproductions for non-commercial private use ‘on any medium’. The provision does not specify whether a legal source must be used for these privileged acts of private copying.
- Article 5(2)(c) ISD covers ‘specific acts of reproduction’ made by publicly accessible non-profit libraries, educational establishments or museums, or by archives. Apart from the exclusion of online delivery of protected material in Recital 40, the nature of these specific acts of reproduction remains undefined.
- Article 5(3)(a) ISD exempts use for non-commercial scientific research and illustrations for teaching as long as the source is indicated. Recital 42 clarifies that the organizational structure and the means of funding of the privileged institution do not preclude the application of the exception. The non-commercial nature of the educational or research activity in question is decisive.
- Article 5(3)(c) and (f) ISD allows use by the press of published articles on current economic, political or religious topics, use for the reporting of current events, and use of political speeches, extracts of public lectures and similar material. Use of this type must be justified by the underlying informative purpose and, unless impossible, requires the indication of the author’s name. In the case of articles of current topics, copyright may expressly be reserved.
- Article 5(3)(d) ISD allows quotations from material already lawfully made available to the public, for purposes such as criticism or review. The taking of material must be justified by the underlying purpose. In addition, the use must comply with fair practice. The author’s name must be indicated.
- Article 5(3)(k) ISD generally exempts use for the purpose of caricature, parody or pastiche without defining these purposes any further.
- Article 5(3)(i) ISD generally privileges the incidental inclusion of protected material in other material without specifying the nature of the inclusion in question.

The flexibility that is inherent in these exception prototypes can be demonstrated by different national implementation strategies. Transposing the Information Society Directive into national law, legislators in EU Member States, as indicated above, enjoyed the freedom to choose exceptions from the catalogue of Article 5 and tailor the scope of resulting use privileges to individual domestic needs. Apart from the mandatory exemption of temporary acts of reproduction, the adoption of exceptions at the national level is optional under the Information Society Directive. In consequence, the scope of a national exception based on a prototype listed in Article 5 ISD may differ from country to country. While certain EU Member States availed themselves of the flexibility inherent in rather general definitions of permissible limitations in the Information Society Directive, others decided to implement a less flexible variant of a given prototype.

⁵⁷ Recital 32 explicitly refers to the different legal traditions in EU Member States. As to the continuous extension of the list of exceptions against this background, cf. P.B. Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, *European Intellectual Property Review* 2000, p. 499.

⁵⁸ Cf. M.R.F. Senftleben, ‘Beperkingen à la carte: Waarom de Auteursrechtregel lijn ruimte laat voor fair use’, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2003, p. 10.

In this context, the implementation of the right of quotation reflected in Article 5(3)(d) ISD can serve as an example. French law is notoriously restrictive in allowing quotation only under strict conditions.⁵⁹ By contrast, Nordic copyright law presents the quotation right as a relatively open rule of reason.⁶⁰ For example, Article 22 of the Swedish Copyright Act⁶¹ provides that a published work may be quoted, ‘in accordance with proper usage and to the extent necessary for the purpose.’ This relatively abstract norm seems to leave room for a relatively broad spectrum of unauthorized transformative uses that exceed the traditional connotation of ‘citation’, making the Nordic quotation right a fairly open norm.

Differences in the implementation of the quotation right can have a significant impact on the availability of information services in a given EU Member State. Implementing the Information Society Directive, the Dutch legislator decided to broaden the scope of the traditional right of quotation. The long-standing ‘context requirement’ of Article 15a of the Dutch Copyright Act, according to which quotations had to serve the purpose of criticism or review, has been attenuated. Instead, the Dutch legislator focused on the fact that Article 5(3)(d) ISD allows quotations for purposes *such as* criticism or review. Use for purposes that are comparable to criticism or review have thus been understood to fall within the scope of the EU prototype.

Against this background, Article 15a of the Dutch Copyright Act nowadays is applicable not only to quotations in an ‘announcement, criticism or scientific treatise’ but also to quotations in a ‘publication serving comparable purposes’. Although framed in much more detailed language, the quotation right in the Netherlands, similar to the approach taken in the Nordic countries, refers to general ethical standards. Article 15a of the Dutch Copyright Act provides:

‘Quotations from a literary, scientific or artistic work in an announcement, criticism or scientific treatise or publication for a comparable purpose shall not be regarded as an infringement of copyright, provided that:

- 1. the work quoted from has been published lawfully;*
- 2. the quotation is commensurate with what might reasonably be accepted in accordance with social custom [...];*
- 3. [...]; and*
- 4. so far as reasonably possible the source, including the author’s name, is clearly indicated.’*

Like the Nordic rule this Dutch implementation leaves ample room for the courts to arrive at fair solutions. While the Dutch law is more specific than its Nordic counterpart, by specifying the context within quotations are legitimate (‘an announcement, criticism or scientific treatise’), the scope of the quotation right is considerable because of the extension to ‘publications serving comparable purposes’.⁶²

⁵⁹ Intellectual Property Code (France), Article L122-5(3), provides: ‘Once a work has been disclosed, the author may not prohibit: [...] 3°. on condition that the name of the author and the source are clearly stated: a) analyses and short quotations justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated [...];’

⁶⁰ Ole-Andreas Rognstad, *Opphavsrett*, Universitetsforlaget 2009, p. 241-252.

⁶¹ Copyright Act of Sweden, Article 22 reads: ‘Anyone may, in accordance with proper usage and to the extent necessary for the purpose, quote from works which have been made available to the public.’ Translated text available at <http://www.regeringen.se/content/1/c6/01/51/95/20edd6df.pdf>.

⁶² Note however that the interpretation of the term ‘quotation’ in Article 5(3)(d) ISD is central to a preliminary ruling currently submitted to the ECJ (Case C145/10). In her Opinion the Advocate General Trstenjak proposes a narrow reading: ‘The notion of quotation is not defined in the [Information Society Directive]. In natural language usage, it is extremely important for a quotation that third-party intellectual property is reproduced without modification in identifiable form. As is made clear by the general examples cited in Article 5(3)(d) of the directive, according to which the quotation must be for purposes such as criticism or review, this is not sufficient in itself. There must also be a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion’. CJEU, case C-145/10, Eva Maria Painer/Axel Springer et al., Opinion AG Trstenjak, 12 April 2011, para. 210.

Considering this relaxation of the traditional context requirement, the Court of Appeals Arnhem concluded, in a case concerning a search engine collecting information from online databases of housing agencies, that the broadened quotation right covered information made available by the search engine. In the Court's view, the search results 'announced' the contents of underlying source databases. With criticism or review no longer being a prerequisite, the Court deemed the taking of material by a search engine an expression comparable to traditional forms of quotations.⁶³ In a similar case, the Court of Alkmaar clarified that for the quotation right to apply, the reproduction and communication of collected data to the public had to keep within the limits of what was necessary to give a good impression of the housing offer concerned.⁶⁴ The Court specified that, under this standard, it was permissible to provide search engine users with a description of up to 155 characters, address and rent details, and one single picture thumbnail not exceeding the format of 194x145 pixels.⁶⁵

In Germany, by contrast, the traditional confinement of the quotation right to criticism or review was upheld when implementing the Information Society Directive. This more restrictive approach limits the room to manoeuvre for the courts. In the aforementioned decision dealing with Google's image search service ('*Bildersuche*'), the German Federal Court of Justice concluded that the unauthorized use of picture thumbnails for search engine purposes did not fall under the right of quotation in § 51 of the German Copyright Act. To fulfil the traditional context requirement that had not been abandoned, the user making the quotation had to establish an inner connection between the quoted material and her own thoughts. This requirement was not satisfied in the case of picture thumbnails that were merely used to inform the public about contents available on the Internet.⁶⁶ In this context, the Court stated that

*'neither the technical developments concerning the dissemination of information on the Internet nor the interests of the parties which the exception seeks to protect justify an extensive interpretation of § 51 of the German Copyright Act that goes beyond the purpose of making quotations. Neither the freedom of information of other Internet users, nor the freedom of communication or the freedom of trade of search engine providers, require such an extensive interpretation.'*⁶⁷

This clarification indicates that the German Federal Court of Justice, because of insufficient flexibility in the German system of limitations and exceptions, was rendered incapable of solving the case on the basis of the right of quotation. Instead, the Court, as explained above, created breathing space for the image search service by assuming that Google's use of the pictures was not unlawful because the copyright owner had consented implicitly to use of her material in the image search service by making her works available online without employing technical means to block the automatic indexing and displaying of online content by search engines.⁶⁸ This assumption of implicit consent bypasses the problem of insufficient flexibility instead of solving it.⁶⁹

⁶³ Gerechtshof Arnhem, July 4, 2006, case no. 06/416, LJN AY0089, para. 4.8, published in *Mediaforum* 2007, p. 21, with case comment by B. Beuving; *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2007, p. 93, with case comment by K.J. Koelman.

⁶⁴ Rechtbank Alkmaar, August 7, 2007, case no. 96206, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2007, p. 148, with case comment by K.J. Koelman. On procedural grounds, the judgement has been annulled by Gerechtshof Amsterdam, December 13, 2007, case no. LJN BC0125, online available at www.iept.nl.

⁶⁵ Rechtbank Alkmaar, *ibid.*, para. 4.14.

⁶⁶ Bundesgerichtshof, April 29, 2010, case I ZR 69/08, p. 11-12, online available in German at www.bundesgerichtshof.de. Cf. Th. Dreier, 'thumbnails als Zitate? – Zur Reichweite von § 51 UrhG in der Informationsgesellschaft', in: U. Blaurock/J. Bornkamm/C. Kirchberg (eds.), *Festschrift für Achim Krämer zum 70. Geburtstag*, Berlin: De Gruyter 2009, p. 225.

⁶⁷ Bundesgerichtshof, *ibid.*, 12-13.

⁶⁸ Bundesgerichtshof, *ibid.*, 14-19.

⁶⁹ See the critical comments by M. Leistner, 'The German Federal Supreme Court's Judgment on Google's Image Search – A Topical Example of the "Limitations" of the European Approach to Exceptions and Limitations',

A more flexible implementation of the quotation prototype of Article 5(3)(d) ISD would have allowed the German Federal Court of Justice to solve the case more consistently on the basis of the right of quotation. In this way, a questionable expansion of the rules governing implicit consent in German private law could have been avoided. It is thus important to note in the present context that the wording of Article 5(3)(d) ISD has inspired an implementation strategy in the Netherlands which seems to bring picture thumbnails under the umbrella of the right of quotation. In Germany, by contrast, the maintenance of the traditional context requirement prevents the courts from this more extensive reading of the quotation right.

The comparison of different implementation strategies elicits an important point that must not be overlooked when assessing the limitations included in the Information Society Directive. Implementing the Directive, national law makers often sought to safeguard their individual national traditions in the field of exceptions and limitations. They did not necessarily intend to exhaust the flexibility inherent in exception prototypes set forth in the Directive. The scope of national derivatives of a permissible EU exception, therefore, must not be equated with the breathing space offered by the underlying prototype at the European level. These national derivatives may be much more restrictive. The EU *acquis*, in other words, contains flexibilities that may be invisible at the national level because of an overly cautious and restrictive implementation.

To identify hidden flexibilities, the wording of a prototype in the Information Society Directive must be compared with national derivatives. In all respects where the prototype offers more room than a given national implementation, the domestic law maker is free to enhance the scope of the use privilege currently offered under national law without trespassing the boundaries of the *acquis communautaire*. The German legislator, for instance, would be free to adhere to the more flexible Dutch approach to the quotation right and abandon the traditional context requirement.⁷⁰

The most flexible implementation of permissible EU exceptions, however, can be achieved by including literal copies of the prototypes in the Information Society Directive in national law.⁷¹ In combination with the open criteria of the three-step test, this implementation strategy leads to a semi-open norm that comes close to open-ended defences, such as the US fair use doctrine. The norm inevitably remains semi-open because it can hardly empower judges to identify new use privileges on the mere basis of abstract criteria, such as those constituting the three-step test. Article 5 ISD contains an exhaustive enumeration of permissible exceptions. Without changes to the EU *acquis*, this closed catalogue cannot be reopened at the national level. Recalling several EU exception prototypes with flexible features that have been highlighted above, the envisioned semi-open provision, nonetheless, could take the following shape:

'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'

International Review of Intellectual Property and Competition Law 42 (2011), p. 417; G. Spindler, 'Bildersuchmaschinen, Schranken und konkludente Einwilligung im Urheberrecht – Besprechung der Entscheidung "Vorschaubilder"', *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 785; L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation', *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), p. 55, available online at <http://www.jipitec.eu>; M.R.F. Senftleben, 'Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine', *Journal of the Copyright Society of the U.S.A.* 57, No. 3 (2010), p. 521, available online at <http://ssrn.com/abstract=1723902>.

⁷⁰ However, see the more restrictive approach proposed in CJEU, case C-145/10, Eva Maria Painer/Axel Springer et al., Opinion AG Trstenjak, 12 April 2011, para. 210. The Advocate General proposes to interpret the quotation right more narrowly in the sense of requiring a 'material reference'. This more restrictive approach will be discussed in more detail below.

⁷¹ See M.R.F. Senftleben, 'Beperkingen à la carte: Waarom de Auteursrechtrechtlijn ruimte laat voor fair use', *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2003, p. 10.

serving comparable purposes, for caricature, parody or pastiche, or the incidental inclusion in other material, provided that 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.'

Further requirements to be found in the relevant provisions of Article 5 ISD, such as use ‘in accordance with fair practice’,⁷² use ‘to the extent required by the specific purpose’,⁷³ or use ‘to the extent justified by the informative purpose’,⁷⁴ can be understood to be covered anyway by the elements taken from the three-step test. Otherwise, these additional requirements – being flexible themselves – could be added without changing the semi-open nature of the proposed provision. The same can be said about the requirement, set forth in several provisions of Article 5 ISD, to indicate the author’s name. Use without respect for the author’s right of attribution can be understood to cause an unreasonable prejudice in the sense of the three-step test. Otherwise, this further requirement could also be added to the provision without compromising its flexibility.

With regard to the three-step test, it seems unnecessary to include the first test criterion – certain special cases – in the proposed provision. The cases covered by the provision can be regarded as ‘certain special cases’ in the sense of the three-step test. Adding the certain special cases criterion would give the wrong impression that these forms of use must further be restricted. A more detailed discussion of the role of the three-step test in the Information Society Directive elucidates this point.

Impact of the Three-Step Test

In line with Article 5(5) ISD, the exceptions and limitations set out in Article 5(1) to (4) ISD

‘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.’

The inclusion of this three-step test – modelled, as indicated above, on corresponding international provisions in Article 9(2) BC, Article 13 TRIPS and Article 10 WCT – induced the courts in different EU Member States to place additional constraints on national exceptions that were defined more precisely than the prototypes in the Information Society Directive anyway. Interestingly, this restrictive approach to national exceptions based on the three-step test can be observed not only in countries where the three-step test itself has been incorporated into national law, such as in France, but also in Member States, such as the Netherlands, where the three-step test has not been implemented into national law.⁷⁵

Dutch courts applied the three-step test already prior to the Information Society Directive.⁷⁶ On the one hand, the adoption and implementation of the Directive led to more frequent references to the three-step test that are made to confirm and strengthen findings equally following from domestic

⁷² Article 5(3)(d) ISD.

⁷³ Article 5(3)(d) ISD.

⁷⁴ Article 5(3)(c) ISD.

⁷⁵ For a discussion of different national approaches to the three-step test, see J. Griffiths, The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions, *Intellectual Property Quarterly* 2009, p. 489 (495), online available at <http://ssrn.com/abstract=1476968>; C. Geiger, The Three-Step Test, a Threat to a Balanced Copyright Law?, *International Review of Intellectual Property and Competition Law* 37 (2006), p. 683; K.J. Koelman, ‘De nationale driestappentoets’, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2003, p. 6.

⁷⁶ In the case ‘Zienderogen Kunst’, dating back to the year 1990, the Dutch Supreme Court invoked the three-step test of Article 9(2) of the Berne Convention to support its holding that the quotation of a work may not substantially prejudice the right holder’s interest in the exploitation of the work concerned. See Hoge Raad, June 22, 1990, no. 13933, *Nederlandse Jurisprudentie* 1991, p. 268 with case comment by J.H. Spoor; *Informatierecht/AMI* 1990, p. 202 with case comment by E.J. Dommering; *Ars Aequi* 40 (1991), p. 672 with case comment by H. Cohen Jehoram.

rules.⁷⁷ This way of applying the three-step test has little impact on the Dutch catalogue of statutory exceptions. On the other hand, however, the Directive inspired decisions that use the three-step test to override precisely-defined exceptions in the Dutch Copyright Act.

In a ruling of March 2, 2005, for instance, the District Court of The Hague forced the long-standing exception for press reviews onto the sidelines, and invoked the three-step test of the Information Society Directive instead.⁷⁸ The case concerned the unauthorised scanning and reproduction of press articles for internal electronic communication (via e-mail, intranet etc.) in ministries – a practice that also offered certain search and archive functions. Seeking to determine whether this practice was permissible, the Court refused to consider several questions raised by the parties with regard to the specific rules laid down in Article 15 of the Dutch Copyright Act and Article 5(3)(c) of the Information Society Directive. In the Court's view, consideration of these specific rules was unnecessary because the contested use did not meet the requirements of the EU three-step test anyway:

*'The reason for leaving these three questions unanswered is that the digital press review practice of the State, in the opinion of the court, does not comply with the so-called three-step test of Article 5(5) of the Copyright Directive.'*⁷⁹

In the subsequent discussion of non-compliance with the three-step test, the Court stresses the growing importance of digital newspaper exploitation and the impact of digital press reviews on this promising market. The ministry press reviews are held to 'endanger' a normal exploitation of press articles and unreasonably prejudice the publisher's legitimate interest in digital commercialisation.⁸⁰ Hence, they are deemed impermissible.

The French case 'Mulholland Drive' also gives evidence of the freezing effect that the restrictive application of the three-step test can have. The case was brought by a purchaser of a DVD of David Lynch's film Mulholland Drive who sought to transfer the film into VHS format in order to watch it at his mother's house. Technical protection measures applied by the film producers prevented the making of the VHS copy.⁸¹ In this regard, the French Supreme Court held that the relevant Articles L. 122-5 and L. 211-3 of the French Intellectual Property Code had to be interpreted in the light of the three-step test. The exception for private copying could not be invoked against the application of technical protection measures when the intended act of copying would conflict with a normal exploitation of the work concerned.⁸²

⁷⁷ In 2003, the Amsterdam Court of Appeals found that a parody did not harm the normal exploitation of the parodied work because it concerned a different market. See Gerechtshof Amsterdam, January 30, 2003, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2003, p. 94 with case comment by K.J. Koelman. In a 2006 decision concerning online advertisements reproducing the so-called 'TRIPP TRAPP chair', the Court of Zwolle-Lelystad referred to the three-step test of Article 5(5) of the Directive in the context of Article 23 of the Dutch Copyright Act – a limitation permitting the use of certain artistic works for the purpose of advertising their public exhibition or sale. The Court found that the use in question prejudiced the exploitation interest of the right holder. This was one of the reasons for denying compliance with Article 23. See Rechtbank Zwolle-Lelystad, May 3, 2006, case no. 106031, LJN: AW 6288, *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2006, p. 179 with case comment by K.J. Koelman; *Mediaforum* 2006/9 with case comment by B.T. Beuving.

⁷⁸ Rechtbank Den Haag, March 2, 2005, case no. 192880, LJN: AS 8778, *Computerrecht* 2005, p. 143 with case comment by K.J. Koelman

⁷⁹ Rechtbank Den Haag, *ibid.*, para. 14.

⁸⁰ Rechtbank Den Haag, *ibid.*, para. 16-18.

⁸¹ Cour de cassation française, case 05-15824, February 28, 2006, *Mulholland Drive* : JCP éd. G 2006, II, 10084, with case comment by A. Lucas. For further commentary, see C. Geiger, 'The Three-Step Test, a Threat to a Balanced Copyright Law?', *International Review of Intellectual Property and Competition Law* 2006, p. 683; L.Y. Ngombe, 'Technical Measures of Protection versus Copy for Private Use : Is the French Legal Saga Over?', *European Intellectual Property Review* 2007, p. 61.

⁸² See Cour de cassation, *ibid.*, JCP éd. G 2006, II, 10084.

Examining the private copying exception in the light of this criterion of the three-step test, the French Supreme Court rejected the previous decision taken by the Paris Court of Appeals. The latter Court had ruled that the intended private copy did not encroach upon the film's normal DVD exploitation.⁸³ The French Supreme Court reversed this holding for two reasons. On the one hand, it asserted that a conflict with a normal exploitation had to be determined against the background of the enhanced risk of piracy inherent in the digital environment. On the other hand, the Court underlined that the exploitation of cinematographic works on DVD was important for recouping the investment in film productions.⁸⁴ The result of this way of applying the test is the erosion of the French private copying exception in the digital environment.⁸⁵

This restrictive application of the three-step test as a means of placing additional constraints on national exceptions is due to the structure of Article 5 ISD. The three-step test in the last paragraph of the provision can be understood to require an additional scrutiny of exceptions and limitations that are narrowly defined at the national level anyway. The inclusion of the criterion of 'certain special cases' may even be understood to impose an obligation on national legislators to further specify the exception prototypes in Article 5(2) and (3) ISD in the sense of an obligation to only implement certain special cases of the EU prototypes at the national level.

This restrictive approach based on the three-step test was advocated, in particular, in several comments on the Information Society Directive made at the time of its adoption. They may have been inspired by the fact that, during the negotiations on the later Directive in the Council Working Group, EU Member States had insisted on the maintenance of the majority of limitations existing in their national laws. Instead of the initially proposed list of only a few exceptions, the negotiations finally led to the current list of 21 permissible exceptions, 20 of which are optional.⁸⁶ Given this gradual expansion of the enumeration of permissible exceptions and limitations, it was felt by several commentators that the three-step test should serve as a counterbalance placing additional constraints on the catalogue of exceptions and limitations.⁸⁷ In a follow-up document to the Green Paper underlying the Information Society Directive, the European Commission had moreover referred to the three-step test as a guiding principle by emphasizing that 'a number of parties suggest the general "economic prejudice" clause in Article 9(2) BC as a point of reference'.⁸⁸ In the light of statements of this nature, it is not surprising that the three-step test was perceived as an 'economic prejudice' test, rather than a balancing tool that seeks to offer flexibility with open-ended criteria.⁸⁹

The clear reference to the international three-step test in the Information Society Directive itself,

⁸³ See Cour d'appel de Paris, fourth chamber B, decision of April 22, 2005, Juris-Data n° 2005-268600, Mulholland Drive, JCP éd. G 2005, II, 10126, with case comment by C. Geiger.

⁸⁴ See Cour de cassation française, *ibid.*, JCP éd. G 2006, II, 10084.

⁸⁵ Cf. C. Geiger, 'The Answer to the Machine Should not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment', *European Intellectual Property Review* 2008, p. 121.

⁸⁶ Cf. P.B. Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid', *European Intellectual Property Review* 2000, p. 499 (500-501). See also M. Hart, 'The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions', *European Intellectual Property Review* 1998, p. 169.

⁸⁷ For instance, see J. Reinbothe, 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft', *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 2001, p. 733 (740), predicting that EU Member States would have considerably less room to manoeuvre because of the three-step test. See also H. Cohen Jehoram, 'Restrictions on Copyright and their Abuse', *European Intellectual Property Review* 2005, p. 359; H. Cohen Jehoram 'Wie is bang voor de driestappentoets in de Auteursrechtrechtlijn?', in: N.A.N.M. van Eijk & P.B. Hugenholtz (eds.), *Dommering-bundel*, Amsterdam: Otto Cramwinckel 2008, p. 57 (64), who regards the three-step test as a means of preventing abuse of copyright exceptions; A. Lucas, 'For a Reasonable Interpretation of the Three-Step Test', *European Intellectual Property Review* 2010, p. 277, who defends the application of the three-step test as an additional control mechanism in the EU system of limitations and exceptions.

⁸⁸ EU Commission, Document COM(96) 586 final, dated 20 November 1996, p. 11-12.

⁸⁹ Cf. the critical comments by T. Heide, 'The Berne Three-Step Test and the Proposed Copyright Directive', *European Intellectual Property Review* 1999, p. 105 (107).

however, leaves room for an alternative approach. The restrictive understanding of the open test criteria is not the only valid interpretation. Recital 44 explicitly recalls that

'[w]hen 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.'

Hence, the three-step test in Article 5(5) ISD is primarily intended to ensure compliance with relevant international obligations, namely the international three-step tests. Considering this close link with its international counterparts, however, Article 5(5) ISD can hardly be understood as a restrictive control mechanism or even a straitjacket of precisely defined exceptions.

The first three-step test in international copyright law – Article 9(2) BC – was based on a drafting proposal tabled by the UK delegation at the 1967 Stockholm Conference for the Revision of the Berne Convention.⁹⁰ Having its roots in the Anglo-American copyright tradition, it is not surprising that the three-step test consists of open-ended factors comparable to traditional fair use legislation in common law countries. A line between the criteria of the three-step test and the factors to be found in fair use provisions, such as the US fair use doctrine, can easily be drawn. The prohibition of a conflict with a normal exploitation, for instance, recalls the fourth factor of the US fair use doctrine ‘effect of the use upon the potential market for or value of the copyrighted work.’⁹¹

Not surprisingly, the three-step test was perceived as a flexible framework at the Stockholm Conference, within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural and economic needs.⁹² This international *acquis* of the provision already indicates that the three-step test must not be misunderstood as a straitjacket of national exceptions. On its merits, the flexible formula is a compromise solution allowing Berne Union Members to tailor national exceptions and limitations to their specific domestic needs.

In the context of the Information Society Directive, the reappearance of the three-step test in Article 10 WCT is even more important than the outlined initial understanding of the provision. As pointed out in Recital 15, the Information Society Directive particularly aims to implement the new international obligations resulting from the aforementioned WIPO Internet Treaties. The reference to international obligations in Recital 44, therefore, particularly addresses the three-step test in Article 10 WCT. The Agreed Statement Concerning Article 10 WCT, however, could hardly be more explicit with regard to the flexibility inherent in the international three-step test:

'It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and

⁹⁰ See observation by the United Kingdom, Doc. S/13, Records 1967, supra note 22, 630. For a more detailed discussion of the drafting, see M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 47-52.

⁹¹ Cf. Section 107 of the U.S. Copyright Act. With regard to the application of fair use analyses concerning the fourth factor in the context of the three-step test, see M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 184-187. Lessons for the application of an EC fair use doctrine can particularly be derived from experiences with an overly broad application of the fourth factor test. As pointed out by Leval, supra note 7, 1124-1125: “By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. Therefore, if an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary use. [...] The market impairment should not turn the fourth factor unless it is reasonably substantial. When the injury to the copyright holder’s potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.”

⁹² See Doc. S/1, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, p. 81.

appropriately extent 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. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'

This balanced Agreed Statement, allowing the extension of traditional and the development of new exceptions and limitations with regard to the digital environment, is the result of the deliberations at the 1996 WIPO Diplomatic Conference that led to the adoption of the WIPO Internet Treaties. At the Conference, the intention to ensure limitations a proper ambit of operation occupied centre stage. The basic proposal for the later WIPO Copyright Treaty already noted with regard to limitations that,

*'when a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.'*⁹³

In this vein, the concern about sufficient breathing space for socially valuable ends played a decisive role in the deliberations concerning exceptions and limitations. The Minutes of Main Committee I mirror the determination to shelter use privileges. The US sought to safeguard the fair use doctrine.⁹⁴ Denmark feared that the new rules under discussion could become ‘a “straight jacket” for existing exceptions in areas that were essential for society’.⁹⁵ Many delegations opposed the later Article 10(2) WCT which subjects current limitations under the Berne Convention to the three-step test.⁹⁶ Korea unequivocally suggested the deletion of paragraph 2⁹⁷ – a proposal which was approved by several other delegations.⁹⁸ Singapore, for instance, elaborated that the second paragraph was

*‘inconsistent with the commitment to balance copyright laws, where exceptions and limitations adopted by the Conference were narrowed, and protection was made broader’.*⁹⁹

The Agreed Statement Concerning Article 10 WCT is thus the outcome of an international debate in which the need to maintain an appropriate balance in copyright law has clearly been articulated. The three-step test of Article 10 WCT is intended not only as a restrictive control mechanism but also as a guideline for the extension of existing limitations and exceptions, and the introduction of new exemptions in the digital environment. The preamble of the WCT confirms this analysis. It stresses the necessity

*‘to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’.*¹⁰⁰

⁹³ See WIPO Doc. CRNR/DC/4, § 12.09.

⁹⁴ See WIPO Doc. CRNR/DC/102, § 488.

⁹⁵ See WIPO Doc. CRNR/DC/102, § 489.

⁹⁶ See, for instance, the statements made by the delegations of Denmark, WIPO Doc. CRNR/DC/102, § 489, New Zealand, ibid., § 495, and Sweden, ibid., § 497. See for the text of the draft provision the end of the previous subsection.

⁹⁷ See WIPO Doc. CRNR/DC/102, § 491.

⁹⁸ See, for instance, the statements made by the delegations of Hungary, WIPO Doc. CRNR/DC/102, § 493, and China, ibid., § 500.

⁹⁹ See WIPO Doc. CRNR/DC/102, § 492.

¹⁰⁰ See the preamble of the WCT. The WPPT contains a similar formulation in its preamble. The issue had already been addressed in the basic proposal for the later WCT. See WIPO Doc. CRNR/DC/4, § 12.09. Moreover, it was raised in the course of the deliberations of Main Committee I. See WIPO Doc. CRNR/DC/102, 72 and 74. Cf. as to the reference to the Berne Convention (‘as reflected in the Berne Convention’), A. Françon, ‘La conférence diplomatique sur certaines questions de droit d'auteur et de droits voisins’, *Revue Internationale du Droit d'Auteur* 1997, p. 3 (9); S. Ricketson,

The international obligations to which Recital 44 of the Information Society Directive refers, therefore, can hardly be understood as a heavy burden on law makers seeking to enhance the flexibility of limitations and exceptions. The three-step test of Article 5(5) ISD need not necessarily be perceived as a restrictive control mechanism. Recital 44 points out that national exceptions and limitations

'should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.'

Recognizing this understandable need to consider an increased economic impact in certain cases, however, it must not be forgotten that, in line with the Agreed Statement Concerning Article 10 WCT, it may be indispensable in other cases to carry forward and appropriately extend into the digital environment traditional limitations and exceptions, and devise new exceptions and limitations that have become necessary. It is not apparent why this breathing space inherent in the international *acquis* should have been eliminated in EU copyright law.¹⁰¹

At the national level, the three-step test has been used in this more flexible sense by the German Federal Court of Justice. In a 1999 case concerning the Technical Information Library Hanover, the Court underlined the public interest in unhindered access to information. Accordingly, it offered support for the Library's practice of copying and dispatching scientific articles on request by single persons and industrial undertakings.¹⁰² The legal basis of this practice was the statutory limitation for personal use in § 53 of the German Copyright Act. Under this provision, the authorized user need not necessarily produce the copy herself but is free to ask a third party to make the reproduction on her behalf. The Court admitted that the dispatch of copies came close to a publisher's activity.¹⁰³ Nonetheless, it refrained from putting an end to the library practice by assuming a conflict with a work's normal exploitation. Instead, the Court deduced an obligation to pay equitable remuneration from the three-step test, and enabled the continuation of the information service in this way.¹⁰⁴

In a 2002 decision concerning the scanning and storing of press articles for internal e-mail communication in a private company, the Court gave a further example of its flexible approach to the three-step test. It held that digital press reviews had to be deemed permissible under § 49(1) of the German Copyright Act just like their analogue counterparts, if the digital version – in terms of its functioning and potential for use – essentially corresponded to traditional analogue products.¹⁰⁵

'The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties', *Intellectual Property Quarterly* 1999, p. 56 (61); H. Cohen Jehoram, 'Some Principles of Exceptions to Copyright', in: P. Ganea/C. Heath/G. Schricker (eds.), *Urheberrecht Gestern – Heute – Morgen, Festschrift für Adolf Dietz zum 65. Geburtstag*, München: C.H. Beck 2001, p. 382.

¹⁰¹ Cf. M. Buydens, 'La nouvelle directive du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information: le régime des exceptions', *Auteurs & Media* 2001, p. 429 (441-442), recalling the Agreed Statement in the context of the three-step test in the Information Society Directive.

¹⁰² See Bundesgerichtshof, February 25, 1999, case I ZR 118/96, *Juristenzeitung* 1999, p. 1000, with case comment by H. Schack. For an English description of the case, see Senftleben, *supra* note 3, 206-208.

¹⁰³ Bundesgerichtshof, *ibid.*, 1004.

¹⁰⁴ Bundesgerichtshof, *ibid.*, 1005-1007. Cf. P. Baronikians, 'Kopienversand durch Bibliotheken – rechtliche Beurteilung und Vorschläge zur Regelung', *Zeitschrift für Urheber- und Medienrecht* 1999, p. 126. In the course of subsequent amendments to the Copyright Act, the German legislator modeled a new copyright limitation on the Court's decision. § 53a of the German Copyright Act goes beyond the court decision by including the dispatch of digital copies in graphical format.

¹⁰⁵ See Bundesgerichtshof, July 11, 2002, case I ZR 255/00, *Gewerblicher Rechtsschutz und Urheberrecht* 2002, p. 963; *Juristenzeitung* 2003, p. 473, with case comment by Th. Dreier. Cf. Th. Hoeren, 'Pressespiegel und das Urheberrecht', *Gewerblicher Rechtsschutz und Urheberrecht* 2002, p. 1022.

To overcome the problem of an outdated wording of § 49(1) that seemed to indicate the limitation's confinement to press reviews on paper,¹⁰⁶ the Court stated that, in view of new technical developments, a copyright limitation may be interpreted extensively.¹⁰⁷ Taking these considerations as a starting point, the Court arrived at the conclusion that digital press reviews were permissible if articles were included in graphical format without offering additional functions, such as a text collection and an index. This extension of the analogue press review exception to the digital environment, the Court maintained, was in line with the three-step test.¹⁰⁸

Hence, the three-step test can be used to enable limitations and enhance flexibility in EU copyright law.¹⁰⁹ The provision proposed above – consisting of literal copies of EU exception prototypes and elements of the three-step test – would make this breathing space visible at the national level. For this purpose, however, the three-step test in Article 5(5) ISD must be interpreted in the light of the described international, flexible *acquis*. The Declaration on a Balanced Interpretation of the 'Three-Step Test' can serve as a guideline in this regard.¹¹⁰

CJEU Jurisprudence

So far, the CJEU has not taken a clear position on the interpretation of the three-step test. The indications given in *Infopaq*, on the one hand, point towards the adoption of the questionable general principle that limitations and exceptions must be interpreted restrictively. On the other hand, the Court has underlined in *Football Association Premier League* the importance of lending weight to the objective and purpose underlying limitations and exceptions.

Scrutinizing the precisely defined mandatory exemption of transient copies in Article 5(1) ISD in *Infopaq*, the Court recalled that for the interpretation of each of the cumulative conditions of the exception, it should be borne in mind

*'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.'*¹¹¹

The Court, in other words, took as a starting point the traditional dogma that exceptions and limitations, in principle, have to be interpreted restrictively. According to the Court,

*'[t]his 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.'*¹¹²

¹⁰⁶ § 49(1) of the German Copyright Act, as in force at that time, referred to "Informationsblätter."

¹⁰⁷ See Bundesgerichtshof, *ibid.*, 966-966.

¹⁰⁸ See Bundesgerichtshof, *ibid.*, 966-967. The Court referred to the three-step test of Article 5(5) ISD. The EC three-step test enshrined in this provision, however, does not deviate from the international three-step test.

¹⁰⁹ See M.R.F. Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation', *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), p. 67, available online at <http://ssrn.com/abstract=1723867>.

¹¹⁰ See C. Geiger/J. Griffiths/R.M. Hilty, 'Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law', *International Review of Intellectual Property and Competition Law* 39 (2008), p. 707.

¹¹¹ CJEU, 16 July 2009, case C-5/08, *Infopaq International/Danske Dagblades Forening*, online available at www.curia.europa.eu/juris/curia/56-57_en.html.

¹¹² CJEU, *ibid.*, para. 58.

This further consideration seems to indicate that the Court infers, from the three-step test, the necessity of a strict interpretation of exceptions and limitations. In *Football Association Premier League*, however, this earlier decision did not hinder the Court from emphasizing with regard to the same exemption – transient copying in the sense of Article 5(1) ISD – the need to guarantee the proper functioning of the exception and ensure an interpretation that takes due account of the exception's objective and purpose. The Court explained that – in spite of the required strict interpretation of the conditions laid down in Article 5(1) ISD –

'the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting that directive (OJ 2000 C 344, p. 1).'¹¹³

The Court went on to explain more generally that

*'In accordance with its objective, that exception 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.'*¹¹⁴

In the light of these considerations, the Court concluded that the transient copying at issue in *Football Association Premier League*, performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test of Article 5(5) ISD.¹¹⁵

On balance, these first cases seem to indicate that the Court of Justice EU, as many national courts in EU Member States, formally adheres to the dogma of a strict interpretation of limitations and exceptions. The adoption of this general principle, however, need not necessarily prevent the Court from arriving at a balanced solution in an individual case. Hence, the dogma of strict interpretation itself may be applied rather flexibly by the Court. A similar approach can be found, for instance, in Germany where the Federal Court of Justice keeps referring to the principle of strict interpretation. In spite of this constant reference, however, the Court rendered the aforementioned judgments in the *Technical Information Library Hannover* case and the *Digital Press Review* case, which both testify to a flexible application of the three-step test.

At the European level, further cases may follow in which the Court of Justice EU develops a more nuanced approach in line with *Football Association Premier League*. In particular, this may occur in respect of limitations and exceptions in the Information Society Directive that are supported by the fundamental guarantee of freedom of expression and information in Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights.¹¹⁶ As the Charter

¹¹³ CJEU, 4 October 2011, cases C-403/08 and C-429/08, Football Association Premier League/QC Leisure, para. 162-163.

¹¹⁴ CJEU, *ibid.*, para. 164.

¹¹⁵ CJEU, *ibid.*, para. 181.

¹¹⁶ As to the influence of freedom of speech guarantees on copyright, cf. C. Geiger, "Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union', *International Review of Intellectual Property and Competition Law* 37 (2006), p. 371; A. Strowel/F. Tulkens/D. Voorhoof (eds.), *Droit d'auteur et liberté d'expression*, Brussels: Editions Larcier 2006; P.B. Hugenholtz, 'Copyright and Freedom of Expression in Europe', in: N. Elkin-Koren/N.W. Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, p. 239; Th. Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?', in: R. Dreyfuss/D. Leenheer-Zimmerman/H. First (eds.), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy*, Oxford: Oxford University Press 2001, p. 295; S. Macciacchini, *Urheberrecht und Meinungsfreiheit*, Bern: Stämpfli 2000; Y. Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain', *New York University Law Review* 74 (1999), p. 355; N.W. Netanel, 'Copyright and a Democratic Civil Society', *Yale Law Journal* 106 (1996), p. 283.

of Fundamental Rights has been reinforced in the context of the Lisbon Treaty, it may be invoked by the Court to interpret limitations and exceptions less strictly in cases involving the fundamental guarantee of freedom of speech. With regard to compliance with the three-step test, the above considerations concerning the flexible international *acquis* may become relevant in this context.

4.2 Flexibilities Outside the EU Acquis

The Information Society Directive only harmonizes the right of reproduction, the right of communication to the public, the right of making available to the public and the right of distribution.¹¹⁷ Other exclusive rights fall outside the scope of the Directive and, thus, outside the EU *acquis* insofar as they are not covered by one of the more specific Directives in the field of copyright.

Right of adaptation

Against this background, considerable flexibility outside the EU *acquis* can be identified in the field of the right of adaptation. As Prof. Spoor has shown, a distinction between the right of reproduction and the right of adaptation can be drawn by assuming that, while reproduction concerns the copying of the particular shape of a work determined by the author, the adaptation right covers changes to the underlying *corpus mysticum*.¹¹⁸ A distinction between the right of reproduction and the right of adaptation is also drawn in international copyright law. While Article 9(1) BC establishes a far-reaching general right of reproduction covering reproduction ‘in any manner or form’, a separate right of adaptation is granted in Article 12 BC.¹¹⁹ A distinct right of translation is moreover recognized in Article 8 BC. In line with this international framework and the theoretical distinction between mere copying and changes to the intellectual substance of a work, the Information Society Directive can be understood to cover only literal reproduction. The regulation of transformations – changes to the *corpus mysticum* of a copyright protected work – is left to national lawmaking.¹²⁰

Examples of national implementation practices confirm this approach. German copyright law, for instance, traditionally recognizes that adaptations may be free under certain circumstances.¹²¹ This ‘free use’ privilege requires the transformed material to have new features of its own that make the individual features of the original work fade away.¹²² These requirements may particularly be fulfilled in the case of parodies. German courts traditionally exempt parodies from the control of the copyright owner on this basis.¹²³ In the ‘Perlentaucher’ case, the German Federal Court of Justice confirmed that the general principles governing the determination of free adaptations could also be

¹¹⁷ Articles 2, 3 and 4 ISD.

¹¹⁸ J.H. Spoor, ‘De twee betekenissen van het woord ‘verveelvoudigen’ in de Auteurswet 1912’, *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 105 (1974), p. 165 (167).

¹¹⁹ A further right of cinematographic adaptation is granted in Article 14 BC. With regard to the interplay of reproduction and adaptation rights at the international level, see the detailed analysis provided by S. Ricketson/J.C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, 2nd ed., Vol. 1, Oxford: Oxford University Press 2006, p. 652-656. They conclude that Union countries enjoy considerable freedom to shape the right of adaptation and determine the nature of relevant adaptations at the national level.

¹²⁰ Cf. M. Walter, in: M. Walter/S. von Lewinski (eds.), *European Copyright Law: A Commentary*, Oxford: Oxford University Press 2010, p. 964; S. Bechtold, ‘Commentary on the Information Society Directive’, in: Th. Dreier/P.B. Hugenholtz (eds.), *Concise European Copyright Law*, Alphen aan den Rijn: Kluwer Law International 2006, p. 358.

¹²¹ § 24 of the German Copyright Act.

¹²² For a recent discussion of this free use privilege against the background of international obligations, see P.E. Geller, A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?, *Journal of the Copyright Society of the U.S.A.* 57 (2010), p. 901.

¹²³ See the overview provided by Geller, *ibid.*

applied to other transformations.¹²⁴ The case concerned abstracts derived from book reviews published in the German newspaper '*Frankfurter Allgemeine Zeitung*'.

Implementing the Information Society Directive, the free adaptation privilege has been retained in Germany. Law makers in Germany, thus, availed themselves of the freedom left under the Information Society Directive to regulate the right of adaptation.¹²⁵

The breathing space that can be created in this way must not be underestimated. In Germany, for instance, the Federal Court of Justice recognized in parody cases that the required distance from the original work, making its individual features fade away, could not only be achieved through substantial alterations of the original work. By contrast, an inner distance, such as the distance created by a parodist's mockery, could also be sufficient.¹²⁶ An adaptation, therefore, may be free even though the original has not been changed substantially. When applied broadly, this consideration may become relevant in cases of user-generated content. Arguably, the individual, non-commercial nature of certain amateur performances of protected material posted on the Internet also justify to assume a sufficient inner distance from the underlying original work.

In the Netherlands, breathing space for parody has traditionally been provided on the basis of the rule that adaptations constituting a new, original work fall outside the scope of the right of adaptation.¹²⁷ The requirement of a new, original work has been concretized by the Dutch Supreme Court in the sense that the parodist may not take more from the original work than necessary for the intended critical statement in the guise of parody.¹²⁸ While this standard may be considered more restrictive than the approach taken in Germany, the existing tradition of creating breathing space for parody in this way may serve as a basis for the development of a broader free adaptation rule that includes other forms of transformations, such as adaptations made by amateur performers that are offered as user-generated content on the Internet.

Parody exception in the Information Society Directive

Besides the outlined national flexibilities that remained untouched by the Information Society Directive, such as the free adaptation rule in Germany and the new work exemption in the Netherlands, it is to be recalled that in addition, there is a parody exception in Article 5(3)(k) ISD that can be understood to offer extra breathing space with regard to cases where a parody, caricature or pastiche does not meet the national requirements for a 'free' adaptation or a 'new work' and, instead, is deemed to involve a relevant act of reproduction of protected features of the original. In this context, Article 5(3)(k) ISD can be understood to make it clear that, besides those parodies that are exempted on the basis of national free adaptation and similar principles, national legislators are free to also exempt parodies amounting to relevant reproduction.¹²⁹ The implementation of the Information Society Directive in the Netherlands can serve as an example in this context. Seeking to enhance the room for parodies, the Dutch legislator complemented the traditional exemption of new works with an explicit parody exception modeled on Article 5(3)(k) ISD.¹³⁰

¹²⁴ Bundesgerichtshof, 1 December 2010, case I ZR 12/08, 'Perlentaucher', *Gewerblicher Rechtsschutz und Urheberrecht* 2011, p. 134 (137-138), online available at www.bundesgerichtshof.de.

¹²⁵ Cf. M. Walter, in: M. Walter/S. von Lewinski (eds.), *European Copyright Law: A Commentary*, Oxford: Oxford University Press 2010, p. 970.

¹²⁶ See G. Schulze, in: Th. Dreier/G. Schulze, *UrhG – Kommentar*, 3^e druk, München: C.H. Beck 2008, p. 366.

¹²⁷ Article 13 of the Dutch Copyright Act.

¹²⁸ Hoge Raad, 13 April 1984, case LJN: AG4791, 'Suske Wiske', *Nederlandse Jurisprudentie* 1984, 524. Cf. F.W. Grosheide (ed.), *Parodie – Parodie en kunstcitaat*, Den Haag: Boom Juridische Uitgevers 2006.

¹²⁹ With regard to adaptations amounting to reproduction, see A. Ohly, 'Economic Rights', in: E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Cheltenham: Edward Elgar 2009, p. 212 (218).

¹³⁰ Article 18b of the Dutch Copyright Act.

Impact of the three-step test

When considering the implementation of a national free adaptation rule, the EU three-step test in Article 5(5) ISD does not apply. As the right of adaptation falls outside the scope of the Information Society Directive, national legislators are not bound by the EU three-step test that regulates limitations and exceptions to the rights harmonized under the Directive.

It is to be considered, however, that the international three-step tests of Article 13 TRIPS and Article 10(2) WCT may become relevant in this context.¹³¹ On the one hand, it can be argued that the aforementioned national principles – the free adaptation rule in Germany and the new work exemption in the Netherlands – define the scope and reach of the right of adaptation rather than limiting the exclusive right. In other words, these principles may be seen as part of the definition of the right of adaptation – a ‘carve-out’ of certain uses from the scope of the right. In this line of reasoning, it is plausible to conclude that the exemption of free adaptations or new works does not constitute a limitation or exception in the sense of the international three-step tests of Article 13 TRIPS and Article 10(2) WCT.

If, on the other hand, these international three-step tests are deemed applicable to national rules, such as the free adaptation principle in Germany, it is to be considered that the international three-step tests are flexible balancing tools that, as elaborated above, seek to offer sufficient breathing space for national lawmakers to satisfy domestic social, cultural and economic needs.¹³² Hence, the international three-step tests are unlikely to impose substantial constraints on national lawmakers seeking to offer breathing space for parody or user-generated content. Use of this type fulfils important social and cultural functions and is supported, as pointed out above, by the fundamental guarantee of freedom of expression and information.¹³³

¹³¹ For a detailed discussion of this additional control function of these international three-step tests, see M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 121-124.

¹³² Cf. P.E. Geller, ‘A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?’, *Journal of the Copyright Society of the U.S.A.* 57 (2010), p. 901 (909-916).

¹³³ Cf. OECD, ‘Participative Web: User-Created Content’, document DSTI/ICCP/IE(2006)7/Final, dated April 12, 2007, online available at http://www.oecd.org/document/40/0,3746,en_2649_34223_39428648_1_1_1,00.html; E. Lee, ‘Warming Up to User-Generated Content’, *University of Illinois Law Review* 2008 (5), p. 1459, available online at <http://ssrn.com/abstract=1116671>; M. Knopp, ‘Fanfiction – nutzergenerierte Inhalte und das Urheberrecht’, *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 28; N. Helberger/L. Guibault/E.H. Janssen/N.A.N.M. van Eijk/C. Angelopoulos/J.V.J. van Hoboken, *Legal Aspects of User Created Content*, Amsterdam: IViR 2009, available online at <http://ssrn.com/abstract=1499333>.

5. SUMMARY AND CONCLUSIONS

There appear to be good reasons and ample opportunity to (re)introduce a measure of flexibility in the national copyright systems of Europe. The need for having more openness in copyright law is almost self-evident in this ‘information society’ of highly dynamic and unpredictable change. A historic perspective also suggests that, due to a variety of circumstances, copyright law, particularly in the civil law jurisdictions of Europe, has lost much of its flexibility in the course of the past century. In other words, making copyright law in author’s rights regimes more flexible would not go against the grain of legal tradition.

Ironically, as copyright law has gradually lost its openness, with the accelerating pace of technological change in the 21st Century the need for flexibility has greatly increased. Concomitantly, the process of revising copyright law has become a lot more complex and time-consuming as national lawmakers in the Member States of the EU are increasingly constricted by European harmonization, making the need for flexible copyright norms – both at the EU and the national levels – even more urgent.

The lack of flexibility of the present system of limitations and exceptions can be demonstrated by the way courts in several Member States have struggled to, nevertheless, protect the general social, cultural and economic interest by allowing certain ‘free uses’ not expressly recognized in the law, by applying a variety of – sometimes implausible – doctrines external to copyright law.

The authors of this study however believe that a measure of flexibility should be available inside the system of copyright proper. This need not necessarily imply the introduction into European copyright law of an American-style general *fair use* provision. There are drawbacks and risks associated with establishing a completely open norm into copyright systems that, like those of the author’s rights tradition in most Member States of the EU, traditionally provide for circumscribed limitations and exceptions that offer a good deal of predictability and legal security. We would therefore recommend to introduce a measure of flexibility alongside the existing structure of well-defined limitations and exceptions, and thus combine the advantages of legal security and technological neutrality.

As our analysis has demonstrated, the EU copyright *acquis* leaves considerably more room for flexibilities than its closed list of permitted limitations and exceptions *prima facie* suggests. In the first place, the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation, as is confirmed by actual legislative practice in various Member States. In the second place, the EU *acquis* leaves ample unregulated space with regard to the right of adaptation that has so far remained largely unharmonized.

A Member State desiring to take full advantage of all policy space available under the Information Society Directive, and thus maximize flexibilities available at the EU level, might achieve this by literal transposition of the Directive’s entire catalogue of exception prototypes into national law. In combination with the three-step test, this would effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States. For less ambitious Member States seeking to enhance flexibility while keeping its existing structure of limitations and exceptions largely intact, we recommend exploring the policy space left by distinct exception prototypes. For example, Article 5(3) of the Directive apparently would allow Member States to exempt a much wider range of ‘fair’ educational and scientific uses than many national laws presently provide. And the quotation right set forth in Article 5(3)(d), arguably, leaves room for an exception permitting the fair use of copyright protected material for the purposes of search engines and other reference tools. In addition, the unharmonized status of the adaptation right would leave Member States free to provide

for limitations and exceptions permitting, for instance, fair (i.e. non-commercial) transformative uses in the context of user-generated content.

Flexible limitations that are compliant with EU law might come in different forms, either as outright exceptions allowing free uses, or as compensated limitations. An exception that would permit fair transformative uses could be modeled, for example, on the proposal that is currently before the Canadian parliament.¹³⁴ While the Canadian proposal allows the creation and subsequent posting on a platform of user-generated content that builds upon pre-existing works without compensation, one could also imagine a variant that provides for remuneration to be paid by intermediaries that commercially benefit from user-generated content on their platforms.

The three-step test enshrined in the Information Society Directive as such does not in our opinion present an insurmountable obstacle to broadly worded limitations and exceptions at the national level, insofar as the core of the economic right(s) protected under copyright is left intact. An impediment however may arise from the rule of narrow construction of the exceptions enumerated in the Directive that the Court of Justice of the EU has articulated in recent cases. On the other hand, the Court has also indicated that exceptions are to be interpreted in ways that allow them to fulfil their purpose. Moreover, it is to be expected that the EU Charter, which expressly recognizes a catalogue of fundamental rights and freedoms including freedom of expression and information as a primary source of EU law, will in due course lead to more liberal readings of the Directive's catalogue of exceptions.

Whatever trend prevails, Member States aspiring to introduce flexible copyright norms are advised to take advantage of the policy space that presently exists in EU law, and not wait until initiatives to introduce flexibilities at the EU level materialize – a process that could easily take ten years. In this way, national models can be developed and tested in practice that may serve as a basis for more flexible future law making at EU level.

¹³⁴ Bill C-32 (*Copyright Modernization Act*), Article 29.21, available at <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/home>. See generally G. Reynolds, 'Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression', in: M. Geist (ed.), *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*, Irwin Law (2010), and D. Gervais, 'User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32', *ibid.*