

Limitations: The Centerpiece of Copyright in Distress

An Introduction

by **Thomas Dreier**, Karlsruhe

Prof., Dr. iur., M. C. J. (New York University), Director, Institute for Information and Economic Law, Karlsruhe Institute of Technology (KIT), and Honorary Professor, University of Freiburg, Germany.

Abstract: After the exclusive rights in copyright have been consolidated in a century-long historical development, limitations and exceptions have become the main instrument to determine the exact scope of copyright. Limitations and exceptions do not merely fine-tune copyright protection. Rather, they balance the interests of authors, rightholders, competitors and end-users in a quadrupolar copyright system. Understanding this is of particular importance in the digital and networked information society, where copyrighted information is not only created and consumed, but constantly extracted, re-grouped, repackaged, recombined, abstracted and interpreted.

However, serious doubts exist whether the present, historically grown system of limitations adequately balances the interests involved in the information society. Both the closed list of limitations allowed under Art. 5 of the EU Information Society Directive 2001/29/EC and a narrowly interpreted three-step test contained in Arts. 13 TRIPS and 5 (5) of the Information Society Directive appear as obstacles in the way of achieving the appropriate balance needed. This brief article outlines the issues involved which were discussed at the International Conference on “Commons, Users, Service Providers – Internet (Self-) Regulation and Copyright” which took place in Hannover, Germany, on 17/18 March 2010 on the occasion of the launch of JIPITEC.

Keywords: Copyright, Exceptions, Limitations, Three-Step Test, Information Society Directive

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Recommended citation: Thomas Dreier, Limitations: The Centerpiece of Copyright in Distress - An Introduction, 1 (2010) JIPITEC 50, para. 1.

1 For more than a century, the process of the formation and later the harmonization of copyright mainly focused on the definition and subsequent enlargement of the scope of exclusive rights. This is equally true for the national, the European, and the international level. In a first step, the core of the exclusive rights was established, comprising the rights of reproduction, translation, adaptation and communication to the public.¹ In a second step, additional rights were defined, such as the resale royalty right, the distribution right, the rental and lending right and, most recently, the making available right.² Of course, at the international level, not all of these rights are equally binding,³ and technically speaking the minimum rights contained in international con-

ventions are only applicable to non-nationals. However, a third step then saw the enlargement of existing exclusive rights, or, in other words, a tendency to formulate exclusive rights ever more broadly. To cite just the most prominent example of the reproduction right: from “reproduction in any manner or form” (Art. 9 (1) BC) via “the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole” (Art. 4 (a) of Directive 91/250/ECC) for computer programs and the “temporary or permanent reproduction by any means and in any form, in whole or in part” (Art. 5 (a) of Directive 96/9/EC) for original data bases to “direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or

in part” (Art. 2 of Directive 2001/29/EC) for copyrighted works in general. Most likely, the development will not even stop there, as can be witnessed, for example, in Germany where a draft amendment to the Copyright Act proposed by newspaper publishers proposes to treat even the mere “representation” of protected subject matter on a computer screen as a reproduction.⁴

- 2 The traditional view of copyright as a set of exclusive rights is guided by the aim to provide for as much protection as possible. Nowhere has this been formulated more clearly as in the recitals of the Infosoc Directive. According to recital 4, only “providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation.” Similarly, recital 9 of the said Directive expresses the fundamental belief that “[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.” It is this “owner”- and “property”-centered approach which provides the momentum for an ever-increasing level of protection, and which has even more far-reaching consequences because of a simultaneous lowering of the threshold of protection⁵ and of a continuous prolongation of the term of protection.⁶ Of course, this focus on authors and rightholders and, together with it, on the increase in the level of protection can easily be explained by historical reasons and by current economic and technical developments. Historically, copyright – or authors’ rights, to be more precise – are understood as a legal instrument to protect the interests of authors. In copyright countries, the overall approach may be more utilitarian in nature and thus internalize aspects other than the protection of interests of authors to a higher degree than in authors’ rights countries. However, in both copyright and author’s rights countries the increase in exclusivity is largely driven by rightholders’ powerful lobby groups. In economic terms, these groups have been able to convince the national legislature to provide for strong international protection for exported copyrighted works in foreign markets with hitherto weak legal protection and lack of enforcement of laws.⁷ Moreover, in technical terms, the increase in the exclusivity of copyright protection may be explained as a reaction against the ease of unauthorized copying and distributing of copyrighted works brought about by digitization and networking technologies.
- 3 From this perspective, which is mainly taken by rightholders, limitations and exceptions to the exclusive rights are seen almost as the unavoidable evil, i.e., the necessary concession to be made to public interests which does little more than cutting away some of the exclusivity granted by the exclusive rights and which, therefore, should be kept at a minimum.⁸ In addition, from this perspective the exclusive rights appear as the rule, whereas limita-

tions apparently are nothing more than mere exceptions. This has led the courts in some member states – notably Germany – to follow the principle that in case of doubt, limitations should be narrowly interpreted.⁹ There is another imbalance between exclusive rights on the one hand and limitations and exceptions on the other. Whereas exclusive rights are subjective rights that grant their respective owner a legal power against third parties and which in many countries are consequently protected by the constitutional guarantee of property, limitations and exceptions are – at best – legal privileges devoid of any higher-ranking legal protection.¹⁰

- 4 However, limitations and exceptions are more than just the unavoidable tribute to “the public.” Rather, limitations fulfill not only one, but several tasks. First of all, from a technical point of view, where the exclusive rights are broadly defined, the limitations and exceptions are the decisive legal element that defines the exact contours of the exclusivity. Second, limitations and exceptions thus help to fine-tune the balance between the proprietary interests of authors and rightholders on the one hand, and of conflicting interests on the other hand. This explains why limitations and exceptions are nowadays such a battlefield, contrary to the exclusive rights as such. Moreover, it should be noted that in balancing the interests at stake, limitations do not only provide a black-and-white, all-or-nothing answer. Rather, limitations can differentiate between a total exception from the exclusive right (i.e., no permission is needed and no payment has to be made) and claims for remunerations (i.e., no permission is needed, but remuneration has to be paid).¹¹ The claim for remuneration can be an individual one or one which can only be made by collecting societies, as is often the case in some of the EU member states. Third, what is usually referred to as “the public” is comprised of a whole set of interests which merit legal protection. Contrary to a widely held belief, copyright limitations and exceptions do not only benefit end-users. Rather they help to define the delicate relationship between authors, rightholders, and end-users and – which is often overlooked – they also define competition in the area of downstream information value-added production chains.¹² Finally, it should be noted that not all limitations are based on the same rationale. Although classifications vary, one might distinguish limitations and exceptions covering use acts of little or no independent economic value, from limitations and exceptions for the purpose of freedom of expression and information and limitations and exceptions which promote social, cultural, and related political objectives such as, but not limited to, exceptions for the purpose of research and education. Other limitations and exceptions have been adopted in order to enhance competition or just correct market failure.¹³

- 5 In other words, after the exclusive rights in copyright have been consolidated in a century-long historical development, limitations and exceptions have become the main instrument in order to determine the exact scope of copyright. Even more, limitations and exceptions do not merely fine-tune copyright protection; rather, they balance the interests of authors, rightholders, competitors, and end-users in a quadrupolar copyright system. This is all the more true in the digital and networked information society, where copyrighted information is not only created and consumed, but constantly extracted, regrouped, repackaged, recombined, abstracted, and interpreted.
- 6 However, serious doubts exist whether the present, historically grown system of limitations meets these requirements. These doubts are nourished by a number of reasons:
- 7 Although the InfoSoc Directive 2001/29/EC of 22 May 2001 purportedly *harmonizes* certain aspects of copyright and related rights in the information society, it only prescribes one mandatory exception and leaves the 20 others at the discretion of the member states. This may not be seen as problematic if one works on the assumption that what counts most is the harmonization of exclusive rights. However, as demonstrated above, at least for practical reasons, what counts in modern copyright law are no longer the exclusive rights but rather the limitations and exceptions. Consequently, one may conclude that the InfoSoc Directive hardly brought any harmonization whatsoever,¹⁴ in particular since member states cherry-picked whatever limitations and exceptions they liked to have in their respective national legislation.
- 8 Another problem – at least at the European level – is that the InfoSoc Directive provides for a closed list of limitations and exceptions that does not leave room for even a small and flexible fair-use-type exception. However, there is an urgent need for such a flexible – albeit *de minimis* – exception in view of the rapid technological development of the information society infrastructure and the different new business models and use possibilities. Since these new business models and use possibilities can hardly be foreseen, it is rather unlikely that what should be exempt from the exclusive rights will be adequately covered by existing limitations and exceptions that were defined in the InfoSoc Directive almost a decade ago in view of the then existing technology. At any rate, the lack of a sufficiently flexible limitation or exception will either result in a more or less far-fetched interpretation of existing limitations and exceptions, or in overbroad exclusive rights. Neither of these two scenarios is an appealing one.¹⁵
- 9 At the international level, the three-step test is often understood merely as a test for prohibiting limitations and exceptions. This is all the more true if the three steps are applied as subsequent “filters” and if the second step – “normal exploitation” – is construed as covering any exploitation possibility that might arise during the whole of the copyright term of the subject matter concerned. Needless to say, such an interpretation, which is often propagated by major corporate rightholders, tends to upset the balance of conflicting interests to be struck by the limitations and exceptions. The situation is even more aggravated by the fact that – contrary to its counterparts in patent and trademark law¹⁶ – Art. 13 TRIPS does not mention interests of “third parties” to be taken into account. In view of all this, a more appropriate approach seems to be called for, according to which the three-step test works as an instrument which both may prohibit and enable limitations and exceptions.
- 10 Last, but certainly not least, it seems worth noting that the structure of existing limitations and exceptions has been developed in view of relatively short production and delivery chains (rightholder – producer/communicator – end-user) that no longer correspond to the much longer production, transformation, delivery, and consumption chains of the digital networked environment. It can be assumed that these changes in reality should be reflected in the formulation of limitations and exceptions in a much better way than is presently the case.
- 11 Of course, there have been several attempts to remedy the unsatisfactory situation just described in order to avoid “protecting ourselves to death.” Only two of these attempts shall be briefly mentioned here. The first is the “Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” of the Munich Max Planck Institute and the Queen Mary University of London.¹⁷ This Declaration makes the case that “the Three-Step Test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions.” To this effect, the Declaration expresses the opinion that “[w]hen correctly applied, the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies” and that “[n]o single step is to be prioritized.” Moreover, “[t]he Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development.” The second of these initiatives are the model provisions on limitations and exceptions formulated by the European academics who collaborated in formulating the Draft European Copyright Code.¹⁸ The drafters – the so-called “Wittem-Group” – were guided by the belief “that rapid technological development makes future modes

of exploitation and use of copyright works unpredictable and therefore requires a system of rights and limitations with some flexibility.” In order to achieve this, the Code – although heavily borrowing from Art. 5 of the InfoSoc Directive – is not limited to a restatement of the existing *acquis communautaire*. Rather, by defining certain limitations as non-exclusive normative examples, and adding the possibility of limitations and exceptions similar to “[a]ny other use that is comparable to the uses enumerated,” the Draft Code “reflects a combination of a common-law-style open-ended system of limitations and a civil-law-style exhaustive enumeration.” Moreover, in addition to the limitations and exceptions regarding use acts of little or no independent economic value, use acts made for the purpose of freedom of expression and information, use acts in line with certain social, cultural, and related political objectives, and use acts for the purpose of research and education, the Draft Code contains a special exception which privileges certain uses for the purpose of enhancing competition, thus integrating a control mechanism similar to the one hitherto reserved to competition law into copyright itself.

- 12 Against this backdrop of copyright and its discontents – as one may call it – the first session of the International Conference on “Commons, Users, Service Providers – Internet (Self-)Regulation and Copyright” which took place in Hannover, Germany, on 17/18 March 2010 explored both the status quo and the legal possibilities for shaping the limitations and exceptions in a way that they contribute to a balanced and well-limited copyright system that satisfies the needs of the information society and meets with acceptance by all four interest groups concerned. Several contributions – which are partly reproduced following this brief introduction and partly in the next issue of JIPITEC – first examined what the EU member states made out of the list of non-mandatory exceptions and limitations in Art. 5 of Directive 2001/29/EC (*Guibault*). Subsequently, the relationship between copyright and the freedom of expression was highlighted, in particular in view of Art. 10 of the European Convention on Human Rights (*Geiger*). Likewise, the possibilities and limits for a fair use approach under the famous three-step test were explored (*Senftleben*), in particular in view of the Max Planck Declaration regarding the three-step test and its further impact (*Hilty*). Finally, some conclusions regarding limitations, the centerpiece of copyright, were drawn (*Griffiths*).

1 For a comprehensive account of the history of the exclusive rights in the Berne Convention, see, in particular, *Ricketson/Ginsburg*, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, 2nd ed., 2006, Vol. 1, pp. 578 et seq.

- 2 See Art. 14^{ter} BC (resale royalty right/droit de suite), Art. 6 WCT (distribution right), Art. 11 TRIPS (partial rental right), Art. 3 Rental Directive, Art. 7 WCT (general right of rental) and Art. 8 WCT (making available right). For discussion, see *Ricketson/Ginsburg*, op. cit. (note 1); *Goldstein*, *International Copyright*, 2001, pp. 249 et seq.; *Gervais*, *The TRIPS Agreement: Drafting History and Analysis*, 1998, pp. 91 et seq.; *Ficsor*, *The Law of Copyright and the Internet*, 2002, pp. 145; *Reinbothe/v. Lewinski*, *The WIPO Treaties 1996*, 2002, pp. 80 et seq.; v. *Lewinski*, *International Copyright Law And Policy*, 2008, pp. 137 and 448 et seq.; *Dreier/Hughenoltz* (eds), *Concise European Copyright Law*, 2006, pp. 63, 99 and 205 et seq.
- 3 In particular, the resale royalty right/droit de suite is only an optional minimum right; see Art. 14^{ter} (2) BC. Moreover, whereas the TRIPS Agreement, as an integral part of the WTO Agreement, binds a great number of states, the WCT is binding only for those states which have signed it.
- 4 See draft § 87g (2) of the German Copyright Act, as proposed by the newspaper publishers in order to obtain a special exclusive neighboring right for products of the press and parts thereof (“Presseerzeugnisse” und “Teile daraus”); see <http://irights.info/blog/arbeits2.0/wp-content/uploads/2010/05/Leistungsschutzrecht-Gewerkschaftssynopse.pdf>.
- 5 See the criterion of “the author’s own intellectual creation,” first adopted for computer programs in Art. 1 (3) of Directive 91/250/EEC (2009/24/EC) and subsequently taken over by Art. 6 of Directive 93/98/EEC (2006/116/EC) for photographic works and by Art. 3 (1) of Directive 96/9/EC for database works. Following, the ECJ has concluded that the same criterion also applies to all works under Art. 2 (a) of Directive 2001/29/EC; see case 5/08, para. 37 – *Infopaq*.
- 6 In the EU, see Art. 1 of the Term Directive 93/98/EEC (2006/116/EC), and – as regards neighboring rights – the recent proposal to prolong the term for performing artists and phonogram producers, Doc. COM(2008) 464 final of 16.07.2008. In the U.S., see the Sonny Bono Copyright Term Extension Act of 1998, Pub.L. 105-298.
- 7 A similar argument can be made for subject matter and scope of neighboring rights, which, however, are not discussed here in detail.
- 8 For an overview of the exceptions in international Conventions, see *Ricketson/Ginsburg*, op. cit. (note 1), pp. 755 et seq.; *Goldstein*, op. cit. (note 2), pp. 292 et seq.; v. *Lewinski*, op. cit. (note 2), pp. 151 et seq.
- 9 See, e.g., recently again Federal Supreme Court of Germany (Bundesgerichtshof, BGH) of 29.04.2010, case I ZR 69/08, para. 27; for a summary of the critique, see *Dreier/Schulze*, *Urheberrecht*, 3rd ed. 2008, Vor §§ 44a ff. note 7. At any rate, according to German civil law, a principle of narrow interpretation of exceptions does not exist; rather, the legislature is free to use whatever technique in order to provide for a certain balance, and the technique used does not prejudice which of two conflicting interests is to be preferred; see, e.g., *Larenz/Canaris*, *Methodenlehre der Rechtswissenschaft*, 3rd ed. 1995, pp. 175 and 243.
- 10 For a detailed analysis, see, e.g., *Guibault*, *Copyright Limitations and Contracts*, 2002, pp. 90 et seq.
- 11 See, e.g., the differentiation between the limitations listed in 5 (2) (a), (b) and (e) of Directive 2001/29/EC on the one hand, and all the other exceptions of Art. 5 of the same Directive on the other.
- 12 For the tri-polar approach, see *Hilty GRUR* 2005, 819, 820; *Geiger*, *Droit d’auteur et droit du public à l’information*, 2004, paras. 19-97, and for the quadrupolar approach *Dreier*, *Regulating competition by way of copyright limitations and exceptions*, in: *Torremans* (Hrsg.), *Copyright Law: A Handbook of Contemporary Research*, 2007, pp. 232 et seq.

- 13 For a detailed account, see *Guibault*, op. cit. (note 10), pp. 27 et seq.
- 14 For a critique, see in particular *Hugenholz*, [2000] EIPR 11, 501.
- 15 See also, in German legal literature, *Förster*, Fair use, 2008, pp. 211 et seq. and 231.
- 16 Art. 26 (2) TRIPS (for trademarks) and Art. 30 TRIPS (for patents). For an extensive discussion, see *Senftleben*, Copyright, Limitations and the Three-Step Test, 2003.
- 17 The Website of the Declaration is www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step_cfm, with a list of supporters and a possibility to sign. The text of the Declaration is also reprinted in JIPITEC 1 (2010) 119 (*in this issue*).
- 18 Art. 5 of the Draft European Copyright Code; see www.copyrightcode.eu. The text of the Code is also reprinted in JIPITEC 1 (2010) 123 (*in this issue*).