

Unsticking the centre-piece – the liberation of European copyright law?

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Abstract: Following European legislative initiatives in the field of copyright limitations and exceptions, policy flexibilities formerly available to member states has been greatly diminished. The law in this area is increasingly incapable of accommodating any expansion in the scope of freely permitted acts, even where such expansion may be an appropriate response to changes in social and technological conditions. In this article, the causes of this problem are briefly canvassed and a number of potential solutions are noted. It is suggested that one such so-

lution – the adoption of an open, factor-based model similar to s 107 of the United States' Copyright Act – has not received the serious attention it deserves. The fair use paradigm has generally been dismissed as excessively unpredictable, contrary to international law and/or culturally alien. Drawing on recent fair use scholarship, it is argued here that these disadvantages are over-stated and that the potential for the development of a European fair use model merits investigation.

Keywords: Copyright, Exceptions, Limitations, Three-Step-Test, Fair use, Wittem Group

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Introduction

1 This article is based upon a paper given at the “Commons, Users, Service Providers” conference at which the *Journal of Intellectual Property Information Technology and e-Commerce* was inaugurated.¹ The paper was delivered in a stream entitled, “Limitations: the Centre-Piece of Copyright Stuck”. This striking image suggests a balancing mechanism – perhaps previously well-lubricated and freely moving – which has ground to a halt, immovably set in a single position. This seems to me to be an accurate metaphor for the current system of limitations and exceptions in European copyright law. Flexibility formerly available to member states has been greatly diminished and the law is increasingly incapable of accommodating any expansion in the scope of freely permitted acts, even where such expansion would be an appropriate response to changes in social and technological conditions. In this article, the widely-noted causes of this problem are briefly canvassed and a number of potential solutions are noted. It is suggested that

one such solution – the adoption of an open, factor-based model similar to s 107 of the United States' Copyright Act – has not received the serious attention it deserves. While the fair use paradigm has certainly been discussed in this context, it has generally been dismissed as excessively unpredictable, contrary to international law and/or culturally alien. It is argued here that these disadvantages are over-stated.

A. The problem – the centre-piece stuck

2 There has been widespread criticism of the system of exceptions² established under the *acquis communautaire*.³ This criticism has been particularly strong in respect of the legislative choices enshrined in the Information Society Directive.⁴ As is well-known, that Directive establishes a series of broadly defined rights⁵ and subjects those rights to an exhaustive, but optional, list of permissible exceptions. The application of those exceptions is constrained by the

“three-step test”.⁶ They can also generally be nullified through the imposition of contrary contractual prohibition and/or the application of technological measures. In her contribution to this edition of *JIPITEC*, Lucie Guilbault clearly indicates the negative consequences of the legislative decisions taken in drawing up the Information Society Directive. In particular, she notes the tendency towards obsolescence that inevitably arises as a result of the choice of an exhaustive list of “closed” exceptions.⁷ Martin Senftleben describes the way in which the direct application by courts of the “three-step test” in some jurisdictions exacerbates the negative features of this scheme, producing a copyright system which has neither flexibility nor legal certainty – in short, the “worst-case scenario”.⁸

3 This is a bleak picture. Nevertheless, things appear to have got even worse. In an ideal world, the Court of Justice would mitigate some of the potential disadvantages of this legislative scheme – perhaps by holding that the exceptions permissible under the *acquis* are to be interpreted broadly where appropriate (for example, to take account of the fundamental rights of users and/or the promotion of technological development) or by finding that the obligation to apply the “three-step test” under Article 5(5) of the Directive is directed at national legislatures only. Rather, to the contrary, in its judgment in *Infopaq International A/S v Danske Dagblades*,⁹ it appears to have gone out of its way to ensure that the “centre-piece” of European copyright law is more firmly stuck than ever.

4 *Infopaq* concerned a defendant media monitoring agency’s provision of its clients with summaries of selected articles from Danish newspapers. The agency used an automated process involving the scanning and temporary storage of the whole of selected articles and the more permanent storage of shorter sections of these articles. The main issues with which the Court was concerned were; (i) the interpretation of the concept of “reproduction... in whole or in part” (Art 2) and; (ii) the question of whether or not the defence available for transient reproductions of copyright works (Art 5(1)) covered the defendant’s activities in this case. The Judgment is rich in significance for copyright lawyers and has an impact that extends beyond these points. Attention has focused on its indirect harmonisation of the “originality” standard for all forms of copyright works.¹⁰ However, it is with the general approach established by the Court to (i) the interpretation of the exceptions and limitations under Art 5 and (ii) the manner in which the question of whether or not a “reproduction [in part]” is to be answered under the Directive, with which we are concerned here.¹¹

5 In relation to the exceptions, the Court states that:

“...the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly...”¹²

6 In this instance, it is suggested that the rights granted under the Directive constitute the “general principle” and, accordingly, exceptions must be interpreted narrowly. The Court also claims that this interpretation is supported by the need for exceptions to be “interpreted in the light of Article 5(5)”.¹³ This stance effectively generalises the principle of narrow interpretation traditionally applied in certain member states and, as result, raises obvious concerns. At a fundamental level, the harmonisation by stealth of this important aspect of copyright law – not covered in the Directive itself – is undemocratic. Some jurisdictions within Europe have, to date, operated a very different interpretative rule in this context.¹⁴ Apart from this concern about process, there are also a number of substantive objections that can be levelled at the decision. Most obviously, where a particular exception is supported by the fundamental rights of users or members of the public (news reporting, parody or quotation are potential examples), narrow interpretation seems inappropriate.¹⁵ More generally, however, the adoption of such a dogmatic approach seems unwise. The circumstances regulated by copyright law are very diverse and deserve a graduated range of solutions. A rule that was developed in a traditional setting in which the interests of authors could generally be supported by the claims of high creativity no longer seems appropriate in a world in which rights have proliferated and overlap with one another. This conclusion even appears to have been reached on occasion already by courts within the “author’s right” tradition.¹⁶ In the face of rapidly changing technological conditions, it seems foolhardy to set in place a firm predisposition in favour of one party to disputes in all circumstances.

7 The Court’s reliance upon the “three-step test” in support of its decision on this issue is also misplaced. It confuses legal mechanisms with quite different functions.¹⁷ Under the Berne Convention and the TRIPS Agreement, the function of the “three-step test” is to constrain the powers of national legislatures to introduce exceptions that do not satisfy its conditions.¹⁸ Arguably, under Art 5(5) of the Information Society Directive, this role has been extended to prevent *judges* from “applying” exceptions in a manner that does not satisfy the “test”.¹⁹ Nevertheless, even in this extended role, its function is not the same as a principle of narrow interpretation that obliges courts to construe exceptions in a manner that favours right-holders. At no point in the drafting history of any version of the “three-step test” is it suggested that the “test” was designed to serve this role.

8 It would appear that, in laying down a rule of narrow interpretation, the *Infopaq* judgment has exacerbated the difficulties outlined at the beginning of

this article.²⁰ However, this may not be its only negative consequence. The Court's decision on the appropriate method of determining whether a defendant has reproduced a work "in whole or in part" may also remove residual flexibility from the European copyright system. On this issue, the Court held that:

"...[T]he reproduction of an extract of a protected work...is such as to constitute reproduction in part within the meaning of article 2 of directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation..."²¹

- 9 This statement emphasises the link between the threshold for the acquisition of copyright in the first place and the analysis of infringement. A reproduction will only infringe copyright where it contains an element of the protected creativity. On the face of it, this appears uncontroversial to a copyright lawyer.²² It seems highly likely that such an investigation of the relationship between the "input" of a creator and a defendant's "taking" would form a part of the traditional approach to the analysis of infringement in all member states.²³ However, if the Judgment is to be interpreted as holding that this is the *only* relevant criterion for determining whether an infringement in part has occurred, it may have significant consequences. In Germany, for example, in applying the "free use" provision,²⁴ courts consider not only the extent to which an author's "input" has been "taken" by a defendant, but also the extent of a defendant's "additions" to a work. While this approach to the question of infringement is not directly addressed by the Court in *Infopaq*, it seems hard to reconcile the Judgment with such doctrines. If this analysis is accurate, *Infopaq* will have stuck the "centre-piece" yet more firmly again.

B. Potential solutions – unsticking the centre-piece

- 10 How then can "balance"²⁵ and flexibility be restored to the system of copyright exceptions in Europe? One obvious step would be to review and redraft the existing list of exceptions as appropriate. Unfortunately, there are a number of obvious obstacles to such a project. First, the legislative process in this area is notoriously violent and slow. Secondly, a number of jurisdictions have only recently implemented the requirements of the Information Society Directive and thus seem unlikely to be keen to consider another substantial overhaul of the system. Thirdly, in the face of constant technological development, such a review process would need to be regularly repeated.
- 11 Several other proposals for restoring "balance" to the system have been advanced. These suggestions address one or more of the features of the *acquis* that

contribute to its current state of sclerosis. It has, for example, been proposed that the systemic imbalance arising from the fact that, in most member states, exceptions can be over-ridden by contractual provision could be addressed if some – or all – exceptions and limitations were designated as imperative.²⁶ Similarly, it has been suggested that more effective protection against the by-passing of exceptions through technological measures should be implemented²⁷ and that the "three-step test" enshrined in Art 5(5) should be interpreted in a more "balanced" manner than has sometimes been the case,²⁸ thus mitigating the "worst-case scenario" described by Senftleben.

- 12 These proposals all advance remedies for specific problems that contribute to the overall calcification of the system described above. A number of ideas for more comprehensive realignment of the European copyright system have also been made. It has, for example, been argued that the law should more effectively recognise the fundamental rights of users and members of the public; thus allowing powerful rights, such as the rights to freedom of expression, information and privacy, to counter-balance the recent tide of right-holder-focused developments.²⁹ These suggestions are important and valuable. However, none provides a comprehensive solution to the structural problem of inflexibility. Even the intervention of fundamental rights is unlikely to provide guidance in certain areas in which new questions about the application of copyright law arise.
- 13 There have, however, also been proposals for change at this structural level. For example, the Wittem group³⁰ has published a draft European copyright code as a model or reference tool for future harmonisation initiatives.³¹ In this draft code, a re-drafted (and mandatory) list of specific exceptions and limitations is proposed.³² Several of the exceptions are drafted in a relatively open manner, enabling a flexible judicial response to changing circumstances.³³ The draft code also includes an open "meta-exception" covering:
- "Any other use that is compatible to the uses enumerated...is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or right-holder, taking account of the legitimate interests of third parties."³⁴
- 14 This proposed provision seems to be directed at national legislators, allowing the creation of new exceptions where such exceptions would (i) be "compatible" with existing statutory exceptions and (ii) comply with a redrafted, less restrictive, version of the "three-step test". Its rationale is set out as follows:

“[The chapter of the code covering exceptions] reflects a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration. On the one hand, the extension to similar uses provides the system with a flexibility which is indispensable in view of the fact that it is impossible to foresee all the situations in which a limitation could be justified. On the other hand, the possibility of flexibility is narrowed down in two ways. Firstly, the extension applies to uses “similar” to the ones expressly enumerated ... Thus, a certain normative effect is bestowed on these examples ... Secondly, such similar uses may not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.”³⁵

- 15 If such a provision were to be introduced, the added flexibility that it bestows may be valuable in allowing a relatively rapid, and proportionate, response to altered circumstances. However, if it is directed solely at legislatures, either at national or at European, level, any flexibility will be significantly reduced because users would still depend upon the slow-moving and heavily lobbied legislative process.
- 16 Some copyright scholars have taken an extra step by proposing flexible instruments directed at the judiciary, rather than simply at the legislature. It has, for example, been argued that, in appropriate cases, a judge should have the power to permit use of a copyright work where such use is not covered by an existing statutory exception.³⁶ For example, within Europe, Martin Senftleben has suggested that:

“To allow new internet industries to develop and take advantage of their economic potential, sufficient breathing space for copyright limitations is indispensable...Given these challenges, the time seems ripe to turn to a productive use of the three-step test. Instead of employing the test as a straitjacket of copyright limitations, modern copyright legislation should seek to encourage its use as a refined proportionality test that allows both the restriction and the broadening of limitations in accordance with the individual circumstances of a given case. The adoption of a fair-use system that rests on the flexible, open criteria of a conflict with a normal exploitation and an unreasonable prejudice to legitimate interests would pave the way for this more flexible and balanced application of the test.”³⁷

- 17 Such a fair use-type provision would undoubtedly inject flexibility into the system. It is noteworthy, however, that Senftleben, and others who have advanced similar ideas, generally propose that normative constraints upon this flexibility should derive from the terms of the “three-step test” (or at least the second and third elements of this “test”) rather than from the adoption of a list of factors, as in the US fair use

doctrine. In so doing, they modify the function of the “test” from negative constraint to positive mechanism – effectively permitting all uses which do not conflict with the conditions of the “test”.

- 18 The application of the “three-step test” formula in this context has obvious advantages. Its terms are internationally recognised and it may prove more politically acceptable in Europe than the US fair use model. However, as I have argued elsewhere³⁸, its application in this context is problematic. In its original function, it serves a restrictive role, constraining the potential expansion of free uses of copyright works. Thus, even if it were to be interpreted in an appropriately “balanced” manner, it does not seem the obvious mechanism for introducing greater open-ended flexibility in the European system. Furthermore, it provides almost nothing in the way of normative guidance. The “test” has little in the way of settled meaning and, when applied in national courts, has served only to provide *ex post facto* justification for decisions arrived at by other means.
- 19 In these circumstances, it is strange that commentators have not explored more whole-heartedly the obvious alternative mechanism for injecting greater flexibility into the European copyright system – the adoption of a factor-based fair use doctrine based on the US model. It is often suggested that fair use may hold valuable lessons³⁹ and legislators in several other jurisdictions have recently chosen to take advantage of its model. However, commentators have generally steered clear of recommending the full-scale transposition of a fair use doctrine in the European context.⁴⁰ Can this reluctance be justified?

C. The fair use model – the question of unpredictability

- 20 The terms of the fair use provision under US copyright law are well-known:

Notwithstanding the provisions of sections 106 and 106A the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁴¹

21 This section is a codification of a pre-existing, judge-made doctrine and stands alongside a long list of other, explicitly defined, “closed”, exceptions. Its most important feature is its “openness”. Uses falling within the provision are listed non-exhaustively and the fairness, or otherwise, of any use is determined by reference to a list of specified factors. That list is itself non-exhaustive⁴² and the relative weights of the various factors is not pre-determined. Under the terms of s 107, courts can take into account the facts of specific situations and reach an appropriate balance of interests in each instance. Under this power, US copyright law has been modified to take into account developing technological conditions and has, as a result, avoided the spectre of obsolescence haunting the European copyright regime.⁴³

22 Of course, this very flexibility is problematic. The open, factor-based enquiry is often argued to provide insufficiently clear guidance for judges and, as a result, to function purely as validating cover for subjective decision-making:

“Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions”⁴⁴

23 It is sometimes suggested that such an approach to decision-making produces a level of unpredictability that not only places the rights of copyright owners in jeopardy, but also diminishes the defence’s utility for users. Where a user is uncertain whether a use is fair, he or she may be unwilling to run the risk of infringement proceedings:

“Given the vagaries of fair use doctrine, fair use thus provides a highly permeable, often merely theoretical, defense...This is certainly so for individuals and nonmarket speakers who can ill afford to risk being sued or fight a lawsuit if they are. But it also holds true for the risk-averse publishers, studios, broadcasters, and record labels that serve as speakers’ gateways to a mass audience. Copyright’s inconstant, unpredictable free speech safety valves, coupled with the high cost of litigation, have engendered a “clear it or delete it” culture in which these gateway intermediaries – and their errors and omissions insurance carriers – regularly insist that speakers obtain

permission for all potentially actionable uses, even those that do not infringe.”⁴⁵

24 It is this aspect of the law of fair use that is most frequently cited as the reason for rejecting the introduction of a fair use type model in Europe. Marie-Christine Janssens has recently written that:

“An obvious alternative to an exhaustive and closed system of exceptions would be to provide for an openly worded set of application criteria by analogy with the “fair use” system. The fair use concept certainly has some advantages as it provides for a flexible defence to copyright infringement, allows for “ad hoc” exceptions, leaves more latitude to take into account specific circumstances of the case and, very importantly, also allows for its application to new (unforeseen) evolutions. On the other hand, “fair use”...constitutes a rather intricate concept that has not ceased to challenge even IP specialists. These factors are, moreover, only guidelines and the courts are free to adapt them to particular situations on a case-by-case basis. In summary, even more than in a closed system, users in a fair use system are left at a loss as to what uses they are – or are not – allowed to make. I am therefore not unhappy that the predominant view seems to oppose the adoption of a plain concept of fair use (even though proponents keep returning to the idea).⁴⁶

25 This “predominant view” is also sometimes supported through the suggestion that the unpredictability of the fair use inquiry is not only problematic in its own right, but also prevents fair use from satisfying the “certain special case”⁴⁷ condition of the “three-step test” and thus takes the fair use defence outside international copyright law.⁴⁸

D. Questioning received wisdom

26 The problem of perceived unpredictability clearly lies at the heart of European reluctance to the apparent advantages of fair use. To what extent can this resistance be justified?

27 In considering this question, it is important to recognise at the outset that the search for a doctrine that is both perfectly flexible and perfectly foreseeable is doomed to failure. Tolerance of some degree of unforeseeability is inevitable if the sclerosis described at the outset of this article is to be addressed. Furthermore, the cliché of fair use as “the most troublesome doctrine”⁴⁹ merits closer attention. In rejecting fair use as a model, critics often do not go beyond the terms of the statutory provision itself. However, it is important to understand that judges do not have unfettered freedom in applying s 107. Over many years, a complex body of precedent has been established. For example, following decisions of the Supreme Court, fair use is harder to establish

in the case of unpublished works than in the case of published works⁵⁰ and harm to a copyright owner's market arising as a result of adverse criticism does not militate in favour of a copyright owner under s 107's fourth factor (the effect of the use on the market for or value of the work).⁵¹

- 28 Indeed, the analysis of the fourth factor by US courts demonstrates the way in which the fair use doctrine has given rise to a detailed body of sub-rules and sub-principles that exceed in precision the tools employed to resolve similar problems in many jurisdictions with less flexible systems of exceptions. For example, the perennial problem of circularity that arises in assessing the impact of a defendant's use on market and value is alleviated by the US courts' refinement, over time, of the terms of the appropriate enquiry under this factor:

"We have recognised the danger of circularity in considering whether the loss of potential licensing revenue should weight the fourth factor in favour of a plaintiff...Since the issue is whether the copying should be compensable, the failure to receive licensing revenue cannot be determinative in the plaintiff's favour...We have endeavoured to avoid the vice of circularity by considering "only traditional, reasonable, or likely to be developed markets" when considering a challenge upon a potential market."⁵²

- 29 Furthermore, through the evolution of jurisprudence, it has been established that this question is to be considered by assessing the effect on the plaintiff's market if a defendant's use were to become widespread, rather than by assessing the specific activities conducted by the defendant in the case itself. Fairness is not to be considered purely *inter partes*, but in a broader social context. The development of such a sophisticated body of complex sub-rules and factors places US jurisprudence far in advance of many jurisdictions with apparently more certain systems of exceptions.⁵³
- 30 Indeed, it has recently been suggested by some copyright scholars in the United States that criticisms of fair use doctrine on the ground of excessive unpredictability are significantly over-stated. In "An Empirical Study of US Copyright Fair Use Opinions 1978-2005",⁵⁴ Barton Beebe presents the result of a statistical analysis of all significant fair use decisions since the coming into force of the Copyright Act 1976. His results run counter to received wisdom on the application of s 107. It has, for example, been suggested that, as a result of the inherently subjective aspects of the enquiry, fair use determinations tend to be subject to a disproportionately high number of reversals by appeal courts.⁵⁵ Beebe, however, demonstrates that, with the exception of a small number of prominent cases in which such reversals and re-reversals have taken place, the fair use case law demonstrates no such disproportionate tendency.⁵⁶

Contrary to the view expressed by leading commentators, he also shows that judges do not tend to apply the fair use factors to provide post hoc rationalisation of an antecedent conclusion.⁵⁷ His overall conclusion is that:

"To be sure, the data reveal many popular practices that impair the [fair use] doctrine: courts tend to apply the factors mechanically and they sometimes make opportunistic uses of the conflicting precedent available to them. These are systematic failures that require intervention. Nevertheless, as a whole, the mass of nonleading cases has shown itself to be altogether worthy of being followed."⁵⁸

- 31 Beebe's carefully reasoned conclusions are supported by the recent work of Pamela Samuelson. In "Unbundling Fair Use",⁵⁹ she identifies a number of different categories of fair use case, including, for example, cases implicating First Amendment freedoms, cases concerning uses of copyright to promote the creation and dissemination of knowledge and cases concerning uses that Congress could not have foreseen when enacting the 1976 Act. Samuelson argues that, viewed in this systematic, categorical way, much of the criticism of fair use jurisprudence as unpredictable is revealed to be unfounded. Within particular "clusters", there are distinct patterns in decision-making. In conclusion, she recommends that:

"...judges and commentators should stop wringing their hands about how troublesome fair use law is, and look instead for common patterns in the fair use case law upon which to build a more predictable body of fair use law. Analyzing fair uses in light of cases previously decided within the same policy cluster will make fair use more rule-like without a concomitant loss in its utility as a flexible standard for balancing a wide range of interests in a wide range of situations."⁶⁰

- 32 It would appear that, in the light of this recent scholarship, traditional European resistance to the fair use model as excessively uncertain ought perhaps to be reconsidered.
- 33 The criticisms of fair use as a potential violation of international law are also not as compelling as is sometimes suggested. The doctrine has not yet been formally challenged through the mechanisms available under the Berne Convention or the TRIPS Agreement and some have, in any event, argued that the circumstances of the United States' entry into the Berne Convention may shelter the doctrine.⁶¹ Some commentators have also argued that the doctrine can be reconciled with the demands of the "three-step test".⁶² In any event, whatever the merits of the arguments for and against the compatibility of fair use with the "three-step test" (and there is something more than a little scholastic about the debate), it is worth pausing for a moment to gain a little per-

spective on the question. Is it seriously to be suggested that the carefully evolved, minutely-scrutinised body of fair use doctrine under s 107 is to be invalidated by reference to a “test” which came into being as an intentionally vague political compromise formula and whose meaning and requirements remain almost entirely uncertain. It would certainly be ironic if this were the case. Any unpredictability resulting from the open-ended nature of the fair use doctrine is dwarfed by comparison with that attributable to the impact of the uncertain “three-step test” formula.

E. Conclusion

- 34 In drawing distinctions between US and European law, it is important to avoid stereotypes. Even in jurisdictions that have an apparently “closed” approach to exceptions, important flexibilities exist. While these may not be as widely known or as structurally central as the fair use provision in United States law, they should not be overlooked when considering the possibility of incorporating a degree of flexibility within the European system. The factors taken into account under s 107 are not particularly contentious. They are precisely the sort of considerations regarded as relevant to an assessment of the justification for copyright exceptions in many copyright jurisdictions around the world. There are undoubtedly important cultural differences between the values underlying the fair use doctrine in US law and the foundations of European copyright law. The fact-based and precedent-driven judicial enquiry mandated by s 107 sits uneasily within some European judicial traditions. There is also a real concern that the flexibility and pragmatism of fair use, as applied in the United States, fails to secure the high level of protection for authors considered fundamental in many European jurisdictions. The laws of many European states have been shaped by a commitment to recognise and protect the ongoing relationship – both creative and economic – between an author and his or her work. This relationship is weakly protected under US copyright law – and plays very little role at all in the assessment of fair use under s 107.
- 35 Nevertheless, it is worth considering whether it would be possible to take account of such serious divergences of approach in recasting a factor-based, fair use provision for Europe – the “best of both worlds” as a route out of the “worst-case scenario”. This would be a major task and it is not my intention to tackle it here. However, it can at least be suggested that any such “European fair use” doctrine could be based on a modified version of the US fair use model. The relatively uncontroversial factors underpinning s 107 could be supplemented. Further factors could address issues considered to be fundamental within the European context (“the moral and economic interests of

the author of the work”) or could, taking the benefit of the US history of fair use analysis, address other significant issues (perhaps “the importance of promoting technological development” or “the need to foster competition on secondary markets”). Such a “European fair use” provision could state explicitly that it is to be applied in a manner that is compatible with European norms relating to fundamental rights and that courts may permit uses of a work in appropriate circumstances on payment of appropriate remuneration to author or right-holder. The development of such a doctrine would not only help to alleviate the inflexibility currently prevailing in the European copyright system, but may also go some way to reducing the competitive advantage that the fair use doctrine may grant the US over Europe⁶³ and would secure a degree of harmonisation with the increasing number of jurisdictions adopting fair use-type provisions around the world.⁶⁴

- 36 The idea floated here is beset with obvious difficulties. A number have been sketched above. The negotiation of the terms of any modified “European fair use” clause would be highly contentious and there would also be little point in providing such a valuable instrument to judges if, as in the case of the *In-fopaq* court, they seem determined to apply a rigid framework to the law.⁶⁵ Nevertheless, it is worth investigating the development of such a doctrine. Any obstacles to the project should be viewed against the background of the dire situation in which we currently find ourselves.

- 1 Institut für Rechtsinformatik, Leibniz Universität Hannover, March 17-18 2010.
- 2 The term “exceptions” is used throughout this article to designate provisions referred to variously in national laws as “exceptions”, “limitations”, “permitted acts”, “defences” etc. This choice is not intended to advertise a preference for an approach under which “exceptions” are to be viewed, and interpreted, as strictly limited, “exceptional”, incursions into an author or other right-holder’s right. For discussion of naming conventions and politics in this respect, see A Kur, “Of Oceans, Islands and Inland Water – How Much Room for Exceptions and Limitations under the Three-Step Test?” in Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04 (available at SSRN: <http://ssrn.com/abstract=1317707>).
- 3 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Arts 5, 6; Council Directive 92/100/EEC of 19 November 1992 on rental right and on certain rights related to copyright in the field of intellectual property (codified by Directive 2006/115/EC) Art 10; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Art 6; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Arts 5, 6(4).
- 4 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain as-

- pects of copyright and related rights in the information society (“Information Society Directive”).
- 5 For the argument that exclusive rights have expanded in scope, see, for example, J Litman, “Billowing White Goo”, (2008) *Columbia Journal of Law & the Arts* 587; M Senftleben, “Overprotection and Protection Overlaps in Intellectual Property Law – the Need for Horizontal Fair Use Defences” in *Horizontal Issues in Intellectual Property Law: Uncovering the Matrix*, ed A Kur (Edward Elgar, 2010) 6–7. Although cf J Ginsburg, “Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?” (2009) *Revue Internationale du Droit d’Auteur*.
 - 6 See, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (“Computer Programs Directive”), Art 6(3); Council Directive 92/100/EEC of 19 November 1992 on rental right and on certain rights related to copyright in the field of intellectual property (codified by Directive 2006/115/EC) (“Rental Right Directive”) Art 10(3); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (“Database Directive”), Art 6 (3); Information Society Directive, Art 5(5).
 - 7 L Guilbault, “Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations in Copyright under Directive 2001/29/EC”, 1 (2010) *JIPITEC* 55.
 - 8 M Senftleben, “The International Three-Step Test: A Model Provision for EC Fair Use Legislation”, 1 (2010) *JIPITEC* 67.
 - 9 *Infopaq International AS v Danske Dagblades Forening* (C-5/08), 16th July 2009 (ECJ) [2009] ECDR 16.
 - 10 See, for example, E Derclaye, “*International A/S v Danske Dagblades Forening* (C-5/08): Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law” [2010] *EIPR* 2010 247; M Handig, “*Infopaq International A/S v Danske Dagblades Forening* (C-5/08): is the term “work” of the CDPA 1988 in line with the European Directives?” [2010] *EIPR* 53.
 - 11 On (ii), see J Pila, “An Australian Copyright Revolution and its Relevance for UK Jurisprudence: *IceTV* in the light of *Infopaq*” [2010] *Oxford University Commonwealth Law Journal* (forthcoming)
 - 12 [2009] ECDR 16, para [56].
 - 13 *Ibid*, para [58]
 - 14 see, for example, *Pro Sieben Media v Carlton UK Television* [1999] FSR 610 (CA, United Kingdom).
 - 15 C Geiger, “Implementing an international instrument for interpreting copyright limitations and exceptions” (2009) *IIC* 627.
 - 16 See, for example, *Bild-Kunst v Focus* [2005] ECDR 6 (BGH, Federal Supreme Court, Germany), para 10.
 - 17 R Hilty, “Declaration on the ‘Three-Step Test’: Where do we go from here?”, 1 (2010) *JIPITEC* 83.
 - 18 Berne Convention, Art 9(2); TRIPS Agreement, Art 13.
 - 19 For discussion, see J Griffiths, “The ‘Three-Step Test’ in European Copyright Law – Problems & Solutions” [2009] *IPQ* 428.
 - 20 In this respect, it is questionable whether the flexible application of exceptions by national courts in certain cases is in keeping with the interpretative presumptions apparently applied by the Court. See, for example, *Re the Supply of Photocopies of Newspaper Articles by a Public Library* [2000] *ECC* 237 (Supreme Court, Germany); *ProLitteris v Aargauer Zeitung AG* (2008) 39 *IIC* 990 (Federal Court, Switzerland); *Buren* (2005) *IIC* 869 (Supreme Court, France); *Dior v Evora* 1996 *NJ* 682 (Supreme Court, Netherlands).
 - 21 [2009] ECDR 16, para [48.]
 - 22 Although others may harbour doubts about the idea of identifying “creativity” within specific aspects of a work.
 - 23 For example, in the United Kingdom, the House of Lords adopted a very similar approach to the one described here in its decision in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 *WLR* 2416.
 - 24 Copyright Act 1965, Art 24.
 - 25 For criticism of the “balance” metaphor in intellectual property law, see G Dinwoodie, “The WIPO Copyright Treaty: Transition to the Future of International Copyright Lawmaking?” [2007] *Case Western Reserve Law Review* 751; A Drassinower, “From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law” [2009] *Journal of Corporation Law* 991.
 - 26 See, for example, M van Eechoud et al, *Harmonizing European Copyright Law – the Challenges of Better Lawmaking* (Kluwer Law International, 2009) 106–109.
 - 27 See, for example, M-C Janssens, “The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation” in *Research Handbook on the Future of EU Copyright*, P Torremans ed (Edward Elgar, 2009) 340–344.
 - 28 “Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” (2008) 39 *IIC* 707; See also C Geiger, J Griffiths & R Hilty, “Towards a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law [2008] *EIPR* 489. The Declaration is discussed in H He, “Seeking a Balanced Interpretation of the Three-Step Test: an Adjusted Structure in View of Divergent Approaches” [2009] *IIC* 274; R Wright, “The ‘Three-Step Test’ and the Wider Public Interest: Towards a More Inclusive Interpretation [2009] *Journal of World Intellectual Property* 600; W Patry, “The Declaration on the Three-Step Test” *The Patry Copyright Blog*, 23rd July 2008, <http://william-patry.blogspot.com/2008/07/declaration-on-three-step-test.html>; see M Ficsor, “The ‘Three-Step Test’ – *De Lege Lata* – *De Lege Ferenda*”, paper delivered at the Fordham International Intellectual Property Law and Policy Conference, Cambridge 2009, <http://iplj.net/blog/page/2/>; A Lucas, “For a Reasonable Interpretation of the Three-Step Test” [2010] *EIPR* 277.
 - 29 See, for example, C Geiger, “Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law” [2004] *IIC* 268
 - 30 A group of prominent copyright scholars drawn from across the European Union.
 - 31 www.copyrightcode.eu
 - 32 See Chapter 5.
 - 33 See, notably, Art 5.4
 - 34 Art 5.5.
 - 35 The Wittem Project, *European Copyright Code* 19, n 48.
 - 36 This, within a relatively limited sphere, is an inherent aspect of the proposals of those scholars who suggested an enhanced role for the doctrine of abuse of rights or of those who argue that fundamental rights ought to be more fully recognised.
 - 37 M Senftleben, “Fair Use in the Netherlands – a Renaissance?” [2009] *AMI* 1, 7. See also, A Christie, “Fine-tuning the System: the Role of Limitations”, paper delivered at ATRIP Congress, 21st–23rd July, 2008; D Gervais, “Towards a New Core International Copyright Norm: the Reverse Three-Step Test”, (2005) 9 *Marquette IP Law Review* 1, 32. Most recently, see M Senftleben, “Overprotection and Protection Overlaps in Intellectual Property Law – the Need for Horizontal Fair Use Defences” in *Horizontal Issues in Intellectual Property Law: Uncovering the Matrix*, ed A Kur (Edward Elgar, 2010).
 - 38 J Griffiths, “The ‘Three-Step Test’ in European Copyright Law – Problems & Solutions” [2009] *IPQ* 428.
 - 39 See, for example, K J Koelman, “Fixing the Three-Step Test” [2006] *EIPR* 407, 410.
 - 40 See, for example, M-C Janssens, “The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation” in *Research Handbook on the Future of EU Copyright*, P Torremans ed (Edward Elgar, 2009) 338.
 - 41 This final paragraph was added in 1992. See Fair Use of Unpublished Works Act, Pub L No 102-492, 106 Stat 3145 (1992); HR Rep No 102-836, at 8 (1992).

- 42 Although courts have not tended to give great weight to factors falling outside the listed four.
- 43 For notable examples, see *Sega Enters Ltd v Accolade Inc* 977 F 2d 1510 (9th Cir, 1992); *Field v Google Inc* 412 F Supp 2d 1106 (D Nev, 2006); *Perfect 10 v Amazon, Inc* 487 F 3d 701 (9th Cir, 2007).
- 44 D Nimmer, “Fairest of them All and Other Fairy Tales of Fair Use” 66 *Law & Contemp Probs* 263 (2003) 281.
- 45 N Netanel, *Copyright’s Paradox* (Oxford University Press, 2008) 66 (footnote omitted).
- 46 M-C Janssens, “The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation” in *Research Handbook on the Future of EU Copyright*, P Torremans ed (Edward Elgar, 2009) 338 [fns omitted]
- 47 See, for example: R Okediji, “Toward an International Fair Use Doctrine” (2000) 39 *Columbia Journal of Transnational Law* 75, 116-30; H Cohen Jehoram, “Restrictions on Copyright and Their Abuse” [2005] *EIPR* 359 (“If ever the antiquated American ‘fair use’ would be contested for a TRIPs Panel, its fate would, I think, be sealed.” 362); G Dworkin, “Copyright, The Public Interest and Freedom of Speech: A UK Copyright Lawyer’s Perspective” in *Copyright and Free Speech*, J Griffiths & U Suthersanen (eds), (OUP, 2005) 153, 162 (“...[I]t is difficult to see how, in many cases, a fair use defence, which normally means a free use defence, cannot conflict with the normal rights of a copyright holder.”); R Burrell & A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005); J Reichman, “Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement” (1995) 29(2) *International Lawyer* 345, 369; S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (Geneva: WIPO, 2003); S Ricketson, “The three-step test, deemed quantities, libraries and closed exceptions” (Centre for Copyright Studies, 2003), 147-154; T Newby, “What’s Fair Here is not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?” (1999) *Stanford LR* 1633; P Geller “Can the GATT Incorporate Berne Whole?” [1990] *EIPR* 423. At the time of its adherence to TRIPs, the US Government’s view was that fair use was compatible [“Article 13 of [TRIPs] widens the scope of...[Article 9(2) Berne] to all exclusive rights in copyright and related rights, thus narrowly circumscribing the limitations and exceptions that WTO member countries may impose. This approach is consistent with s 107 of [US Copyright Act] relating to fair use of copyrighted works.” (Uruguay Round Agreements Act, Statements of Administrative Action in Relation to Intellectual Property Rights. H R Doc 103-316, 103 Cong 2d Sess 656.)]. Some commentators have argued that it is through the balancing act required under the fair use defence that the law of the US secures compliance with the three-step test. Dan L Burk and Julie E Cohen, “Fair Use Infrastructure for Rights Management Systems” (2001) 15 *Harvard Journal of Law and Technology*.
- 48 There may be other tensions between the fair use doctrine and the apparent demands of the “test”. It may, for example, also be argued that the fair use defence has the capacity to exempt uses of copyright works in circumstances that “conflict with a normal exploitation” of a work or “unreasonably prejudice the legitimate interests” of the author of a work and thus to violate the second and/or third “steps” of the “test”. For example, under the WTO Panel’s interpretation of the second “step”, an exception will violate the “test” where it allows a defendant to deprive a right-holder of a potentially licensable market. If this is correct, certain applications of the fair use doctrine seem questionable. While “the effect of the use upon the potential market for or value of the copyright work” is a very significant factor in the balancing exercise required under s 107, it is not a paramount consideration. Thus, for example, in the Supreme Court’s most recent decision on fair use (*Campbell v Acuff-Music Inc* 510 US 569 (1994)), it was emphasised that a negative impact on the right-holder’s market arising as a result of the defendant’s use did not render that use presumptively unfair. Furthermore, under certain versions of the “three-step test”, an exception is not permitted unreasonably to prejudice the legitimate interests of the author of a work. Those interests may include non-economic, moral interests. However, under the “fair use” doctrine, the interests of the author, as distinct from the holder of the economic rights in the work, generally carry no weight in the balancing of values conducted under s 107. See, further, S Ricketson, “The three-step test, deemed quantities, libraries and closed exceptions” (Centre for Copyright Studies, 2003), 147-154
- 49 *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1930)
- 50 See *Harper & Row, Publishers Inc v Nation Enters* 471 US 539 (1985)
- 51 *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994),
- 52 *Ringgold v Black Entertainment Television Inc* 126 F 3d 70 (1997) para 49.
- 53 Compare, for example, the rather undisciplined approach of some courts in the United Kingdom to the much more restrictive “fair dealing” provisions to be found in the CDPA 1988. See J Griffiths, “Comparative advertising and celebrity photographs: fair dealing under the CDPA 1988” [2006] *JILPL* 515.
- 54 (2008) *University of Pennsylvania L Rev* 549.
- 55 *Ibid*, 574.
- 56 *Ibid* 574-5.
- 57 *Ibid* 582-591.
- 58 *Ibid* 622.
- 59 77 *Fordham Law Review* 2537 (2009)
- 60 *Ibid*, 2621.
- 61 For discussion, see R Okediji, “Toward an International Fair Use Doctrine” (2000) 39 *Columbia Journal of Transnational Law* 75.
- 62 See M Senftleben, *Copyright, Limitations and the Three-Step Test: an Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004) 167-8 and “Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” (2008) 39 *IIC* 707, 3.
- 63 Google’s reliance on fair use to shelter its activities provides a potential example of the way in which the doctrine may foster innovative business models.
- 64 Recently, versions of the fair use doctrine have been adopted in Singapore (see N Loon, “Exploring Flexibilities within the Global IP Standards” [2009] *IPQ* 162) and Israel (see OF Afari, “An Open Standard ‘Fair Use’ Doctrine”: a Welcome Israeli Initiative” [2008] *EIPR* 85). Japan and South Korea are currently exploring “fair use”-type initiatives. See Y Chang, “Debates on Introduction of ‘Fair Use’ to the Copyright Act of Japan & Korea. Do Japan and Korea need Fair Use?” (2010) 3 *Quarterly Review of Corporation Law & Society* 282; T Ueno, “Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act – Towards a Japanese-style ‘Fair Use’ Clause” *AIPPI Journal*, July 2009, 159.
- 65 For an argument that courts’ inherent conservatism may render the apparent flexibility of a fair use provision illusory, see R Burrell & A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 249-275.