

## Teil 2 – Interne Beschränkungen

### 2ter Diskutant – Dr. Cyrill Rigamonti

Ich möchte mich zuerst herzlich bedanken, dass ich die Gelegenheit habe, hier zu sprechen. Auf Wunsch von Frau Dusollier werde ich meinen Vortrag auf Englisch halten, damit sie danach in Echtzeit und ohne Verzögerung durch die Übersetzung replizieren kann, wenn sie dies möchte.

I will begin with a preliminary remark before commenting on what Professor Schwarz and Dr. Dusollier have just presented. I think that one of the most important points is that, when approaching the subject of copyright exceptions or limitations, we have to realise that exceptions are just one side of the issue. What we are really interested in, I think, is the overall scope of copyright protection. The reason why we discuss and focus on copyright exceptions is in large part due to the fact that legislators have chosen to employ a specific legislative technique, which is to establish a set of rights on one hand and a set of exceptions on the other hand. What is of real interest, however, is not one or the other, but the unity of these two. This point may seem trivial, but this legislative technique has at least contributed to a certain bias in favour of the rights side of the definition of the scope of copyright protection. In other words, there is a widely held perception that there is this natural property right that is self-evident in its existence and that does not need any further justification, while the exceptions are positive encroachments on this natural property right that serve some suspect private interests, which require heightened scrutiny and are in need of specific argumentative justification in order to be legitimate. This is why we talk about exceptions instead of rights today, which makes it seem like the rights side of the equation is not worthy of discussion, as if it were self-evidently legitimate. We should more carefully account for this bias and should always keep in mind that the issue of copyright exceptions or limitations has a flipside. Instead of searching for justifications for particular exceptions, the absence of which would indicate that the exception should be abandoned, we should also ask whether there is any reason to expand copyright protection into areas currently covered by a copyright exception.

Let me now turn to what I think is the main theme in the two presentations that we have just heard. What they have in common is a search for or a reliance on some normative guidance from constitutional law or from some other principles of legitimacy. My view differs fundamentally from this approach.

One of the key statements made by Dr. Dusollier was that copyright exceptions are statutory expressions of fundamental freedoms. I agree that one can conceptualise copyright exceptions in terms of some higher authority or as an expression of constitutional freedoms and constitutional rights. In fact, I think that this is a promising strategy in current argumentative practice. If you are a politician, a lobbyist, or an attorney trying a case for a client, it is clear that you must couch your private interest claims in constitutional language if you want to be successful. This is what the current legal consciousness requires, especially in a country like Germany, where there is a constitutional court with a history of striking down or at least modifying copyright exceptions on constitutional grounds.[6] If this is your mission, then you have to do exactly what Prof. Schwarz suggested. You have to look into the individual copyright exceptions, link them to constitutional freedoms and rights, and then reason from there.

Nevertheless, as a scholar, I would resist constitutionalising the debate, because constitutions do not ordinarily tell us anything about the scope of copyright protection, except for two very basic things. First, copyright protection is required, because that is what most constitutions explicitly mention. Second, such protection cannot be absolute, because constitutional values other than the protection of copyright or property are also protected, and, at least according to modern constitutional law and theory, need to be factored into the design of the scope of copyright protection. In between these two extreme positions, namely absolute protection on one hand and no protection on the other hand, I do not think that constitutions provide any normative guidance whatsoever. Of course, I acknowledge that the German Constitutional Court and other constitutional courts may have offered some insights about what a particular constitution is supposed to tell us in terms of copyright protection. If you read these opinions, however, it becomes clear that the courts essentially recognise that constitutions are normatively empty, which is why they usually go beyond the constitution in question and reach out to some natural rights theory of copyright that is then read into the text of the constitution.

Clearly, what the German Constitutional Court did in the cases I mentioned was an act of lawmaking, and I think it makes little sense to turn to the constitution if we need to first read into the constitution what we want to get out of it. I also believe it is dangerous to do so, because it carries with it the risk of passing off as constitutional mandates individual value judgements that special interest groups might have regarding certain copyright exceptions. In other words, focusing on constitutional law blurs our view of the real issues and the real motives that special interest groups have or do not have with respect to individual copyright exceptions. What I have just said about constitutional freedoms and constitutional rights as guidelines for copyright legislation is also true for the magic three-step-test in international and European law<sup>[7]</sup> that has been resurrected after 30 years of near death to now tell us what we should do in terms of exceptions. However, it is just as vague and indeterminate as the constitution and does provide any more normative guidance as to what should be done in terms of copyright exceptions in the future.

As a result, in order to determine the legitimacy of different exceptions, we should not make any distinctions on the basis of whether they are constitutionally mandated, because the constitutional argument is flippable. For example, it is generally recognized that the copyright exception for parodies is required by the constitutional freedom of expression and serves an important public interest, but copyright holders might just as well argue that all that parodies do is rip off and ridicule another work without paying the license fee that would normally be required for the creation of derivative works and, therefore, serve purely private interests.

The second key statement made by Dr. Dusollier is that copyright exceptions are philosophically, socially, or economically justified, and they should prevail over technological and contractual measures taken by copyright owners to protect their works. I agree with the conclusion that copyright exceptions or limitations should trump technical or contractual protection measures, and I will say in a minute what I mean by that. However, my agreement with this conclusion is not because copyright exceptions are philosophically or otherwise justified, but rather for a different reason. I think that by inserting specific copyright exceptions, the legislature makes a value judgement on the scope of copyright protection. We cannot allow private parties to extend protection unilaterally, because that would mean that they could privately rewrite the copyright statute and upset the legislative value judgments embodied in the statutes. If these private regimes, established through technological measures

and contractual waivers, became sufficiently pervasive, lawmaking would be left to special interest groups, much more than it already is today. This is why statutory copyright exceptions should trump technical protection measures.

In terms of contracts, I agree with Prof. Schwarz that, as a default rule, what is commonly known as the freedom of contract also exists in matters of copyright law. A user can validly agree not to make a backup copy of a work, and if the user nevertheless makes one, he or she may be in breach of contract, but there is no copyright infringement if the backup copy is covered by the private use exemption or some other limitation on copyright protection. In other words, the question of whether such contractual clauses should be enforceable is for the law of contracts to decide, and the answer will usually depend on whether one thinks that there is an imbalance of power that would require the government to step in and legislate in favour of certain groups. In copyright contracts, this is done all the time, as authors are protected, at least to a certain extent, against the typically more powerful copyright industries, at least in Germany. Much like consumer protection laws, the law of copyright contracts is really a contractual issue and not so much an issue of balancing the interests in copyright law, which is what this symposium is all about.

In terms of technical protection measures, it seems quite obvious to me that if we legally protect technical measures, the legal protection of technical measures should be co-extensive with the scope of copyright protection. But we know that this is currently not the case in either the United States or Europe, as I have pointed out in a recent paper.<sup>[8]</sup> As a result, there are two different levels of protection depending upon whether the work is technologically secured, which generally leads to an extension of the scope of copyright protection. I am not primarily arguing against such an extension, but if it is to be done, then the rules of substantive copyright law should be openly changed. I am opposed to changing them through the backdoor by adopting legal protection for technical measures that has always been sold to the public as an enforcement mechanism that is not meant to establish new neighbouring rights. The standard argument in favour of such rules has always been to make sure that copyright can be enforced on the Internet without actually changing the underlying balance of copyright law, but this is just the opposite of what is actually happening as we speak.

With respect to the question of what should be done instead, let me conclude my remarks by posing a counter-statement to the statements made by Dr. Dusollier and Prof. Schwarz. In approaching the subject of copyright exceptions, we should not look to the constitution, the three-step-test, or some other principle derived from economics, philosophy, or the social sciences to tell us what we should do. We must realise that, in copyright, there is no such thing as objective normative guidance by principles, and we should not look for some where there is none. Instead, the only thing we can do today is to focus on, scrutinize, and discuss the interests of those affected by copyright law, because it is ultimately all about interests, interests, and interests – although not necessarily in this order.

Thank you.

**Prof. Reto M. Hilty**

Vielen Dank, Herr Rigamonti, für diesen wichtigen Beitrag. Jetzt bitte ich noch Frau Prof. Xalabarder.

[6] See, e.g., German Constitutional Court, Decision of July 7, 1971, BVerfGE 31, 229; German Constitutional Court, Decision of October 25, 1978, BVerfGE 49, 382.

[7] See Article 9(2) of the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), April 15, 1994, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 81 (1994); Article 10 of the WIPO Copyright Treaty, WIPO Doc. CRNR/DC/94; Article 16(2) of the WIPO Performances and Phonograms Treaty, WIPO Doc. CRNR/DC/95; Article 6(3) of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 20; Article 5(3) of the 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, 2001 O.J. (L 167) 10.

[8] The paper has since been published. See Cyrill P. Rigamonti, Schutz gegen Umgehung technischer Maßnahmen im Urheberrecht aus internationaler und rechtsvergleichender Perspektive, GRUR Int. 2005, 1.