Teil 2 – Interne Beschränkungen

3ter Diskutant – Prof. Raquel Xalabarder

I will try to be as controversial as possible. But, let me tell you, this is not what I am teaching to students in my copyright class.

I.- "Copyright exceptions are not rights" – But, I would add: "within copyright law". They ARE rights ... somewhere else. Copyright exceptions are the legal expression – within the copyright law- of key legitimate interests and fundamental freedoms which ARE RIGHTS -and even, CONSTITUTIONAL RIGHTS (the right of information, the right to access culture and education, free speech, etc) and PRINCIPLES (for instance, the general –and classic- abuse of right), which can be found outside of the copyright law The fact that these rights and principles are envisioned as "exceptions" within our copyright laws does not (and should not) diminish their importance.

Copyright law was not created and does not evolve in a "vacuum". The exceptions that we know today have been "incorporated" over the years into the copyright law, to ensure the protection of such "external" rights/principles as a limit to the exclusive rights granted to the author. Such incorporation within the copyright law has taken place steadily, as society –and most importantly, technology- evolve, hand in hand with the introduction of new rights or the re-definition of the existing ones.

II.- Now we are facing a new "disrupting" technology: digital technologies; which challenge the existing copyright laws on a double ground: in its creation/expression and in its exploitation[9]. Our first reaction –should I say "over-reaction", but comprehensible, to some extent- has been TPMs (technological protection measures). In my opinion, we have acted prematurely and have gone too far. Do not get me wrong: TPMs are not bad per se. In fact, we have always had TPM (keys and bolts in our doors, fences on our land)[10]. What is bad and disrupting, is the careless way in which they have been incorporated into our copyright systems, at all levels: international, European and national level. The WIPO Internet Treaties (arts.11 WCT / arts.18 WPPT[11]) imposed on the States the obligation to protect TPMs. Yet, let me comment on three important issues concerning the 96 Treaties:

· under the WIPO Treaties, infringement of a TPMs is not necessarily envisioned as an infringement of copyright: States must grant protection of TPMs –it does not say this protection must be within the copyright law;

· under the WIPO Treaties, only anti-copy TPMs are envisioned: no protection for "access-control" TPMs is established[12].

· under the WIPO Treaties, exceptions ("acts allowed by the law") are clearly "saved" from the scope of TPMs: exceptions prevail upon TPMs.

However, both the US legislator (see Digital Millenium Copyright Act of 1998[13]) and the EU legislator (see Directive 2001/29/EC, of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society[14]) not only chose to incorporate TPMs protection into their copyright laws (thus, circumvention of a TPMs qualifies as a copyright infringement), but also to expand that protection to also cover "access-control" TPMs (in addition to "anti-copy" TPMs). In addition, both texts did a poor job in ensuring the subsistence of copyright exceptions in a digital environment (let alone, think of a new balance). Just take a look at art.6.4

of the Directive: a disaster! Was it deliberate? Was it the result of too much one-sided lobbying power? Were exceptions the victim of too much compromising to get the Directive passed as soon as possible? One might say that national legislators cannot do much now, since their hands are "tied up" by the Directive. Still, I believe they can and should make some sense out of it. But I am loosing hope as the Directive is being implemented –slowly- in national laws.

And this was – I believe – a big mistake. By introducing a strong protection of TPMs within our copyright law, and more specifically, by failing to constrain the strong protection of TPMs within the copyright limits (both external and internal), we jeopardize the precious "balance" that had been achieved within our copyright laws during all these centuries. Now, because of our failure, copyright is being limited "from the outside".

A TPM to control "access" goes beyond the scope of the exclusive rights, initially and traditionally focused on the exploitation of the work. Copyright has never been concerned about an author controlling how many times the book is read or the movie is seen or the music is heard; but rather about how many copies are reproduced and distributed, and how many times the music is played in public. Copyright used to be a system among professionals (to regulate exploitation of works among "peers" who compete in the market); now we have turned it into a system against users (because in a peer-to-peer network, users become "professionals": they are exploiting the works of others by making them available to the public). We are being told by the copyright "industry" that TPMs will provide more choices for the consumer (choices being: how many times I can see a movie and how many "private copies" I can make). We are being told by scholars that copyright has always conveyed a right to control "access" to the work. I do not agree. Copyright was never about access or use, it was about exploitation. Copyright never intended to "cover it all". If every "use" becomes an act of exploitation and technology ensures that every "use" is "authorized", then copyright takes it all, and there is only room for either licensing or infringement.

Not enough effort was made to ensure the protection of the exceptions in a digital context. The Directive does oblige States to ensure effectiveness of a few exceptions (art.6.4), but not all: for instance, quotations are not there. And let's not forget that the quotation exception is the only mandatory exception in the Berne Convention[15]. For most exceptions, its effectiveness is left to voluntary measures; that is, by contracts and, ultimately, by courts! Neither one is good enough[16]. Therefore, if the only way to ensure protection of these fundamental rights and principles, when using copyrighted works, is by reaching out -"beyond" copyright- to the original sources (to constitutional rights and freedoms, and even further to general principles of law such as the abuse of right...) then, so be it. I think we –as a society- have more to loose with an all-encompassing TPMs-enforced copyright regime (that prohibits any access or any use not authorized by the author), than with a regular/imperfect regime with a few holes.

So, how did we get here? As I see it, it all started with the acceptance of computer programs as literary works. We envisioned a special regime for them: ensuring a tailor-made system of exceptions that only the "lawful user" could benefit from and, at the same time, allowing a lot of room for contractual freedom and derogation of such exceptions. Anyone who uses a work according to copyright law should be a "lawful user", not only those who have been licensed to use it. User should not amount to licensee. Just because technology allows us to turn every use into a li-

cense, it does not mean we need to do so, and expand the exclusive rights to control every use.

Another criticism: exceptions should not be set aside by contracts. But on that issue, I cannot add anything to what has already been said: and it may be true –as Mr. De Werra said- that the answer may depend on the exception.

III.- But, let me go beyond TPMs and exceptions, because after all, they are not the origin of the problem, but a result from a careless (and premature) over-reaction to the digital challenge. The real problem, as I pointed out, is that digital technology opens new perspectives for the creation and exploitation of works... to an extent that maybe the whole system –as we know it, of exclusive rights, exceptions and fundamental-rights-and-principles-outside-copyright- should be reconsidered? Maybe we should get rid of all the statutory exceptions, and find the limits to copyright outside copyright? Maybe one only fair-use/three-step-test exception would be enough?[17] It is true that such a system would not provide legal certainty and harmonization; but let's not forget, though, that so far we have been very successful in harmonizing exceptions.

We are putting too much pressure on exceptions, and too little pressure on limiting the definitions of the exclusive rights. The first limit to an exclusive right is its definition: its scope. There seems to be a tendency to expand –joyfully, without much questioning or justification- the scope of the exclusive rights, while, on the other, we are expecting only a few exceptions to prevail: those justified by fundamental rights! Why don't we require any justification at all for expanding the scope (and even the term) of exclusive rights? As I see it, we are taking a rather biased approach to balancing exclusive rights and their limitations. At the same time, we rush into creating a new and mandatory exception for temporary copies to counterbalance the broad and over-reaching definition of reproduction in art.2 InfoSoc Directive. Where is the fundamental right protected by this mandatory exception? None, just common sense: to enable the functioning of the Internet. Some more common sense is required.

So my point is: before turning to exceptions (and question their justification), we should pay more attention to the definition of the exclusive rights, and question their justification before expanding them.

For instance, the definition of "public" is fundamental, however, such concept has never been harmonized at a EU level; the Commission's communication SEC(2004) 995 of, 17 July 2004, on the review of the EC legal framework in the field of copyright and related rights[18] not only confirms that, but also expressly states that there is no need for harmonizing it either. By defining what is "public" and what is not, we are limiting the right of communication to the public –without any need for an exception. Reciting a poem or playing a musical work or watching a movie at home is usually not considered "public"; but what about watching a TV program at a bar/pub or in a hotel room? In addition, so far, we have never required an exception (let alone, a Constitutional right or freedom) to justify such acts (the ones in the first group). We have limited the scope of the exclusive right of communication to the public, not by means of an exception justified by a fundamental right, but rather by means of limiting its definition to the "exploitation" and leaving out some acts (some uses) that cannot and should not be qualified as "an act of exploitation".

IV.- Which leads me to another point, already "sketched" at the beginning of my presentation: copyright should not be abusive. We should consider common benefit –in general, the progress of culture (that is, citizens using works)- when defining the scope of the exploitation rights. Copyright was made –and has evolved- around an industry of exploitation: the print, the record, the radio, the movies, etc. We have justified it with references to AUTHORS and to the PUBLIC INTEREST (promote creation and culture), but the primary goal was to protect an industry (business). In my opinion, the best way to protect both the authors and the public interest is to limit the exclusive rights to the exploitation of the work: allowing the authors to "benefit" from such exploitation of works and –at the same time- allowing the public to "use" them. Thus, there would be no need to ask for a justification for the "private copy" exception, because private copies should not qualify as an act of exploitation covered by the exclusive right of reproduction.

If we could start from scratch, might we do it differently? We play with the toys we have been given by our parents: exclusive exploitation rights, exceptions based on key legitimate interests and fundamental freedoms, and more recently, TPMs. If we could choose which toys to buy, which ones would we choose? Do we need exclusive rights (and exceptions)? Should we get rid of the monopoly (exclusive rights top authorize and prohibit) and turn to a system of Government-subsidized creation? Should a "simple" remuneration right suffice? After all, this is what collecting societies are doing for their members[19]. Authors may prefer a remuneration right for certain non-authorized uses, over an exclusive right to authorize them all? In any case, we should refrain from hiding behind "legal tradition" excuses, such as a natural law vs. a utilitarian approach to copyright, etc. which usually result from stubborn repetition over the years, rather than from a well-conceived and justified logic.

I believe that the time has come to stop, take a deep breath and reconsider our copyright-ego. The world does not begin and end with copyright. We should find the way to limit it ourselves, or we will soon be limited "from the outside"! It is our duty to find that balance before we take too much time and then can't go back.

Thank you very much.

Prof. Reto M. Hilty
Herzlichen Dank, Frau Prof. Xalabarder. Nun haben wir einen enormen Input an Informationen bekommen. Dieser würde wohl für den ganzen Nachmittag ausreichen. Dies ist leider nicht möglich. Aber ich möchte gerne noch Verständnisfragen an die fünf Repräsentanten der Thesen – denn im Grunde sind ja alle Thesenlieferanten – einräumen, damit sie den Kaffee nachher genießen können.

Fragen scheinen nicht aufgetreten zu sein.

Dann schlage ich vor, Frau Dusollier und Herrn Schwarz nach der Pause die Möglichkeit zu einer kurzen Stellungnahme zu geben, damit sie auf das ja zum Teil widersprüchliche Gesagte reagieren können. Nach dieser Runde eröffnen wir dann die Generaldiskussion.

[9] We are more concerned with exploitation, here. But we should not forget that the digital technology challenges the very theories of creation, originality and authorship, as well as the very same concept of exclusivity. These are topics that should be addressed soon.
[10] This morning, Prof. Kaiser was reminding us about the 17th century debate, when landowners started to fence their properties. Three centuries have not taken us too far.

[11] See the WIPO Copyright Treaty of 1996: http://www.wipo.int/treaties/en/ip/wct/index.html; And the WIPO Performances and Phonograms Treaty of 1996: http://www.wipo.int/treaties/en/ip/wppt/index.html
[12] The text only refers to TPMs used "in connection with the exercise of [the authors'] rights … and that restrict acts, in respect of their works, which are not authorized by the authors … or permitted by law"
[13] See U.S. Copyright Act: http://www.copyright.gov/title17/circ92.pdf
[14] See Directtive 2001/29/EC: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf
[15] Therefore, by means of the principle of national treatment plus the minimum of protection granted by the Berne Convention, works of foreign Berne Union authors may be quoted in a digital world, but not those of European Union authors (protected under national laws alone –where the quotation exception may be strangled by TPMs).
[16] Ensuring the effectiveness of an exception can only be achieved by contracts when the bargaining power of the parties is balanced –and this is usually not the case when dealing with works licensed by consumers (we have all seen the software licenses). And as to courts, not all cases will go to court; so, we will see a shrinking use of exceptions.
[17] The "special case" being the exercise of the fundamental rights and principles embodied in National Constitutions and non-copyright laws.
[18] http://europa.eu.int/comm/internal_market/copyright/docs/review/sec-2004-995_en.pdf
[19] Most authors receive more money from legal licenses and remunerated exceptions subject to collective management, than from the individual exercise of their exclusive rights.