Teil 2 – Interne Beschränkungen

Prof. Reto M. Hilty
Im zweiten Teil haben wir die Frage der Beschränkungen der überschießenden Wirkungen des Urheberrechts als Aufgabe. In der ersten Runde geht es dabei um die internen Beschränkungen, also die Frage, wie man ein zu weitgreifendes Urheberrecht aus sich selbst heraus beschränken könnte. Wir haben die Frage gestern schon kurz erwähnt, jetzt gehen wir direkt darauf los.

1te Thesenpräsentation – Dr. Séverine Dusollier

This conference is a great opportunity to discuss key issues in copyright without being constrained by any agenda and be able to say whatever we want to say about copyright. I think it's really time to do it.

I will talk about internal limitations in copyright but I will limit my speech today to copyright exceptions, so I won't talk about duration of copyright or the idea/ expression dichotomy. As to copyright exceptions, I suppose that most of you know about those two recent court decisions, one in France, the other in Belgium, which have stated that copyright exceptions are no rights. I might surprise some of you by saying that I completely agree with those decisions.

I personally think that copyright exceptions are no rights. This will be my first thesis and I will explain the thesis in a moment. I also kind of regret those decisions, because the time was really ripe for a debate about the relationship between technological measures and exceptions, and those decisions could have made a difference in that topic. But the way the consumer associations, involved in those litigations, evoked the interest for a private copy by trying to make the judge say it was a right was, in my opinion, a legal wrong strategy. There are better legal strategies that could be used to promote the exceptions rather than simply stating they are rights. This will be my second thesis. And my third thesis is that it is really important to preserve exceptions, because exceptions are a key part of the copyright regime as an whole, exceptions are really part of the fundamental justification of copyright[1].

Thesis 1: Exceptions are not rights in copyright. If you look at the court decisions, which I mentioned, they explain this position by using very minimal arguments. Some arguments are also very peculiar. For instance in the Belgian decision, the judge had a look at the table of contents of the copyright law and said: exceptions to copyright are listed in a separate title of the copyright law that is called "---". This title follows the enunciation of the exclusive rights of the rights holders. Thereby, the judge has concluded that exceptions are not rights.Such reasoning is a bit strange and straightforward. That the lawmaker has coined exceptions some legal provisions in the table of contents of a piece of legislation, does not say much about the legal nature of the entitlements granted by such provisions.

Besides, both decisions did only rule from a strictly copyright perspective. I think that so as to legally define what a copyright exception is, and more generally what sort of entitlement is granted by a legal provision, one should not stick with what the copyright law makers said, but one has to refer to how the civil law has defined what is a subjective right (un droit subjectif), what are the characteristics of such a right and whether they are present in a copyright exception provision. And this is what I would like to do with you today.

There have been many definitions of what is a right in the law history. In the 19th century, some scholars, such as von Ihering have highlighted the interest element, by saying that a subjective right is an interest legally protected. Others (Savigny)have insisted on the will element: subjective right is what the will of a person can achieve. More recently, some theories (Roubier) have placed the criteria of power at the core of the definition of a subjective right: subjective right gives a power to the holder of the right to do whatever he wants to do with the object of the right. Most of you know those definitions. There are some common elements in all those definitions. The first one that you can find in any definition of subjective rights is the necessary link between subjective rights and positive law, with the droit objectif. The source of any subjective right is to be found in law. This element is present with the copyright exceptions, since copyright exceptions are defined by law and their limits and their conditions are determined by the copyright law.

Another element is the existence of a specific power enjoyed by the person, who holds the right, i.e. a power to exert over the object of the right. That power is exclusive, which means that this power can exclude others from using the object of the right. For instance, if you have a property right in a house, you can decide to use the house the way you want, to exclude some people from entering to your house, to rent the house to some people. You are the master of your house and you decide what to do with it. This element of power and exclusivity cannot be found in copyright exceptions. If you are the user of a copyrighted work and, due to a copyright exception, you can make a parody of that copyright work, it doesn't mean that you have any power over that work, or over that specific use of the work. You cannot exclude others from using the work in the same way. It's not because I can make a parody of such song that I can prohibit any of you in that room to make the same parody or to make another parody of that work; so my power or my freedom to use that work is not exclusive of any other person to do the same.

Another key element of a subjective right is also that the owner of the right obtains a legal remedy to protect his right. The holder of a subjective right is granted a specific legal action to make other persons to comply, to respect the right. As far as copyright exceptions are concerned, the user does not have any legal action to act against people who do not comply with his entitlement to use the work in a certain way. Exceptions only serve as a legal defence when an user is sued for copyright infringement.

Finally, one can remind that the law does not grant subjective rights equally. Of course every person is able to benefit from some rights, but the law does not allocate subjective rights in an equal way. There are some people, who have rights in some objects and others who have other rights in other objects or who do not have rights. The logic of copyright exceptions is rather different, since they benefit to any person of the public. As a principle, every user of a work can make a parody or a private copy. For some exceptions this rule might change, if you accept some theory about the fact that copyright exceptions are granted only to lawful users of the work or to lawful acquirers of the work. In that case, a certain inequality in the allocation of copyright exceptions emerges.

So for me, copyright exceptions do not comply with the definition of the subjective right. Exceptions are no subjective rights.

Some other arguments have been argued in favour of the qualification of copyright exceptions. For instance it has been said that since in some countries, copyright ex-

ceptions are mandatory, they are rights. But it's not because a legal provision is mandatory, that it is amounts to grant a right to the beneficiary of that legal provision. It has also been argued that the remuneration, the levy, that is sometimes paid in compensation for the benefit of some use, such in the private copy, makes that benefit a right to use the work. This argument has been heard in the court decisions I have mentioned. The users have tried to induce from the remuneration for the private copy they paid when buying the copying equipment or the blank tapes an actual right to make that private copy. To that, the judge logically replied that there is no direct relationship between the remuneration you pay and the fact that you can make a private copy. The relationship is between the remuneration, which is due to compensate the granting of an exception and the existence of a limitation in the copyright law. The remuneration is there to compensate the global lost suffered by the copyright owners because of the private copies that can be made, not to remunerate the actual copy made by one particular user. So the link is more indirect, the remuneration does not create a right to use the work, so exceptions are no subjective rights.

What can we do with that? If it is not a right, how can one define the legal entitlement that enables the user to make some use of a copyrighted work? The court decisions do not solve that question. They suggested that a copyright exception such as the private copy exception is just a defence. But to say that an exception is a defence, does not say anything about the legal nature of the exception, it just says something about the function of the exception. The exception exists in the law to act as a defence against a copyright infringement suit, but it does not say what the exception is. In one of those decisions, is the private copy s deemed to be only a tolerance, in the sense that the law tolerated that particular use.

I do not agree with those few points; I think that there is more than a mere tolerance in the rule of copyright exceptions. Exceptions are no subjective rights, but they are the application of a legal provision. They are what Paul Roubier called a "legal situation". He established a distinction between subjective rights, that are legal provisions which grant the benefit of a legal action, and other legal provisions, where the beneficiary of such provision do not have a legal action but is anyway entitled to benefit from something. One can also coin that sort of legal entitlement, as Lucie Guibault has done for the copyright exceptions, as a provision of the objective law (droit objectif), as an entitlement that is granted by the positive law. Maybe it might sound I'm saying nothing or something very obvious but I think this approach really gives a positive role to the copyright exception. It is not only a limit of the copyright law; it is also a rule of the law, which has a positive meaning and not just a negative meaning as a mere tolerance might have. It limits the rights of the copyright owner.

There is a further step in my reasoning. The further step is to say that legal provisions of copyright exceptions embed, in copyright law, legitimate interests or fundamental freedoms. Indeed, the copyright exceptions might result from the consideration of fundamental freedoms within the copyright regime. For instance, the freedom of expression justifies some exceptions such as the quotation, the parody, the freedom of the press justifies news reporting exceptions, or the freedom of competition can explain the granting of the decompilation exception in software's legal protection. The legitimate interests are another legal category, that we know for many years, that can be defined as legal entitlements that convey the protection of the interest pursued by one person or a group of persons. Those interests will be either taken into account by the lawmaker - for instance it is what the copyright lawmaker has done by granting copyright exceptions as limitations to thesubjective rights of the copyright holders – but they can also be taken into account by the judge in case of a conflict.

When a specific interest comes into a conflict with a right or with a freedom, the judge, by saying it is an interest, can refer to some rules to settle the litigation and to see which one should prevail: is it the subjective right? Is it the freedom? Is it the interest?

I will give you an example with that reasoning in case of copyright exceptions. If you say that courts can take into consideration the interests or freedoms invoked by copyright users, for instance against a contract or against technological measures that inhibit the use they normally enjoy under a copyright exception or against the application of anti circumvention provisions, that means that the judge will have to decide which interests are in stake and what is the legal prevalence of that interest compared to the other entitlements that the copyright holder is exerting over the work. If the copyright holder uses a technological measure to block some use of work, he does not exercise an exclusive right, he just exercises a freedom resulting from the overall principle of freedom of enterprise. He uses a technological measure to distribute commercially the works. So this is merely the expression of that particular freedom. It means that if you argue that these technological measures impair your freedom to make a quotation, for instance, the freedom of expression to make a quotation, the judge will have to achieve a balance between both freedoms and see whether one freedom has really been impaired or prohibited by the exercise of the other freedom.

So, it will be a case by case analysis. The judge should look at the situation and see whether the use of the technological measure really prevents you from making a quotation. And if it's the case, the judge should conclude that the freedom to use technological measures is to be limited in order to enable the other freedom to be exercised concurrently. If you are invoking a simple interest, not a freedom but an interest, for instance the interest of education, that justifies the copyright exceptions for education activities, or the interest of libraries or the interest of a disabled person to be able to get access to the work. In that case, the interest is more weak against the freedom to use this technological measures and in that case the judge would have to weight the interest concerned by the exception and the freedom to use technological measures. Here, it might be more difficult to make your interest recognised. This is what consumer associations in France and in Belgium should have done in the case against technological measure locking up CDs or DVDs. They should not have considered the private copy to be a right, but they should have put forward the interest of consumers to make some use or copy of copyrighted works. I think they might have had a stronger case by choosing that strategy: then, the judge would have to really appreciate the interest at stake and maybe he would have held another solution.

By saying that copyright exceptions are interests or are the expression of interests or the expression of some fundamental freedoms, it also means that the law maker should take into account those interests and those freedoms not only to grant limitations to copyright, but to reduce other entitlements that the copyright holder is trying to exert over the work. For instance, where the law admits, as it is the case in Europe now and in many countries in the world, that the copyright holder can use a technological measure to block some use and access to a work, the law maker is obliged, in my view, to take into account the interest of the user and he has to limit the power of technological measure by those interests and freedoms as he did for exclusive rights of copyright. When he is regulating the circumvention of those technological measures, he has to do the same, he has also to take into account those interests and freedoms. This is, for instance, what the Belgian law maker said when he

stated a few years ago that copyright exceptions are mandatory and cannot be contracted out. The legislator just said: okay, now we have settled the conflict between some interests and the interest of the copyright holder in the copyright law by saying that some uses are not copyright infringements but are exceptions to the copyright monopoly. Now we notice that the author can also exercise some power over the works by using a contract. So, if we are logical, we need to take into account those interests. Therefore, the law maker has enacted that those interests, recognised in copyright law, cannot be contracted out, so it is just to take into account the same interest at a different layer of protection. For the technological measures, the European lawmaker has done the same with its famous article 6.4 of the directive. We can debate for hours to see whether this attempt was a success or a failure. I personally think it is a failure, because it's not broad enough. But it is the same logic that says that since there is another layer of protection over the work, constituted by a technological measure and because exceptions are important in the copyright regime, the interests they convey should be taken into account in that other layer of protection. On the contrary, the European law maker has done nothing for anti circumvention provision. The last layer of protection is completely immune from the play of the interests and freedoms underlying copyright exceptions.

My last thesis is to say that the law maker or the judge should be guided in their consideration of those interests and freedoms by the key importance of copyright exceptions have in the regime of copyright. I t is really fundamental that we continue to preserve those interests present in those exceptions in the copyright regime, particularly when the copyright monopoly now extends to include technological measures and anti circumvention protections. By studying the foundations of the copyright law, the justifications of copyright, whether philosophical, economic, sociological or from any other perspective, the conclusion is always the same, that copyright exceptions are really a part of the regime of copyright. They are not just some accessories in the law; they are an integral part of what copyright is and are really at the basis of the function of the copyright regime.

If we take a philosophical point of view or political point of view, it is true, as Mireille Buydens said yesterday, that you can connect the birth of the copyright regime with the emergence of the author in our western societies. But this is not enough, because, as she said, the author has emerged in the 12th or 13th Century while the copyright is a creature of the 18th Century. So what happened during those 5 centuries, where there were no copyright and there was an author emerging and creating? For copyright to emerge, the author was certainly needed, but the public was needed too. That public, composed of people that could enjoy literary and artistic works, emerged as a political figure in the 18th century. This is particularly well explained in the thesis of Jürgen Habermas about the public sphere. Habermas explains that the public sphere has emerged as a real political actor in the western society in the 18th century and is the source of the modern democracy that we know today. But Habermas also insists on the fact that this political public sphere found its source in the literary and artistic public sphere. He said that it is because in the 18th century there was a public of readers or people who wanted to read books, who wanted to read journals, who wanted to go in literary salons to discuss works, that those people started to politically discuss and founded a political public sphere that could act as an opposition to the government, to the kings, to the rulers of that time. I think that this link with the artistic creation and the democracy is really important and should not be underestimated. For me it's not a coincidence that copyright is contemporary to the birth of that public sphere and that explains that copyright was born both for protecting the author, the creator for giving him or her the autonomy to create, to talk,

to take part in the public discourse, but also it was created to protect the public, to protect the autonomy of the public, to promote the participation of the public in that public sphere of discussion.

So, for me, copyright is really a matter of both the exclusive rights granted to the author and of the exceptions or limitation reducing those exclusive rights. Both are interconnected and this interconnection should stay at the heart of the copyright regime. One could make the same reasoning from a law and economic perspective and conclude that also copyright exceptions are not just market failures, they are also uses that have an economic and social efficiency. Whatever the perspective you take to explain the existence and functioning of the copyright law, copyright exceptions will always appear as key elements of that regime.

Prof. Reto M. Hilty
Herzlichen Dank, Frau Dusollier, ich darf direkt an Herrn Schwarz übergeben. Ich kann mir vorstellen, dass die Dinge hier etwas eine andere Richtung nehmen. Aber das schauen wir uns jetzt an.

[1] This paper is a written transcription of an oral intervention. A more complete overview of the thesis presented here can be found in S. Dusollier, Droit d'auteur et protection des oeuvres dans l'environnement numérique, Bruxelles, Larcier, 2005.