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The imaginary "European Copyright Code" and EU copyright policy

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Full title

The full title of this paper would have had to be read as follows:

Comments on draft articles prepared by a group of academics (with whom many other academics and a lot of stakeholders do not agree) on certain issues (but not on the most difficult and urgent problems) of copyright for an imaginary "European Copyright Code" in the light of EU copyright policy

The Code may be found at www.copyrightcode.eu.

Kudos for civil law/common law „harmonization”
(in a cosy Dutch castle within a group of academics)

- The readiness of the group of academics forming the Wittem Group (highly respected by this commentator, even if he does not share the views of some of them on certain issues) to react to the idea of the European Commission that the issue of a “European Copyright Code” (and as a corollary, a “European copyright title”) should be studied **deserves appreciation**. It also should be noted with due recognition that **they have made successful efforts in trying to agree *between each other* (at least, at the level of some general principles) on certain general aspects of copyright in respect of which there is traditional division between the civil law and common law systems.**
- **However, it was one thing to agree within a group of academics linked by friendly relationship in a Dutch castle, and it would be another thing to do the same between EU Member States with different legal traditions serving as basis for age-old established practices and acquired rights of reliance parties.**

A number of issues that copyright legislation should deal with are not covered

Beyond this castle-level agreement on certain quite general aspects of copyright **what the suggested draft norms offer is not too much**.

The "Code"

- **only covers some general issues of copyright**, but does not address many aspects of authors' rights either,
- **does not cover related rights**,
- does not include provisions on the *sui generis* rights of database makers,
- **does not deal with the questions of contracts**,
- **does not address the issues of collective management**,
- **does not contain norms on the protection of technological protection measures and rights management information**,
- **does not extend to the obligations concerning enforcement of righ**ts
- **completely avoids dealing with certain urgent questions** such as the use of **orphan works, distant education**, measures against **illegal "file-sharing" systems,** the **liability of service providers and other intermediaries**, and so on.

The preparation of such a Code is not timely

The preparation of such a "Code" is not timely at least for three reasons:

- **Firstly,** it does not seem to be a right method to proceed to the preparation of draft provisions as a first step. For such an important project, **it would be necessary to establish and/or confirm a well-thought well-informed and well-balanced EU copyright strategy and policy (still a task to be solved).**
- **Secondly, it would be too early to proceed to a codification of the copyright norms when there are so many important issues unsettled.** This is not a season of harvest yet; we have to address and try to settle many weighty and urgent issues. At present, and it seems still for quite a long time, **step by step harmonization may only be a realistic objective.**
- **Thirdly**, **the present stage of EU integration is not at a level that a more or less uniform regulation of a branch of law so much important from the viewpoint of such a specific field as culture might be realistic**.

The Commission on a possible Code and a „unitary copyright title”

„The Commission undertook in the "IPR Strategy" **to examine the more far-reaching approach of the creation of a comprehensive unitary European Copyright Code**. Such a unitary European Copyright Code could be based on **a codification of the existing EU copyright directives** where **the need to go beyond** the current harmonisation **will be examined**. It could also provide the opportunity **to examine whether the exceptions and limitations to copyright** allowed under the Information Society Directive… **need to be updated**.

„In addition to such a Code, **the feasibility of creating an optional unitary copyright title on the basis of Article 118 TFEU could be examined**… An optional title could be made available on a voluntary basis and co-exist with national titles.”

From the “Green Paper on the online distribution of audiovisual works in the European Union” (hereinafter: Green Paper); see at http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm.

„Minimalist" interpretation of the Commission's idea on a Code

- "Minimalist" reading:
  - **the *codification* of the existing *directives* would not change the nature of the EU instruments** (it would not transform the directives into directly binding regulation) and **would not in itself involve substantial modifications and extensions;**
  - it is *possible* that the "Code" **may still go beyond the current *harmonization*** where it is found necessary, **but the nature of the possible new elements would still have the nature of *harmonization*** rather than of establishing directly applicable norms; and
  - it is also *possible* that **the provisions** of the Information Society (Copyright) Directive **on exceptions and limitations may be updated but** the updating, apart from Article 5(1), **would result in exceptions and limitations *allowed* to be applied rather than obligatorily applied.**

- **This kind of program would seem to be realistic and might be useful.** Nevertheless, **in such a case the fantasy name "European Copyright Code" would not be appropriate**; it would reflect something more ambitious to which such an updated codification of the directives would not correspond (yet).

„Maximalist" interpretation of the Commission's idea on a Code

- "Maximalist" reading:
  - the **codificatio**n of the existing directive **would be only a starting point**;
  - the expression "**going beyond the current harmonization**" would mean that the "Code" **could cover any issues** and would go beyond mere harmonization and **would include directly applicable norms in the form a regulation**; and
  - this would be the case also as regards **exceptions and limitations**: they would not only be updated but **would also be made obligatorily applicable.**

- **It is doubtful that the Commission's idea may truly be interpreted in such a broad manner**; and, in particular, in a way that the regulation should extend to all substantial issues of copyright (and related rights).

„Unitary copyright title" – an unclear idea (1)

The EC documents refer to **Article 118 of the Treaty on the Functioning of the European Union** (TFEU) **as a possible basis for such a "unitary" European copyright tit**le. It reads as follows:

„In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish **measures for the creation of European intellectual property rights** to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements." (Emphasis added.)

„Unitary copyright title" – an unclear idea (2)

- Of course, **it is possible to create European intellectual property rights where there is any need and possibility of creating such rights**. This is the case as regards **industrial property rights** which are not acquired automatically on the basis of international treaties and national (or possible regional) legislation; they have to be acquired by fulfilling certain formalities (basically registration). **It is also possible to set up European registration systems** and, through them, to provide unitary and uniform protection of the relevant industrial property rights. Furthermore, **this is not only a possibility anymore;** such systems do exist in the field of trademarks and industrial designs, and such a system is also getting reality as regards European patent protection.

- **However, copyright is completely different. As soon as a work is created, they are protected automatically not only in Europe but practically all over the world**. In a way, **authors immediately have a "European title" in the sense that their works are protected throughout Europe, and, at the same time, also a "world title**."

„Unitary copyright title" – an idea rejected by European owners of rights

The represantives of European owners of copyright and related rights have rejected the idea of a „unitary copyright title" practically in a unanimous manner. See, the commenst on this idea of the Green Paper on behalf of

- authors (GESAC) at www.gesac.org/fr/homepage_fr/dowload/055AC11.pdf.
- film directors (FERA) at www.filmdirectors.eu/wp-content/uploads/2011/11/FERA-Green-Paper-Reply-Final-18.11.pdf.
- performers (Pearle) at www.pearle.ws/_cms/files/file_sys_PDF_pagers__Document_50.pdf.
- public broadcasters (EBU) at www.ebu.ch/en/union/news/2011/tcm-6-72503.php.
- commercial televisions (ACT) at www.acte.be/EPUB/easnet.dll/execeq/page?eas:dat_im=025B1D&eas:template_im=025A59.
- professional associations (British Copyright Council, representing all categories of owners of copyright and related rights) at www.britiscopyright.org/pdfs/policy/2011_007.pdf.

„Unitary copyright title" – a limited (and thus more realistic) interpretation

- The Commission Green Paper – in connection with the idea of a „unitary copyright title" – **also refers to the possibility of setting up of an EU copyright registry.**

- **This might be a much more realistic project.** Although registration in such a registry would not truly create a real „title," it **might be the basis of a unitary rebuttable presumption concerning the data registered**.

- However, **it is to be noted that WIPO is also considering the establishment of international registration systems**. If registration in a WIPO registry would produce the same effect (rebuttable presumption) at the international level, **it might be more advantageous also for EU owners of rights.**

Protection of cultural diversity militating against copyright uniformization

- **The EU** (along with its Member States) **is not only party to the 2005 UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions – which emphasizes the role of copyright protection in the protection cultural diversity – but it was among its initiators and strongest supporters.**
- **Article 167 of the TFEU confirms the importance of the protection of cultural diversity** within the EU. The Treaty **does not mention culture among the fields of exclusive** (Article 3) **or even „shared"** (Article 4) **EU competence** but only among the fields where only „soft" integration may be applied.
- Specific **copyright norms may have an important role in the protection of the cultural identity** of the Member States.
- Thesis: in contrast with unjustified opposition to economic and political integration within the EU, **the protection of cultural diversity through maintaining cultural identities is not a sign of „euroscepticism" but a source of what may be called „eurooptimism;**" it is not against but very much in favor of „More Europe."

Comments on the „Code" – Preamble (1)

This commentator is of the view that **the philosophy and principles reflected in the Preamble are not in accordance with the interests which a well-thought EU copyright strategy and policy would have to serve**. The reason for this is what **Jane Ginsburg expressed in the following way**:

> **‚while the rhetoric of „balance" imbues the text, on closer inspection "balance" often seems to resemble a coded version of "cutting back on exclusive rights" or, more baldly, "users' rights."'**

(Jane C. Ginsburg: „European Copyright Code" – Back to First Principles (with Additional Detail)" (2011), Columbia Public Law & Legal Theory Working Papers; available at *Social Science Research Network*, http://papers.ssrn.com/Sol3/papers.Cfm?abstract_id=1747148 (hereinafter: Ginsburg), p. 4).

Comments on the „Code" – Preamble (2)

Let us quote the „balancing" paragraphs:

„- copyright protection in the European Union finds its justification and its ***limits*** in the need to protect the moral and economic interests of creators, while serving the public interest by promoting the production and dissemination of works in the field of literature, art and science by granting to creators ***limited*** exclusive rights for ***limited*** times in their works;

„- copyright legislation should achieve an optimal *balance between protecting the interests of authors* and right holders in their works and *securing the freedom to access*, build upon and use these works;

„- rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore *requires a system of rights and* ***limitations*** *with some* ***flexibility****;"*(Emphasis added)

Comments on the „Code" – Preamble (3)

Let us some up (well, with a touch of caricature, but reflecting what is suggested):

- **not only the justification but also *the limits of copyright protection are found in the need to protect the moral and economic interests of creators*** (that is,the ***limitations*** of their rights are dictated by their moral and economic interests),
- **the rights of creators must be granted as *limited* rights**;
- *the task of copyright legislation is to establish* ***balance*** **between the interests of authors through protecting their *limited* rights**, on the one hand, and securing *freedom of access* to their works, on the other hand (through ***limiting*** those rights which are supposed to be ***limited*** since ***limitation*** is in the interest of authors);
- when carrying out this intensive ***limiting*** exercise, it should be taken into account that *freedom of access* – in contrast with ***limited*** authors' rights – is not characterized as what may be limited on any basis whatsover;
- **after that all these *limitations* of the *limited* rights are achieved and that the "*balancing*" between *copyright characterized as limited* and the various "*freedoms" not qualified by any limitation* is completed, only one task remains: to guarantee that the *limitations* of the *limited* rights are *flexible* enough**.

Comments on the „Code” – Chapter 1. Works (1)

An element which would fit into the kind of codification of the existing acquis that seems to be forseen in the Commission's Green Paper (also in accordance the „minimalist” approach): *Article 1.1(1)* of the Code **extends the originality test provided for certain categories of works** (the only condition of copyright protection of a production as a work is that it is the authors' own intellectual creation) **to all categories of works.** At present it is only provided for computer programs in Article 1(3) of the Computer Programs Directive; for databases, Article 3(1) of the Databases Directive; and for photographs in Article 6 of the Terms Directive.

Comments on the „Code" – Chapter 1. Works (2)

In contrast, *Article 1.1(2) of the Code* which contains a ***non-exhaustive list of works*** not only **does not make use of those elements which have been harmonized partly by the international treaties and partly by the *acquis***, and **even doubts may emerge whether it is in accordance with those norms**. It is stressed in a footnote that only the "core" areas of copyright are mentioned. However, **it is hard to understand that, if harmonization** (or perhaps even uniformization) **is the purpose of the draft, why it had been decided to leave the regulation of a number of details to national laws** (or, if the real objective is the abolition of national laws, to national courts and the EU court system) **when those details are *already harmonized* by the international treaties and the EU directives**.

Comments on the „Code" – Chapter 1. Works (3)

- *Article 1.2* **goes beyond the Berne Convention by excluding certain works from copyright protection.** Article 2(4) of the Convention leaves it to national legislation to determine the protection to be granted (read: to protect or not protect) to official texts of a legislative, administrative and legal nature, and to translations thereof. Such a provision is included in point (a) of the article. However, under point (b) of the article, also other works are mentioned the inclusion of which is not allowed by the Convention; namely **"official documents published by the public authorities" which, since this provision follows point (a), necessarily are supposed to be works other than those mentioned in Article 2(4) of the Convention**.
- The particular problem with this provision is that it does not define „official documents published by public authorities."

Comments on the „Code" – Chapter 2. Authorship and ownership; Chapter 3. Moral rights

- In general, **one could live with these chapters**.

- Two comments:
  - **it is in the case of Chapter 2 in particular that the drafters have agreed on a commendable harmonization of the civil law and common law positions** (see, however, the reasons mentioned above for which it is doubtful that this agreement could be easily applied outside the Wittem castle);
  - **it is doubtful that at present it is timely to spend time and energy for trying to harmonise these aspects of copyright protection**.

Comments on the „Code” – Chapter 4. Economic rights (1)

Deharmonization

- *Article 4.1* containing *general provisions on economic rights* **would result in narrowing of the scope of rights provided under the existing directives.**

- The drafters seem to suggest the **elimination of the right of lending** (which, although with various options of derogation, is basically provided as an exclusive right). Furthermore, they would completely **leave out the resale right of authors** (which is not an exclusive right but which is definitely an economic right). At first sight, it may also seem that no **right of translation** is foreseen either; however, when one reaches Article 4.6, it turns out that, for some – not easily understandable – reason, it is regarded to be covered by the right of adaptation.

Comments on the „Code" – Chapter 4. Economic rights (2)

Deharmonization, decrease of protection

- Paragraph (2) of *Article 4.1* reflects the intention of an even more general decrease of the level of protection in the EU. ***No term of protection of copyright is indicated***, and a footnote (note 40) explains this as follows: „It was generally felt by the members of the Group that **the current term of protection of the economic rights is too long**. **However views diverged as to the appropriate term**." (Emphasis added.)

- However, it has been not much time after the publication of the "Code" that **the competent bodies of the EU, with the increase of the terms of protection of performers and producers of phonograms (as well as, in certain cases, of the co-authors of musical works with words), did clearly express their disagreement with the drafters' basic premise that the protection of economic rights is too long**. (*See* Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.)

Comments on the „Code" – Chapter 4. Economic rights (3)

Deharmonization, conflicts with international norms and the *acquis*

- *Article 4.2* on the *right of* ***reproduction*** **does not include something that would be needed to be clearly in accordance with the international treaties** (in particular with the WIPO Copyright Treaty (WCT)); namely, **an explicit statement** in accordance with the agreed statement concerning Article 1(4) of the WCT, to clarify **that storage of works in digital form in electronic mediums is also reproduction.**

- At the same time, **the drafters have excluded from the concept of reproduction and thus from the operation of the right of reproduction a broad but quite poorly defined scope of acts of temporary reproduction in electronic memories. This is in conflict with** Article 9(1) of the Berne Convention (and, therefore, also with Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT), as well as with **Article 3(1) of the Information Society** (Copyright) Directive under all of which the right of reproduction is applicable for *any kinds of reproduction in any manner or form*. It is another matter that, under the international treaties, certain exceptions and limitations are applicable to this right if they correspond to the three-step test as provided in Berne Article 9(2), in TRIPS Article 13 and WCT Article 10.

Comments on the „Code" – Chapter 4. Economic rights (4)

Deharmonization

With *Article 4.3* on the *right of distribution,* there are at least two substantive problems:

- In paragraph (2), **the lack of any clear reference to the *first* sale of copies is particularly conspicuous**, **since after all, in this provision, the first sale doctrine is expressed**. It reads as follows: "The right of distribution does not apply to the distribution of the original or any copy that has been put on the market by the holder of the copyright or with his consent."
- The bigger problem with paragraph (2) is **that it is not clear what is the drafters' intention concerning the territorial effect of exhaustion**. In fact, **the text of the provision** – which does not indicate where the putting on the market (which probably means sale) of the copies has an exhausting effect – **suggests that international exhaustion is foreseen** (that is, no matter where on the earth a copy is sold in respect of which the right of distribution is exhausted). **The EU directives, however, are not based on the principle of international exhaustion**; the right of distribution is only exhausted with the first sale if it takes place in one of the Member States of the EU. If the drafters of the "Code" do not agree with the directives and, therefore, they suggest its modification, it would be necessary to present some reasons for this (this commentator can hardly see any justification which might justify the revision of this correct and consistently followed principle of the *acquis*). The other possibility, of course, is that they do not have such an intention; just they have forgotten to "harmonize" paragraph (2) with the harmonized EU rules.

Comments on the „Code" – Chapter 4. Economic rights (5)

Deharmonization

The provisions of *Article 4.4* on the *right of rental* are in order. However, **in the absence of any provision on this in the "Code," it is not clear what is the position of the drafters concerning the various specific rules of the Rental, Lending and Related Rights Directive on the exercise of this right** (in particular, in respect of the unwaivable right to remuneration maintained by the authors when they transfer their exclusive rental right to producers).

Comments on the „Code” – Chapter 4. Economic rights (6)

The categorization of rights under the international treaties „revised”

- By the „**overcrowded”** ***Article 4.5*** **on the** ***right of communication to the public*** **t**he following acts are covered: (i) **public performance**, (ii) **public recitation**, (iii) broadcasting, (iv) communication to the public by cable (of cable-originated programs), (v) rebroadcasting, (vi) retransmission by cable, (vii) public communication by loudspeaker or any other analogous instrument, (viii) (interactive) making available to the public, (ix) **public display** and (x) any other possible communication to the public.
- **It is not clear why the drafters have found it necessary to revise the categorization by the international treaties** (similarly to the case of the right of translation which they have merged into the right of adaptation) by including public performance, recitation and display into the concept of communication to the public. **This is hardly helpful since different rules may be justified in respect of these various rights**

Comments on the „Code" – Chapter 4. Economic rights (7)

Deharmonization

The "Code" **does not contain many important rules of the EU directives concerning the concepts and the application of the various "sub-rights" included in the Code under the umbrella of the overly broad general right of communication to the public**. There is **no provision on the concept of broadcasting and choice of law in the case of satellite broadcastin**g; it is **not clarified under what conditions encrypted transmissions may be regarded broadcasting; the entire complex regulation concerning retransmission of broadcasts by cable is missing**; and so on. With this de-harmonization, **the application of many of the "sub-rights" would become uncertain.**

Comments on the „Code" – Chapter 4. Economic rights (8)

- Paragraph (2) of Article 4.5 offers a *definition of "public*:" "A communication of a work shall be deemed to be to the public **if it is intended for a plurality of persons, unless such persons are connected by personal relationship**." (Emphasis added)
- Let us quote Jane Ginsburg on this definition. First, in connection with the language "intended for a plurality of persons," she notes that "to require that a particular delivery or transmission of the work be simultaneously conveyed to a plurality of persons **would substantially eviscerate the making available right**." Then she points out the even more fundamental problem:

  > More problematically, however, **the exclusion from "the public" of persons "connected by a personal relationship" seems exceedingly vague and potentially overbroa**d. What, in the digital era, is a "personal relationship"? For example, are Facebook "friends" "connected by a personal relationship"? **The drafters' choice to go beyond traditional criteria like "family circle" or "circle of family and its social acquaintance" risks opening up the category of "non-public" to an extent inconsistent with the author's limited monopoly over the public communication of her work**. (Ginsburg, p. 20., emphasis addedd)

Comments on the „Code" – Chapter 5. Limitations (1)

- In this chapter of the „Code," **exceptions and limitations are provided in five categories**: (1) "uses with minimal economic significance;" (2) "uses for the purpose of freedom of expression and information;" (3) "uses permitted to promote social, political and cultural objectives;" (4) "uses for the purpose of enhancing competition;" and (5) "further limitations." It is submitted that **this categorization does not have any useful contribution to the draft provisions of the chapter; it does not make them clearer and more appropriately applicable; just the contrary. The drafters themselves admit this implicitly** in a footnote where they state (i) the categorization does not "prejudice" what interests are supposed to serve as a basis for an exception or limitation; (ii) in practice, a mixture of different interests may justify an exception or limitation (also others than those indicated in respect of the given category), and (iii) the weakness of an interest serving as a basis for the categorization is not an obstacle to apply an exception or limitation. If this is the case – and what follows proves that definitely it is – **what is the point in introducing this textbook-style artificial categorization?**
- The most important problem with this chapter, however, is that, **in many aspects, it is in conflict with the relevant international treaties and EU directives.**

Comments on the „Code" – Chapter 5. Limitations (2)

First of all, apart from the last category of exceptions and limitations referred to as "further limitations" (which, however, raises some other problems from the viewpoint of the *acquis* on its own) **none of the exceptions and limitations is subject to the three-step test** or – if it is accepted that the first "step" to determine the scope of limited special cases is up to legislation and not to those who apply the law – **at least to its second and third steps**. **This is in spite of the fact that those exceptions and limitations are provided in a much more open-ended manner than in the international norms and in the *acquis*** (**neglecting certain conditions included in the treaties and the directives**).

Comments on the „Code" – Chapter 5. Limitations (3)

Article 5.1 bears the title of *"Uses with minimal economic significance."* At first sight, the **three subparagraphs** of this paragraph seem to cover – as the title also suggests – *de minimis* exceptions. A closer analysis, however, reveals **certain problems with each of them.**

Subparagraph (1) of Article 5.1 prescribes an exception for "**the making of a back-up copy of a work by a person having a right to use it and insofar as it is necessary for that use**." **There is one provision in one EU directive in respect of one category of works explicitly allowing such an exception; namely Article 5(2) of the Computer Programs Directive. If the EU bodies had found it justified to apply such a back-up copy exception for other categories of works** (in particular those in digital format, such as in CDs, CD-ROMs or DCDs) **they would have done so in the framework of the exhaustive list of exceptions and limitations provided in Article 5 of the Information Society (Copyright) Directive or elsewhere**. They did not do so and for good reasons.

Comments on the „Code" – Chapter 5. Limitations (4)

Article 5.1 bears the title of *"Uses with minimal economic significance."* At first sight, the **three subparagraphs** of this paragraph seem to cover – as the title also suggests – *de minimis* exceptions. A closer analysis, however, reveals **certain problems with each of them.**

Subparagraph (2) is on an exception for "the **incidental inclusion of a work in other material**." At first sight, this seems to be an innocent provision; nevertheless Jane Ginsburg points out some problems with it too, and rightly enough:

> **It is not clear what "incidental inclusion" means**. Accidental and unintentional incorporation of a copyrighted work when the including work's focus was on something else? The amount of the incorporated work was of minimal quantity or duration? Must the inclusion be all of accidental, unfocused and minimal? Moreover, **the scope of the exception appears to be considerably broader than the conduct exempted in Berne Conv. art. 10*bis*(2**), which permits reproduction and communication of literary or artistic works seen or heard in the course of an event which is the subject of news reporting, "to the extent justified by the informatory purpose."
>
> (Ginsburg, p. 22.)

Comments on the „Code" – Chapter 5. Limitations (5)

Article 5.1 bears the title of *"Uses with minimal economic significance."* At first sight, the **three subparagraphs** of this paragraph seem to cover – as the title also suggests – *de minimis* exceptions. A closer analysis, however, reveals **certain problems with each of them.**

The first part of **subparagraph (3)** on exception for "use in connection with the demonstration or repair of equipment" is in accordance with Article 5(3)(l) of the Information Society (Copyright) Directive, and there is no problem with it. **There would be no problem with the second part of the subparagraph either if it provided an exception for the reconstruction of an original or a copy of a work only in the narrow case determined in Article 5(3)(m); namely, for the reconstruction of *buildings***. However, this substantial specification which was found necessary in the Directive has been "**revised" and left out by the drafters of the "Code" – again in accordance with their apparent objective: narrowing protection and broaden exceptions and limitations.**

Comments on the „Code" – Chapter 5. Limitations (6)

The **fact that the provisions on exceptions for *"uses for the purpose of freedom of expression and information"*** listed in *Article 5.2* of the "Code" **are not subject to the three-step test creates potential conflicts with the international treaties and the *acquis*.** This is the case in particular in the case of subparagraph (2)(a) and (b).

- Concerning **subparagraph 2(a)** on a limitation for "**use of single articles for purposes of internal reporting within an organization**," it seems worthwhile quoting Jane Ginsburg again:

„It is very unclear what "internal reporting within an organization" means. If the exception is meant to permit multiple reproductions of single articles for distribution within an organization, for example to convert one journal subscription into multiple copies of individual articles, **it would most likely run afoul of the three-step test**. If the exception is meant to concern clipping services, its phrasing does not correspond to the nature of the use, at least not to the extent that the clipping service is external to the organization that is the object of the news clippings. (Ginsburg p. 24, emphasis added.)

- Under **subparagraph 2(b)**, a limitation applies also for "**use for purposes of scientific research**." It **also covers use by commercial purposes and is not subject to any condition whatsoeve**r, even if it is linked to the obligation to pay remuneration, **it does not seem to correspond to the very first "step" of the three-step test, let aside the second one.**

Comments on the „Code" – Chapter 5. Limitations (7)

In *Article 5.3* on "***uses permitted to promote social, political and cultural objectives***," it is also **subparagraph (2)(a) and (b) on certain limitations which raise problems**.

If one compares **subparagraph (2)(a)** with Article 5(2)(b) of the Information Society (Copyright) Directive, he or she can see that, although **it includes a commendable clarification which would be an improvement in comparison of the provisions of the Directive, an important condition is missing from it. The commendable clarification** is that the limitation is **not applicable if the source of the reproduction is an obviously infringing copy**. **The important condition missing** is that the private use for which the copy is made **must not serve either direct or indirect economic or commercial advantage.**

In this case, it is a particularly conspicuous conflict with the international treaties and the *acquis* that this limitation is not subject to the three-step test, since the 1967 Stockholm revision conference considered a proposal to provide for private copying without any further condition but – wisely enough – it explicitly rejected the idea and subjected any exception or limitation for such purposes also to the three-step test.

Comments on the „Code" – Chapter 5. Limitations (8)

In *Article 5.3* on "***uses permitted to promote social, political and cultural objectives***," it is also **subparagraph (2)(a) and (b) on certain limitations which raise problems**.

On **subparagraph 2(b),** Jane Ginsburg states as follows:

> The proposed Code's **failure to restrict the scope of this exception to non-commercial, not for profit educational purposes, its lack of definition of the nature of the "educational purpose," as well as its absence of limitation as to the kinds of works subject to the exception, make the consistency of this exception with Berne Conv. art. 9(2) very problematic** notwithstanding its requirement that the use be remunerated. (Ginsburg, p. 24.)

Comments on the „Code" – Chapter 5. Limitations (9)

Although there are serious problems with the above-analyzed other provisions of Chapter 5, they may still appear less weighty *if* they are compared with the suggested provisions in *Article 5.4* on "*uses for the purpose of enhancing competition*," in particular what are included in subparagraph (2).

Although the draft provisions of subparagraph (2) of the article would create the biggest violations of the international norms and the *acquis* certain comments are justified also concerning its **subparagraph (1).** Firstly, its **point (a)** – providing an exception "for the purpose of advertising public exhibitions or sales of artistic works or goods which have been lawfully put on the market" – as Jane Ginsburg also observes it, **does not have anything to do with competition** (Ginsburg, p. 25). Secondly, **in both points a) and b) of the subparagraph, a number of decisive conditions have been "de-harmonized" from the relevant provisions of the EU directive** (Article 5(3)(j) of the Information Society (Copyright) Directive and Article 6 of the Computer Programs Directive, respectively). **This is particularly spectacular in the case of point b) which provides for a reverse engineering exception** in this – may be "elegantly short" but inadequate – way: "[The following uses… are permitted without authorization and without remuneration, to the extent justified by the purpose…] (b) use for the purpose of reverse engineering in order to obtain access to information, by a person entitled to use the work." In contrast, the provisions of Article 6 of the Computer Programs Directive take 35 lines to list indispensable conditions in order that the exception for what is called more precisely "decompilation" might be in accordance with the three-step test.

Comments on the „Code" – Chapter 5. Limitations (10)

Subparagraph (2) of Article 5.4 reads as follows:

(2) **Uses of news articles, scientific works, industrial designs, computer programs and databases are permitted without authorisation, but only against payment of a negotiated remuneration**, and t**o the extent justified by the purpose** of the use, **provided that**:

(i) the use is **indispensable to compete on a derivative market**;

(ii) **the owner of the copyright in the work has refused to license the use on reasonable terms, leading to the elimination of competition** in the relevant market and

(iii) **the use does not unreasonably prejudice the legitimate interests of the owner of the copyright in the work**.

(Note 54 to the "Code": The term 'negotiated remuneration' means that the compulsory license fee is to be negotiated in individual cases, and therefore does not imply a role for collective rights management. The term 'negotiated remuneration' means that the compulsory license fee is to be negotiated in individual cases, and therefore does not imply a role for collective rights management.)

Comments on the „Code" – Chapter 5. Limitations (11)

Problems with Article 5.4(2):

It is **completely unclear what, in point (i), a "derivative market" may mean** (in the case of this concept, it would have been particularly necessary to have some explanation by the drafters). **Let us presume**, however, that a derivative market means **a market of derivative works** (this is the most probable meaning). The provision seems to guarantee the possibility of the creators, producers and distributors of such works to **compete on the market with the authors of the original works** (used by them to produce derivative works) without their authorization. **This would be equal to transformation of the exclusive right of adaptation into a mere right to remuneration on the basis of a sort of compulsory licensing.** For this, **not only the modification of the *acquis* but also the revision of the Berne Convention, the TRIPS Agreement and the WCT would be necessary**. Without this, such a draft provision could hardly be taken seriously.

Comments on the „Code” – Chapter 5. Limitations (12)

Problems with Article 5.4(2):

Concerning **point (ii**) again quoting the comment made by Jane Ginsburg seems to be the most appropriate:

> **If the “relevant market” is the market for the work, then this exception is either incoherent or fundamentally at odds with an essential feature of copyright law, which is to vest the author with exclusive rights**. (Ginsburg, p. 26.)

Comments on the „Code" – Chapter 5. Limitations (13)

Problems with Article 5.4(2):

In the case point (iii), **the open-ended and hardly justifiable limitations are subject to a condition which has something to do with the three-step test. This, however, is not a good news**, since t**he drafters has transformed the three-step test – for some reasons they do not explain – into a single-step test** (only reproducing the third step thereof). It should be admitted that, **in the context of these provisions, this even has an internal logic** and a sign of consistency. This is so since points (i) and (ii) foresee limitations in certain – far from special – cases (it would be difficult to imagine even more sweeping limitations) are **textbook examples for a conflict with a normal exploitation of the works concerned.** Therefore, **it would have been truly a contradiction if they had subjected these limitations to all the three conditions of the three-step test**. **However, the Berne Convention, the TRIPS Agreement and the WCT do not permit to the countries of the Berne Union, to the Members of the World Trade Organization (WTO) and to the Contracting Parties of the WCT to introduce these kinds of limitations which do not fulfill all the three conditions of the tes**t.

Comments on the „Code" – Chapter 5. Limitations (14)

Article 5.5 on "*further limitations*" **prescribes the application not only of the third condition of the three-step test but also of its second one**. However, **the drafters have added a condition which nowhere appears in the texts of the international treaties and the EU directives** concerning copyright exceptions and limitations. This strange provision reads as follows:

> „**Any other use that is comparable** to the uses enumerated in art. 5.1 to 5.4(1) 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 rightholder, taking account of the legitimate interests of third parties."**

It must have been obvious also for the drafters that **this completely open-ended provision is not in accordance with the copyright laws of the overwhelming majority of the EU Member States which prefer and use exhaustive lists of well-determined exceptions and limitations (also subject to the three-step test) – neither with the EU directives .**

Comments on the „Code" – Chapter 5. Limitations (15)

Article 5.8 on "limitations prevailing over technological measures" reads as follows:

> „In cases **where the use of copyright protected works is controlled by technical measures, the rightholder shall have an obligation to make available means of benefiting from the uses mentioned in articles 5.1 through 5.5 with the exception of art. 5.3(2)(a) [private copying], on condition that**
>
> (a) **the beneficiary** of the limitation **has lawful access** to the protected work,
>
> (b) **the use of the work is not possible to the extent necessary to benefit from the limitation** concerned, and
>
> (c) **the rightholder is not prevented from adopting adequate measures regarding the number of reproductions that can be made**."

These provisions suggest **various revisions of Article 6(4) of the Information Society (Copyright) Directive**. It is **commendable that the proposed article excludes the private copying limitation from its application** (the issue of which is not regulated quite consistently in the Directive). At the same time, there are **three problems with it**.

Comments on the „Code" – Chapter 5. Limitations (16)

Problems with Article 5.8:

Firstly, **in contrast with the Directive which only prescribes an intervention mechanism** for the case where owners of rights do not make access for the beneficiaries possible, **the "Code" would directly obligate the owners of rights**. **Secondly**, these provisions **would extend this obligation to a number of exceptions and limitations that are *not* covered by the intervention mechanism under the Directive**. And, **thirdly**, **it is extremely anachronistic that the "Code" would not provide adequate protection for the technological measures used by the owners of rights as prescribed in Article 11 of the WCT and Article 6(1) to (3) of the Information Society (Copyright) Directive, but, at the same time, it would just obligate them not to use it in certain cases**.

Summary

- **1. Not now, not yet (if ever)!**
- **2. Not in this way (never ever)!**

THANK YOU FOR YOUR ATTENTION

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