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Copyright limitations and exceptions : the consumers' contribution to raise the intellectual property debate

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If there is a domain in which consumer protection also means consumer empowerment, it is intellectual property².

Consumers are more than mere buyers : they are copyright users. The dimension of intellectual property goes far beyond the «consumption of goods». It's also about buying, renting, copying, borrowing, taking and giving, but it's about arts, information and knowledge... and, precisely, it's about taking and giving in return.

Copyright law aims to benefit the public interest, by giving incentives for the creation and the dissemination of works of authorship to the general public. Intellectual property was thought to enable innovation and creation for the social and economic welfare.

The balance of interests is a general objective of intellectual property law. The Preamble of the World Intellectual Property organisation's Copyright Treaty³ underlines «*the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information*».

Where is the consumer interest in intellectual property? Shall consumers be considered as part of the general public, with special needs and specific rights? (I) Concretely, how can consumers assess their rights and ensure their respect in the field of intellectual property? A large part of the answer lies within copyright limitations and exceptions (II).

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² Although intellectual property includes the rights on trademarks and patents (also called «industrial property») and copyright, this article will mainly focus on the latter.

³ WIPO Copyright Treaty (WCT), adopted in 1996.

The digital environment creates new challenges for copyrights holders, but also for consumers. However, there should be no fatality. Intellectual property law provides the tools to give proper answers to the challenges it has been facing from decades. This is why this article focuses on limitations and exceptions to exclusive rights, which represent the core of the intellectual property regulation and philosophy.

THE PUBLIC AND THE CONSUMER INTERESTS IN INTELLECTUAL PROPERTY : SAME NEEDS, SAME GAME?

Consumer law is built around a core principle : the consumer protection (A). However, classic notions of consumer law have dramatically evolved, notably in the intellectual property domain (B), leading consumer advocates to use fundamental rights and public freedoms defenses.

A. Consumer protection

The consumer has to be protected as the weakest party of the contract. The consumers' weak position cannot be denied. Nevertheless, their global awareness of many of the main critical issues concerning them shall give them more than a mere right of information.

This is especially true in the domain of intellectual property. Rights owners assert that their «fight» against «counterfeited goods» and «pirated goods» is not only in their own interest, but also for the sake of consumer protection. When counterfeits of medicines endanger consumers health, one can only acknowledge this argument.

Nevertheless, intellectual property concerns many parts of everyone's daily life, including music, books, television or Internet. Consumers are more than mere buyers. They use and take advantage of copyright protected content on a daily basis. This is possible without purchasing a good, by simply browsing a website.

Therefore, when the enforcement of intellectual property rights affect consumers' access to content, one can only question the way those rights are enforced. The increasing pressure for the enforcement of rights has to be challenged, especially when such a pressure derives from private interests. This is where civil liberties and fundamental rights can be used for the protection of the public at large, and

for the protection of consumers. Their application to copyright law is older than the Internet⁴, but the right to access information (and the right to access to knowledge, which gave rise to a broad thinking movement called «Access to Knowledge», or «A2K»), the right to privacy, the right for a due process have been used to counter enforcement solutions such as the «graduated response»⁵.

Intellectual property crystallises the thin frontier between consumer protection and consumer «empowerment». This is more than a question of advocacy language. The game around fear and protection is where some would like consumers to be confined, but we should be aware that intellectual property «welfare» shall go beyond that assertion.

B. Consumers, access to content and «price»

The copyright system finds its origins in economic considerations⁶. More recently, this economic dimension of intellectual property has been further established with the Agreement on trade-related aspects of intellectual property rights (TRIPS) adopted by the World Trade organisation (WTO) in 1994. With the adoption of this Agreement, the trade dimension of intellectual property was officially recognised by international institutions.

The economic dimension of intellectual property does not only concern international trade, but also basic commercial aspects. Such «down-to-earth» considerations also demonstrate the changing nature of the copyright balance of interests. The first court decisions on technical protection measures (TPMs)⁷ were taken on

⁴ The right of information enshrined in the European Convention on Human Rights has served many times as a justification for courts to rebut the scope of certain copyrights.

⁵ The «graduated response» has been first introduced in France (and is debated in several other countries, among which Great-Britain. It has been also debated at the European Union level, during the discussion of the «telecoms package»). The solution consists in Internet filtering solutions that would target alleged illegal downloaders, starting with sending warning messages to them, then pursuing with second warnings, and ultimately lead to the termination of the users' Internet access.

⁶ As a legal concept, copyright origins came from a reaction to printers' monopolies in Great-Britain at the beginning of the eighteenth century.

⁷ Technical protection measures (TPMs) aim to restrict the use of protected content (for instance, through a computer program embedded on a CD, rights-holders can allow a certain amount of digital copies of a music file, or prevent any copy on a portable device). Digital rights management systems (DRMs) enable rights-holders to control the way in which the content is used, in order to «manage» their rights, *i.e.* to allow their own remuneration. «DRMs» are often misused to designate «TPMs», but only the latter really affect the use of content.

the basis of consumer law⁸. This has led consumers to gain importance within the copyright debate, notably through campaigns targeting technical protection measures⁹. Such campaigns aim to draw attention on specific and concrete aspects of daily life, but at their basis is the issue of balance between the interests of rights holders and the interests of the public.

Although the discussion on the notion of «price» is usual in consumer law, it is yet not always relevant when talking about intellectual property, especially as regards copyright protected content. Indeed, apart from the issue of the price of books or CDs, what is the meaning of «price» when it deals with accessing content on the Internet? What is «price» for consumers when offers of digital content vary in the amount of available content, in its duration of availability and in its capacities to be copied on several devices (for instance, an offer can allow the downloading of a limited amount of files for a limited period of time, whereas other services can allow to download an unlimited amount of music files that can be kept permanently on a computer hard-drive or can be copied on any device, at more or less low prices)?

The answer should be simple : pay less for more possibilities of use. But are consumers really aware of what they are paying, and to whom, when accessing online content? The «free access» to content shall not be misleading. If users don't have to pay to access a particular content, they still have to pay Internet access providers, and some rights holders might be remunerated through indirect means, such as for example online advertising.

It is not that the wide range of buying (or rental)¹⁰ options makes the issue of price irrelevant, but the consumer is most of the time not even aware of this variety of options. How can consumers estimate what they really get if they discover that they cannot burn a DVD, or if the termination of their subscription to a service prevent them from reading the files they have legally acquired?

Rather, the price issue is here still relevant, but under different rules. Users can accept to pay more for «less», for content that is simply accessible without any

⁸ See for example in France one of the earliest court decisions on TPMs : Versailles, 30 September 2004, *EMI Music France v. CLCV* [CCE, December 2004, comm., 163].

⁹ National consumers organisations, but also regional organisations such as the European Consumers' organisation (B.E.U.C.) have taken part to the copyright debate.

¹⁰ If the access to content that was legally acquired is rendered impossible after a certain period of time, the acquisition of this content was momentary, as for a rental (this model of acquisition of digital content is frequent regarding online music offers).

additional feature, for maximum possibilities of use¹¹. If access to content is restricted, the public, users and consumers do care about the «price» to pay.

The tendency of copyright law to restrict competition through the grant of exclusive rights is quite inevitable. In this respect, competition law plays its role to regulate the market. However, anti-competitive and exclusive market positions can also be eliminated through copyright limitations and exceptions.

COPYRIGHT LIMITATIONS AND EXCEPTIONS : HOW CONSUMERS CAN INFLUENCE THE BALANCE OF RIGHTS

The whole intellectual property system is about finding the balance between the rights of copyright holders and the rights of copyright users. This inner balance is materialised through the exceptions and limitations to the exclusive rights that are conceded by the law. If the discussion about how this balance can be better achieved is perpetual (A), it has nonetheless gained importance in the digital environment, with the growing role of consumers as core stakeholders and with new challenges for the legislator (B).

A. The crucial importance of copyright limitations and exceptions

1. A question of balance...

The balance of interests is at the core of intellectual property regulation, as stated in the Preamble of the World Intellectual Property organisation's Copyright Treaty¹² and in article 7 of the TRIPS Agreement¹³, which provides that «*the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations*».

¹¹ Some online music services propose their users to choose between downloads of files protected by technical measures for the usual price, and downloads of files in the open MP3 format for a higher price. A large part of users chose the latter option.

¹² See above, p. 526.

¹³ Agreement on Trade-related aspects of intellectual property rights (see above, p. 528).

The main premise of copyright law is that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work¹⁴.

Nevertheless, copyright law also sets forth several important exceptions to those rights, making allowance for such concerns as private copying (*i.e.* copies made for private use), backup copies of software, distance learning or some reproductions made by libraries¹⁵. Depending on the national legal tradition, the allowance of each use can be made by specific statutes (as it is the case in Common law countries such as Great Britain, and in the United-States, where the copyright law is said to fit an «analytic approach»), or can be incorporated in more general legal provisions (as it is the case in continental European countries, where the copyright law is said to correspond to a «synthetic approach»). The notions of «fair dealing» in Great-Britain and of «fair use» in the US provide for sets of criteria enabling judges to adjust case law on copyright limitations to facts.

The 2001 European Directive on copyright¹⁶ tried to harmonise all the national differences of Member States in terms of exceptions. However, the task was too heavy to be totally fulfilled, and Member States still have freedom in the implementation of the vast majority of exceptions.

The interests of rights holders and the interests of the public have been traditionally opposed, but they tend to come closer. The creation of works is more and more dependent on the influence of preexisting works. Creators are users of works, and users are creators¹⁷. Each of them are facing unprecedented threats in the digital age. Creators have to reinvent business models to benefit from the latest modes of exploitation, and although users can access increasing amounts of

¹⁴ Apart from these remuneration rights, that can be split into two main categories : the right of reproduction and the right of communication to the public, rights holders also benefit from «moral rights», that allow an author to receive or decline credit for a work, or to prevent revision, alteration, or distortion of her/his work without her /his permission.

¹⁵ The law is very clear as to the fact that the beneficiaries of copyright limitations and exceptions are the «legitimate users» that have legally acquired or accessed the copyrighted content. Whether such exceptions can be considered as «users rights» is debated among intellectual property law specialists.

¹⁶ 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, *OJ*, L 167, 22 juin 2001, p. 10.

¹⁷ The development of «user generated content» on the Internet is an illustration of this phenomenon.

digital content, their ability to use content is restricted by new control and intrusion means¹⁸.

Shall it mean that these interests oppose even more to each other? We rather think that they shall meet towards «intellectual property welfare», even if the immediate goal to achieve may differ : more «control» and more remuneration for copyright owners, and more «informed» access to content for users.

Copyright limitations and exceptions are also important because they ensure legal certainty to users, but also to rights holders, who can both reasonably use and allow uses without excessive litigation. Limitations and exceptions also reduce transaction costs, instead of expensive remedies provided by competition law.

2. ... a balance that needs guidance

The issue of copyright limitations and exceptions cannot be accurately tackled without mentioning the «three step test». Under this complex terminology lies a core notion copyright law, that is not as incomprehensible as it looks : «*Members [States] shall confine limitations or exceptions to exclusive rights [‘first step’] to certain special cases [‘second step’] which do not conflict with a normal exploitation of the work and [‘third step’] do not unreasonably prejudice the legitimate interests of the right holder*» (art. 13 TRIPS¹⁹, art. 10 WCT²⁰, art. 5.5 of the 2001 European copyright Directive)²¹.

The three-step test gives national legislators a «tool box» of concepts to help them to determine the scope of copyright limitations and exceptions within their domestic legal system. The role of the three-step test is also wider than that, since it aims to perform distinct functions at different regulatory levels. Internationally, the test allows to control the States autonomy in drafting exceptions in national copyright laws. At the domestic level, the test may be incorporated directly into the law, or it may serve as a means of interpretation of the law for local jurisdictions²².

¹⁸ Notably through technical protection measures (see above, footnote 7), often coupled with spywares or other softwares enabling to track the uses made by users.

¹⁹ Agreement on Trade-related aspects of intellectual property rights (see above).

²⁰ W.I.P.O. Copyright Treaty (see above).

²¹ See above, footnote 16.

²² On the application of the three-step test, see, for example, Ch. GEIGER, «Right to Copy v. Three-Step Test – The Future of the Private Copy Exception in the Digital Environment», *Computer Law Review International* (Cri), 1/2005, p. 7; J. GINSBURG, «Towards Supranational Copyright Law? – The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions», *R.I.D.A.*, January 2001/187, p. 1.

The three-step test introduces an economic dimension into the assessment of copyright exceptions, which is new to many countries, especially for latin countries that are not acquainted with the legal «testing» system (which is quite common in the US). Some local jurisdictions are therefore hesitant as to the implementation of the test, which has led to some landmark decisions²³.

What are the concrete circumstances where the three-step test shall apply? How shall the test be interpreted? Shall the «steps» be considered as a whole, or is there a hierarchy that has to be respected, by the legislator and by the judge? The answers to those questions have significant consequences.

All these considerations have led the Max Planck Institute to issue a «Declaration for a balanced interpretation of ‘the three-step test’ in copyright law»²⁴. This position adopted by such a prestigious academic institution shows the importance of the debate, and the high need of guidance to hold the copyright balance of interests.

As stated in the Max Planck Declaration, the three-step test has established an effective means of preventing the excessive application of limitations and exceptions. However, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach. For this reason, the three-step test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions, which is essential if an effective balance of interests is to be achieved.

Limitations and exceptions are the legal instrument for the empowerment of consumers in the domain of intellectual property. If the balance of rights is altered, it has then to be reestablished. In that respect, consumers can make their voice heard through the organisations representing them.

B. Towards more and better copyright limitations and exceptions

The interpretation of existing copyright exceptions is important, and a proper reading of the three-step test is essential in that respect. However, the whole balance of interests has to be reassessed in the digital context.

²³ See the «Mulholland Drive» case (France) : Cass. , 1^{re} ch. civ., 28 February 2006, *Studio Canal et a. v. Perquin et UFC-Que-Choisir*. On this case, see for example Ch. GEIGER, in *R.L.D.I.*, 2006/15, p. 49.

²⁴ The Declaration can be found on the Max Planck Institute’s website : http://www.ip.mpg.de/www/en/pub/news/declaration_on_the_three_step_cfm.

Copyright limitations and exceptions are on the work program of the World Intellectual Property organisation (WIPO) Standing Committee on Copyright and Related Rights (SCCR). Some WIPO Member States and some non-governmental organisations have striven to keep the issue of limitations and exceptions on the WIPO agenda, to call the Organisation to adopt a norm-setting instrument on minimum standards.

The Trans Atlantic Consumer Dialogue has issued a policy recommendation²⁵ to the European Commission and to the US government, advocating for the adoption of minimum copyright limitations and exceptions needed to protect the public interest, especially as concerns the needs of the visually impaired.

Consumer organisations shall ensure the empowerment of consumers in general, but also of vulnerable consumers, such as the persons with disabilities. The WIPO Standing Committee commissioned a «Study on Copyright Limitations and Exceptions for the Visually Impaired»²⁶. As this study noted, «copyright legislation is territorial in nature (...). Where activity is undertaken across jurisdictions, it is usually, therefore, extremely difficult to determine with certainty what parts of that activity are lawful and what parts are not».

This confirms the extreme complexity and legal uncertainty of navigating different national copyright regimes, in order to publish works and services for the visually impaired in one country that are used in another country. The World Blind Union (WBU) has called for global norm setting²⁷ to create the type of harmonisation and legal certainty needed in the area of minimum limitations and exceptions, in order to facilitate investment in services that are essential for expanded access to protected works for visually impaired persons.

National laws on limitations and exceptions for disabled populations lack harmonisation and are often out-of-date as they relate to modern information technologies. Digital copies of copyrighted works can now be transmitted over the Internet and distributed to disabled populations in formats that support indexed and searchable access to works using audio, refreshable Braille and large type readers. Some national laws do not address the new publishing platforms that are impor-

²⁵ [Http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=342](http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=342).

²⁶ Judith SULLIVAN, «Study on Copyright Limitations and Exceptions for the Visually Impaired», February 2007, SCCR/15/17 (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696).

²⁷ The WBU has made a proposal for a «WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons», which is supported by several organisations, among which the Trans Atlantic Consumer Dialogue.

tant to the disability community, and the current legal environment does not allow for the export and import of works across borders. This has the consequence of severely restricting access to copyrighted works for a very large range of persons. Because digital technologies give new opportunities to fill the gap, these opportunities should be fully recognised by the law at the international level.

Even if efforts are already made to obtain voluntary licenses for access to works, yet the reality is that only a tiny fraction of copyrighted works licensed for use in available accessible formats exists. Using limitations and exceptions to copyrights, some countries have created some important collections of works in accessible formats, but cannot export those works to countries that lack such collections.

What is true for the visually impaired is true for others groups and industries, namely that there are areas where cross-border publishing and innovative services cannot fully develop without greater harmonisation and legal certainty regarding minimum limitations and exceptions.

An agreement on minimum limitations and exceptions for visually impaired persons would present challenges, but it may provide a concrete model for addressing other areas where there are compelling benefits of harmonisation of minimum limitations and exceptions.

At the European level, the Green Paper on Copyright in the knowledge economy²⁸, that has been submitted to public consultation by the European Commission, is also a good opportunity to address the issue of limitations and exceptions.

This European initiative and the current work program of the World Intellectual Property Organisation show the importance of the debate on copyright limitations and exceptions. This debate is not just another theoretical discussion on the concepts of copyright law. It is very concrete and addresses the question about how consumers can contribute to make intellectual property law evolve.

²⁸ See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156>.