

V. Potential Impediments to the Introduction of a Public Interest Exception to Copyright

A. *The EC Copyright Directive*

The European Community (hereinafter the “EC”) does not have direct competency in the field of copyright. Hence the EC legal framework on copyright law is based upon a series of Community Directives which attempt to harmonize certain aspects of the law.

The current EC framework comprises seven Directives relating to copyright i.e. the Computer Programs Directive,¹¹³ the Rental Rights Directive,¹¹⁴ the Term Directive,¹¹⁵ the Copyright Directive,¹¹⁶ the Satellite and Cable Directive,¹¹⁷ the Database Directive¹¹⁸ and the Resale Rights Directive.¹¹⁹ These Directives have been addressed to all EC Member States and hence are of common application within the EC.

113 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

114 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

115 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

116 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.

117 Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

118 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

119 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

The Directives constitute binding laws which Member States are obliged to implement into their domestic legal frameworks. Hence the provisions contained in these Directives can have a direct bearing on the present discussion in terms of the manner in which they promote or hinder the introduction of a public interest defense within the EC Member States. The Copyright Directive is of particular significance in this respect.

The Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (usually referred to as the EC Copyright Directive) attempts to achieve harmonisation within the EC legal framework with respect to several essential rights of authors and neighbouring right holders, and the limitations and exceptions that may be imposed upon these rights by the national legislatures of Member States.¹²⁰

Although the Directive applies expressly to the protection of copyright and related rights in the context of the internet, its application is not limited to the protection of copyright in the information society and it is of general application with regard to all categories rights and subject matter that fall within its scope.¹²¹

It guarantees to authors, performers, phonogram producers, producers of films and broadcasting organisations the exclusive rights to reproduction, communication and making available to the public and distribution in respect of specified subject matter,¹²² and was enacted with the primary objective of securing the implementation of two international treaties into the EC legal framework, namely the WIPO Copyright Treaty¹²³ and the WIPO Performances and Phonograms Treaty.¹²⁴

120 Stefan Bechtold *Directive 2001/29/EC in Concise European Copyright law* Thomas Dreier and P Bernt Hugenholtz (eds.) 343 Kluwer Law (2006).

121 See Article 1(1).

122 See Articles 2,3 and 4.

123 World Intellectual Property Organization, Copyright Treaty Apr. 12, 1997 S. Treaty Doc. No. 105-17 (1997).

124 World Intellectual Property Organization, Performances and Phonograms Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997).

The preamble of the Directive sets a positive note by acknowledging in Recital 31 that a fair balance of rights and interests must be safeguarded between the various categories of right holders, as well as between the different categories of rightholders and users of protected subject-matter.

Hence it appears that the Directive aims towards the achievement of an equilibrium between the rights of copyright owners and the public interest.

Towards this end a series of limitations are introduced under Article 5 of the Directive with respect to the rights granted therein. However the manner in which these limitations are framed and presented pose a serious challenge to the possibility of the introduction of a public interest exception to copyright in Europe.

Firstly these are rigidly defined and aimed to apply within a precisely delimited scope of application.

For example they apply with regard to reproductions made by publicly accessible libraries, educational establishments, museums or by archives which are not for direct or indirect economic or commercial advantage;¹²⁵ use of copyrighted works for the purpose of illustration for teaching or scientific research;¹²⁶ and reproduction by the press or use in connection with the reporting of current events to the extent justified by the infamatory purpose.¹²⁷ It is noted that save the mandatory limitation to the right of reproduction under Article 5(1) all other limitations are merely optional.¹²⁸

Hence it is evident that although the list of exceptions provided for under Article 5 of the Copyright Directive form a comprehensive set of limitations to copyright, the manner in which they are framed do not allow the courts to exercise the necessary level of discretion so as to use them in order to strike an equilibrium between copyright and the freedom of expression.

125 Article 5(2)(c).

126 Article 5(3)(a).

127 Article 5(3)(c).

128 *See* Articles 5(2) and (3).

Further an even more serious challenge is posed to the introduction of a public interest exception, under Recital 32 of the preamble to the Directive which states that,

*“This Directive provides for an **exhaustive enumeration** of exceptions and limitations to the **reproduction right** and the **right of communication to the public**”.* (emphasis added)

Therefore, the limitations set out under Article 5 of the Directive are to be interpreted as being exhaustive with regard to the limitations and exceptions that could be introduced by the EU Member States within their domestic legal systems in relation to the right of reproduction and the right of communication to the public as provided under the Directive.

Thus it appears that with regard to the two categories of rights expressly mentioned therein, Member States are effectively prevented from introducing novel limitations or exceptions apart from those expressly mentioned under Article 5.

Thus the primary issue that arises for consideration is as to whether pursuant to Article 5 read with Recital 32, The EC Copyright Directive forms an effective bar to the introduction of a broad-based general exception to copyright based upon the public interest in Europe.

The legislative history of the Copyright Directive is considerably vague in relation to the objective sought to be achieved by the introduction of the rule in Recital 32.

The Green paper which preceded the enactment of the Copyright Directive deals only incidentally with the issue of the limitation of the rights to be protected under the Directive.¹²⁹

However a consideration of the general discussions which took place during the drafting process as well as the general objective of

129 Green Paper: Copyright and Related Rights in the Information Society. Commission of the European Communities. Brussels 19.7.1995 COM(95)382 final; Hugenholtz *“Why the Copyright Directive is Unimportant, and Possibly Invalid* 11 EIPR 501,501-502 [2001] <http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html>.

the Directive which as expressed in its long title relates to the harmonization of copyright within the EU Member States, indicate that the rule in Recital 32 was introduced primarily to ensure uniformity in the application of limitations to copyright and neighbouring rights within the EU and to minimize the confusion and the resulting impediment to the free movement of goods and services within the EU that would ensue as a result of the existence of divergent standards of limitations.¹³⁰

As noted in the explanatory memorandum to the proposal on the enactment of the Copyright Directive, it was felt that without adequate harmonization of copyright exceptions and the conditions of their application, Member States might continue to apply different categories of limitations to these rights in different forms.¹³¹

This serves to indicate that the purpose of Recital 32 was to ensure harmonization of standards of copyright enforcement within the EU Member States in relation to the rights specified in the Recital, as opposed to the desire to merely strengthen the scope of these rights, by ensuring that they would be encumbered by a minimum degree of limitations.

Thus this serves to establish that the primary legislative intention behind the introduction of the Copyright Directive, does not *expressly negate* the introduction of a public interest exception to copyright in

130 See for example the statement on the draft Directive issued by the European Federation of Journalists

EFJ Statement on the Draft Copyright Directive 22 December, 1999. <http://europe.ifj.org/en/articles/efj-statement-on-the-draft-copyright-directive->

“The EFJ urges the European Union Member States to ensure that the copyright directive establishes an exhaustive list of non-mandatory limitations in Article 5...The harmonisation of limitations in Article 5 must be exhaustive, because without harmonisation of the limitations, Member States might continue to apply a large number of different limitations and exceptions to these rights and, consequently, apply these rights in different forms. On the other hand, it is crucial for journalists and other authors in the digital environment to have a strong legal protection against different interpretations of limitations and exceptions between Member States in respect of their national laws.

131 See *“EFJ Statement on the Draft Copyright Directive”*, page 3.

Europe although it deems desirable the establishment of a uniform standard of copyright limitations within the EC Member States.

1. Article 5 of the Copyright Directive

Although defined in very specific terms the limitations introduced under Article 5 can be seen to constitute a comprehensive body of limitations to copyright.

As Hugenholtz observes,

*“The Commission’s original aim of limiting the number of exemptions to a bare minimum, enumerated in an exhaustive manner, has backfired dramatically. In the course of the negotiations in the Council Working Group the Member States have managed to maintain most, if not all, of the limitations currently existing in national law. Thus, article 5 now lists no fewer than 20 possible exemptions. An exhaustive list indeed!”*¹³²

It is further noted that the limitations set out under Article 5 do succeed in encompassing a wide spectrum of instances where the use of a copyright-protected work would be in the legitimate interests of the public.

For example Article 5(3)(k) which provides an exception with regard to the use of copyrighted material for the purposes of caricature, parody and pastiche offers a basis upon which to balance the economic interests of copyright holders against the freedom of expression of the public and individual artists to utilize copyrighted material for the purposes of jest and social commentary.

Hence although it is admitted that the limitations do not allow the legislature or the judiciary adequate flexibility to engage in a broad-based balancing exercise between the competing values of copyright and the interests of the public, it does offer limited scope for the bal-

¹³² Hugenholtz *Why the Copyright Directive is Unimportant, and Possibly Invalid* 11 EIPR 501,502 [2001] <http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html>.

ancing of the competing values of copyright protection and the legitimate interests of the public with regard to the particular instances defined under Article 5.

However notwithstanding the limited possibility offered under the Directive for the balancing of copyright and the public interest, substantial arguments exist in favour of the introduction of a broad-based general exception to copyright independent of Article 5 of the EC Copyright Directive.

Firstly although the limitations set out under Article 5 are fairly comprehensive in scope they cannot foresee all possible instances which would require the limitation of copyright in the public interest.

Secondly as has been noted earlier, save the mandatory limitation to the right to reproduction under Article 5(1) all other limitations are merely optional and are to be adopted by Member States at their discretion.¹³³ Thus all the limitations set out under Article 5 may not in fact be available within the legal systems of all Member States, which would necessitate the existence of a general exception to copyright in order to effect an adequate equilibrium between copyright and the public interest.

2. *Overcoming the Bar under Recital 32*

Hence it remains to be considered as to whether possible means exist by which the bar placed by Recital 32 to the introduction of further limitations and exceptions to the rights enumerated thereunder may be circumvented.

133 Article 5(2) “Member States **may** provide for exceptions and limitations to the reproduction right provided for in Article 2 in the following cases...” (emphasis added)

Article 5(3) “Member States **may** provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases...” (emphasis added).