DOCTRINE AND OPINIONS

OVERVIEW OF EXCEPTIONS AND LIMITATIONS TO COPYRIGHT IN THE DIGITAL ENVIRONMENT

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Introduction

Most copyright laws have been framed with a view to striking a balance between the monopoly granted to creators over their work on the one hand and society’s need to have free access to creative work without being impeded by authors’ exclusive rights on the other hand. These laws have been aimed at ensuring a good “balance” between the interests involved, and they have done so by granting authors a monopoly over their creative work, but at the same time instituting exceptions and limitations to that monopoly.

However, technological changes, and the development of digital media in particular, have considerably modified the balance that had been struck. The question of defining the exclusive rights granted to authors in such a way as to accommodate both creators’ interests and the needs of society has therefore arisen once again.

To assess the current situation, we propose first to examine briefly the notion of exceptions and limitations to copyright (I), their place in new standard-setting texts that take the digital environment into account (II), and lastly to consider their possible future in this new environment (III).

I. The notion of exceptions and limitations to copyright

Exceptions and limitations to copyright constitute a notion that lies at the very heart of the ratio legis of legislation. While copyright corresponds to a monopoly that society grants to authors over their creative work, exceptions and limitations to these exclusive rights appear to be a form of quid pro quo, allowing individuals, under certain conditions, to use a work without requiring authorization from the owner of the copyright, which shows that in granting the author a monopoly account has been taken of the need to balance the interests of both parties, namely the author and society, which undertakes to protect the author’s creative work (A). In practice, exceptions and limitations to copyright are spelt out in domestic laws and international texts (B).

A. Exceptions and limitations to copyright in order to achieve a balance of interests

1. The underlying philosophy of copyright

Copyright is a compromise between the interests of authors and users, in other words, society at large. It represents a balance between the interests at stake. The system does not depend on the author alone; if society grants exclusive rights, it must be to its advantage to do so, and it is through exceptions and limitations that this balance is achieved. By allowing users to use a protected work without requiring the author’s permission, the exceptions and limitations are a reminder that copyright is granted by society with a view to deriving cultural and scientific “benefits” from it. This is the philosophy underlying nearly all copyright laws, whether in common law or civil law countries.

Accordingly, in American law, the Constitution itself explains why a monopoly is granted to the author. Article 1, Section 8, stipulates that it is in order “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. The same ratio legis is found in the laws of continental European countries. For example, Spanish Law 22/187 on intellectual property states in its explanatory section that “this law is aimed at providing a satisfactory response to our society’s demand that due recognition and protection
be granted to the rights of those who through their creative works contribute so brilliantly to the formation and development of culture and science for the benefit and enjoyment of all citizens.¹

A single country appears to be an exception to the recognition of this balance of interests which is paramount to copyright legislation: France. French copyright law is based on respect for the artist’s creative work, and is centred on the author. Desbois has written² that, “In accordance with French tradition, Parliament has rejected the view that intellectual works are protected by virtue of considerations of opportunity in order to stimulate literary and artistic activity” and that “on the contrary, the French tradition is imbued with individualism”. Therefore, even though it recognizes exceptions to copyright, French law does not officially recognize that copyright entails a *quid pro quo* in favour of society.

Whether it is recognized explicitly or not, in all copyright laws protection of the exploitation of a work is nonetheless conditional on recognition of exceptions to and limitations on the monopoly enabling certain users to perform or reproduce the work without infringing its author’s exclusive right. These limitations and exceptions have been the subject of discussion, which has helped to classify them and clarify their *raison d’être*.

2. **Justification of exceptions and limitations to copyright**

B. Hugenholtz³ has identified three types of reasons justifying limitations to the copyright monopoly. His analysis complements, without contradicting it, the rationale based on the *ratio legis* of legislation. He distinguishes different rationales for exceptions to copyright. His views shed a more modern light on copyright and the reasons for limitations thereto. By classifying exceptions according to type, he helps to define them more clearly in order to determine which ones are relevant or obsolete in the digital environment. He holds that these exceptions do not all have the same force, and that in the world of networks, some are no longer justified, while others remain fully valid.

The first type of limitation to the exclusive right granted to authors is explained by respect for fundamental freedoms, in particular freedom of expression, freedom of the press and the right to information. This type includes exceptions to copyright that are often known as right of quotation, parody, caricature, press review, pastiche, etc., which allow a user to refer to and quote another person’s work without having to request prior consent.

The fact that such use is not made part of the author’s exclusive rights is easily explained. If the author’s monopoly were broad enough to prevent such use, it would be impossible, for example, to review an exhibition, to quote a work and make a study or pastiche thereof, etc. No critical reviews would be possible and no news could be circulated about a work without the copyright owner’s prior authorization. This being the case, limitations to copyright are the guarantees of a democratic society. Such limitations are crucial and must be preserved, whether in the analogue world or in the digital world.

The second type of exception to copyright concerns the public interest. Here, limitations to copyright are based on the needs of society, which are met through libraries, museums, the education system, archives, etc. Certain users of works are excluded from the copyright owner’s monopoly because of society’s need to have access to them without hindrance and free of charge. This is the policy that lawmakers seek to pursue by defining exceptions and limitations to copyright precisely: the author’s monopoly may thus be restricted on behalf of educational institutions, libraries or, for example, the disabled.

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With regard to the second type of limitation to copyright in the digital environment, according to M. Buydens and S. Dusollier, “even though one can only be in favour of maintaining existing exceptions in this new framework, this will not obviate the need to reflect on the role and function of online libraries and education and the potential prejudice to authors and the exploitation of their work”.

The third type involves exceptions designed to address market dysfunctions, in other words situations in which it is impossible for copyright owners to exercise their exclusive rights in the work. This limitation is found in the so-called private copy exception, which is granted because it was impossible for copyright owners to know about and therefore to authorize or prohibit the copying of their work by means of reproduction devices such as audio or video cassettes or diskettes and other blank disks.

This last type of exception poses a particular problem in the digital environment. Unlike analogue media, digital media enable copyright owners to supervise the use that is made of their work: technology now enables them to authorize or prohibit whatever use is made of their creative work, which was impossible before the development of the new technologies. Digital media are a solution to this market dysfunction. The question is therefore whether private copy exceptions are still justified in the digital environment, whether they can be implemented effectively, and how, if need be, they may be regulated.

A characteristic which is common to all copyright laws is that the exceptions and limitations provided for reflect both philosophical and practical considerations. However, they take different forms in the various legal texts, both national and international.

B. The various systems of exceptions and limitations to copyright

Exceptions and limitations to copyright are enshrined in two kinds of legislation. The first concerns open systems (1); the second involves closed systems (2). Finally, the Berne Convention has instituted a test aimed at justifying recognition thereof (3).

1. Open systems of exceptions

An “open” limitation on copyright is based on a statement rather than on an exhaustive list of acts which do not constitute infringements. It involves a general “clause” outlining exceptions to copyright. As Colombet states quite clearly, although this technique is less precise than an exhaustive list, it has the advantage of flexibility.

The most significant example of an open system is that of fair use, favoured by the United States. Fair use is an equity-based doctrine that allows a copyrighted work to be used in certain circumstances without requiring the copyright owner’s authorization and without constituting an infringement. As Jane Ginsburg has indicated, fair use applies in theory to all exclusive rights granted to authors, however most lawsuits concern the right of reproduction and the right to create derivative works.

Fair use is now governed by the provisions of Section 107 of the Copyright Act of 1976, which contains a non-exhaustive list of considerations which determine whether or not fair use is made of a work. This is not a cumulative list of elements but rather a set of factors to be considered.

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6 Jane Ginsburg, Chronique des USA (II), RIDA, April 1999, p. 223.
The first factor concerns the purpose and character of the use: the question, as summarized by Professor Merryman, is whether the work is copied in good faith, for the benefit of the public, or primarily to serve the commercial interests of the infringer. American courts have clarified this factor in recent rulings. Accordingly, in the 1994 ruling on Campbell v. Acuff Rose Music Inc. concerning a parody of Roy Orbison’s song Oh Pretty Woman, the Supreme Court, in its assessment of this borrowing, considered that greater emphasis should be placed on the transformative nature of the use than on its commercial aspect. Similarly, the ruling on Leibovitz v. Paramount Pictures Corp. (2nd Circuit, 1998) indicated that use of a work for advertising purposes could qualify as fair use.

The second factor concerns the nature of the “borrowed” work: there is a need to determine whether factual, creative and imaginative factors are involved if the work was created in pursuit of financial gain.

The third factor concerns taking into account the amount of the work used: it would not be fair to use more of the work than necessary.

The last factor to take into consideration is the effect of the “borrowed” work on the market for the original work: a balance needs to be struck between the profit that the owner of copyright in the original work would get if the use is recognized not to be fair and the benefit that the public would derive from it if the use is deemed to be fair. In a recent case, Infinity Broadcast Corp. v. Kirkwood (2nd Circuit, 1998), a retransmission service enabling subscribers to listen over the telephone to radio broadcasts by distant stations invoked fair use. That service was creating a new market. The Court rejected the fair use defence in this particular case, however, for “But if fair use exempts non transformative redissemination of copyrighted works to new audiences generated by new modes of exploitation, then what is left of copyright when the new modes of exploitation rival the old if the fair use exception were to exempt the non-transformative retransmission of protected works to the new audiences generated by new modes of operation, what would remain of copyright when the new modes of operation are in competition with the old ?[…].” It would thus seem all the more difficult to invoke fair use to justify the retransmission of works to audiences which are far away from the place of initial transmission by digital media such as digital broadcasting and the Internet.

Alongside this open system of exceptions, the least widespread are closed systems.

2. Closed systems of exceptions

A closed system of exceptions to copyright is based on an exhaustive list of lawful acts. This is the solution adopted by European countries, whether governed by civil law, like France, or common law, like England and Ireland.

In France, for example, the system may be seen in Article L122-5 of the Intellectual Property Code, which lists a series of exceptions to the author’s exclusive right, such as the right to copy for private use, analyses, short quotations, press reviews, parody, pastiche, etc. These are the only exceptions that may restrict the author’s monopoly, and they are furthermore subject to strict interpretation.

In English law, the Copyright, Designs and Patent Act of 1988 sets out a series of exceptions to copyright, some of which have to do with criticism, information or educational purposes. These exceptions must be interpreted by the judge in the light of fair dealing. Fair dealing is a criterion for assessing the validity of exceptions. English judges have therefore had to clarify this notion. They have

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8 Jane Ginsburg, News from the US, (part II), RIDA, April 1999, p. 127.
9 Taken from the decision quoted by Jane Ginsburg, op. cit., pp. 243-245.
determined that their appraisal must be made *in concreto*, taking into account the proportion of the work that was “borrowed”, while ensuring that the amount borrowed did not prevent normal exploitation of the work or cause the copyright owner to incur any financial loss. Fair dealing is therefore similar in spirit to America’s *fair use*, but unlike the latter, is not a full limitation on the monopoly granted to the author since its application is tied to clearly stipulated exceptions.

The recently reformulated Irish copyright law is founded on the *Copyright and Related Rights Act 2000*, which sets out a list of exceptions, such as quotation for the purposes of criticism, reporting, education, archives, etc. Like its English model, Irish law requires that the validity of exceptions be dependent on the fact that in order to be lawful, use must constitute “fair dealing”. Article 50-4 of the Act provides that fair dealing “means the making use of a […] work […] which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright”. As in English law, the idea of measure is thus present: borrowing is not lawful unless it respects the legitimate interests of the copyright owner.

In addition to these two systems, international texts stipulate criteria for appraising exceptions and limitations to copyright which may be appropriate for both closed and open systems.

3. **The three-step test instituted by the Berne Convention**

The Berne Convention does not give a new definition of limitations to copyright, but it introduces a test for determining whether or not unauthorized use is lawful. The three-step test involves three factors which must be taken into consideration. It is set out in Article 9-2 of the Convention, which stipulates that “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.

The three-step test has been taken up in the TRIPs agreements, as can be seen from Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakech, April 1994), which stipulates that, “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work”.

By means of this three-step test, international texts have provided a framework for the “balance of interests” which governs recognition of limits to copyright for the benefit of society. However, this balance has been called into question following the development of digital media; in particular, the relevance of certain exceptions and limitations to copyright has been criticized. It may therefore be useful to examine how the new international and national standards that take the digital environment into account have reacted to that debate.

**II. Exceptions and limitations to copyright in the digital environment**

The growth in dissemination of works in digital form has brought to the fore the need for new legislation (A). This has led to the adoption of new laws, which provide examples of ways of striking a balance between the protection of copyright owner’s interests and the maintenance of limitations on their exclusive rights (B).

A. **The need for new legislation**

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Authors and users were the first to lobby for new texts (1), leading eventually to the elaboration of the 1996 WIPO Treaties (2).

1. Lobbying by the parties concerned by digital dissemination

Digital communication, essentially through the Internet, has rekindled the debate on authors’ rights and the justification for them. First of all, the idea has rapidly caught on among network users that private copying is permissible so long as no profit motive is involved.\(^{12}\) That has led one school of thought to champion the notion of free use, which – it is claimed – should be a central principle of the Internet.\(^{13}\) Free use is a recurrent theme among digital network users (see the debates on the patentability of software, the positions taken by anti-Microsoft and the pro-Linux camps, etc.). At the same time, the development of digital networks has enabled copyright owners to ensure that their rights are fully and wholly respected. Fairly quickly, another school of thought, endorsed by the courts, has established that even if certain readjustments are required, “literary and artistic property, which has historically demonstrated its capacity for adaptation, is basically well enough equipped to meet the challenge of digital technology”\(^{14}\). It follows that the legal provisions hitherto applicable in the analogue environment are equally so in the digital environment, whether in the case of networks or CD-ROMs.

In addition to traditional legal measures, rightholders can also protect their property through technological measures. Technological progress has made it possible, firstly, to control access to certain works by encryption or encoding and, secondly, to control the use of the works. For example, the owner of video game rights may choose to authorize the use of such games only on certain machines or, again, a film distribution rightholder may prevent DVD copies from being produced.\(^{15}\)

Taking a lead from Charles Clark, we may sum up this method of “defending” copyright in the phrase: *The answer to the machine is in the machine.*\(^{16}\) Technological progress is a threat to copyright, but this same technological progress also allows copyright to continue existing.

However, this approach does have some inherent limitations: for while rightholders can protect themselves by technological measures such as encoding, those same measures can obviously be circumvented or neutralized by new techniques. Rightholders have therefore turned to lawmakers for protection specifically designed to cover digital distribution. It was against this background that the 1996 WIPO Treaties were drawn up.

2. The 1996 WIPO Treaties

WIPO adopted two treaties on 20 December 1996, the first relating to copyright and the second to related rights. In the preamble to the WIPO Copyright Treaty (WCT), the Contracting Parties recognize the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”. The same approach is adopted in the treaty on related rights. It may be noted that the limitations on copyright are not at issue: their *raison d’être* is clearly reaffirmed.

13 See, for example, Christian Vandendorpe, “Pour une bibliothèque universelle” (For a universal library), *Le Débat, Internet, une révolution pour la propriété intellectuelle*, October-November 2001, Gallimard, p. 31 et seq.
14 André Lucas, *Droit d’auteur et numérique* [Copyright and digital technology], Litec, 1998, No. 19, p. 12.
Articles 10 and 11 of the WIPO Copyright Treaty concern limitations and exceptions to copyright in the digital environment.

Article 10 stipulates that, “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author, and (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”.

This article extends the three-step test, applicable in the Berne Convention to the right of reproduction only, to the entirety of the rights provided for in the new treaty. It follows that, to conform with the new treaty, any legislation relating to copyright in the digital environment must meet this requirement when defining the exclusive rights granted to authors.

Article 11 stipulates that the “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”.

This article encourages States to provide for adequate legal protection as well as effective sanctions against the circumvention of effective technological measures employed by copyright owners. Such measures, which include encoding or anti-copy systems, are designed to restrict acts not authorized by rightholders or by the law. The first condition of such protection is that these measures must be implemented within the framework of the WIPO Copyright Convention or the Berne Convention. Thus, to warrant protection, a technological measure must have as its aim the protection of a right deriving from the author’s exclusive rights. Article 11 cannot, for example, be used to protect any measure aimed at protecting something that is not a work (for example a mere piece of information) or a work that is in the public domain.

The second condition of protection specifies, a contrario, that acts authorized by the rightholders concerned or permissible in law do not come within the purview of Article 11. It may thereby be inferred that the recognition of limitations and exceptions to copyright (whether the system is open or closed) is “protected” under Article 11. A literal reading of this provision makes it clear that technological measures aimed at circumventing a legitimate use of a work do not qualify for legal protection.

These treaties establish three levels of protection in the digital environment for copyright owners: the first consists of basic copyright; the second involves technological measures to protect access to and use of the work; and the third comprises legal protection of the second-level technological protection measures.17

Following the adoption of the WIPO Treaties, the legislators concerned have correspondingly modified their laws to ensure the full exercise of authors’ rights in the digital environment.

B. The new laws

Four examples of legislation adapted in accordance with the principles embodied in the 1996 WIPO Treaties indicate possible ways of reconciling the interests of copyright owners with those of users of protected works in the digital environment:

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17 Jacques de Verra, op. cit., p. 4.
• the United States Digital Millennium Copyright Act of 28 October 1998 (1);
• the Japanese laws on copyright and unfair competition, in effect from 1 October 1999 (2);
• the Australian Digital Agenda Act, in effect from 4 March 2001 (3);

1. The Digital Millennium Copyright Act (DMCA)

On 28 October 1998, the United States Congress promulgated the Digital Millennium Copyright Act, thereby adding a new chapter to federal copyright law. This Act was the outcome of bitter debates between two camps. The first was constituted by the copyright-owner industries, which sought the broadest possible protection against acts designed to circumvent technological measures. They regarded this approach as the only way to protect their rights effectively. The second camp, bringing together universities, libraries and consumers, held that such measures would hinder innovation and would be completely unjustified in the case of the lawful use of a work. The following aspects of the DMCA illustrate the compromise position arrived at by the drafters of the law.

(a) Circumvention

Firstly, concerning access to a protected work, the DMCA prohibits the circumvention of technological measures controlling such access together with the manufacture, sale or importation of materials or services designed for that purpose. Secondly, concerning the protection of a work against copying, the DMCA prohibits the manufacture, sale or importation of technologies or services designed to circumvent such protection.

The difference between these two points is that, in respect of access to the work, the act of circumvention itself is prohibited, whereas in respect of protection against copying, the act of circumvention itself is not prohibited. Lawmakers wished thereby to enable the fair use principle to be applied by permitting the lawful copying of a protected work.

(b) Exceptions to the prohibition on circumvention

To maintain the possibility of fair use, the DMCA expressly provides for a series of exceptions to the prohibition on circumvention, including: encryption research; reverse engineering for the sole purpose of identifying and analysing those elements of the program that are necessary to achieve interoperability of computer programs; security testing; access to databases containing personal information; and authorizing libraries, archives and educational institutions to access a protected work to enable them to make a good faith determination of whether to acquire a copy of the work.

In addition, the section of the DMCA relating to prohibition of the circumvention of technological measures controlling access to a protected work is subject to a two-year moratorium to enable the Library of Congress, in consultation with the Register of Copyrights, to determine the impact of such a prohibition on acts hitherto non-infringing under the title of fair use and to establish new exceptions where necessary. The Library of Congress and the Register of Copyrights accordingly published in October 2000 two additional exceptions, namely:

• compilations consisting of lists of websites blocked by filtering or parental control software applications;

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literary works, including computer programs, protected by access-control mechanisms that fail to permit access because of malfunction or obsolescence.

(c) Limitations of the new legislation with regard to the “balance of interests”

The Digital Millennium Copyright Act has modified the traditional American approach to limitations on copyright by enumerating exceptions and limitations. As a result, some legal scholars have raised the question of whether fair use can survive under these new conditions. Julie Cohen, for example, predicts that “it is likely that the scope for privileged uses will narrow”. She goes on to explain that the list of exceptions to the Digital Millennium Copyright Act runs counter to the American tradition of fair use, which is a pre-eminently open system and is much closer to the European system of making a comprehensive determination of the exceptions to copyright. More precisely, according to Cohen, the scope of fair use in the digital environment will be narrowed for three reasons:

- the DMCA approach reverses the traditional conception of fair use as essentially linked to non-commercial uses;
- the technological measures necessary for enablement of the exceptions to the DMCA are likely to be unavailable on the market since commercializing the technologies concerned would not yield any substantial profit;
- the whole procedure established under the DMCA takes no account of the idea that copyright and limitations on copyright may have other justifications for their existence (for example, fostering innovation, or respect for fundamental freedoms), recognizing market shortcomings as their sole justification. Since in the digital environment, authors can, at minimal cost, protect their exclusive rights, fair use would seem to serve no further purpose and could disappear. Furthermore, the small number of exceptions recognized by the Library of Congress tends to give more weight to the cause of copyright owners.

The Digital Millennium Copyright Act appears therefore to have created instruments of control that may threaten fair use. While the DMCA continues to recognize the existence of fair use, it makes the exercise of fair use impossible through excessive protection of technological measures, on which the existence of fair use depends.

2. Japanese law on copyright and unfair competition

In compliance with the 1996 WIPO Treaties, Japan enacted two laws, which came into force on 1 October 1999.

(a) Copyright law (Japan)

This law concerns the circumvention of technological copyright protection measures, principally directed against copying. These measures are defined as those taken to prevent any infringement of copyright. The law lays down criminal penalties for persons who manufacture or market devices aimed mainly at circumventing technological protection measures or who publicly transmit computer programs permitting such circumvention. The act of circumvention is not therefore illegal in itself; it is the trade in technologies conducive to this result that is prohibited and made subject to legal penalties.

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20 Julie E. Cohen, op. cit.
(b) The Japanese law on unfair competition

The second law relates to the circumvention of technological measures controlling access to protected works. The law refers to “technological restriction measures”, which are defined as “measures using electromagnetic devices to restrict the viewing of, listening to or recording of images or sounds or the execution or recording of programs”.

The law prohibits the transmission, importation, exportation or sale of technologies, the sole purpose of which is to impair the effectiveness of a technological measure. It may be noted, firstly, that unlawfulness is defined in a restrictive fashion and, secondly, that the act of circumvention itself is once again not prohibited (cf. the qualification “the sole purpose of which”).

Unlike United States law, Japanese law does not regard the act of circumvention per se as illegal. Furthermore, Japanese laws do not provide for any exceptions to the technological protection measures, which is explained by the fact that the act of circumventing these measures is not prohibited.

3. The Digital Agenda Act (Australia)

The Australian legislation enacted in pursuance of the 1996 WIPO Treaties entered into force on 4 March 2001, amending the Copyright Act of 1968. The status of limitations and exceptions to copyright is as follows:

(a) Technological circumvention measures

The technological measures protected by this new law are, equally and without distinction, those aimed at controlling access to a work and those designed to prevent copying. Copying is the only form of use against which the law offers copyright owners protection.

Like its Japanese counterpart, Australian law does not penalize the act of circumvention per se; rather it sanctions the trade in circumvention devices. It may be noted, as pointed out by S. Fitzpatrick, that Australia, which is more an “importer” of authors’ rights, wished – in contrast to the United States – to tip the balance in favour of users’ rather than authors’ rights. For that reason the Digital Agenda Act prohibits the trade in circumvention tools rather than private acts of circumvention.

(b) Exceptions to the prohibition on circumvention

The Act offers certain users exceptions – already recognized in the 1968 Act – to the prohibition on acts of circumvention. These include the reverse engineering of computer programs, copying by libraries, and security testing.

To obtain an exception, a certain procedure must be followed. The individual (or organization) requesting the exception must submit a declaration containing: the name and address of the applicant, the name and address of the supplier of the technological circumvention devices, the act authorized under the 1968 Copyright Act that the applicant wishes to carry out, and a statement to the effect that the use to be made of the work necessitates recourse to circumvention of technological protection measures.

Australia thus offers the example of a novel system, more conducive to the enablement of exceptions and limitations to copyright. However, it will have to be seen how the Act is applied in practice before judging its effectiveness with respect to the “balance of interests”.


Following lengthy preparatory work, the new Directive was adopted on 22 May 2001. According to preambular paragraph 14, the text seeks to promote learning and culture by protecting works “while permitting exceptions or limitations in the public interest for the purpose of education and teaching”. Preambular paragraph 31 stipulates that these exceptions and limitations have to be reassessed “in the light of the new electronic environment”. A balance of interests appears therefore to be at the heart of the European Commission’s concerns.

Articles 5 and 6 of the Directive concern the exceptions and limitations to copyright. Article 5 contains a comprehensive list of the lawful uses that can be made of a work without the need for prior authorization, subject to compliance with the three-step test. Article 6 deals with technological measures.

(a) Exceptions to exclusive rights of authors provided for under article 5(5) of the Directive

Article 5 of the Directive is disconcerting as regards the position it takes on the limitations on copyright. It starts with a comprehensive enumeration, as befits a closed system, linked in some cases to conditions such as fair compensation, indication of source and so forth. The exceptions cited fall into the following categories. First, there are exceptions associated with reproduction rights, including private copying, acts of reproduction by libraries, educational establishments, museums or archives and ephemeral recordings made by broadcasting organizations. Then come exceptions associated with reproduction rights, communication rights as well as distribution rights, including for the purpose of illustration for teaching or research purposes, for the benefit of handicapped persons, for making current events available to the public, for the purpose of citation or caricature. Lastly, article 5(4) specifies that all these exceptions are applicable to distribution rights provided that the use is justified by the purpose of the authorized reproduction.

The Directive thus appears to conform to the model of a closed system. However, article 5(5) blurs the issue by specifying that such exceptions are applicable only if they meet the three-step test, i.e. if they only apply in certain special cases, do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder. That is tantamount to applying the principles of an open system. The Directive thus contains an unexpected mixture of the two systems, and this raises questions as to how States with a closed system of exceptions should proceed in adapting their legislation. Should compliance with the three-step test be written into their national legislation? Or should they restrict themselves to applying the test to cases coming before the courts?

(b) Technological circumvention measures and exceptions to the prohibition on circumvention

Article 6 defines the technological measures subject to protection as “any technology [...] that, in the normal course of its operation, is designed to prevent or restrict acts [...] which are not authorized by the rightholder of any copyright or any right related to copyright”. As pointed out by J. de Werra,24 this definition is more favourable to rightholders than to users since the measures are not defined with reference to the infringement of copyright but rather with reference to acts which are not authorized by the rightholder. This broad definition clearly favours rightholders, along the lines first laid down by the WIPO Treaties.

To benefit from protection, such technological measures must be effective. This provision concerns equally measures restricting access to a work and those controlling reproduction of a work (as opposed to other uses of a work). Unlike the previous versions, the final text of the Directive prohibits

not only the trade in circumvention technology but also the act of circumvention itself, when carried out by a person “in the knowledge [...] that he or she is pursuing that objective”.

The issue is put into clearer perspective by article 6(4), which takes into account the balance of interests by encouraging the parties concerned to take voluntary measures to ensure that users benefit from the exceptions to copyright. While innovative, this solution is not free from risk in the case where parties to the negotiations are not on an equal footing.

Article 6(4) also stipulates that Member States must take all the necessary measures to ensure respect for the exceptions and limitations to copyright as enumerated in article 5 of the Directive. This provision is nevertheless substantially restricted because paragraph 4 of article 6(4) specifies that “(These) provisions [...] shall not apply to works or other subject-matter made available to the public on agreed contractual terms”. The Directive thus accords priority to contractual relations between rightholders and users.

Like the Digital Millennium Copyright Act, the Directive, in article 12, provides for the establishment of a contact committee entrusted with monitoring and assessing the application of the Directive. In addition, every three years, the Commission must submit to the European Parliament and the Council a report on the application of articles 5 and 6 of the Directive. The same question raised in respect of the Digital Millennium Copyright Act may be raised here: only the test of time will prove whether this system is conducive to the effective exercise of the limitations and exceptions to copyright in the digital environment.

Having reviewed the laws enacted for the purpose of implementing the WIPO Treaties and establishing the exceptions and limitations to copyright in the digital environment, we may turn to the question of the future of fair use in the digital environment.

III. The future of fair use in the digital environment

In spite of this body of legislation reorganizing copyright in the context of the digital environment, the question arises, firstly, as to whether the effective exercise of limitations on the author’s exclusive rights might disappear in such an environment (A) and, secondly, as to the possible adaptations that could safeguard the balance of interests (B).

A. The risk that the effective exercise of limitation on copyright might disappear

In the digital environment, fair use comes up against two major obstacles, namely: the risk of creating an [owner’s] access right to works (1) and the growing contractualization of relations between copyright owners and users (2).

1. The creation of an access right

(a) The concept of access right

Whether the new legislation specifies that the act of circumvention itself is not illegal, or whether it recalls the legitimate exceptions and limitations to the monopoly of rightholders, it still does not guarantee the effective exercise of users’ rights. In protecting technological anti-circumvention measures, recent laws prevent, for instance, the quotation of a work, its pastiche and its use for educational purposes, for the simple reason that protection measures against circumvention have the effect of impeding access to the work; and the question may be asked whether they are not in this way introducing a new “access right” for the benefit of the rightholders.

Such an access right must be distinguished from two other rights closely related to it. On the one hand, it is distinct from the right to disclose a work, which is a component of the moral right enabling
the author to decide the moment at which the work may be disclosed. It is also to be distinguished from the right to communication to the public, which forms part of the author’s economic right and may be summed up as a modern term covering the right to reproduction and the right to representation. The access right enables a rightholder, once the work has been disclosed, to set conditions for access to it with his or her consent. The work is indeed communicated to the public, but it is not accessible to all who may wish to access it.

This access right furthermore overturns the equality among users, since what is possible for a user in an analogue environment is not possible in the digital environment. For whereas someone who buys a book can consult it and reread it indefinitely, the person who acquires the rights to consult a work by means of a digital transmission may find that the number of authorized consultations of the work is limited, may be prevented from making copies of it, may only be able to consult it from a single workstation, and so on. The new technologies thus permit a considerable expansion of the exclusive rights of the rightholder. Access to the work has come to be dependent upon the will of the copyright owner. The consequence for the exercise of limitations on copyright may be easily drawn: without specific legislative waiver provisions, it will not be possible to exercise even a lawful right in respect of a work without seeking authorization from the rightholder, who has sole control over access to it.

In practical terms, it is not possible to write a press review, pastiche a work or quote it if it is disseminated by digital means only, since to do so would mean requesting access to the work from the rightholder, and it is quite possible that access will be refused or granted in exchange for money. The principle of fair use is thus voided of all meaning, since it implies a circumscribed but nonetheless free use of the work, whereas in the digital environment the prior accord of the rightholder is inescapable. The balance between the rights of users and those of copyright owners is upset, to the considerable advantage of the latter.

The risk is of course lessened by the fact that some legislation (in particular, Japanese and Australian), while prohibiting the production and manufacture of circumvention devices, does not prohibit the act of circumvention per se. The question remains whether this distinction has any practical consequences. This is doubtful in that, where it is not possible to obtain circumvention devices, it is hard to see how an ordinary user could circumvent a protection measure unaided.

This threat to the survival of fair use is compounded by the fact that case law in the United States has proved more favourable to rightholders than to users.

(b) American case law

Three American case-law rulings highlight the strengthening of the prerogatives of rightholders vis-à-vis the fundamental freedoms implicit in the limitations on the exclusive right to the exploitation of a work.

The first is the ruling RealNetworks, Inc. v. Streambox, Inc. handed down by a Washington District Court on 18 January 2000. RealNetworks had developed a system enabling the owners of the rights in musical works to encrypt those works and communicate them through RealServer. To access the works, the users had to use RealPlayer software, bearing in mind that RealPlayer and RealServer work in tandem, with the server allowing the files to be read only by RealPlayer customers. Streambox then developed Streambox VCR, which misled RealServer by substituting itself for RealPlayer and thus obtaining the works from the server. In addition, Streambox VCR, unlike RealPlayer, enables users to copy works even when the rightholders are opposed. The plaintiff argued that Streambox had infringed
copyright legislation. The court found the Streambox VCR to be a circumvention device to circumvent the access control provided by RealNetworks, and it had been designed with that sole aim, without any other significant commercial purpose. It did then violate the Digital Millennium Copyright Act (DMCA), which meant RealNetworks could obtain an injunction against the defendant. This then is a very strict and conventional application of DMCA.

The second ruling is *Universal City Studios, Inc. et al. v. Reimerdes*, handed down by a District Court of New York on 17 August 2000.\(^{27}\) Eight major motion picture studios brought a suit against website operators for posting and encouraging others to copy a computer program known as DeCSS. This program contains the keys to the encryption locks used in the system known as CSS for protecting DVDs from being copied and from being performed on players not complying with the standard. The plaintiffs asked the judges to prohibit the posting of DeCSS and linking to other sites where the program was posted. With regard to the merits, the judges held that CSS effectively controlled access to works on DVD and that DeCSS was a circumvention device which had been primarily designed to circumvent CSS. In its defence, the site operator had invoked fair use. The court rejected that argument, stating that fair use did not apply in an action under DMCA. The court thus ruled in favour of the plaintiffs, granting them a preliminary injunction. The decision was upheld by the Court of Appeals for the Second Circuit on 29 November 2001,\(^{28}\) which specified that software code may be protected by freedom of expression (First Amendment to the Constitution) but that DMCA takes precedence over it as it is a legitimate restriction of that freedom.

The third ruling was that handed down by an Appeals Court in the State of California on 1 November 2001\(^{29}\) in the case *DVDCCA v. Bunner*. The facts are similar to those of the preceding ruling. The question raised here is whether the code of the CSS software is protected by the First Amendment to the Constitution (freedom of expression). Responding in the affirmative, the judges held that, “Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment”. In fact, DeCSS is a software application, consisting of a source code, describing an alternative method of reading DVDs protected by CSS. In this instance, the Californian court took into account the concept of fair use, which encompasses that of freedom of expression. The judges concluded that the right of DVDCCA to protect its trade secret was not a higher right than that of freedom of expression as defined by the First Amendment and thus reversed the preliminary injunction which was the subject of the dispute.

These three instances show that by protecting all technological circumvention measures, the United States is placing very serious restrictions on the possibility of using fair use to access a work. It would thus appear that DMCA may be considered to have created a genuine access right for owners. It may also be thought that other legislation is liable in practice to lead to the same outcome. Another aspect of this access right might similarly modify the habitual application of the limitations on copyright, namely, the growing contractualization of relations between rightholders and users.

2. The contractualization of relations between rightholders and users

(a) The notion of contractualization

The second discernable risk regarding limitations on copyright in the digital environment relates to the growing contractualization of relations between copyright owners and users. Far from constituting an alternative to the creation of an access right, this risk is but another aspect of this same right. As rightholders come to exercise complete control over access to a work, they are seen to be free to

\(^{27}\) Jon Bing, op. cit., pp. 11-12, American reply to the ALAI questionnaire, Pascal Kamina, *Veille de droit anglo-américain* [Anglo-American Law Watch], communication-commerce électronique, September 2000. pp. 5-6.


authorize access to a work through the contractualization of their relations with users. Rather than respecting the exercise of limitations on copyright, frequently cost free, rightholders thus have the possibility of concluding, even imposing, financial contracts with users for the purpose of allowing them free and lawful use. Use has thus become subject to authorization and, even when the compensation requested is minimal, it remains compensation: users will pay for the use of a work that is guaranteed cost free by law in an analogue environment.

This type of contract can be characterized as an imposed contract insofar as the rightholders make a unilateral offer that users can only accept or refuse. It is difficult for them to make a counter-offer or negotiate. It is thus the whole philosophy underpinning limitations on copyright that disappears. Not only have digital use and its accompanying legislation led to the obligation to seek the rightholder’s consent, but they have also led to a contractualization and monetarization of these relations.

(b) The consequences of contractualization

The first consequence of the contractualization of relations between rightholders and users could be the creation of a compulsory licence and its corollary, equitable remuneration. It is true that this system – which originally concerned mainly musical works whose dissemination could not easily be controlled by rightholders – is recognized in most legislations. So recourse to a similar system for the remuneration of works in digital networks would certainly not present any problems of adaptation. The fact remains that the establishment of such a system in the digital network context in order to charge for the hitherto lawful and free use of works not subject to the rightholders’ monopoly would be a radical upset where users of the works are concerned. If the legal licence is an adequate solution to compensate for market shortcoming (to address the issue of private copying, for instance), it is entirely contrary to the spirit of certain exceptions justified in terms of the exercise of fundamental freedoms such as freedom of expression. Would it be meaningful to make the exercise of a basic right conditional on payment of a fee?

It follows that a new gap would be created between users with the means to refer to a work (to quote it, pastiche it, make a private copy of it, etc.) and others unable to participate in the development of culture and the extension of knowledge.

The second consequence of this contractualization concerns the conditions under which contracts are drawn up. What if there are several rightholders? In this event, many legislative and legal adjustments will have to be envisaged. Thus, in the case of the exploitation of a work, it is recognized that the unanimous agreement of the authors is necessary. But is the situation comparable when it comes to granting exceptions? Is it not the case that unanimity is liable to be difficult to obtain, which would limit the possibility of certain uses?

Contractualization removes the raison d’être of a number of limitations on copyright. The creation – even indirect – of an access right carries with it a major risk that some exceptions and limitations to copyright would come to grief. An outline of possible solutions to meet this situation is thus in order.

B. Outline of possible solutions for the safeguarding of fair use

Various systems could be envisaged with a view to bolstering the effectiveness of limitations on copyright in the digital environment. The first would be to entrust an oversight function to independent bodies (1); another would involve reaffirming the fundamental freedoms that underpin the recognition of these limitations (2); and a third would take as its basis a recent decision by WTO on exceptions to copyright (3).

1. Oversight by independent bodies

As we have seen, this solution is provided for in at least two texts: the American DMCA and the European Directive on copyright in the information society. It consists of entrusting a body with the task of verifying the effectiveness of exceptions. This solution has the advantage of permitting a regular assessment of the state of the balance of interests. The existence of such bodies is a guarantee against a system organizing a closed system of exceptions, less open to changes in technologies.

However, care must be taken to ensure that these bodies are not composed of, or under the influence of, one of the parties concerned (this would mostly involve the rightholders, who are better organized than users), in order for them to play an effective role and not simply provide an alibi for compliance with exceptions.

Buydens and Dusollier\(^{31}\) therefore propose the establishment of “an international observatory to consider the effects of introducing technological measures into copyright protection on access to information and to the public domain, and on the exercise of limitations on copyright”. The aim here is to allow technologies time to develop and to be in a position to gauge the consequences of this development. These authors furthermore recommend that the observatory should be established at the global level so as to organize surveillance on an international scale.

2. Reaffirming the bases for exceptions and limitations to copyright

Some forms of limitations reflect, as we have seen, the concern to safeguard the exercise of certain fundamental freedoms, such as freedom of expression, freedom of information, freedom of the press, and so forth. Thus, if the new legislative provisions do not permit the enablement of certain exceptions to copyright, it would perhaps be more effective to reaffirm basic rights directly, eliminating the intermediary stage involving the enumeration of exceptions.

This solution was adopted in France by TGI de Paris in 1999.\(^{32}\) In this case (\textit{Fabris v. France}),\(^{2}\) a television programme had shown paintings by the artist Utrillo for the purpose of reviewing an exhibition of his works, but had in consequence infringed the exclusive rights of the artist’s successor in title. In this instance, while no exception to copyright justified such a use of the pictures (the quotation exception does not authorize such a use under French law), the court gave priority to the public’s right to information under Article 10 of the European Convention on Human Rights, choosing not to make the case one of blatant infringement and thereby skirt the strict interpretation of national law. Similarly, the Supreme Court of the Netherlands considered “that the logic of copyright itself entailed that the list of exemptions featured in copyright law could not be considered exhaustive”.\(^{33}\)

Even if those two rulings were overturned on appeal, they nevertheless offer a new and very relevant perspective for ensuring the survival of a number of exceptions.

3. WTO’s decision of 27 July 2000

In 1999, the European Union called on the United States to enter into consultations with respect to a DMCA provision (article 110 5, paras. A and B) creating an exception to copyright for the private use of musical works by commercial companies. The European countries deemed this new exception to be at odds with the TRIPS Agreements since it was not justified by any international treaty. They accordingly considered that it infringed the legitimate interests of their national copyright owners.


\(^{33}\) Ruling cited by M. Buydens and S. Dusollier, op. cit., pp. 11-12.
A special WTO panel was therefore entrusted with presenting conclusions and recommendations on the dispute. On 27 July 2000, the WTO Dispute Settlement Body\textsuperscript{34} adopted the report of the special panel and invited the United States to implement the proposed solution.

This decision, which relates only to a particular use of a work, sheds a new light on the general status of exceptions. To resolve this specific case WTO took the view that all rights covered in the TRIPS agreements (reproduction rights, representation rights, etc.) admit of exceptions, subject only to the condition that these limitations must comply with the three-step test (i.e. that they are limited to certain special cases, that they do not conflict with a normal exploitation of the work and that they do not unreasonably prejudice the legitimate interests of the rightholders).

In so doing, WTO has departed from the exhaustive definition of limitations and exceptions by enlarging their scope.