FEDERATION OF EUROPEAN PUBLISHERS
FÉDÉRATION DES ÉDITEURS EUROPÉENS

FEP POSITION PAPER ON A TRANSPOSITION OF FAIR USE AT EU LEVEL

The Federation of European Publishers (FEP) is the association representing national book and learned journal publishers' associations from 26 member states of the European Union and the European Economic Area. Thus FEP is the voice of the great majority of publishers in Europe. Founded in 1967, FEP deals with European legislation and advises publishers' associations on copyright and other legislative issues.

Some companies, whose business activities usually involve the internet – being manufacturers of consumer devices, software developers or internet search machines and web hosting providers – have been lobbying in recent years for the introduction at EU level for the *fair use* copyright exception. This doctrine, developed in the US, limits the exclusive rights granted by copyright to rightsholders of a creative work, which enables users a limited use of copyrighted material without requiring permission from the rightsholders.

Those companies argue that the *fair use* doctrine is a much more flexible system than the European copyright system with its current exceptions. However, we strongly caution against adopting such doctrine at EU level. The *fair use* doctrine is a statutory defence whose test is based on decades of jurisprudence. In effect it is court-made law that was subsequently codified in the US Copyright Act and since then has been subject to further litigation. Consequently, it is impractical to import it into European legal systems: most EU and EEA member states do not have common-law legal systems; and for the ones that do there is no history of appropriate case law.

1. High level of legal uncertainties in the application of the fair use doctrine

The *fair use* doctrine does not offer a *carte blanche* exception, but neither does it provide the legal certainty demanded by stakeholders. The fundamental principle of *fair use* is the balancing of economic interests. The US courts have defined four factors which determine whether a use if fair. Some sort of guidelines can be drawn from the past decades of case law. The judge has to take different elements into account for each factor in order to qualify a certain use as fair, such as: whether it is for commercial purposes or not (factor #1 on purpose and character of use), whether the re-use is of factual rather than creative works (factor #2 on the nature of the copyrighted work), which amount of protected work is used (factor #3 on the amount and substantiality of the portion used) and whether the new work is a substitute for the copyrighted work (factor #4) weigh in favour of an adjudication by a judge that a use is fair.

Fair use guidelines are flexible, so that the courts can decide cases on their individual merits. Nevertheless this entails that they are also indeterminate, capricious and unprincipled. Whereas our European copyright system with its current exceptions fulfills the same purposes within a defined framework, *fair use* is unpredictable and highly subjective. Even a rigorous analysis of each of the four factors does not help to predict the result. Legal uncertainties still surround the notion of transformative use in cases of sampling in music, fan websites, books summarizing TV shows or films, to give but a few examples. The fair use doctrine creates great ambiguities which are detrimental to all users, whether professionals, creators or user-generated content creators.

Moreover, besides this apparent lack of clarity, one should remember that *fair use* is not a right, but a defence. In often leads to very long and expensive litigation which entails significant costs to the potential beneficiary of the *fair use* doctrine. In a 2007 report by the American Intellectual Property Law Association, it was estimated that the average cost of a fair use action was approximately $1 million.

The Google Book Settlement, which was rejected at the end of March 2011 by Judge Chin[1], was trying to settle a lawsuit based on the publishers' and authors' contention that Google was infringing their copyrights when it scanned copyrighted books from libraries into its database. Google was relying on fair use to defend their scanning and the display of snippets of the works. The litigation and the decision of the Judge on the settlement took a very long time and entailed very high costs, which allegedly would not have happened in a well-framed European legal system.

The ambiguity of US Copyright law stems from the fact that it is based on an economic theory – that US copyright should be determined by the economic effects of that right. These should be to encourage wealth creation and distribution. This formula creates ambiguity because it is based on "balancing tests" which weigh different factors and are mutable.

In 2000, the copyright expert David Nimmer[2] independently analysed the four factors in every federal court case since the "Oh Pretty Woman" decision in 1994. His conclusion was that there was no correlation between the four factors and the courts' ultimate rulings on fair use. According to Nimmer the judges all tend "to align the four factors" in order to fit the result that they think is best, rather than evaluating them objectively. Nimmer concluded that "had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same... It is largely a fairy tale to think that the four factors determine resolution of concrete fair use cases". Nimmer is not the only one to be dismayed by the unpredictability of fair use.

How can European legislators hope to implement such a doctrine in countries with no case law while enabling the courts to give balanced judgments?

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1 http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115

2 David Nimmer « 'Fairest of Them All' and Other Fairy Tales of Fair Use", 66 *Law and Contemporary Problems* 264, 280-82 (2000)

2. *European Copyright law is better adapted to respond to the changes entailed by technological progress*

The EU has adopted a comprehensive copyright legal framework adapted to the changes brought about by the Internet and other technological progress, whilst implementing the WIPO[3] Internet treaties with its 2001/29/EC Directive.

Copyright law is thus entirely adequate for the new environment of networks and digital dissemination, but its management can be improved to better fit it. So far, uses are easily provided either implicitly on the purchase of a book or other cultural goods or services, or through licences (individual or collective). For the book sector, publishers acquire at least pan-European licences. E-books are individually managed which enables any European user to buy an e-book from anywhere in Europe.

But beyond this, publishers and other rightsholders are working towards even more developed digital management rights systems which will enable them to handle payments that will support many different types of business model – from low-value micropayments to high-value subscriptions. The object is the widest possible dissemination of content. This will be achieved through automated processes to identify content; to identify who controls the rights in it; and to create an automatic link between the user and the usage in order to complete a transaction[4]. This idea was successfully endorsed by the DG Information Society of the European Commission and presented on 17 June at the Digital Agenda assembly.

Publishers have also been actively involved in developing an infrastructure, ARROW (www.arrownet.eu), Accessible Registries of Rights Information and Orphan Works towards Europeana. ARROW enables libraries and other users to identify rightsholders and to clarify the actual rights status of a work, including whether it is orphan or out-of-print. They will thereby know how and where they can seek permission to digitise and make available a work on the Internet.

Furthermore, all European copyright systems contain well-framed provisions providing for balanced exceptions for certain uses, which limits the exclusive rights of rightsholders. Those

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3 WIPO Copyright Treaty adopted in Geneva on December 20, 1996:
http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html

4 http://copyright-debate.co.uk/wp-content/uploads/EPC-A-Big-Idea1.pdf

exceptions are clearly set and are subjected to reasonable limits[5] set in the Berne Convention three-step-test enshrined amongst others in article 5.5 of Directive 2001/29/EC[6].

Copyright law exceptions are thus granted under most EU legislation for the following purposes: personal use, news reporting, quotation, criticism, science, class-room teaching, other educational uses, archival storage, visually impaired people, and transient copies. The European copyright framework delivers greater legal certainty than that in the US, where any prior outcome of a fair use case is virtually impossible to predict.

Fair use advocates argue that the *fair use* doctrine was created to remedy a market failure. The granting of an exclusive right on creation, discovery and form of information is meant to encourage the production of creative works, discoveries in research and the production of information. This economic rationale is not challenged in the digital environment. On the contrary, it is even more relevant. Any alleged benefit to society resulting from the breach of an author's exclusive right must be balanced against the long-established and acknowledged benefits to society that derive from the right itself. Because copying has become very easy and costs virtually nothing, the benefit of copyright law to authors and to creativity – and therefore to society in general – has been diminished. There are few arguments that demonstrate how the fair use doctrine might improve this market failure. On the contrary, we submit that it would worsen it: it would be a further clear compromise of the author's right.

Furthermore, *fair use* advocates also claim that it is the only way to allow proper freedom of expression. Are we to believe that there is no such proper freedom of expression in Europe?

The further claim is sometimes made that *fair use* should be implemented in EU law to accommodate user-generated-content (UGC). This is grounded in the misunderstanding that US law would allow all transformative uses: in fact, it is just one factor amongst other to be weighed by the court. There are several pending cases in the US related to UGC services and very little legal certainty on their outcome. In contrast, French law provides for the exception for "parody, pastiche and caricature"[7] and German law provides for "free use"[8]. Both allow the re-use for user-generated content whilst setting some boundaries within the remit of copyright law. In

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5 Article 13 of TRIPs agreement: "members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder"

6 It was first applied to the exclusive right of reproduction by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967. Since then, it has been transplanted and extended into the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty.

7 Article L 122-5 French Copyright Law

8 Article 24 German Copyright Act

Germany, an independent work created by free use of the work of another person may be published and exploited without the consent of the author of the work used. In France, an author cannot prevent someone making a parody, a pastiche or a caricature providing the public is able to distinguish between the original work and the re-use. The Intellectual Property Strategy document[9] released on 24 May 2011 by the European Commission explores ways to adapt to the needs of users of content "in a responsible way" and to strike "a balance between the rights of content creators and the need to take into account new forms of expression", without any mention of fair use.

3. Incompatibility of the fair use doctrine with EU law

It is hard to see how a doctrine based on case law, which is absent from most European jurisdictions, could be introduced in EU law. The *fair use* doctrine has been developed in the US in a system based on common law and was built over the years on a body of case law. Besides the fact that EU jurisdictions contain a mix of legal traditions dominated by civil law, implementing the *fair use* doctrine in the EU simply appears unrealistic and unfeasible. The legal uncertainty would be all the greater. There would be a need to create first some consequent case law to provide guidance in particular cases, in order to delimit the boundary between copyright protection and fair use which obviously cannot be improvised from one day to the next. Second, a unitary Copyright title would be needed to be created at EU level, which would be terribly difficult to achieve.

The 2001/29/EC Copyright Directive provides for an optional non-exhaustive list of limitations to copyright exclusive right. The reason no exhaustive list of mandatory limitations was achieved is because Europe had to deal at that time with 15 different national and cultural traditions (now it would be 27) and that the discussions on the Copyright directive generated unprecedented debate. It was not that a long list of exceptions was the most desirable option for rightsholders but it appeared the only way to agree on a Copyright directive approvable in all the EU jurisdictions.

Nonetheless, the EU has managed to strike a balance in its copyright law by harmonising what was necessary to harmonise in order to achieve a single market of IPR protected goods and services, without disrupting what has proved so far to be efficient and stable legislation. Considering that the EU has to accommodate 27 different legal traditions and cultures, it is hard to see how a unitary copyright title, which appears necessary to apply the *fair use* doctrine across all European legislation, could be achieved.

Finally, this European copyright title, if achieved, will not be retroactive. Therefore, it would only apply to works created after its adoption, which would not solve most of the cases that the implantation of the *fair use* doctrine is supposed to solve.

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9 A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe.

4. *No respect of moral right and non-compliance with the Berne Convention and TRIPs*

A further hurdle for a transposition of the *fair use* doctrine into EU law is the fact that it does not appear to be compliant with the Berne Convention and TRIPs nor with the great majority of EU copyright legislation, as it does not recognize the moral right (*droit moral*).

US copyright law recognizes very limited moral rights of authors over the integrity of their work, being based on a purely utilitarian and economic perspective. Rights of personality were introduced in the US (e.g. obligation of citation and that the work is not mutilated) but to a very limited extent in comparison to European jurisdictions, because it is limited by the US Copyright Act § 107 fair use exception.

Moreover, the Berne Convention, which is the international keystone of intellectual property law, is grounded upon the European perspective of moral right: IPR protects inter alia the moral right of the creator to the integrity of their work. This principle has been carried forward with TRIPs, which makes fair use incompatible with both the Berne Convention and TRIPs agreement.

The reason why the US maintains its fair use doctrine is because it is a dualist system that regards US law and international law as consistent with each other, whereas most EU states are monist: they regard international law as superior to domestic law and therefore must comply with the Berne Convention. In the event that § 107 (c) of the US Copyright Act were ever challenged before the WTO for inconsistency with the TRIPs, and given the unfavourable decision before the WTO regarding 110 (5) of the US Copyright Act, it is conceivable that the US might be forced to abandon the *fair use* doctrine.

Michel Barnier, EU Commissioner to DG Internal Market, which deals with copyright, stated in a speech on 8 June 2011 that the "Berne Convention was not to be tidied away together with the antiques. Copyright was not old-fashioned, actually it didn't age at all after 100 years of existence of this Convention. On the contrary it is on the forefront and at the heart of the embryonic digital world"[10]. The Berne Convention and EU Copyright law are based on technologically neutral principles and are therefore still valid despite the revolutionary changes entailed by new technologies and the internet.

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10 Free translation of the author's "« La convention de Berne... n'est pas à ranger au rayon des antiquités. Car le droit d'auteur n'est pas démodé, il n'a pas pris une ride après plus de 100 ans d'existence de cette convention. Au contraire : il est de toute première actualité. Il est au cœur du monde numérique en gestation.», Michel Barnier, 'To be or not to be : Le droit d'auteur fait toute la différence' World Copyright Summit, Brussels, 8 June 2011 (http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/421)

The necessary flexibility is already built into the existing framework. EC Copyright legislation is well-equipped to foster innovation on the Internet and provide for the necessary legal certainty that users need. If there is any use that is allowed under the fair use doctrine which is not under the EU copyright system of exceptions, then it should be brought to the attention of the legislators and a debate should be stirred to decide whether or not new uses should be exempted under EU Copyright law in compliance with the Berne three-step-test. But for the time being there is therefore no justifiable reason why a new exception(s) for fair use should be implemented in EU law.

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