

Kluwer Copyright Blog

Infopaq II – The CJEU elucidates some aspects of the exemption for certain acts of temporary reproduction

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This entry deals with some aspects of the decision by order by the Court of Justice of the European Union (CJEU) in [Case C-302/10 \(Infopaq II\)](#) on 17 January.

The reference for a preliminary ruling was brought to the CJEU by the Danish Supreme Court and concerns the interpretation of Article 5(1) and 5(5) of Directive [2001/29/EC](#) (the so-called Infosoc directive). The reference was made in the context of proceedings between [Infopaq](#) – a company operating a media monitoring and analysis business – and [Danske Dagblades Forening \(DDF\)](#) – an association of Danish daily newspaper publishers. In the national case Infopaq had sought a declaration that it was not required to obtain the consent of the rightholders (the newspapers) for acts of reproduction of newspaper articles. This was done using an automated process, consisting in the scanning of those articles and their conversion into a digital file, followed by electronic processing of that file. There was disagreement between the parties as to whether some of the acts, carried out during the data capture process, could constitute reproduction as provided by Article 2 of Directive 2001/19 and furthermore, if it was reproduction, whether the acts were covered by the exemption from the right of reproduction, provided for in Article 5(1) of the same directive.

The case is a follow-up to a previous case, [C-5/08 \(Infopaq I\)](#), in which the CJEU responded to a string of questions concerning the same articles emanating from the same national case. Having received those answers from the CJEU, the Danish Court assessed that it had to refer additional questions to the CJEU.

In answering the new questions the CJEU started off by referring to its established interpretation, that an exemption to copyright must be interpreted strictly because it is a derogation from the general principle that the rightholder shall authorize any reproduction of a protected work.

The court stated that the exemption aims to make access to the protected works and their use possible. Thus to be permitted under the exemption in Article 5(1), an act of reproduction must “not have independent economic significance”. The court held that since protected works have an economic value, access to them and their use necessarily has economic significance. Against this background the court held that for an act of temporary reproduction to be permitted under Article

5(1) it must not “enable the generation of an additional profit” (for the user) going beyond that derived from lawful use of the protected work and that the acts of temporary reproduction must not “lead to a modification of that work”.

The requirement that a temporary reproduction must not “enable the generation of an additional profit” seems to infer that the exemption cannot enable uses for which the rightholder has not already been remunerated. This could for example be the case in situations concerning temporary reproductions emanating from so-called unlawful master copies, i.e. temporary reproductions made from a copy which has been reproduced or made available without the consent of the rightholder.

The condition that the acts of temporary reproduction must not “lead to a modification of that work” seems to imply that the exemption cannot constitute a basis for adaptations of the work. Even if this is consistent with the purpose behind the exemption for “lawful use” which has “no independent significance” it removes from the scope of the exemption temporary fusions or combinations of pre-existing works for the purpose of creating new (derivative) works – such as might be the case for some [user-generated content](#).

Further, the court also made a statement regarding the link between the scope of the limitation in Article 5(1) and the so-called three step test in Article 5(5) of the same directive. The latter provision establishes the “outer boundaries” applicable to all exceptions and limitations. It has gained a great deal of attention by [scholars](#) as the mechanism by which the rights and interests of rightholders are “balanced” vis-à-vis individual and public interests. This is not the first time that the court has been asked to interpret the test, it has however to this date refrained to do so – including in this case. Thus, without explicitly interpreting the conditions of the three-step test, the court held that acts of temporary reproduction carried out during a “data capture” process, such as those in the case before the national court, which fulfill the conditions in Article 5(1) must be regarded as fulfilling the conditions of the three-step test. By this, the court seem to hint that there is no need to interpret the three step test if the national legislation already falls within the scope of the exemption for temporary purposes. I am very doubtful whether this is the case for all exemptions in Article 5, as many of them have an evidently wider scope – at least regarding their wording – than what can be [accepted](#) under the three step test.

In sum, the case clarifies some aspects of the scope of the exemptions for temporary acts of reproduction. The CJEU stated that for an act to be permitted under Article 5(1) it must not enable the generation of an additional profit and it must not lead to a modification of the work. The court also reiterated its stance that exemptions to copyright must be interpreted strictly, and the unimportance of an (explicit) interpretation of the three step test for reaching this conclusion.

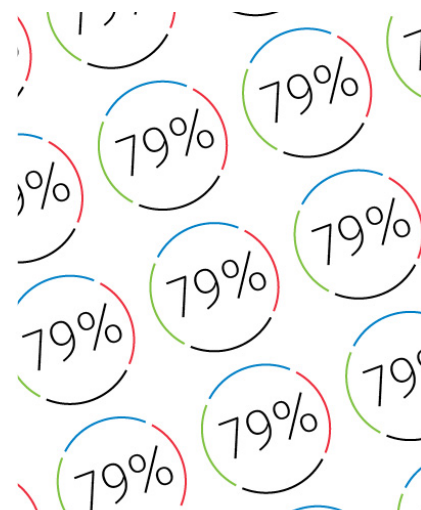
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