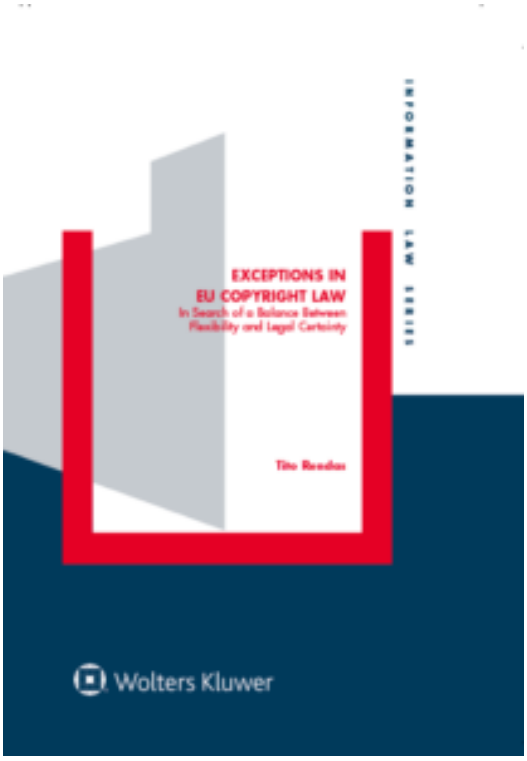
Kluwer Copyright Blog

Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty – Part I

Tito Rendas (Universidade Católica Portuguesa) · Monday, April 26th, 2021

This post is the first instalment of a synopsis of the doctoral thesis the author defended at Universidade Católica Portuguesa (Lisbon) on 25 September 2020. The thesis was recently published by Kluwer Law International, as part of its Information Law Series.



Copyright exceptions fine-tune the reach of authors' exclusive rights. They treat as non-infringing certain categories of unauthorised uses that fall within the *prima facie* scope of such rights, fostering a compromise between the private interests of rightholders and the broader public interest in the dissemination of literary and artistic works. In a system characterised by long-lasting and wide-ranging exclusive rights, exceptions provide a vital counterweight. They are, as James Boyle tastefully put it, "the holes [that] matter as much as the cheese".

The core of the EU law on copyright exceptions lies in Article 5 of the so-called InfoSoc Directive, as well as in the rules that guide their implementation, interpretation and application, which have often been clarified or even established by the CJEU through the preliminary reference procedure.

The appropriateness of this framework has been the object of much debate in scholarly and policymaking circles. Participants in this debate are largely split into two sides. One side – which

gathers some academics, information technology companies, and digital rights NGOs – criticises the InfoSoc framework, on grounds that it lacks sufficient flexibility and that it fails to deliver on the legal certainty promise. Participants adhering to this view call for the framework's reform. The other side – composed of collective management organizations, creative industries, publishers, as well as some academics – generally supports the *status quo*, arguing not only that it provides ample legal certainty, but also that it has so far proven to be adaptable to changes in the cultural and technological landscape.

Although the two sides disagree on whether the InfoSoc framework should be reformed, one idea seems to gather consensus: that EU copyright law, in general, and the framework of exceptions, in particular, must achieve a balance between *flexibility* and *legal certainty*. Calls for compromise between both values are commonplace in copyright literature, with scholars and policymakers agreeing that the Holy Grail lies in having a legal framework that combines the best of the two worlds.

In what concerns "flexibility", the InfoSoc framework should, on the one hand, seek to prevent obsolescence, by remaining adaptable to technology-related changes, and, on the other hand, respect the legal traditions and specificities of the various Member States. Likewise, the concept of "legal certainty" is used to refer to two related goals: first, the need to ensure that copyright law is capable of guiding the behaviour of users and rightholders regarding the boundary between infringing and non-infringing uses; and second, the importance of promoting the approximation of national laws.

As to the goal of ensuring *adaptability to technology-related changes*, the InfoSoc framework is fundamentally flawed. Member States currently enjoy very limited freedom to legislate autonomously, with the burden of updating the catalogue of exceptions resting on the shoulders of the EU legislator. Nonetheless, relying on periodic updates of the catalogue at the EU level is an impractical solution, given the relative pace of technological change. The EU ordinary legislative procedure is complex and lengthy, and the level of lobbying that nowadays characterises copyright law-making makes the adoption of new legislation or the revision of existing instruments even harder. This casts considerable doubt over the idea that updating the framework of exceptions should be the task of the legislative power only.

To make things worse, narrowly framed exceptions, like the ones provided in Article 5, grant a limited degree of discretion on judges, further contributing to the law's incapacity to adapt swiftly to technological change. While a broad and teleological interpretation of these exceptions may not be barred, their wording will hardly allow sufficiently flexible readings. The InfoSoc three-step test – which, unlike its international incarnations, functions as a constraint on the judicial application of the listed exceptions – provides no relief either. However vague, the test works as a one-sided, rightholder-centric standard, adding to the overall restrictive character of the framework of exceptions. The InfoSoc Directive therefore lacks a mechanism that allows courts to take into account the competing interests of rightholders and users, in deciding on whether to accommodate new uses.

At the same time, the framework gives inadequate *guidance on the legal status of unauthorised uses*. Although the listed exceptions provide stakeholders with relatively precise indications, the need to apply the elusive three-step test as a second tier of scrutiny ends up blurring the line between lawful and unlawful behaviour, ultimately corroding the certainty that emerges from the wording of exceptions.

In addition, courts that find the solution dictated by the application of the governing copyright provisions unsatisfactory have on occasion striped off the straitjacket and bypassed those provisions. In order to deliver reasonable and context-sensitive decisions, they have circumvented the strictness of the framework of exceptions, by creatively construing the applicable copyright rules – as the CJEU did in the *Ulmer* judgment – or by resorting to doctrinal emergency valves like implied consent and abuse of rights – as the German courts did in the *Vorschaubilder* saga (here, here and here) or the Spanish courts in the *Megakini* case. Arguably, having judicial decisions sidestepping the rules that stakeholders legitimately expect will guide the court has a more adverse effect on legal certainty than having decisions guided by transparently open-ended provisions. If the most immediately applicable statutory provisions conferred greater discretion on judges, there would certainly be no need to resort to these "interpretative gymnastics", as some scholars have called them. This kind of judicial pragmatism entails that the InfoSoc framework is producing less predictability than expected, whereas it can hardly be considered a sustainable solution to the problem of technological adaptability.

Having said this, such trend in the behaviour of courts should not be read as confirming fears of transferring a greater share of the burden of guidance to the judicial branch. On the contrary, when interpreting indeterminate concepts of EU copyright law, the CJEU has proven capable of developing their meaning in a coherent and systematised manner. The Court's case law on the notions of "originality" and "communication to the public" shows that it is very much able to sharpen the edges of open-ended doctrines by introducing factors and requirements that make judicial analysis more routinized and predictable over time. This capacity further supports the introduction of a standard-like provision within the EU system of exceptions.

In what regards the objective of ensuring *adaptability to national cultures*, the InfoSoc framework performs generally well. Although Article 5 leans clearly towards the Continental European tradition of exceptions (to the detriment of the common law system), it takes national legal particularities into due consideration through three of its features. First, the optional nature of permitted uses has the effect of *not* forcing Member States to implement exceptions that they may find unnecessary. Second, some of those particularities have been incorporated into the long and diverse catalogue of exceptions itself, which covers not only classic copyright exceptions, but also less common ones, such as those for religious celebrations and for building reconstruction. And finally, the grandfather clause in Article 5(3)(o) has granted Member States some latitude to accommodate local and long-established exceptions.

Nonetheless, it should not be forgotten that the respect for national legal differences and for the cultural diversity within the Union must be balanced with the need to achieve a harmonised framework of exceptions. And in fact, in safeguarding national cultural autonomy, the EU legislator has partly overlooked the objective of harmonisation, with the InfoSoc approach producing mixed effects in this regard. On the one hand, the catalogue in Article 5 has promoted a higher degree of harmonisation than before: it has led some Member States to implement exceptions that previously existed in other Member States and, due to its exhaustiveness, it has prevented them from increasing fragmentation by autonomously adding new use privileges. On the other hand, the fact that the vast majority of exceptions in Article 5 is optional has contributed towards the preservation of an unharmonised mosaic of exceptions throughout the Union. Quite evidently, this feature can be prejudicial for the functioning of the internal market, especially in the case of exceptions that are crucial for copyright-dependent agents that operate across borders.

Given this grim state of affairs, my book has tried to pave the way for a future reform of the

InfoSoc framework of exceptions. The proposal that has been put forward – which will be described in Part II of this synopsis (here) – is an effort at striking a better balance between flexibility and legal certainty.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Monday, April 26th, 2021 at 9:45 am and is filed under European Union, Exceptions, Fair Use, Jurisdiction, Limitations
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.