Kluwer Copyright Blog

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

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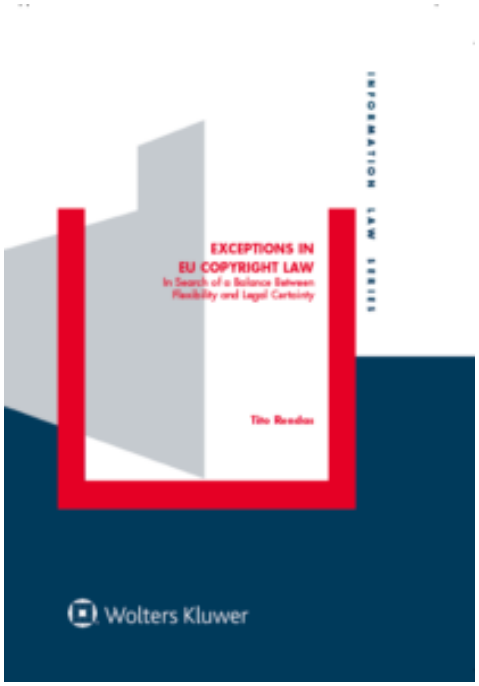
This post is the second installment of a synopsis of the doctoral thesis the author defended at Universidade Católica Portuguesa on 25 September 2020. The thesis was recently published by Kluwer Law International, as part of its Information Law Series.



The first part of this post has established the need to reform the InfoSoc framework of exceptions in light of the purpose of achieving a balance between flexibility and legal certainty. It is now time to set forth a road map on how to go about such reform.

In order to achieve a compromise between the different policy goals that have been previously identified, the EU legislator should consider restructuring Article 5 of the InfoSoc Directive as a multi-tiered framework of exceptions.

The first tier would be a closed catalogue of mandatory and precisely formulated exceptions for known uses with a relevant impact on the functioning of the internal market. This tier would include time-tested exceptions that apply to specific kinds of uses (such as quotation and private copying), which will predictably keep occurring along relatively stable fact patterns, regardless of supervening changes in the technological environment. These are socially common uses that, as such, lend themselves to *a priori* identification and settlement through a rule-like formulation.

Under this first tier, Member States would be obliged to introduce a number of exceptions, ensuring a certain balance with the (already mandatory) economic rights. By preserving a

catalogue of exceptions that have a narrow scope and precise wording, the reform fosters one of the main advantages of the existing framework: the *ex ante* guidance it provides on the lawfulness of unauthorised uses. The exhaustiveness of the catalogue and the mandatory nature of the enumerated privileges aim at securing a high level of harmonisation and at mitigating one of the principal handicaps of the current framework.

The second tier would be a catalogue of optional exceptions that would reflect national particularities in this domain. These exceptions lack the cross-border relevance of the ones provided in the previous tier. For that reason, they need not be made mandatory and their conditions of application do not need as high a degree of uniformity as the ones in the first tier. This tier is therefore intended to uphold one of the main strengths of the existing InfoSoc framework – its capacity to respect the different domestic cultures and traditions in the realm of copyright exceptions. This second catalogue would be quasi-closed, in that the grandfather clause would be preserved, ensuring that the enumeration is not unduly long and detailed.

Finally, the third tier would be a mandatory exception cast in the form of a standard, empowering courts to decide on the lawfulness of certain uses on a case-by-case basis. This third tier reflects the acknowledgement that, as technology races forward, enumerated exceptions may be left in the dust. Because such exceptions are generally insensitive to unanticipated changes in the external environment they regulate and because, in the field of copyright, the rate of change is relatively high, exceptions of this type should be combined with a more responsive provision. The adoption of the third tier would minimise the need for incremental and costly legislative updates to the catalogue at the EU level, while also eliminating the need for improvised judicial constructions.

This third tier would be crafted as a residual balancing test, serving primarily as a safety net for unforeseen uses. The test would rely on pre-existing jurisprudential guidance, by incorporating criteria that have some pedigree in the case law of the CJEU. Instead of performing a decontextualized transplant of US fair use or using the hopelessly incoherent three-step test, the proposal would rely on the wealthy body of CJEU rulings in order to increase the guidance value of a freshly enacted standard-like exception.

The test would require courts to examine whether a certain use achieves a fair balance between the interests of rightholders and users, on the basis of a non-exhaustive set of weighing factors, including (i) the profit-making nature of the use; (ii) the effect of the use upon the volume of sales or of other lawful transactions relating to the work; and (iii) the capacity of the use to promote the practical realisation of users' fundamental rights.

In the thesis, this proposed hybrid model has been tested against real-life cases, involving, for instance, the online reposting of a photograph in the context of a school assignment (*Renckhoff*) and the making available by the press of a politician's essay on issues of public morality (*Spiegel Online*).

Alongside these cases that have been used in the thesis, other uses related to the emergency situation we are currently undergoing could be cited. These would include, for example, (i) the supply to researchers of copies of books that sit within libraries which may be shut to the public and (ii) the scanning by teachers of entire textbooks for remote seminars. Public interest organizations, like LIBER, have called on the Commission to issue guidance on this kind of uses, proposing the adoption of exceptionally broad constructions of the relevant InfoSoc exceptions during government-imposed lockdowns. Under the proposed model, such inventive interpretations

would not be necessary, as the residual balancing test would be openly capable of accommodating those uses, giving copyright law the capacity to adjust to periods of crisis.

Over time, the level of predictability in the case law interpreting and applying these factors would naturally grow. As decisions are rendered, the test would become increasingly refined and clusters of cases would emerge, as it happened with the fair use clause in the United States. Additionally, the codification of normative arguments that already play a role in EU copyright law would evade some of the cultural and ideological resentment that some participants in the debate feel towards fair use.

The DSM Directive provided the ideal occasion to go about a structural review of the EU law on copyright exceptions, as the one I have just outlined. However, by merely updating the *acquis* with a modest set of permitted uses, the new Directive was largely a missed opportunity in this regard. Some commendable choices have certainly been made, specifically that of expanding the list of mandatory exceptions. But the broader course of action elected by the legislator was unwise.

Given the present levels of polarisation in the copyright debate, some might see any proposal to redesign Article 5 of the InfoSoc Directive as a non-starter. Admittedly, the hopes for adoption of the proposed reform in the near future are dim. But the job of legal researchers is not limited to putting forward proposals that are likely to be adopted in the short run. Instead – and all the more so in as contested a field of policy-making as copyright – academics are entrusted with the task of pursuing independent critical inquiry and delivering proposals for the benefit of society as a whole. And that is exactly what my book attempts to do.

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