Kluwer Copyright Blog

ReCreating Europe's report, datasets and data analysis on EU and comparative copyright flexibilities now available online – Part II

Caterina Sganga (Scuola Superiore Sant'Anna) · Thursday, May 18th, 2023

The H2020 project reCreating Europe performed an unprecedented mapping of EU and Member States' sources on copyright flexibilities. Part I of this blog post explained the mapping of EU sources and their conclusions. Part II deals with the comparative analysis of the law of all 27 Member States, with related comparative findings.

The **mapping of national legal sources** of copyright flexibilities **and their comparative analysis** provided a detailed overview of the state of the art of copyright flexibilities in all the 27 Member States, organized in 27 **national reports** which illustrated national provisions using the same taxonomy applied to EU sources. The reports commented on the main features of Member States' rules and, in case of correspondence to an EU provision, they assessed convergences, divergences and degree of flexibility compared to the EU model. If and when relevant, sub-sections also mentioned and briefly described landmark judicial decisions that contributed to shaping the content of national flexibilities. Already this static analysis showed:

- a **full reception of EU Directives and Regulations**, with the only exception of the CDSM Directive, which at the date of the report had still to be transposed by almost half of the Member States (as of the date of this post six Member States have yet to transpose the Directive);
- the **alignment of the majority of Member States around the flexibility categories provided by the InfoSoc Directive**, with just a handful of national legislatures standing out for creativity and originality in the provisions introduced along and/or beyond the model introduced at the EU level;
- the presence of **some variations in the conceptualization of some permitted uses** (e.g., among others, temporary reproduction, some lawful uses, private copy/reprography, private study, illustration for teaching and research), which are either classified or labelled differently in different Member States, or are qualified as acts outside the scope of copyright instead of L&Es.
- along the same lines, the presence of a **wave of amendments of national copyright flexibilities after 2001**, which, however, **regarded only certain categories** (e.g., among others, disabilities, cultural uses, temporary reproductions, private copy, ephemeral recording, various types of lawful uses), **but not others** (e.g. parody, quotation);
- the **non-homogeneous reception of CJEU doctrines by national courts**.

Comparative reports focused on each category of copyright flexibilities, assessing convergences and divergences with regard to beneficiaries, rights, uses and works covered, and additional requirements imposed for the application of each provision. The findings confirmed the scenario depicted by previous legal mappings with regard to the fragmentation of national solutions. Compared, however, to the very negative picture drawn in the past, the study highlighted also the presence of positive instances of convergences and increasing flexibility, while the recent introduction of mandatory exceptions have proven largely successful in terms of harmonization and achievement of greater legal certainty across the Union. On the contrary, areas not covered by the EU harmonization still present moderate to very high degrees of fragmentation, which strongly call for an intervention by the EU legislature.

The findings of each comparative report may be summarized as follows:

- **Temporary reproduction, lawful uses, de minimis uses.** Compared to others, this category shows a high degree of harmonization and convergence, mostly due the mandatory nature of most of its provisions (e.g. temporary reproduction, software interoperability and backup copy exceptions). However, fragmentation is still caused by the oft-substantial difference in definitions, specificities and conditions of applicability.
- **Private copy and reprography.** The degree of harmonization of the private copy exception is not homogeneous across the EU. In fact, national approaches differ but for basic points. As to beneficiaries, some Member States covers also third party copying and, more rarely, legal persons; qualitative and quantitative caps to the amount of work that can be copied vary; permitted uses are limited to reproduction, with some countries opening to digital copies, while remuneration schemes converge on private levy models which, however, show remarkably different features. National courts contributed to the fragmentation by imposing additional conditions of applicability (e.g. three-step test, presence/absence of Technical Protection Measures etc).
- National **parody** exceptions are largely not harmonized. The exception has not even been implemented in several Member States, its space being functionally occupied by an extensive use of the quotation exception, or by resorting to free uses.
- In addition, national courts keep on applying national judicial requirements that have been outlawed by the CJEU in *Deckmyn*. Article 17(7) CDSM Directive has been generally implemented verbatim and limited to online parody, caricature and pastiche, with only a few Member States taking the opportunity to coordinate the provision with the general parody exception, or extending the latter to cover pastiche and caricature. Countries without the parody exception have not filled in the gap, and now explicitly feature it only for OCSSPs users.
- **Quotation** represents the only mandatory exception under the Berne Convention, and this explains while it is present in all Member States. However, national provisions share only basic features, such as the undefined category of beneficiaries, the need to mention the author's name and the source of the work, and, to a certain extent, the purposes(s) of quotation. On the contrary, there are significant divergences as to the objective scope of the provision (works that can be copied and to what extent), and several countries introduce additional requirements, such as compliance with fair practices, on top of those specified by the CJEU in *Funke Medien*. As in the case of parody, Article 17(7) CDSM Directive had a limited impact on harmonization, being usually implemented verbatim and thus adding only the mention to online quotation in favour of

users of OCSSP's services.

- **Informatory purposes.** Flexibilities related to informatory purpose present a simplified structure at the EU level but a much greater complexity in national implementations. All Member States recognize the prevalence of the public interest in receiving information on current events over copyright, but they do not converge on practical implementations. The three InfoSoc exceptions are not always transposed in their entirety, while the pool of beneficiaries varies a lot, ranging from countries that open such E&Ls to those limiting to "mass media" only or other circumscribed categories of stakeholders. A number of Member States covers such uses under quotation or other exceptions protecting freedom of expression – a circumstance that may increase flexibility but triggers uncertainties in national case law. In addition, most national laws feature E&Ls that make it difficult or impossible to extend their scope to digital media publishers, thus severely curtailing the balance between conflicting interests in the online environment.
- **Teaching and research uses.** Copyright flexibilities for uses in research and teaching are among the most fragmented and less harmonized E&Ls This is mostly due to the fact that all EU Directives but for the CDSM Directive always covered the two purposes – teaching and research – under the same general, vaguely worded exception, paving the way towards the enactment of a wide variety of national solutions, covering either both categories or just one (usually teaching), and addressing the definition of beneficiaries and permitted uses in a similarly various fashion. Fragmentation of national solutions can be noted at all levels. Member States present a highly diversified approach towards the definition of the subjective scope of their teaching and research E&LS, by choosing either not to identify beneficiaries, or to provide open or closed list of educational (and more rarely research/scientific) entities. Lack of harmonization is even more evident in the case of the objective scope (permitted uses, works covered, quantity of works that can be used). Some Member States include additional conditions of applicability such as limitations in purpose, necessity benchmarks, three-step test and remuneration, which are often read restrictively by courts. Research purposes are almost completely neglected, for the great majority of national provisions are solely addressed to teaching or general educational activities. Article 5 CDSM Directive is leading to a greater convergence. However, every time a detail is left to the discretion of Member States (e.g. the possibility to request remuneration or to subordinate the operation of the exception to the absence of adequate licenses), differences emerge again – this time tackled, however, by the introduction of the country-of-origin principle. The first research-oriented-only flexibility introduced in EU copyright law – Article 3 CDSM Directive on text and data mining for research purposes – has also been implemented almost verbatim by Member States, with only a few divergences on permitted uses and beneficiaries, usually in favour of broader approaches. This represents a welcome novelty in the interplay between EU and national legal systems, showing a path that may be successfully followed in the future.
- **Cultural and socially oriented uses.** In the pre-CDSM era, the EU copyright acquis was characterized by a piecemeal approach to E&Ls directed to target cultural uses and the preservation of cultural heritage. Three different approaches are equally distributed across the EU with regard to beneficiaries (unidentified, closed/open lists of selected beneficiaries, single beneficiaries), works covered and permitted uses (general right of use, only a selected list of rights, one single use, as well as unspecified, a selected list of works or single categories thereof). Conditions of applicability – remuneration duties and limitations in purpose – are read in a highly diversified manner, and the same fragmentation characterises other cultural, educational and socially oriented uses, where there is little or no convergence in focus, and no possibility to conduct a real comparative assessment for the extreme heterogeneity of national solutions. In

addition, only a few countries implemented Article 5(2)(e) InfoSoc. The mandatory nature of the Orphan Works Directive exception pushed national laws towards a much greater standardization, and the same can be said with regard to Articles 6 and 8 CDSM DIrective. Yet, this area is still characterized by great fragmentation, hindering the possibility to develop cross-border cooperation and exchanges, and ultimately creating obstacles to the development of consistent EU cultural policies when protected works are involved.

- **Copyright and disability.** National implementations of the Marrakesh Treaty's disability exception present a high degree of harmonization, with limited areas of divergences (such as the identification of authorized entities, which is some instances is based on case-by-case appointments and strict criteria). As to the implementation of the InfoSoc Directive's disability exception, greater differences can be found. A number of countries provide broader definitions of disability, while a handful of national laws adopt more restrictive readings, and the same can be said vis-à-vis the possibility for third parties to exercise the exception on behalf of disabled individuals. As to the objective scope, a restricted group of countries provides for open lists of works, following the EU model; few of them encompass also databases and software; others go as far as to provide different rules for different works. Permitted uses are generally regulated in a harmonized manner, except for some countries mentioning a general right to use, or adding also other rights such as public performance. Criteria of applicability are harmonized, while more divergences can be found on the side of remuneration, where the majority of Member States exclude it, or require it only in limited circumstances.
- **Uses by public authorities.** While flexibilities for uses by public authorities have very much nation-based, the introduction of Article 5(3)(e) InfoSoc has triggered some basic harmonization. When Member States transpose the provision they follow the EU model, but for some instances, such as the definition of the purposes of the exception (e.g. public security, or judicial or administrative proceedings), the presence of subject-specific restrictions, the exclusion of some categories of works, uses or beneficiaries. On the contrary, only a few countries have implemented Article 5(3)(g) InfoSoc, in a much more fragmented fashion, and with a wide array of restrictions as to events and works covered.
- **Public domain.** Public domain and paying public domain regimes remain highly fragmented and not harmonized in the EU. There is convergence on two broad categories of subject matters excluded from protection (official documents/symbols and daily news/facts), and the idea-expression dichotomy usually emerges between the lines. Yet, national specifications are different, with the result that, despite the CJEU's intervention in the field, the boundaries of public domain in EU copyright law remain unclear.

The **mapping of private ordering sources** led to four sets of conclusions.

First, users are granted few flexibilities for the use of intangible or service-like contents, on top of the restrictions already narrowed down by legislators. EULAs evidenced that platforms tighten the grip on potential uses. Limitations are placed on access to contents on a geographical basis or secondary dissemination and Technical Protection Measures are often applied. EULAs are either silent on some end-user flexibilities (e.g., freedom of expression-based E&Ls) or unclear about their application (e.g. well-developed notice-and-take-down regime, but loose(r) complaint-and-redress mechanisms). A misleading language is often adopted, e.g., speaking of "sale", "purchase" and the like, although EULAs are licenses for customers of service providers. Second, ownership-based user rights are the strongest. The analysis also suggests that social media users are granted more flexibilities than those of streaming platforms. Third, end-user flexibilities are heavily

affected by the legal framework. Especially service providers offering licensed professional contents are impacted by copyright rules whilst User-Generated Content (UGC) platforms enjoy greater flexibility (*regulatory lock-in effect)*. Fourthly, end-users are influenced by the fierce competition among platforms. Horizontal (service-based, e.g., Facebook v Twitter) and vertical (company- or portfolio-based, e.g., Apple v Facebook) competition is fuelled through mutual learning and the overbidding of competing offers. Lots of end-user flexibilities stem from this, e.g. secondary dissemination, family/UGC-sharing and other benefits, e.g., subtitles (*business flexibility effect).*

EULAs in the post-CDSM period focus, instead, on two main aspects: the exclusion of primary liability of platform operators and an effective notice and takedown procedure. Most terms of use include safeguards to challenge the lawfulness of content removal, but those of Article 17 CDSM Directive, such as content filtering, do not appear in contract terms. On the one hand, it seems that OCSSPs stick to liability limitation clauses, shifting liability to end-users and weakening the impact of Article 17. On the other hand, some platforms, such as YouTube, also actively filter and remove uploaded content at their own discretion and without prior notice through automated systems. In other words, the balance among operators, rightholders and end-users tips in favour of the first two stakeholders, whilst it is unclear how platforms protect freedom of expression, creative creation and access to information, which have been among the main watchwords for criticism of Article 17. In fact, the status quo seems to remain unchanged despite the implementation of the CDSM Directive – a circumstance that is also backed by the inertia of North-American platforms operating under US law.

This entry was posted on Thursday, May 18th, 2023 at 8:03 am and is filed under CDSM Directive, Digital Single Market, European Union, Exceptions and Limitations, Liability
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