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Law and Technology
Fair Use in Europe

Examining the mismatch between copyright law and technology-influenced evolving social norms in the European Union.

Like the euro, the law of copyright in the European Union seems to be in a state of perennial crisis. Copyright owners complain the law has left them defenseless against mass-scale infringement over digital networks, and call for enhanced copyright enforcement mechanisms. Users and consumers accuse the copyright industries of abusing copyright as an instrument to conserve monopoly power and outdated business models. Authors protest that the law does little to protect their claims to receive compensation—from the copyright industries and the users of their works alike.

A major cause of this crisis in copyright is the increasing gap between the rules of the law and the social norms that are shaped, at least in part, by the state of technology. Of course, technological development has *always* outpaced the process of lawmaking, but with the rapid and spectacular advances in information technology of recent years the law-norm gap in copyright has become so wide the system is now almost at a breaking point.

All this may look very familiar to U.S. readers well versed in the ongoing Great American Copyright Debate. However, in Europe the situation is much more complex, for at least two reasons. One is the intricacy of the EU lawmaking machinery, which requires up to 10 years for a harmonization directive to be adopted or revised. The other is the general lack of flexibility in the laws of copyright in the EU and its Member States, which—unlike the U.S.—do not permit "fair use" and thus allow little leeway for new technological uses not foreseen by the legislature.

As a consequence there is an increasing mismatch in the EU between the copyright law and emerging social norms. For example, the law in many Member States fails to take account of current educational and scholarly practices, such as the use of copyright-protected content in PowerPoint presentations, in digital classrooms, on Blackboard sites, or in scholarly correspondence. By the same token, many European laws severely restrict the use of (parts of) copyright works for purposes such as data mining or documentary filmmaking. By obstructing these and other uses that many believe should remain outside the reach of copyright protection—and would likely be called *fair use* in the U.S.—the law in Europe impedes not only innovation, science, and cultural progress, but also undermines the social legitimacy of copyright law. Arguably, this ever-widening copyright law-norm gap is an important factor in explaining why illegal sharing of copyright content is more widespread in Europe than it is in the U.S.

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Like in most countries of the world, copyright laws in the EU traditionally provide for "closed lists" of limitations and exceptions that enumerate the various uses that are permitted without authorization. Examples of such uses

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are: private copying, quotation, parody, library archiving, classroom uses, and reporting by the news media. Statutory exceptions are usually detailed and connected to specific states of technology, and therefore easily outdated. To make matters worse, the EU legal framework leaves Member States little room to update or expand existing limitations and exceptions. The EU's Copyright in the Information Society Directive of 2001 lists 21 limitations and exceptions that Member States may provide for in their national laws, but does not allow exceptions beyond this "shopping list."

Search

A case in point, and a major cause of contention, is *search*. While operating a search engine in the U.S. would generally be considered fair use,[a] courts across Europe are struggling to accommodate information location tools in copyright laws that provide for extensive rights of reproduction but only narrow and outdated exceptions. This should come as no surprise given the widespread copying of copyright material that most search engine providers routinely engage in. Consider, for example, Google's webcrawler that makes digital snapshots of most content available on the Web at any time, or the Google cache that archives these copies for indexing purposes. For another example, consider the myriad thumbnails image search engines commonly return to users in response to queries. Dealing with these unauthorized copies in European legal systems that do not generally allow fair use is becoming increasingly problematic.

Court decisions in the Member States of the EU illustrate the current state of confusion regarding the copyright status of search. In a case brought against Google by Belgian newspaper publishers the Brussels Court of Appeals held that Google squarely infringes the rights of copyright owners in content cached by Google.[b] By contrast, the Spanish Supreme Court held that the unauthorized copies in the Google cache were merely *de minimis*, and did not amount to infringement. In a case involving Google Image Search the German Federal Supreme Court took a middle-ground position by holding, on the one hand, that Google's unauthorized use of (thumbnail) images is not exempted by any existing statutory limitation. On the other hand, any author that makes his content available on the Web without blocking webcrawlers, is deemed to have consented to the use of his content by search services.[c] Other search-related cases decided by courts in France, Austria, and other countries point in yet other directions.[7] Eventually, the European Court of Justice in Luxembourg will have the final say on

a See *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003); *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006); *Perfect 10, Inc. V. Amazon, Inc.*, 487 F.3d 701 (9th Cir. 2007).

b *Google Inc. v. Copiepresse*, Court of Appeal Brussels, May 5, 2011.

c German Federal Supreme Court (*Bundesgerichtshof*), Judgment of April 29, 2010, Case I ZR 69/08, available in German at http://www.bundesgerichtshof.de.

these questions. Will the Court allow search without permission? Or will the World Wide Web in Europe be searchable only on condition of a billion (or so) licenses?

To further complicate matters in Europe, the German government last year proposed special legislation that would require search engines and other online news aggregators to seek licenses from newspaper publishers for linking to news items.[2] Although the German parliament has recently watered down the bill to allow search engines to show news snippets, the bill has already set a dangerous precedent in other Member States, such as France, where newspaper publishers feel equally threatened by Google News and similar services.[1]

User-Generated Content

Another area where a need for flexibility in copyright is evident is user-generated content. Whereas the social media have in recent years become essential tools of social and cultural communication, copyright law in most EU Member States leaves little or no room for sharing user-generated content that builds upon preexisting works. For example, a spoof video composed of materials taken from broadcast television and uploaded to YouTube or Facebook would be exempted only in the rare case that it would qualify as a quotation providing critical commentary, or as a parody or pastiche. As the European Commission already recognized in its 2008 *Green Paper on Copyright in the Knowledge Economy*, the absence in European copyright laws of an exemption permitting user-generated content "can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated."[4] The Commission's suggestion to introduce a special user-generated content exception in EU copyright law has however as yet not materialized.

Good News

The good news is that the idea of introducing a measure of flexibility in the European system of copyright limitations and exceptions is now gradually taking shape. The Dutch government has in recent years repeatedly stated its commitment to initiate a discussion at the European political level on a European-style fair use rule. In the U.K., the Hargreaves Report, a forward-looking government-commissioned study on copyright reform published in May 2011, recommends the U.K. government argue in Brussels for "an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners."[5] The U.K. government's official response to the *Review*[6] highlights the need for more flexibility in EU copyright law. Most recently in Ireland the Copyright Review Committee advised the Irish government to consider the introduction of a general fair use rule, which would make Ireland part of a growing number of states—including Israel and Singapore—adopting the American model.[3]

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Toward a Semi-Open Norm?

Clearly, the time is ripe for a critical review of the EU's closed list of permitted limitations and exceptions to copyright. The Information Directive of 2001 that sought to deal with the early copyright challenges of the digital environment, is now well over 10 years old, but has never been properly reviewed by the European Commission. Opening up the Directive's closed list to allow other fair uses that promote innovation and cultural development should feature high on the European Commission's legislative agenda for the near future. A straightforward way to do this would be by allowing Member States to provide for *other* (that is, not specifically enumerated) limitations and exceptions permitting unauthorized uses, on the condition these uses comply with the so-called three-step test. The three-step test, which is part of the WTO's TRIPS Agreement and other international treaties that are binding upon the EU, is already incorporated in the Directive as an overarching norm preventing Member States from introducing overbroad copyright limitations. The test requires that exceptions: apply only in certain special cases; not conflict with the normal exploitation of copyright works; and not otherwise unreasonably prejudice the interests of rights holders. By combining the present system of circumscribed exceptions with an open norm that would allow other fair uses, a revised Directive would better serve the combined goals of copyright harmonization and promotion of culture and innovation.

A good example of such a semi-open norm can be found in the *European Copyright Code* that was released by a group of leading European copyright scholars (the Wittem Group) in 2010. If the EU legislature wishes to infuse a measure of flexibility and fair use in its currently defunct copyright system, it needs to look no further.[8] C

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