

Flexible Copyright Elastyczność

Prof. P. Bernt Hugenholtz



C4C Warsaw Event, 24 May 2013

Calls in Europe for More Flexibility

- Gowers Review UK (2006):
 - Exception for ‘creative, transformative or derivative works’
- Hargreaves Review UK (2011):
 - Explore L&E’s allowed by EU to the max
 - UK Government Response (2011)

Recent Calls for More Flexibility

- Dutch Government (2010, 2011, 2012):
 - Need for ‘fair use’, flexible L&E’s
 - Dutch Copyright Committee (2013): create flexible rules for UGC and search engines, based on extended quotation right
- Irish Copyright Review (2012):
 - Explore open-ended *fair use* provision

Background:

Limitations and Exceptions

- EU Member States: ‘closed’ list of L&E’s
 - Enumeration of circumscribed permitted uses
 - UK/Ire: ‘fair dealing’ under specified conditions
- Extensive copyright harmonization in EU
 - Information Society Directive (2001): **exhaustive list of permitted (optional) L&E’s**
- US, Isr, Sing, Phil: *Fair use*
 - Open norm allowing spectrum of ‘fair’ uses

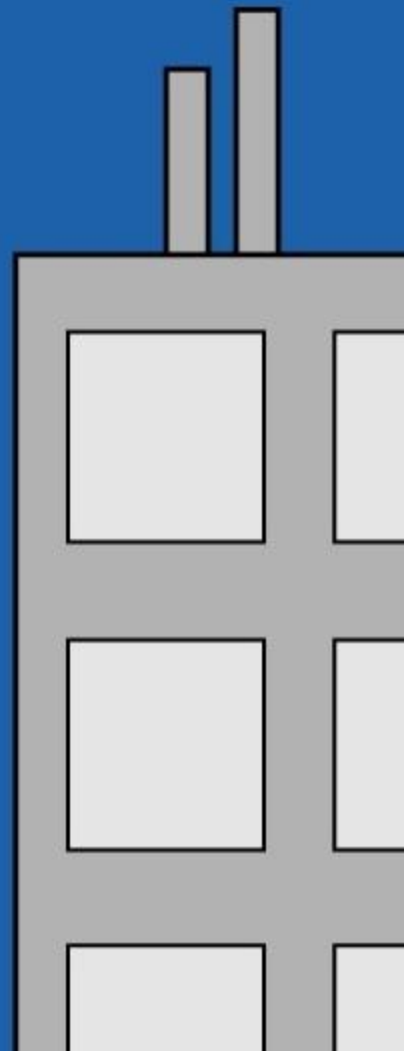
Increasing Need for Flexible, Open Norms

- Accelerating pace of technological change
- Legislature cannot respond, must anticipate
 - Need for abstract, flexible norms
- EU harmonization requires extra cycle of law making
 - Total legislative response time > 10 years!

Where Flexibility is Needed: Examples

- User-generated content: creative remixing

nijn - eleven



Where Flexibility is Needed: Examples

- User-generated content
 - Parody or quotation exceptions may be too narrow

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)



Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
 - Cache: transient copying exception may not apply
 - Search results: quotation exception may not apply
 - See e.g. *Copiepresse v. Google* (CoA Brussels 2011)

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom



Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
 - PPT, Blackboard, e-boards, etc. not (always) covered by educational exceptions

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making

Where Flexibility is Needed: Example

- User-generated content
- Information location tools (
- Digital classroom
- Documentary film making



Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making
 - Media reporting & current events exceptions often too narrow

Where Flexibility is Needed: Examples

- User-generated content
- Information location tools (search)
- Digital classroom
- Documentary film making
- ‘Unknown unknowns’

GET SHAZAM

SHAZAM MUSIC

MY SHAZAM

(SHAZAM) RED on iPhone & iPod touch



Get (SHAZAM) RED on iPhone & iPod touch: take the ultimate music journey and make a difference to millions of lives.



NEW: LyricPlay - see and sing to the lyrics as they play in time to the music or just find out the words if you're curious! Available in (SHAZAM) RED and Encore Apps. US, UK & CA at launch.

(SHAZAM) RED is a fantastic way to discover, buy and share music. With (SHAZAM) RED you can enjoy exclusive features including unlimited tagging, Play in Spotify and Recommendations; as well as all Shazam's features - identify a track, buy it, check out the videos, get the lyrics, share with friends - and more.

GET SHAZAM

▶ iPhone & iPod touch

▶ (SHAZAM) RED

Download
FAQs

▶ Android

▶ BlackBerry

▶ Nokia

▶ Windows Phone 7

▶ Windows Mobile 6

▶ iPad

Does the EU Framework Allow Flexible Norms?

- InfoSoc Directive: closed list of L&E's
 - Rec 32: "exhaustive enumeration of exceptions and limitations to the reproduction right and right of communication to the public"
- *But* L&E's in Directive loosely circumscribed
 - *Prototypes* rather than precise exceptions
 - Rec 2: "need to create a general and flexible legal framework [...] to foster the development of the IS"

Examples from InfoSoc Directive

Art. 5(3)(d) (quotation):

“....quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose

National Implementations:

From strict to liberal

Article L122-5 Intellectual Property Code (France)

Once a work has been disclosed, the author may not prohibit: [...] 3° . on condition that the name of the author and the source are clearly stated: a) analyses and **short quotations** justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated [...];

Article 22 Swedish Copyright Act

Anyone may, in accordance with proper usage and to the extent necessary for the purpose, quote from works which have been made available to the public.

Examples from InfoSoc Directive

Art. 5(3)(i):

“... incidental inclusion of a work or other subject-matter in other material;”

Examples from InfoSoc Directive

Art. 5(3)(k):

“.... use for the purpose of caricature, parody or pastiche;....”

What Kinds of Flexibilities?

- General open norm (*fair use*)?

EU Compatible *Fair Use* Rule

“It does not constitute an infringement to use a work or other subject-matter for non-commercial scientific research or illustrations for teaching, for the reporting of current events, for criticism or review of material that has already been lawfully made available to the public, or quotations from such material serving comparable purposes, for caricature, parody or pastiche, or the incidental inclusion in other material, provided that [the three-step test is satisfied]”

What Kinds of Flexibilities?

- General open norm (*fair use*)?
- Create flexibilities *inside* circumscribed L&E's
 - Dutch approach: stretch quotation right

Art. 15 Dutch Copyright Act

“It shall not be regarded as an infringement of copyright in a literary, scientific or artistic work to adopt news reports, miscellaneous reports or articles concerning current economic, political or religious topics or works of the same nature that have been published in a daily or weekly newspaper or weekly or other periodical, radio or television program or other medium fulfilling the same purpose, if [...]”

What Kinds of Flexibilities?

- General open norm (*fair use*)?
- Create flexibilities *inside* circumscribed L&E's
- Create flexibility *alongside* circumscribed L&E's

EUROPEAN COPYRIGHT CODE

Introduction

The *European Copyright Code* is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The project has its roots in an International Network Program run by three Dutch universities (Radboud University of Nijmegen, University of Amsterdam and Leiden University), and sponsored by the government-funded Dutch ITeR Program.

The aim of the Wittem Project and this Code is to promote transparency and consistency in European copyright law. The members of the Wittem Group share a concern that the process of copyright law making at the European level lacks transparency and that the voice of academia all too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Nevertheless, the Group does not take a position on the desirability as such of introducing a unified European legal framework.

The Code was drafted by a Drafting Committee composed of seven members. Each chapter of the Code was originally drafted by one or two members of the Drafting Committee, acting as rapporteurs. The rapporteurs for each chapter were: Prof. Quaedvlieg (Chapter 1: Works), Prof. Hugenholtz (Chapter 2: Authorship and ownership), Prof. Strowel (Chapter 3: Moral rights), Prof. Visser (Chapter 4: Economic rights) and Professors Dreier and Hilty (Chapter 5: Limitations).

Each draft Chapter, accompanied by an explanatory memorandum, was discussed in a plenary session with the members of the Wittem Advisory Board and other experts that were invited ad hoc. The proceedings of these plenary sessions were fed into the second versions of each chapter, and thereafter redacted and integrated into a final consolidated version by the Drafting Committee. Although discussions with the Advisory Board and experts have greatly influenced the final product, responsibility for the Code lies solely with the Drafting Committee.

While drafted in the form of a legislative instrument and thereby exceeding the level of detail normally associated with common principles of law, this Code is not comprehensive. It concentrates on the main elements of any codification of copyright: subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4) and limitations (Chapter 5). The Code does not, for instance, treat such remuneration rights as public lending right and droit de suite, nor does it deal with the legal protection of technical measures. Also, the Code does not contain rules on copyright liability or enforcement, nor does it touch upon neighbouring (related) rights and database right.

This Code is not a recodification of EU copyright law *tabula rasa*. Since European copyright law must

- ▶ Introduction
- ▶ Drafting Committee and Advisory Board
- ▶ European Copyright Code
- ▶ European Copyright Code (pdf)
- ▶ Contact



European Copyright Code (Wittem Group)

Art. 5.5 – Further limitations

Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties. [\[55\]](#)



FAIR USE IN EUROPE. IN SEARCH OF FLEXIBILITIES

Prof. Dr. P. Bernt Hugenholtz
Institute for Information Law
University of Amsterdam

Prof. Dr. Martin R.F. Senftleben
VU Centre for Law and Governance
VU University Amsterdam