

FAIR USE BY DESIGN IN THE EUROPEAN COPYRIGHT DIRECTIVE OF 2001: **AN EMPTY PROMISE**

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Legislative solutions to the troublesome relationship between digital copyright management systems and *fair use* or limitations to copyright are diverse. The response recently given by the European lawmaker in the Directive of May 22d, 2001 on copyright and the Information Society¹ to that burning challenge, is a bold one: contrary to the US Digital Millennium Copyright Act or Australian Copyright Act², its main originality lies in the way it induces to implement *fair use* or exceptions to copyright, as we say in Europe_ in the very design of the technical, business and contractual models for distributing copyrighted works.

Indeed, the European directive seeks to put the balance in favor of the user not at the stage of the sanctions for circumvention, but at the earlier stage of the very exercise of the exception constrained by a technical measure. To this end, the directive puts forward an intricate provision, the article 6(4).

The first principle laid down in this article is to entrust the rightholders with the task of reconciling the technological measures with the safeguarding of the exceptions. The first indent of the article 6(4) states: «*in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation(...), the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned*». The intervention of the lawmaker is therefore subsidiary to that of the authors and other rights owners³. Adoption of any voluntary measures by rightholders should be the preferred solution. The State should intervene only in default of such measures.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167 , 22/06/2001 p.0010 – 0019, available at http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm.

² For a comparative analysis of anti-circumvention provisions in the United States, Australia, Japan and the European Union, see J. de Werra, *The Legal system of technological protection measures under the WIPO Treaties, the DMCA, the European Union Directives and other national laws (Japan, Australia)*, 189 R.I.D.A. 67 (2001).

³ In the European Union, performers, phonogram and film producers and broadcasters enjoy a neighboring right in their performances or productions, as the producer of databases enjoy a *sui generis* right in non original databases

The directive does not define the '*voluntary measures*', save for mentioning agreements between copyright holders and other parties concerned. We could think of "building copyright exceptions by design" as one key example of such "voluntary measures". The right holders could devise or revise the technological measures so as to accommodate some exceptions or put in place some breathing space in favor of the user in licenses or business models. This solution is rather bold and revolutionary in the European context. In a way, it implies that the exceptions are given a positive meaning and not only a defensive nature. It is certainly the first time that authors are asked to facilitate the exercise of exceptions to their rights. Countries, such as France or Germany, which consider exceptions to copyright only as 'market failure' or as nothing but a tolerance by the authors, will have a hard time in putting such a new principle in their copyright legislation.

The purpose of the paper will be to consider to what extent this "fair use by design" is sustained in the European Directive and in the *acquis communautaire* which already grants some 'rights' to software or database users. A quick explanation of the *fair use* or exceptions to copyright as they stand in the European Union will be first considered (I.) with some emphasis on the recent failure to harmonize the diverse systems prevailing in the Member States and on the harmonized exceptions to copyright in software and database. Then, the recent directive on copyright in the information society, and particularly the solution to the conflict between technological measures and exceptions it puts forward, will be analyzed (II.). As a conclusion, the paper will highlight the flaws and restrictions of the European solution which makes 'fair use by design' at the European level a broken promise (III.).

I. Exceptions and limitations to copyright in the European Union

In any regulatory framework, copyright is not absolute but is limited in scope, duration and in the ways of it can be enforced. One key limitation to copyright consists of the so-called exceptions, i.e. uses, in theory covered by the monopoly of the author, that are considered as non infringing. Such systems of copyright differ from a country to another. They are generally of two kinds: either they provide for a general and flexible defense to copyright infringement that can be granted by the courts on a case-by-case basis, as in the American fair use, or the law provides for a list of circumstances where the author is said not to be allowed to enforce her rights, as in most European countries. In the former case, the exceptions system is "open" as it allows for more and new limitations to emerge. By its very nature, such regime is thus evolutionary and does not know any fixed and definitive boundaries. The latter case, also qualified as "closed" systems of exceptions, is at the contrary clearly bordered around a list of narrowly defined and exhaustive cases.⁴ For instance, France does know

⁴ For a comparative view of copyright exceptions around the world, see *The Boundaries of Copyright*, ALAI Study Days 1998 (L. Baulch, M. Green & M. Wyburn (eds.) 1999), and particularly the general report by Jaap Spoor at 27

some exceptions to the copyright or author's right for parody, quotation, or private copy, but does not allow for new exceptions, outside of the legal list, to be granted by the courts⁵.

It has to be added to that picture of copyright exceptions around the world, that though the so-called continental countries look alike in the way they comprise a closed list of exceptions, they are rather different in the content of such lists. In Europe, exceptions to copyright are largely diverse and not harmonized. The following exceptions are generally recognized: private copy or other private use, parody, quotation, use of a work for scientific or teaching purposes, news reporting, library privileges, needs of the administration of justice and public policy. But all these exceptions are not recognized in all countries: for instance, France does not know any exceptions for research or education, nor for libraries, while Germany or the Netherlands do not have any exception for parody.

Next to those broad categories of copyright exceptions, there are also very specific cases regarding particular situations. For example, there is the Belgian exception which allows the Film Museum to make copies of films for purposes of restoration, the exception for disabled persons in the Nordic countries, or the German exception which exempts the communication of works during religious ceremonies.

This fragmented picture in the European countries has made obvious a need for harmonization amongst the Member States in order to prevent any hurdle to the proper operation of the internal market. This is what the European Commission has tried to achieve as from its 1997 draft directive on the harmonization of copyright and related rights in the information society. The exceptions were amongst the key fields of copyright where harmonization was pursued. The draft directive imposed then to the Member States to limit their list of copyright exceptions to nine cases⁶. This purpose for harmonization has failed since the directive finally adopted in 2001 states a long list of 23 exceptions⁷

⁵ Nevertheless, recognizing that these exemptions are based on a balance between private and collective interests, some European courts indulged themselves in extending the exhaustive list of exceptions included in the law when a situation arises which jeopardizes this balance between competing interests. See *Dior v. Evora*, Hoge Raad, 20 October 1995, *N.J.*, 1996, N° 682 (The Supreme Court of the Netherlands considered that the logic of copyright itself entailed that the list of exceptions featured in copyright law could not be considered closed. When the *rationale* that has justified exceptions is found in a similar situation (i.e. when the general interest or higher interest of a third party can only be preserved by limiting copyright) it must be accepted that the author's rights must give way to this general interest or third party interest in seeing the work reproduced and/or made available to others) or, for a French example, Court of Paris, 23 February 1999, 184 R.I.D.A. 374 (an exemption unprovided for by copyright law can be recognized on the basis of the public's right to information as laid down in Article 10 of the European Convention on Human Rights. This revolutionary and hence criticized decision has been reversed in appeal however). On all these rulings and some more, P. Bernt Hugenholtz, *Copyright and freedom of expression in Europe*, in *Expanding the Boundaries of Intellectual Property*, (R.C. Dreyfuss, D.L. Zimmerman & H. First (ed.), 2001), at 343.

⁶ The only exceptions that would have been allowed, were the temporary act of reproduction, the reprography, the private copy, the exceptions for archives and libraries, for teaching and research, for disabled persons, for news reporting, for quotation and for public security purpose.

⁷ The exceptions listed in the article 5 of the directive are the temporary act of reproduction, the reprography, the

whose only one (i.e. the exception for temporary acts of reproduction) is to be mandatorily implemented in the regulatory framework of the Member States. Other exceptions are what some have called a 'shopping list' in which Member States can pick and choose. Moreover, looking at the current national proposals for transposition of the directive underlines that in most cases, member States have chosen to keep existing exceptions without suppressing some or creating new ones. This tells a good deal about the outcome of the harmonization purpose marketed by the Commission⁸.

On the contrary, the exceptions regime is largely harmonized in Europe for specific works, i.e. software and databases. The directive of 1991 on the legal protection of computer programs has laid down a closed list of exceptions to the copyright vested in a software, which is the same in each member State. Those exceptions are the use of the computer program, including for error correction, the making of a back-up copy, the study of the program, and the reverse engineering⁹. All these exceptions are restricted to the lawful user of the computer program.

As far as databases are concerned, the 1996 directive has allowed for the following exceptions: uses necessary for the purpose of access to the contents of the databases and normal use by the lawful user, reproduction for private purposes of a non-electronic database, illustration for teaching or scientific research, for the purpose of public security and where other exceptions to copyright which are traditionally authorized under national law are involved¹⁰. Specific exceptions to the *sui generis* right exist in case of extraction for private purposes of the contents of a non-electronic database, for the purposes of illustration for teaching or scientific research, and for the purposes of public security or an administrative or judicial procedure¹¹.

broadcasting organizations, the reproduction made by some social institutions, use for the sole purpose of illustration for teaching or scientific research, use by disabled persons, news reporting, quotation, use for public security purpose, use of political speeches, use during religious or official celebrations, incidental inclusion of a work in other material, use for the purpose of advertising the public exhibition or sale of artistic works, parody, use in connection with the demonstration or repair of equipment, use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building, use for the purpose of research or private study by dedicated terminals in libraries, and finally what has been called the "grandfather clause" which aims at preserving existing exceptions in Member States to the extent that the exception covers certain other cases of minor importance in the analog environment. Each exception has to comply with strict requirements. Some have to provide a fair remuneration to the rights owners.

⁸ See Bernt Hugenholtz, *Why the copyright directive is unimportant and possibly invalid*, [2000] E.I.P.R., 499.

⁹ Articles 5 and 6 of the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *Official Journal L 122*, 17/05/1991 p. 0042 – 004, available at http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm.

¹⁰ Article 6 of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *Official Journal L 077*, 27/03/1996 p. 0020 – 0028, available at http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm.

¹¹ Article 9 of the same directive

Both directives state that most of these exceptions can not be contracted out¹². Any contract preventing the user from reverse engineering the computer program or from accessing to the contents of the database shall be null and void¹³. Therefore, both directives and their transposition in Member States confer to some exceptions an imperative nature¹⁴. Such a binding or imperative nature of certain exceptions does not appear in the 2001 directive on copyright and information society¹⁵.

II. Copyright exception v. technological measures: the European solution

On the 22d of May 2001, the European Council has adopted the directive on the harmonization of certain aspects of copyright and related rights in the information society¹⁶. This directive completes a process of harmonization of copyright and related rights amongst the Member States and of adaptation of copyright to the information society, that has been engaged in as early as 1995 with the Green Paper of the European Commission on copyright in the information society¹⁷. The directive also implements the WIPO treaties of 1996, as the United States have done in 1998 with the Digital Millenium Copyright Act.

The legal protection of technological measures, otherwise called the anti-circumvention provisions, was certainly one of the key issues in the negotiations that have led to the adoption of the directive. The controversy surrounding such protection, and notably the relationship between technical lock-ups

¹² Contrary to that legal provision in the European *acquis communautaire*, the relationship between fair use and contract has been ruled under the preemption doctrine in the United States. See I. Trotter Hardy, *Contracts, copyright and preemption in a digital world*, 1 RICH. J. L. & TECH. 2 (1995); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, DAYTON L. REV. 511 (1997); Mark Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 86 CALIF. L. REV. 111 (1999); Maureen O'Rourke, *Drawing the Boundary between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L. J. 479 (1995); David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543 (1992).

¹³ The binding nature of some exceptions in the software or database context could have a specific outcome when dealing with technological measures. See Thomas Heide, *The approach to innovation under the proposed copyright directive: Time for mandatory exceptions ?*, [2000] I.P.Q., 215.

¹⁴ Legal provisions are said in Europe to be either "suppletive" or default rules that the parties are entitled to modify by private agreements, or "imperative" or "of public order". In the latter case, no contract can derogate from such provisions that are considered as necessary for protecting weaker parties or peculiar interests or for ensuring the proper order, morality or security of the society.

¹⁵ It is worthwhile to note that, since 1998, the Belgian Copyright Act states that all exceptions to copyright, incl. the private copy, though generally based on a market failure, are considered as imperative and can not be contracted out. To our knowledge, it is the only country where such a peculiarity exists.

¹⁶ *Supra note 1*.

¹⁷ Green Paper on Copyright and Related Rights in the Information Society, Brussels, 19.07.1995, COM (95) final

and limitations to copyright, was so intense it was nearly the breaking point of the whole directive. The issue has finally found a solution in article 6 paragraph 4 of the directive, that is but a delicate compromise between the friends and the foes of an absolute legal protection.

The article 6, where anti-circumvention provisions are laid down, states:

«1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC.

Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply mutatis mutandis.»

The first two paragraphs deal with the activities to be prohibited by the Member States: the circumvention of a technological measure on the one hand, the trafficking of devices enabling such a circumvention on the other hand. The third paragraph defines the technological measures to be protected to a very broad extent : it covers any technical tool used by a copyright owner to protect her work and the distribution thereof. While the US DMCA clearly delineates the measures controlling access and those controlling a right of the author, the European provisions cover any type of technological measures used by right holders, including access controls, rights-restriction mechanisms and any other technical tool to which the authors avail themselves to control and manage the use of their works. This goes far beyond the scope of the DMCA.

Our attention will be only devoted to the intricate provision of the fourth paragraph of the article 6 that seeks to preserve some exceptions in a technologically-protected environment.

Compared to other anti-circumvention provisions around the world, the European solution is peculiar in the manner it faces the issue. Indeed, while the United States or Australia have only considered the solution to that 'fair use' issue at the level of the sanction for circumvention, the European Union has chosen to rule the matter even before the enforcement stage. The former countries have enacted different safeguard mechanisms but both exempt the user when the circumvention she carried out was in the framework of the legitimate exercise of some exceptions¹⁸. In such a case, the legitimate use

¹⁸ Yet, both systems are largely different. The US DMCA does not hold liable the circumventer in very limited

being technically locked-up, the user has no choice but to circumvent the digital protection. The US law does not give her the tools to do so but will not hold her liable in some, albeit strict, conditions. Same for the providers of the circumvention means in the Australian law. The message here is thus: "circumvent-we-do-not-sue". It does not actually solve the issue of the digital lock-up. While in the analogue environment the copyright exemption was primarily used as a defense in litigation for copyright infringement _whatever its success might be_, in a digital world wrapped by technological devices, the function of exemptions system will be completely different. If any act of reproduction or communication of a copyrighted work is inhibited by a technological protection, the user will have either to sue the rightholder for enabling her to exercise her exemption (for instance for research, education, criticism purpose); either to deploy some skill for circumventing the technical measure. In both cases, the burden imposed on the user is rather heavy. The solution put forward by the DMCA and the Australian Copyright Act resumes the function of the exception as a defense only in the case of an action brought against the user for having circumvented the system (or against the provider of a device in the Australian case for having distributed the device). Both solutions do not seek to reduce the technological restraint on the legitimate exceptions.

In turn, the European directive seeks to put the balance in favor of the user not at the stage of the sanctions for circumvention, but at the earlier stage of the very exercise of the exception constrained by a technical measure. To this end, the directive puts forward an intricate provision, the article 6(4).

The first indent of 6(4) states: *«in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation(...), the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned».*

The second indent of the article 6(4) provides for a similar solution (appropriate measures of the States if rightholders fail to do so) as to the private copy. In that case, the intervention of the legislator is not mandatory, but optional. Here also, the initiative lies on the rightholders

The key principle of this provision is to encourage the copyright owners to take care themselves of the issue by any "appropriate measure" they could think of. The directive does not define the '*voluntary measures*' that could be taken by the copyright owners, save for mentioning agreements between

when the technological measures protects an exclusive right. Furthermore, generally the exceptions to anti-circumvention provisions _or the 'fair hacking' rights, as Jane Ginsburg has qualified them_ only applies to the circumvention itself and not the trafficking in circumvention devices. Whether fair use will be a legitimate defense to the circumvention or to the trafficking in circumvention devices is wildly discussed. Conversely, the Australia does not prohibit the circumvention itself but the trafficking in the circumvention devices. The fair use concern is thus limited. Anyway, the Australian regime enables the trafficking in circumvention devices where the user who will use the device, signs a declaration that the device will be only used for an identified permitted purpose. On the Australian provisions related to the exceptions, see J. de Werra, *supra note 2*, at 170; Australia Report, ALAI 2001 Congress, *Adjuncts and Alternatives to Copyright*, New York, June 13-17, 2001, available at http://www.law.columbia.edu/conferences/2001/home_en.html; S. Fitzpatrick, *Copyright imbalance: U.S. and Australian responses to the WIPO Digital Copyright Treaty* (2000) EIPR n°5 p. 214-228

rightholders and other parties concerned. As examples from the legislative history of the directive, the rightholders could provide some corporate or collective users with unlocked copy of the works, apply alternative pricing policy¹⁹, devise or revise the technological measures so as to accommodate some exceptions, thus put in place some breathing space in favor of the user. In the latter case, the very design of the technological protection measure will embed some fair use principles. In that sense, one can say that the European directive puts forward a solution, amongst others to be decided by the rightholders, of "fair use by design". Fair use by design can also infer from the choice of a new business model allowing for some place to the exercise of exceptions. In both cases, whether the fair use principle is embedded in the technical design of the management system or in the contractual design of the business model, its integration in the relationship between the author and the user will result from a choice or a negotiation preliminary to any litigation. The existence of the exceptions or fair use will be effective from an explicit decision from the author, in a private orderings model²⁰, and not from a public and democratic process of law making.

The optional provision related to the private copy confirms that the "fair use by design" is the standard adopted by the European Union in the field of copyright exceptions. Here, member States can not prevent the rightholders from adopting «measures regarding the number of reproductions». That refers to the anti-copy devices that allow for one or a small number of copies, such as serial copy management systems. The possibility to embed such restrictions about the number of copies is specifically linked to the design of the technological measure. Moreover, the directive provides that *«the technological measures applied voluntarily by rightholders (...) [or] in implementation of the measures taken by Member States, shall enjoy the legal protection [against anti-circumvention]»*. That indicates that, as to measures to be taken by the authors or the States, the European lawmaker has primarily thought about the integration of copyright exceptions in the very design and features of the technological measure.

In default of such measures from rightholders, the Member States are obliged to take *«appropriate measures to ensure that rightholders make available (...) the means of benefiting from [some] exception[s]»*. But nothing indicates when the default from the side of the rightholders will be sufficiently patent as to necessitate that the State takes the stage. It should be stated in the national implementation of the directive, the period of time at the expiration of which, if no measures have been taken by rightholders, the State must intervene, and the criteria for considering the appropriateness of the measures taken by the authors. On the latter, the directive prescribes nothing. Yet, the State should be allowed to address the merits of the measures taken by the rightholders before considering its intervention. Would any measure, even minimal, free the State from its legislative duty to safeguard the public interest, it would give too much of an unrestrained power to the authors.

¹⁹ Those are some measures mentioned by The International Federation of Phonograms Industry (IFPI).

²⁰ See *infra* note 25 and the accompanying text

The purpose of the appropriate measures to be taken by the right holders or, in default, by the States is to make available to the users the means of benefiting from exceptions. Such means should be made available only to *beneficiaries of exceptions who have legal access to the protected work*. This does not mean that the access to works should be granted to such users. Only the persons who have already access to works should be empowered to exercise legitimate exceptions. The case referred to here is when a work that has been legitimately purchased (or when the access thereto has been legitimately gained in whatever manner) is technically protected to the extent that some legitimate uses cannot be accomplished. For instance, a technical lock-up over a CD ROM on the history of the United States, rightfully purchased by a teacher, could prevent her from any copy for use in the classroom. Or a library would be restrained to make an archival copy of a database it has paid for. Article 6(4) is not about granting a free access to users.

III. Fair use by design in the directive: a critical comment

a) Contractual freedom privileges the copyright holders

Rather than the safeguarding of the exceptions and limitations of copyright, the freedom to contract of the authors is privileged by the directive. It does not impose any obligation to the authors but leave them some time and freedom before asking the lawmaker to intervene. Authors do not have neither to devise the measures they will take according to certain requirements. Any measures appear to be sufficient, whatever their accuracy, efficiency or the actual outcome for the users²¹.

Besides, one recital of the directive states that «*the exceptions and limitations should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law*»²². That confirms that contractual relationships (or design) could prevail in drawing the contours or existence of any exception, whatever open space the law has granted to the user of a copyrighted work.

The exception is thus clearly to be contracted²³. Such a principle stands along the solution advocated by Tom Bell who considered the "fair use" to become "fared use"²⁴ so as any exception could be

²¹ Save for the provision of the article 12 of the directive that requests the European Commission to examine the implementation and effects of some provisions of the directive, and particularly to consider whether acts which are permitted by law are being adversely affected by the use of effective technological measures. The wording here reminds of that of the DMCA that entrusts the Library of Congress with a similar rulemaking. Nevertheless, in the European context, the rulemaking will be less direct, since the Commission, as a result of such a consideration, can only propose some amendments to the directive to be finally decided by the European Council and Parliament and eventually transposed in the Member States.

²² Recital 45 of the directive.

²³ That is reinforced by the reference to 'agreements'

licensed and paid for. Many scholars have discussed this shift of copyright from a public law to a regime of private orderings enabled both by contract and technological measures²⁵. The discussion was not as controversial in Europe so far. But article 6(4) to the extent it leaves the freedom to authors to accommodate, design and restrict the exercise of exceptions, opens the way to a similar debate.

The only way that debate could differ from the American one, would result from the very nature of the exception in Europe. More than being a defense to a claim of copyright infringement, the exception is a natural boundary to the monopoly power of the author. Many European copyright acts formulates the exceptions by «the author is not entitled to prohibit ...». In our view, it should mean that the author has not the power to intrude the space occupied by the legitimate exercise of an exception, be it by enforcement of her rights in front of a court, by a contract or by a technical device. Her exclusive rights stop where the exception starts. Therefore, should the exception be the matter for an authorization or a negotiation with the rightholder, it would not differ much from the exercise of the exclusive right of the author who is nothing but her right to authorize, prohibit and negotiate the use of her work. What remains of the exception, whose key principle is to skip the need for an authorization of the rightholder, in such a bargaining ?

b) The safeguarding regime is limited to some copyright exceptions

The regime put in place by the article 6(4) is only granted to some limited exceptions²⁶. These are the exceptions in respect of reproductions on paper or any similar medium or reprography (article 5(2)a), in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives (article 5(2)c), in respect of ephemeral recordings of works made by broadcasting organizations (article 5(2)d), in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes (article 5(2)e), the use for the sole purpose of illustration for teaching or scientific research (article 5(3)a), uses for the benefit of people with a

²⁴ Tom W. Bell, *Fair use v. fared use : the impact of automated rights managements on copyright's fair use doctrine*, 76 N. CAROLINA L. REV. 557 (1998), at 558; Tom W. Bell, *Escape From Copyright: Market Success vs. Statutory Failure in The Protection of Expressive Works*, 69 U. CIN. L. REV. 741 (2001).

²⁵ Against private orderings in copyright: Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998); Yochai Benkler, *Taking Stock: The Law and Economics of Intellectual Property Rights: An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STANFORD L. REV. 1343 (1989); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998); N.W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); in favor of private orderings as an appropriate answer to the market failure that copyright does not solve: Tom W. Bell, *supra note 24*; Kenneth W. Dam, *Self-help in the digital jungle*, 28 JOURNAL OF LEGAL STUDIES 393, (1999); I. Trotter Hardy, *Property (and Copyright) in Cyberspace*, U. CHI.LEGAL F. 217 (1996); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996).

²⁶ The provision of article 6(4) has to benefit also to similar exceptions that could exist in the related rights and *sui generis* right regimes

disability (article 5(3)b) and the use for the purposes of public security (article 5(3)e). The private copy exception enjoys a specific regime that I have already considered.

Neither the directive, nor the legislative history explain why some exceptions have been elected to such a preferential treatment while others have not. It has been said that these were exceptions that conveyed strong public interests, such as fundamental freedoms. Yet, neither the exception of parody, which is a persuasive illustration of the freedom of expression concern, nor the exception for news reporting, which translates the concern of the freedoms of information and of the press, are included in the restricted list of article 6(4). One could also explain the criteria having led to the choice of some exceptions by the fact that the user of each exception is easily identifiable, which could make it easier to establish a contractual relationship between the user and the rightholder. Some exceptions of the list indeed relate to identified user such as the libraries and archives, the broadcasting organizations, the educational establishments, some social institutions, or administrative offices. But the argument is not convincing altogether. What about the reprography exception whose users are potentially any member of the public? Why is the news reporting exception, whose beneficiaries, i.e. the press and reporters, could be easily identified, not included in the list then ?

Another question here is as to whether a Member States, when implementing the directive, is entitled to provide a similar regime to other exceptions than those on the list of article 6(4). I have seen that the effective means of favoring the exceptions is a matter for the rightholders, and subsidiarily for the legislature. On one hand, rightholders could decide to favor other exceptions by designing their technological measures in a way that accommodates other interests, such as news reporting for instance, or by reconciling some other uses by contract. This is only a matter of the general freedom to contract. On the other hand, should the State itself have the same liberty, it would contravene to the provisions of the directive.

Member States should take appropriate measures only for exceptions listed in article 6(4) to the extent such exceptions exist in their regulatory framework. We have seen that the list of exceptions allowed in the article 5 of the directive was only optional. Therefore, if one exception of article 6(4) has not been chosen by a country to be part of its copyright regime, it does not make sense to grant the exception to users in the case of a technological restraint. For instance, France does not know any education or research-related exceptions. This should not change when implementing the directive. The French legislature will not be obliged to make available to educational institutions the means to benefit in the practice from an exception that does not exist in the law. This underlines the strangeness of the whole article 6(4) that makes mandatory the safeguarding of exceptions whose enactment itself is not.

c) The exclusion of on-demand services

The fourth indent of 6(4) might be the greatest defect of the whole construction. It says that the provisions of the first and second indents, i.e. the obligation to take some measures to safeguard some exceptions, shall not apply to works or other subject-matter made available to the public on agreed

contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

The wording of this provision plainly refers to the definition of the right to make works available to the public²⁷, as laid down in article 3 of the directive. It would mean that any on demand service will not have to comply with the obligation to safeguard the exceptions and could be completely locked up. One case put forward by the music industry is the making available of music for a limited time, e.g. for the duration of one weekend where you plan to have a party. According to the IFPI, enabling some exceptions, such as the private copy, would ruin this new business model of distribution, and thus the normal exploitation of the work. If Warner Music 'lends' you Björk for your birthday party, it does not mean you can keep her any longer _unfortunately. If a technical device obliges Björk to go home once the party is over and other guests have left, you cannot rely on article 6(4) to force Warner Music to change the rules of the game.

The vagueness of the wording could nevertheless jeopardize all the good intents of article 6(4). Making available works on the Internet on demand could become the prevalent business model for distribution of works. The requirement that such services have to be delivered on contractual terms does not matter much given the easiness to embed a click-wrap license in digital products. Some scholars have expressed concerns about this paragraph that could comprise the whole Internet and make void any obligation for preserving some exceptions. The uncertainty of the business models that will prevail on the Internet in the future could definitely prove them right.

IV. Conclusion

At first sight, embedding the fair use or copyright exceptions in the design of the contractual or technical model of distribution of works seems to be a perfect, concrete and flexible solution. Such a fair-use-by-design principle has been chosen by the European Union in its recent directive on copyright in the information society, as to the delegation to the copyright owners or authorities with the further elaboration of norms for circumvention exceptions²⁸. The directive suggests that the accommodation of the exceptions will result from a specific or revised design of the technical measures protecting copyrighted works or from contractual or business models integrating the demands of users. One might reasonably wonder whether this miracle cure is not but all pretense. The solution indeed does not cover all exceptions to copyright and more importantly, will not cover most distribution of works on the Internet.

²⁷ Article 3 of the directive states that « Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them».

²⁸ On the extent and consequence of this delegation see Pierre Sirinelli, *The scope of the prohibition of the circumvention of technological measures: Exceptions*, ALAI 2001 Conference, Columbia Law School, available at http://www.law.columbia.edu/conferences/2001/Reports/GenRep_id?_en.doc

Fundamentally, the very principle of the fair-use-by design model can be criticized. Its premise is based upon the broad freedom and encouragement given to authors to devise their business models accordingly. Under a balanced and public-oriented exterior there lies a clear choice towards a private orderings model where interests of the authors are privileged and preserved. They are undeniably stronger in any contractual negotiation they could enter with users, which could actually end in most cases in standard forms, and they are the only ones in charge of designing technological measures that will govern the distribution and enjoyment of works. Asking them to embed users' interests in such contracts or technical tools does not mean much.

The fair use that might be the product from that peculiar process could be a poor substitute to the legal defense or, as to Europe, to copyright exceptions which reflect, after a democratic and public process, a proper consideration and balance of interests both of any member of the society and of the society as a whole. We could lost fundamental public benefits that a private orderings model will never be able to accurately value²⁹.

²⁹ Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV 1799 (2000).