Copyright in the Knowledge Economy

Response from the IP Foresight Forum (a grouping of independent intellectual property academics in the UK) to the European Commission's Green Paper COM(2008) 466 final

Introduction

The IP Foresight Forum very much welcomes the opportunity to comment on the European Commission's Green Paper on "Copyright in the Knowledge Economy". As a grouping of independent intellectual property academics in the UK, it seems natural to us mainly to address the questions which are concerned with the exceptions for research and teaching (Questions 19-23). To us research and teaching is an everyday exercise. In this area, therefore, we are not merely analysing the law but seeking to engage actively in the debate in our capacity as stakeholders proper offering first-hand experience on how research and teaching exceptions work in practice.

Nevertheless, we are convinced that a revision of the exceptions to copyright, as they are laid out in Directive 2001/29/EC, necessitates a concerted approach based on a set of clear and easy-to-use principles which reflect a reasonable balance between the competing interests. The present situation is marked by considerable legal uncertainty. Not only does the law of copyright no longer reflect technological reality, often it is the law which prevents society from benefiting from technological advancements to the fullest extent possible. At the same time, the copyright laws of EU Member States remain substantially diverse. This lack of harmonisation or even a common normative approach to copyright exceptions further exacerbates society's lack of confidence in the law. To restore that confidence, the law much needs clarity and flexibility. Towards the end of our contribution we will therefore outline how our suggestions for the research and teaching exceptions match with a general coherent approach to modernise the system of copyright exceptions. Our vision of a system which is fit for the challenges ahead will be depicted by addressing the general issues questions raised by the European Commission.

But turning, first, to the exception for teaching and copyright, it will be useful to note briefly their underlying justifications as these considerations inform all the views expressed in this contribution. A copyright law which provides for an exception for the purposes of research and teaching recognises the important role these activities play in the dissemination of information and the promotion of critical understanding and reasoned positions. To seek and receive information is one important aspect of the freedom of expression, and at the same time a wide dissemination of information enhances democracy within society and cultural diversity. Providing for an exception to copyright therefore reflects the belief that society as a whole derives greater benefit from allowing certain uses to take place, under certain conditions, without the rights owners' authorisation, than from maintaining strict control over protected works[1]. Moreover, the fact that researchers are typically both, authors and users, of copyright works argues in favour of a

[1] L Guibault, 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaption to the Digital Environment' (2003) UNESCO Copyright Bulletin <http://portal.unesco.org/culture/en/files/17316/10874797751l_guibault_en.pdf/l_guibault_en.pdf> accessed 20 November 2008, 10.

broad exception for research and teaching. It can be interpreted as an expression of intergenerational equity in the sense that later authors ought to be as free to draw on the full panoply of incessantly renewed intellectual resources as their predecessors were.[2] To determine in practice, however, to what extent authors' monopoly rights over their works should be restricted in view of these justifications is a delicate balancing act. This response sets out our views on the question to what extent the European legislator should be involved in this exercise.

(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

At this time, the research community already actively engages in licensing schemes with publishers in order to increase access to works for research purposes. Seeking to offer scholars and students alike a diverse array of materials higher educational establishments have subscribed to a multitude of e-journals and area-specific databases. Obtaining literature in electronic form has even become the default procedure in many disciplines, and today it is rare that an academic journal cannot (at least also) be obtained in an electronic format. Offering great benefits the availability of electronic material has transformed the research process considerably. Not only are materials nowadays much simpler to access, but also, and even more importantly, electronic databases permit a researcher, in only a couple of mouse clicks, to sift through vast amounts of academic literature in order to find those articles or papers that are truly pertinent to one's own research project.

Turning to teaching purposes, educational establishments might have an interest in providing reproduced articles or parts of books to their students. Even before the digital revolution, a voluntary collective licensing scheme has allowed educational establishments in the United Kingdom to make paper-to-paper copies of journal articles or book parts within certain limits. Higher education institutions, for instance, obtain a blanket licence from the Copyright Licensing Agency (CLA), the competent reprographic rights agency, and in turn pay a licence fee.

In the last years the scope of these blanket licences has been broadened significantly. In 2005 the CLA issued a three year trial licence to higher education institutions which not only allowed for photocopying but also for the scanning of material under comparable conditions and the subsequent distribution of those digital copies to students (paper-to-digital). Since 1 August 2008 higher education institutions can now chose between two different types of blanket licences: a Photocopying and Scanning Higher Education Licence[3] and a Comprehensive Higher Education Licence[4]. While the former in its scope essentially corresponds to the previously available trial licence, the comprehensive licence, in addition, even allows for the re-use of digital material (digital-to-digital).

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[2] M Senftleben, *Copyright, Limitations and the Three-Step Test. An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International The Hague 2004) 248 and throughout.

[3] Its text can be found at <http://www.cla.co.uk/assets/357/he_uuk_photo_scanning.pdf> accessed 19 November 2008.

[4] Its text can be found at <http://www.cla.co.uk/assets/357/he_uuk_comprehensive_licence.pdf> accessed 19 November 2008.

While the system is subject to a number of conditions[5] it should be pointed out that its scope is relatively large, allowing, for example, even copying for commercial research against an additional fee[6].

In addition to the blanket licence issued by the CLA online use of works for teaching can also be provided for in the agreements that higher education institutions conclude with individual publishers to subscribe to e-journals or databases. Although the exact terms of these agreements differ from case to case, many seem to allow educational establishments to make digital copies available to their students, albeit in a restricted way. The general trend appears to be that educational establishments are allowed to provide their students with a link to the respective digital copy of a work, but that they are barred from distributing digital copies themselves.

Although our examples illustrate that there are licensing schemes which enable, to a certain extent, the online use of works for the purposes of research and even teaching, this must not be misinterpreted to mean that a statutory exception for research or teaching purposes in national copyright laws is superfluous. On the contrary, we contend that the existing exception for reprographic copying in the UK largely facilitated the development of the comprehensive CLA licence. Section 36 of the Copyright, Designs and Patents Act 1988 (CDPA) sets out an – admittedly restrictive – regime under which educational establishments can lawfully make reprographic copies of passages of published literary, dramatic or musical works for the purposes of non-commercial instruction, provided they are accompanied by a sufficient acknowledgement[7]. However, not more than one per cent of any work may be copied in any quarter (CDPA s 36(2)) and copying is not authorised if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact (CDPA s 36(3)). While these limitations restrict the direct scope of application of this provision quite strongly, the main importance of CDPA s 36 is to provide an incentive to copyright owner to ensure that licences are available. This is due to the fact that an educational institution can refer proposed licence terms to the Copyright Tribunal if it feels that they are unreasonable (CDPA s 118 *et seq.*)[8]. This way the bargaining power of educational establishments *vis-à-vis* copyright owners is strengthened[9]. In the same vein,

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[5] All details and conditions are summarised in the CLA User Guidelines, available at <http://www.cla.co.uk/assets/169/uukguildhe_userguidelines.pdf> accessed 20 November 2008.

[6] Another licensing scheme, administered by the Educational Recording Agency (ERA), exists in the UK which makes to recording of broadcasts possible for educational uses. Recently, ERA introduced an additional licence which enables licensed ERA recordings to be accessed by students and teachers online, whether they are on the premises of their school, college or university, or at home or working elsewhere within the UK (ERA Plus Licence). The terms of the licence are available at. <http://www.era.org.uk/ERA_plus_lic&terms.html>. More information can be found in ERA's user guide, available at <http://www.era.org.uk/new%20ERA.pdf> both links accessed 20 November 2008.

[7] It should also be noted that CDPA s 178 defines that a reprographic process is a process (a) for making facsimile copies, or (b) involving the use of an appliance for making multiple copies, and includes, in relation to a work held in electronic form, any copying by electronic means, but does not include the making of a film or sound recording.

[8] The legally binding effect of the decision of the Copyright Tribunal seems to be the decisive difference from the Danish (extended) collective licensing regime. The Danish Consolidated Act on Copyright 2006 in s 52 only provides the possibility of mediation in the absence of any result of licensing negotiations. This might explain why – as far as can be seen – no licensing agreement so far has been reached for digital copying in universities and schools.

[9] See G Harbottle, G Davies and others (eds), *Copinger & Skone James on Copyright* (15th edn Sweet & Maxwell London 2005) para 9-97 and 9-98.

CDPA s 36(4) stipulates that the terms of a licence are of no effect so far as they purport to restrict the proportion of a work which may be copied to less than the one per cent per quarter which would be permitted by CDPA s 36(2).

The example of the UK shows that a robust exception for the purposes of research and teaching is vital for establishing models under which educational establishments can reasonably use works in the course of teaching, be it in a traditional classroom setting or by electronic means. In view of these apparent advantages and the fact that member state laws still differ significantly in this respect, we suggest that the research and teaching exception be made mandatory when revising Directive 2001/29/EC. Whether a mandatory exception for teaching purposes would best be transposed into national law by designing it as a statutory exception, as a fair usage rule, or as a case of (voluntary, extended or compulsory) collective licensing[10] depends on the specificities of the legal system of each member state and is therefore a decision which needs to remain in the discretion of each member state. In any case it would appear wise to provide for measures to control the effectiveness of the exception.

While we caution against seeing contractual licensing agreements as a suitable alternative to a workable teaching exception, such licences should nevertheless be encouraged as an accompanying measure as they, to a large extent, facilitate the access to and the work with a wide range of academic materials. If, in addition, such licences make (limited) copying for educational purposes possible this should be welcomed as long as it happens on reasonable terms.

(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Both improved information and communication technologies and innovative teaching strategies have made distance learning a thriving field of education. While already today there are more than 5,000 UK based distance learning courses offered by more than 300 education providers[11], this area is still expected to grow in the future. In order to recognise legally this promising form of teaching and to achieve equal treatment between distant learners and those receiving education on the premises of the educational institution the Gowers Review recommended that the educational exceptions in UK law be amended to encompass distance learning[12]. Unlike UK law, however, recital 42 of Directive 2001/29/EC already recognises distance learning as an activity which falls into non-commercial educational and scientific research. Consequently, there is no doubt that Member States are allowed to apply their educational exceptions (also) to distance learning. To mention distance learning expressly in Art. 5(3)(a) would thus make only a small difference insofar as Member States might feel more encouraged to design educational exceptions also with a view to online learning.

However, as we advocate a mandatory educational exception, it seems only sensible to also support a mandatory inclusion of distance learning. We believe that in so

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[10] The different legal techniques are compared by S Ernst and DM Häusermann, 'Teaching Exceptions in European Copyright Law – Important Policy Questions Remain' (2006) The Berkman Center for Internet & Security Research Publication No. 2006-10 <http://ssrn.com/abstract=925950> accessed 19 November 2008, especially 18-20.

[11] See the database maintained by the International Centre for Distance Learning at <http://www-icdl.open.ac.uk> accessed 17 November 2008.

[12] A Gowers, *Gowers Review of Intellectual Property* (HMSO Norwich 2006) para 4-13 *et seq.*

accommodating distance learners, they would be given access to a greater diversity of resources. In turn, this will facilitate a more vibrant and challenging educational environment. Moreover, it is hardly justifiable that distance learners are at disadvantage compared with traditional learners.

We do not anticipate that including distance learning in a mandatory educational exception will impact unduly on rights holders. In particular, Member States would remain free to choose the legal technique by which they transpose the educational exception into national law, and also the appropriate scope of the exception would be at their discretion. Sufficient security measures, however, should be put in place to avoid uncontrolled dissemination of copyright work.

(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

In the UK context the recommendation of the Gowers Review to afford equal legal treatment to distance learning under the educational exception also extended to the types of use typically employed for distance learning. In particular, making copies of works available via electronic whiteboards and virtual learning environments were mentioned as permissible uses.

We are of the view that the reference to distance learning in recital 42 of Directive 2001/29/EC already implies that Member States can accommodate those types of uses of copyright works which are pertinent to distance learning (subject to the uncertainty of whether such use is or is not for commercial purposes, a matter on which greater clarity is needed). Should, however, the responses to the Green Paper show evidence of uncertainty amongst stakeholders in this regard, a clarification would certainly be helpful. However, we believe that no specific type of use should be prescribed at the European level. On the one hand, a revised directive needs to be drafted in technologically neutral terms and on the other hand distance learning is still a nascent type of education which is in differing stages of development in Member States. In that case it is the national legislator who can best take account of national specificities.

It is another question to which categories of works an exception for teaching should apply. In the UK context, we advocate that the educational exception should encompass all types of works, regardless of the form of education.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

In the UK the educational exception in CDPA s 36 provides for outer limits of what would be permissible to be copied by reprographic means. The exception for non-commercial research and private study in CDPA s 29 only permits acts that qualify as 'fair dealing'. Moreover, 'fair dealing' as a concept is also used in most of the other copyright exceptions in order to limit their scope. This takes into account that the significance of an act of copying rather depends on the quality of what has been copied than on the quantity. For the same reasons, we would oppose mandatory minimum rules as to the length of the extracts that can be reproduced or made available under the exceptions for teaching and research. Rather we would argue for a flexible approach to the size of extracts as percentage rules tend to limit arbitrarily the utility of the exception. Ideally, insti-

tutions ought to be able to use as much of a work as is necessary for education – having considered, among other things, the manner in which the work is to be used, the potential for further communication of the work and the commercial value of the word concerned.

(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Questions 19-22 have primarily been focussed on teaching purposes and the accommodation of distance learning within an exception for teaching. This, however, should not distract from the fact that a robust exception for research is of equal importance. The need to use pre-existing work in order to create new knowledge is particularly visible in the field of research. When Newton said 'If I have seen further, it is because I have stood on the shoulders of giants' he described the nature of all advance in knowledge and understanding[13]. Copyright exceptions for research purposes ensure that rights holders' interests are not unduly protected, and in doing so are an indispensable condition for the development of new material. There are many examples where academics must rely on copyright materials in order to properly conduct their research. New ideas are based on existing ideas and sometimes new work is derived from some original work. Researchers need to be able to criticise and cite previous works[14]. Moreover, research activities often include the exchange of discoveries and works-in-progress amongst scholars which necessitates that scholarly communication flows back and forth between and is capable of moving rapidly enough to contribute to the evolution of knowledge[15].

In view of the important role research plays for the society as a whole in the evolution of knowledge we support the suggestion that the exception should not only be made mandatory for teaching but also for research purposes. Moreover, UK copyright law, although not having transposed the private use exception provided for in Directive 2001/29/EC Art. 5(2)(b), stipulates in CDPA s 29(1C) an exception for private study purposes. As private study is in many ways comparable to research and serves the same goal to promote the dissemination of information, we suggest that this activity also be covered by a mandatory copyright exception[16].

It also seems appropriate to ask whether some of the problems that have arisen in the UK context should be addressed at the European level during the reform of the copyright exceptions. One cause of uncertainty is the notion of the non-commercial nature of research and the question whether publishing research results renders research commercial. Although recital 42 of Directive 2001/29/EC clarifies that the non-commercial nature should be determined by the activity as such, this does not help much as most research projects entail a publication and therefore an element of commerciality. Should they not be seen as non-commercial research? If this was the case the exemption would be largely nugatory and the consequences seriously inimical to scholarship. We therefore take a different view and concur with the British Academy which interprets re-

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[13] See British Academy Review, *Copyright and Research in the Humanities and Social Sciences* (British Academy London 2006) 3.

[14] British Academy Report (n 13) 6.

[15] L Guibault (n 1) 15.

[16] Obviously, this could be achieved in two ways: 1.) establishing a general private use exception or 2.) extending existing research and teaching exceptions also to private study.

search to be non-commercial if its principle object is public benefit rather than private profit, i.e. where the primary purpose is to put new knowledge or synthesis in the public domain rather than to recover the costs of the underlying research (as distinct from the costs of publication of the research)[17]. To add a clarification of this kind to Directive 2001/29/EC would surely enhance the clarity of the law.

The debate about what categories of works an exception should embrace, already mentioned in the context of the teaching exception, also takes place with regard to the exception for research and private study in the UK. Should the exception be extended to all categories of copyright work, including sound recordings and films? Again, while we support such efforts at the domestic level, we are not convinced that this is a question the European legislator to decide. It should rather remain at the discretion of each member state to limit the scope of the research exception.

At any rate, experience from the UK tells that it would be wise for Member States to make sure the research exception is working efficiently. A recent study found that academics in the UK are often asked by their publishers – who become increasingly risk adverse – in an almost mechanical fashion to clear rights for reproduced extracts of pre-existing works even in cases where such use would be allowed under the research exception[18].

Other remarks

After having dealt extensively with the exception for teaching and research we would like to conclude our contribution with some remarks on the general issues which would have to be resolved if a revision of the copyright exceptions were to yield beneficial results.

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

With regard to the first of these questions, it seems to us that there would only be scope for such measures where the national law already set out copyright exceptions drafted in a flexible way (e.g. by using particularly general terms leaving much room for interpretation or by designing exceptions as "fair dealing" or "best practice" clauses). In such a scenario best practice guidelines or contractual agreements could – within the limits of the statutory copyright exceptions – serve to concretise these flexibilities. In our view each member state should decide whether it deems such measures appropriate. At any rate, it would seem prudent to establish some sort of control mechanism, i.e. only allow co- and exclude self-regulatory measures.

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[17] British Academy Review (n 13) para 28 and 52. Clearly this should also extend to those who seek to produce new knowledge or synthesis but may be thought by some not to have succeeded in their objectives.

[18] British Academy Review (n 13) parar 32.

In our view such measures would not be of help if they were applied in a broader sense, i.e. not only to concretise existing flexibilities of the law, but actually to establish the boundaries of copyright exceptions as such. Some copyright exceptions are intrinsically connected to the cultural and social identity of a given country,[19] reflecting a perception that sometimes the general public interest is of wider significance than the private benefit of the copyright owners. Such a decision touches the very heart of the functions and justifications of each copyright system as such, and should therefore be answered by the democratically legitimised legislator by means of generally applicable law.

Turning to the second question, our assessment would be different. Provided that the balance expressed by copyright exceptions remains unchanged, there is no reason to object to guidelines or model licenses. On the contrary, as has been seen in the context of educational establishments, such licences can substantially facilitate access to copyright works. They should therefore be encouraged wholeheartedly.

However, such an encouragement might prove an illusion as the vast majority of contractual agreements between rights holders and institutional users are not limited to other aspects not covered by copyright exceptions but contain a genuine regime of permissible uses. This leads to the question whether licences should be allowed to over-ride copyright exceptions. This highly controversial issue might be fruitfully illustrated with a reference to the UK: While CDPA 1998 s 36(4) declares licences invalid insofar as they override the copyright exception for reprographic reproduction in educational establishments no such rule exists in respect of the other exceptions. In general, it is therefore possible, in the UK, to over-ride statutory exceptions by contracts.[20] Technological Protection Measures further exacerbate the situation as they have the power to cement the supremacy of the licensing terms. It seems that some exceptions are more susceptible to be over-ridden by contracts than others. The problem appears particularly drastic as regards the library exception. A 2008 study conducted by the British Library shows that out of 100 randomly selected licences that were offered to the British Library by publishers of digital content well over 90% undermined copyright exceptions[21].

Answering the problem of whether statutory exceptions should be allowed to be over-ridden by contractual licences entails the somewhat paradoxical exercise to balance the indirect and abstract aim to promote the dissemination of information which copyright exceptions serve with the immediate effect of disseminating information which is achieved by enabling access to copyright materials through licensing agreements. This is because many publishers will not agree to give access to their copyright works if they cannot enforce a restrictive policy as to which reproducing acts are permitted. Although one could of course very well argue in favour or against the possibility for contracts to over-ride statutory exceptions, there might also be a middle course to allow licences to over-ride exceptions as long as they are not disproportionate. Admittedly such a nuanced approach may increase rather than lessen uncertainty. While this is not the place for a

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[19] L Guibault, G Westkamp *et al.*, 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (Institute for Information Law Amsterdam 2007) <http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm> accessed 20 November 2008, part 1, 41.

[20] See generally R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge, 2005), 69 and throughout.

[21] British Library, 'Analysis of 100 Contracts Offered to the British Library' (British Library London 2009) <http://www.bl.uk/ip/pdf/ipmatrix.pdf> accessed 20 November 2008.

full analysis we hope that the comments make it clear that this question is a fundamental problem which urgently needs a broad public debate. We would therefore welcome the European Commission paving the way for such a debate.

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

(5) If so, which ones?

We perceive the present regime of copyright exceptions, as laid out in Directive 2001/29/EC, as an unsuitable response to the pressing questions of reconciling copyright law with the digital environment. Recital 1 of Directive 2001/29/EC states harmonisation as the primary aim of the Directive. The actual degree of harmonisation achieved, however, seems low. The long list of possible exceptions contained in the final version of Art. 5 of the Directive allowed Member States to leave their – differing - national laws essentially untouched. A study conducted by the Institute for Information Law at the University of Amsterdam is the only recent document to take a principled overarching approach to the reform of the law on exceptions. It comes to the conclusion that "actual harmonisation has hardly been achieved" and that the fact that 'Member States are left with near total freedom to pick and choose from the Directive list of optional limitations" has resulted in a "mosaic of exceptions (…) that vary from Member State to Member State, which might seriously impede the establishment of cross-border online services"[22]. At the same time the optional list of exceptions contained in the Directive is also exhaustive which, in effect, freezes current laws. Certainly, the notion that new exceptions specially tailored for the digital world might be developed at either national or European levels appears to be cut off.

The IP Foresight Forum concurs with the Amsterdam Information Law Institute that a "two-tiered approach" seems best fit to remedy the actual deficiencies of the Directive[23]. In a first step a small number of limitations should be made mandatory for transposition in all Member States. On the one hand, these limitations should reflect the fundamental rights and freedoms which are enshrined in the European Convention on Human Rights and at the same time are also general principles of EU law[24]. On the other hand, exceptions should be made mandatory which have a noticeable impact on the internal market or concern consumer rights[25]. In order to achieve a possibly high degree of harmonisation and legal certainty these limitations should, in addition, be strictly worded.

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[22] L Guibault, G Westkamp *et al.* (n. 19) 166.

[23] L Guibault, G Westkamp *et al.* (n. 19) 65-7.

[24] These could be the use for quotations for purposes such as criticism and review (art. 5(3)(d)), the use for news reporting and press reviews (art. 5(3)(c)), the use of political speeches as well as extracts of public lectures (art. 5(3)(f)), the use for the purpose of caricature, parody or pastiche (art. 5(3)(k)), the use for educational and scientific purposes (art. 5(3)(a)) as well as the use by disabled persons (art. 5(3)(b)).

[25] These would include transient copies (art. 5(1)), reprographic reproductions (art. 5(2)(a)), private copying (art. 5(2)(b)), reproductions by libraries, archives and museums (art. 5(2)(c)), the use of works for research and private study (art. 5(3)(n)), and ephemeral recordings by broadcasting organisations (art. 5(2)d)).

Making some exceptions mandatory, however, does not seem sufficient. In a second step a revised version of the Directive should contain an "open norm" which gives Member States the freedom to provide for further exceptions. Such an open norm seems indispensable to guarantee much needed flexibility and to ensure that the regime of copyright exceptions in not only fit for the digital environment but also for those future technological and social challenges which today are still unknown. While the Institute of Information Law does not spell out this open norm in any detail beyond the limitations of the three-step test and the absence of a significant effect upon the internal market, we feel that it would need to be fleshed out in greater detail. To that end, we would suggest to consider deploying the US 'fair use' clause as a source of relevant further factors to be considered.

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