European Copyright Society

Limitations and exceptions as key elements of the legal framework for copyright in the European Union

Opinion on

The Judgment of the CJEU in Case C-201/13 *Deckmyn*

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Abstract

In this opinion, the European Copyright Society (ECS) puts on record its views on the issues raised by the Judgment of the Court of Justice of the European Union (CJEU) in Case C-201/13, Deckmyn, *which departs from the doctrine of strict interpretation of exceptions and limitations in cases in which fundamental rights such as freedom of expression are involved. The opinion welcomes this development for the following reasons: firstly, due to the importance of exceptions and limitations in facilitating creativity and securing a fair balance between the protection of and access to copyright works; secondly, because of the Court's determination to secure a harmonized interpretation of the meaning of exceptions and limitations; thirdly, because of the Court's adoption of an approach to the interpretation of exceptions and limitations which promotes their effectiveness and purpose; and, finally, due to the Court's recognition of the role of fundamental rights in the copyright system: in particular, its recognition that the parodic use of works is justified by the right to freedom of expression. At the same time, the ECS recommends caution in constraining the scope of exceptions and limitations in a manner that may go beyond what might be considered necessary in a democratic society.*

Introduction

1. The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are scholars and academics from various countries within Europe. The Society is not funded by, nor has been instructed by, any particular stakeholders.[1]

2. The ECS wishes to take the opportunity to put on record its views on the issues raised by the Court in Case C-201/13, *Deckmyn*. Exceptions and limitations (E&L) to exclusive rights, such as that permitting parody, are a crucial element of any copyright system. They not only play an important role in ensuring access to information and culture but also stimulate the creation of new works, which in most cases build on existing works. This opinion addresses the following: (i) The importance of E&L in facilitating creativity and in securing a

[*] Assistance with drafting this was provided by Elena Izyumenko, Doctoral Candidate at the Center for International Intellectual Property Studies (CEIPI), University of Strasbourg. The ECS wishes to express its gratitude for her help.

[1] For further activities of the European Copyright Society, see e.g. the ECS Opinion issued in the *Svensson* case (Case C-466/12) (ECS, 'Opinion on the reference to the CJEU in Case C-466/12 *Svensson'*, 15 February 2013, available 25 September 2014 at http://ssrn.com/abstract=2220326 or http://dx.doi.org/10.2139/ssrn.2220326) or the response earlier this year to the Public consultation on the review of the EU copyright rules by the European Commission (ECS, 'Answer to EC consultation on copyright', March 2014, available 25 September 2014 at http://infojustice.org/wp-content/uploads/2014/03/ECS-answer-to-EC-consultation-on-copyright-Review.pdf).

fair balance between the interests and rights involved, in particular the right to freedom of expression and information; (ii) The need to harmonize E&L in the EU while, at the same time, securing the flexibility and adaptability of the system; (iii) The desirability of adopting a purposive, rather than a systematically restrictive interpretation of E&L, while securing a fair balance in the application of competing (fundamental) rights within the copyright system through the application of the proportionality principle; (iv) The recognition that parody (along with some other exceptions) is covered by the right to freedom of expression; and, finally, (v) The importance of ensuring that E&L are not constrained by criteria going beyond what might be considered necessary in a democratic society.

I. The importance of exceptions and limitations in facilitating creativity and in securing a fair balance between the interests and rights involved

3. Copyright law must enable the creative use of existing works in appropriate circumstances. E&L are crucial for any copyright system as they secure common constitutional values such as freedom of expression and information and freedom of arts and sciences, while also serving the public interest in a comprehensive cultural life.

4. Through a well-designed system of E&L, copyright law can accommodate the interests of both creators and users of copyrighted material and thus secure a fair balance between the protection of, and access to, copyright works.

II. The need for a harmonized EU system of exclusive rights and exceptions and limitations and importance of securing flexibility and adaptability of the system

5. The Union legislator has aimed to create a harmonized European copyright law (Information Society Directive, 2001/29, recitals 1, 4, 6, 7, 9, 23, and 31).

6. However, the system of E&L is not truly harmonized. As a result, the goal of creating a harmonized copyright law through the coherent application of limitations (see recital 32 to the Directive 2001/29) has not yet been achieved.[2]

[2] See, for instance, C. Geiger and F. Schönherr, 'Limitations to copyright in the digital age', in A. Savin and J. Trzaskowski (eds.), *Research Handbook on EU Internet Law* (Cheltenham, UK / Northampton, MA, Edward Elgar, 2014), p. 110, and from the same authors: 'Defining the scope of protection of copyright in the EU: The need to reconsider the acquis regarding limitations and exceptions', in T. Synodinou (ed.), *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2012), p. 142; M.-C. Janssens, 'The issue of exceptions: Reshaping the keys to the gates in the territory of literary, musical and artistic creation', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2009), p. 330, with further references; R.M. Hilty, 'Copyright in the internal market, harmonisation vs. community copyright law', 35(7) *IIC* 765 (2004); M. van Eechoud et al., *Harmonizing European Copyright Law, The Challenges of Better Lawmaking* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2009); P.B. Hugenholtz, 'Why the Copyright Directive is un-important, and possibly invalid', 22(11) *EIPR* 501 (2000); L. Guibault, 'Why cherry-picking never leads to harmonisation: The Case of the limitations on copyright under Directive 2001/29/EC', 1 *JIPITEC* 57 (2010); S. Bechtold, 'Information Society Dir., art. 5', in T. Dreier and P.B. Hugenholtz (eds.), *Concise European Copyright Law* (Alphen aan den Rijn: Kluwer Law International, 2006), p. 369.

7. A more comprehensively harmonized legislative framework would be advantageous for authors and right holders (including the copyright industry). It would enable increased lawful cross-border online exploitation of works. Users would also benefit from clear, simple, and accessible rules clarifying the situations in which a work can be used without infringement.

8. In these circumstances, the ECS welcomes the Court's commitment to "uniform application of EU law" by considering parody an autonomous concept across the EU (*Deckmyn*, [15]; see also, *mutatis mutandis*, Case C-467/08, *Padawan* [2010] ECR I-10055, [37]).

9. The desirability of further legislative harmonization of E&L across the Union should nevertheless be emphasized.

10. Harmonization, or even unification, of E&L should, so far as possible, respect the imperative of legal certainty, while allowing a degree of flexibility to permit the adaptation of the copyright system to changing circumstances and social needs.

11. Some room for manoeuvre is to be found in Art. 5(5), which incorporates the so-called "three-step-test". If Art. 5(5) were to be understood as an enabling clause, rather than as an additional restriction on the scope of E&L,[3] a better balance of interests might be achieved.[4] Such a reading of the "three-step-test" would serve to define the outer limits of the regime of E&L.[5]

12. It would appear to be a timely moment to introduce such an "opening clause" within the European copyright framework. Several jurisdictions around the world have recently reviewed or are currently reviewing their regime of E&L, in order, among other things, to introduce greater flexibility.[6]

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[3] See e.g. Case C-117/13, *Ulmer* [2014], [47]; Case C-435/12, *ACI Adam and Others* [2014], [26]; Case C-5/08, *Infopaq* [2009] ECR I-06569, [58].

[4] See on this in detail C. Geiger, D.J. Gervais and M. Senftleben, 'The three-step-test revisited: How to use the test's flexibility in national copyright law', 29(3) *American University International Law Review* 581 (2014), available 26 September 2014 at http://ssrn.com/abstract=2356619 or http://dx.doi.org/10.2139/ssrn.2356619; M. Senftleben, 'Comparative approaches to fair use: An important impulse for reforms in EU copyright law', in G.B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property* (Cheltenham, UK/Northampton, MA, Edward Elgar, 2014), available 26 September 2014 at http://ssrn.com/abstract=2241284; P.B. Hugenholtz and M. Senftleben, 'Fair use in Europe: In search of flexibilities', Amsterdam Law School Research Paper No. 2012-39; Institute for Information Law Research Paper No. 2012-33, available 26 September 2014 at http://ssrn.com/abstract=2013239 or http://dx.doi.org/10.2139/ssrn.2013239.

[5] See in this sense the 'Declaration on a balanced interpretation of the three-step test in copyright law', *IIC* 707 (2008).

[6] See e.g. Copyright Act of South Korea, Law No. 9625, 22 April 2009, Art. 28; Intellectual Property Code of the Philippines 1997, para. 185.1, Rep. Act 8293; Copyright Act of Singapore, S 107/87, 10 April 1987, paras. 35 and 36; Copyright Act of Israel, 5768-2007, 2007 LSI 34, Art. 19 (2007); Copyright Act of Malaysia, Act 332, 30 April 1987, para. 13(2)(a). Moreover, in consultations on new copyright legislation, open-ended copyright E&L have also been proposed in Australia, Ireland, and the UK: see *Copyright and the Digital Economy* 59-98 (Australian Law Reform Commission, Discussion Paper 79, 2013); *Copyright and Innovation: A Consultation Paper Prepared by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation* 111–23 (Copyright Review Committee Consultation Paper, 2012); Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, United Kingdom Intellectual Property Office 44–52 (2011), available 25

III. The desirability of adopting a purposive, rather than a systematically restrictive, interpretation of exceptions and limitations

13. In the short term, while further legislative intervention is awaited,[7] the full potential of the *acquis* should be realized.

14. In interpreting the *acquis*'s existing E&L, courts should weigh the interests of derivative right holders, creators and users against each other in order to secure the proper functioning of those provisions. In some cases, this process may require E&L to be interpreted extensively.

15. In this light, the Court's move away from the narrow interpretation of limitations in favour of an interpretation that promotes the effectiveness of an exception in the light of its purpose and the principle of proportionality is to be welcomed (*Deckmyn*, [19]-[23]; Joined Cases C-403/08 and C-429/08, *FAPL* [2011] ECR I-09083, [163]; Case C-117/13, *Ulmer* [2014], [27], [31]).

16. In *Football Association Premier League*, in the context of Art. 5(1) of the Information Society Directive, the Court emphasized the need to take due account of an exception's objective and purpose (Joined Cases C-403/08 and C-429/08, *Football Association Premier League and Others* [2011] ECR I-09083, [162]-[163]).

17. In *Painer*, the Court later confirmed this line of argument with regard to the right of quotation laid down in Art. 5(3)(d) of the Information Society Directive. The Court underlined the need for Art. 5(3)(d) to be interpreted in a manner that enables the effectiveness of the quotation right and safeguards its purpose (Case C-145/10, *Painer* [2011] ECR I-12533, [132]-[133]).

18. Importantly, the Court's departure from a narrow doctrine of restrictive interpretation of E&L is consistent with the open-ended drafting of some of the *acquis*'s E&L (see, for example, the quotation exception, Art. 5(3)(d) of Directive 2001/29 (emphasis added)):

> "[…] quotations for purposes *such as* criticism or review, provided that they relate to a work or other subject-matter which has already been

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September 2014 at http://www.ipo.gov.uk/ipreviewfinalreport.pdf. See further C. Geiger, D.J. Gervais and M. Senftleben, 'The three-step-test revisited', *supra* note 4. See also J. Band and J. Gerafi, *The Fair Use/Fair Dealing Handbook* (Policybandwidth, March 2013), available 25 September 2014 at http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf, reproducing the fair use and fair dealing statutes of 40 countries and concluding that "the broad diffusion of fair use and fair dealing indicates that there is no basis for preventing the more widespread adoption of these doctrines, with the benefits their flexibility brings to authors, publishers, consumers, technology companies, libraries, museums, educational institutions, and governments".

[7] Various Commission initiatives evoke the issue of limitations and acknowledge that reform might be necessary. See Green Paper from the European Commission on Copyright in the Knowledge Economy, COM(2008) 466 final, Brussels, 16 July 2008; Creative Content in a European Digital Single Market: Challenges for the Future, Reflection Document of DG INFSO and MARKT of the European Commission, 22 October 2009; Communication from the Commission on content in the Digital Single Market, Brussels, 18 December 2012, COM(2012) 789 final; Public Consultation of the European Commission on the review of the European Union copyright rules, 5 December 2013.

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*."

See also, to that effect, Art. 5(3)(f) and Art. 5(3)(a) of Directive 2001/29.

19. The drafting of the E&L in EU copyright law is often more flexible and permissive than their national law transpositions. As the Court has held that the E&L are autonomous concepts of EU law (see [6] of this opinion) such restrictive national implementation should be reviewed.

20. The Court has explicitly denied that the E&L must be restrictively transposed in national laws (*Deckmyn*, [16] and [24]; Case C-510/10, *TV2 Danmark* [2012], [36]). Consequently, Member States are not permitted to have different conceptions of a transposed exception. This position is fully consistent with the Directive's goal of securing as full a harmonization of the EU copyright rules as possible (see [5] of this opinion).

21. The CJEU's initial emphasis on the principle of strict interpretation of E&L[8] would appear to be incompatible with the goal of securing a fair balance within copyright law.[9]

22. Furthermore, the restrictive reading of E&L may compromise the recent tendency to consider some E&L as "rights" of users of protected subject-matter (see *Deckmyn*, [26]; Case C-117/13, *Ulmer* [2014], [43]; Case C-467/08, *Padawan* [2010] ECR I-10055, [43]; Case C-145/10, *Painer* [2011] ECR I-12533, [132]). The idea of "users' rights" as enforceable rights of equal value has also recently featured in Case C-314/12, *UPC Telekabel* [2014], [57].[10] These developments are to be welcomed as they help to ensure that a "fair balance" is struck between the applicable rights and interests (see recital 31 in the preamble to the Directive 2001/29; *Deckmyn*, [27]; Case C-314/12, *UPC Telekabel* [2014], [46]; Case C-461/10, *Bonnier Audio and Others* [2012], [56]; Case C-360/10, *SABAM v. Netlog* [2012], [51]; Case C-70/10, *Scarlet Extended*

[8] *Deckmyn*, [22]; Case C-435/12, *ACI Adam and Others* [2014], [23]; Case C-5/08, *Infopaq* [2009] ECR I-06569, [56].

[9] Recital 31 in the preamble to the Directive 2001/29; *Deckmyn*, [27]; Case C-314/12, *UPC Telekabel* [2014], [46]; Case C-461/10, *Bonnier Audio and Others* [2012], [56]; Case C-360/10, *SABAM v. Netlog* [2012], [51]; Case C-70/10, *Scarlet Extended* [2011] ECR I-11959, [53]; Case C-145/10, *Painer* [2011] ECR I-12533, [132]; Case C-557/07, *Tele2* [2009] ECR I-01227, [28]; Case C-275/06, *Promusicae* [2008] ECR I-00271, [68].

[10] The concept of "users' rights" is also familiar to the Supreme Court of Canada, which since its *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336 and *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339 decisions was increasingly emphasizing "a move away from an earlier, author-centric view" towards "promoting the public interest" and the "users' rights [as] an essential part of furthering the public interest objectives of the Copyright Act": *SOCAN v. Bell Canada*, [2012] 2 SCR 326, [9]-[11]. See also *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345. Interestingly, the Court explicitly referred in these cases to the proper balance between protection and access as an ultimate goal of any copyright law regulation – the same dual rationale that underlines the protection of creators under Art. 27 of the Universal Declaration of Human Rights and Art. 15 of the International Covenant on Economic, Social and Cultural Rights.

[2011] ECR I-11959, [53]; Case C-145/10, *Painer* [2011] ECR I-12533, [132]; Case C-557/07, *Tele2* [2009] ECR I-01227, [28]; Case C-275/06, *Promusicae* [2008] ECR I-00271, [68]).

IV. The recognition that the parodic use of works is justified by the right to freedom of expression

23. A liberal interpretation of E&L will, in certain circumstances, be necessary in order to fulfill the European Union's human rights obligations. As the CJEU has made clear on a number of occasions, Art. 17(2) of the EU Charter (protecting the right to intellectual property) is not absolute, and a maximalist reading of this provision is to be rejected (see Case C-314/12, *UPC Telekabel* [2014], [61]; Case C-360/10, *SABAM v. Netlog* [2012], [41]; Case C-70/10, *Scarlet Extended* [2011] ECR I-11959, [43]). The functional nature of the right to intellectual property likewise follows from the wording of the European Convention on Human Rights (ECHR),[11] to which all Member States are parties and to which the Union will accede as a party in its own right.

24. It is a matter of settled ECHR case law that any exception to the right to freedom of expression under the Convention, including the protection of copyright, must itself "be narrowly interpreted" and "the necessity for any restrictions must be convincingly established" (*Szél and Others v. Hungary* [2014] no. 44357/13, [54]; *Wille v. Liechtenstein* [GC] [1999] no. 28396/95, ECHR 1999-VII, [61]; *Observer and Guardian v. the United Kingdom* [1991] no. 13585/88, Series A no. 216, [59]).

25. In *Deckmyn*, the Court recognized that the parody exception in Art. 5(3)(k) of the Information Society Directive is covered by the right to freedom of expression ([25]-[28]). Accordingly, it follows that, in the light of the need to secure a fair balance between competing fundamental rights and in view of the principle of proportionality, a systematic narrow interpretation of copyright limitations must be rejected in this context.

26. The Court took a similar approach to the quotation exception in Case C-145/10, *Painer* [2011] ECR I-12533. In that context, the Court clarified that Art. 5(3)(d) was

> "intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors" (Case C-145/10, *Painer* [2011] ECR I-12533, [134]).

27. The fundamental guarantee of freedom of expression thus played a crucial role in both the *Painer* and the *Deckmyn* decisions.[12] In those cases, in order to

[11] Art. 1 of the First Protocol to the ECHR.

[12] As to the influence of freedom of expression guarantees on copyright, cf. P.B. Hugenholtz, 'Copyright and freedom of expression in Europe', in: N. Elkin-Koren and N.W. Netanel (eds.), *The Commodification of Information* (The Hague/London/Boston: Kluwer, 2002), p. 239; C. Geiger, '"Constitutionalising" intellectual property law? The influence of fundamental rights on intellectual property in the European Union', 37(4) *IIC* 371 (2006); C. Geiger and E. Izyumenko, "Copyright on the

secure compatibility with Art. 11 of the EU Charter of Fundamental Rights and Art. 10 of the ECHR, the Court adopted an interpretation that was broader than might have been appropriate in the case of an E&L without a comparably strong grounding in freedom of expression.

V. The importance of not constraining exceptions and limitations through the application of criteria that may go beyond what is necessary in a democratic society

28. Less immediately welcome is the way in which the CJEU handled the non-discrimination issue in *Deckmyn* ([30]-[31]).

29. While acknowledging that the public interest in the dissemination of a discriminatory parody may be open to question,[13] the Court's reasons for excluding the application of the parody exception on grounds of non-discrimination are not clearly explained. It must, in particular, be recalled that moral rights are not harmonized at the Union level.

30. It is important that the application of the "fair balance" condition to the parody exception does not provide the copyright owner with the ability to control the content of parodic expression in a manner that goes beyond what is necessary in a democratic society.[14] In particular, copyright law ought not to apply a more exacting standard than public or criminal law in this context. In general, there are laws better placed to take care of discriminatory statements, and it might be preferable to have recourse to those legal mechanisms outside of copyright law to protect against racist or other forms of hate speech.

Human Rights Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression", 45(3) *IIC* 316 (2014); A. Strowel and F. Tulkens (eds.), *Droit d'auteur et liberté d'expression* (Brussels: Editions Larcier, 2006); J. Griffiths and U. Suthersanen (eds.), "Copyright and Free Speech", (Oxford University Press 2005); S. Macciacchini, *Urheberrecht und Meinungsfreiheit* (Bern: Stämpfli, 2000); Y. Benkler, 'Free as the air to common use: First Amendment constraints on enclosure of the public domain', 74(2) *New York University Law Review* 355 (1999); N.W. Netanel, 'Copyright and a democratic civil society', 106 *Yale Law Journal* 283 (1996).

[13] In the same spirit, the CJEU had previously denied intellectual property protection to expressions of racist nature: see, in the trademark context, Case T-526/09, *PAKI* [2011] ECR II-00346. Cf. United States Patent and Trademark Office, Trademark Trial and Appeal Board, *Amanda Blackhorse, Marcus Briggs-Cloud, Philip Gover, Jillian Pappan, and Courtney Tsotigh v. Pro-Football, Inc.*, 18 June 2014, Cancellation No. 92046185, available 1 October 2014 at http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=199.

[14] Thus, in accordance with Art. 10(2) ECHR (to which Art. 11 of the EU Charter corresponds), any limitation to the right to freedom of expression can only be justified if it is "prescribed by law and [is] necessary in a democratic society".

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