THE IMPLEMENTATION OF THE LIST OF EXCEPTIONS OF ARTICLE 5 OF THE INFORMATION SOCIETY DIRECTIVE 2001/29/EC IN SELECTED MEMBER STATES

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Abstract: Article 5 of the Information Society Directive first needs to be put into context with other directives that contain exceptions to protection and with the tools for legal harmonization in general. Also the system of Article 5, which is quite long, is recalled, before provisions on exceptions in national laws of selected Members States before and after harmonization are dealt with. Within the scope of this presentation, only a presentation of the main legal traditions of, and an overview of implementation of Article 5 in, France, Germany, and the United Kingdom are possible; the three-step test is not included in this presentation, since Professor Lucas has separately dealt with that topic. Finally, a number of ideas to modify the existing system of exceptions under Article 5 of the Information Society Directive as recently expressed by a number of lobbyists and academics will be briefly presented and discussed.

Keywords: Article 5 of the Information Society Directive, France, Germany, United Kingdom, fair dealing, fair use, mandatory exceptions, European Copyright Code.

Contents:

I. INTRODUCTION

When talking about Article 5 of the Information Society Directive, one should put this provision in the context of general EU law, in particular on the means for harmonization, i.e., directives versus regulations. Likewise, one should recall that Article 5 of that Directive only has a limited coverage and that other exceptions are harmonized in other directives. Article 5 of the Information Society Directive itself contains different sets of rules, which must be delimited from each others and explained against the background of their development. Also its concept of partial harmonization will be discussed. Against this background, general concepts of exceptions to protection under French, German, and UK law will be presented. Examples of amendments of these national laws due to the implementation of the Directive will then be given. A more extensive analysis would go far beyond the scope of this presentation. Finally, a number of proposals expressed by lobbyists and some academics in respect of possible modifications of the existing system to harmonize exceptions to copyright and related rights protection in the European Union will be briefly presented and evaluated, before the presentation will conclude with an overall evaluation of Article 5 of the Information Society Directive.

II. ARTICLE 5 OF THE INFORMATION SOCIETY DIRECTIVE IN CONTEXT

1. Directives as a means for harmonization

In general, EU law offers several legislative instruments, in particular, regulations and directives. While regulations have been applied in particular in the context of industrial property rights that require registration, such as trade marks, the appropriate instrument for copyright harmonization has been chosen to be a directive. While regulations generally and directly apply in the Member States and are binding in their entirety and thus do not require any implementation into national law, directives are addressed to the Member States and require implementation, since they are not directly applicable and are binding

only to the result to be achieved. The advantage of a Directive is the fact that Member States may choose the form and method that is best suited to implement the provisions of a European directive into their respective national laws; mostly, the leeway existing under directives permits Member States smoothly to insert such provisions into their national legal systems without the need for distorting their systems by elements that are alien to their legal traditions and thereby creating inconsistencies. This discretion usually left by directives as a means for harmonization is particularly important in the field of copyright law, since the legal traditions in this field of law in the European Union Member States are particularly divers not only as a matter of principle, but also in detail.

2. Limited coverage of Article 5 of the Directive

When addressing Article 5 of Information Society Directive, one should also be aware that its coverage is limited in different ways. First, regarding author's rights, it only provides for exceptions to the rights of reproduction, distribution, and communication to the public. Secondly, rights of authors of computer programs and databases are not covered thereby, since they are subject to special rules in the related directives. Thirdly, in respect of related rights, Article 5 of the Information Society Directive only addresses exceptions to the rights of reproduction and making available of four groups of right owners (performing artists, phonogram producers, film producers, and broadcasting organizations). Exceptions to other rights of these right owners are regulated in the EU Rental Directive. Exceptions in other cases (for example, further related rights that are not harmonized) are completely left to national law.

3. Separate harmonization of Exceptions for computer programs, databases, and related rights

As regards computer programs, exceptions to protection as regulated in the Computer Program Directive of 1991 (consolidated in 2009) are tailor-made and thus different, with good reasons, from the exceptions regarding other works. In particular, the making of a back-up copy, permitted uses for the purpose of observing, studying, or testing the functioning of a computer program (Article 5 of the 1991 version), and decompilation (Article 6) take account of the specificities of computer programs and their uses. Furthermore, the specific exceptions to the rights of reproduction, adaptation, etc., of a computer program in favour of the lawful acquirer are different from those for other kinds of works, in particular, under Article 5 (1) of the Information Society Directive. In general, the exceptions in the Computer Program Directive are much more restricted as compared to those in Article 5 of the Information Society Directive for other works. In contrast, the exceptions both to the copyright and sui generis-protection of databases under the Database Directive (Articles

6 and 9) are somewhat closer to those of Article 5 of the Information Society Directive, though not completely in harmony with them. In particular, Article 6 (2) (b) of the Database Directive leaves Member States sufficient discretion to harmonize most of the exceptions for databases with those for other kinds of works. However, Article 6 (1) of the Database Directive in favour of the lawful user of a database is again different from the exceptions under the Information Society Directive, in particular its Article 5 (1). Finally, under the EU Rental Rights Directive (Chapter II on related rights), the permitted exceptions, which have been taken over from the Rome Convention and thus are quite general, today only relate to the rights of fixation, live broadcasting and communication to the public, and distribution; the reproduction right of its Article 7 has been deleted by the Information Society Directive and is now regulated there, including its exceptions.

4. Relationship between these rules

Thus, there is no potential overlap between the Rental Directive and the Information Society Directive as regards exceptions. In contrast, a potential overlap exists between the Information Society Directive and the Computer Program and Database Directives, respectively. The relationship between these latter directives has been regulated in Article 1 of the Information Society Directive, which leaves without prejudice the earlier directives. Accordingly, the exceptions under the Computer Program and Database Directives may be considered as lex specialis.

III. THE SYSTEM OF ARTICLE 5 OF THE INFORMATION SOCIETY DIRECTIVE

1. Development of this Article

When evaluating Article 5 of the Information Society Directive, one should keep in mind its development, which started with the initial proposal of the European Commission, which was limited to the rights of reproduction and communication to the public; in particular, it contained only three facultative and one mandatory exceptions to the reproduction right, supplemented by the three-step-test. Overall, the provisions were much less detailed than the final ones. The European Parliament then added a number of further limitations, many of which were then endorsed by the Commission. When the Member States realized that the list of exceptions should be a closed list with the consequence that they would not be allowed to provide for any other exceptions than those contained in the list, they added the exceptions in Article 5 (3) (f) – (o), which contained any other exceptions that existed under the national laws of

Member States, so as to make sure that they were permitted to maintain them after harmonization. This background explains why the list has grown to the extent as adopted.

2. Delimitation of the individual paragraphs of article 5

The different paragraphs of Article 5 may be delimited from each others as follows: First, Article 5 (1) of the Information Society Directive contains the only mandatory exception, which thus must be provided by all Member States. In contrast, the other exceptions provided in paragraphs (2) – (4), are facultative; they do not need to be provided under national law. Finally, paragraph (5) sets out the three-step-test as first established in Article 9 (2) of the Berne Convention and later reintroduced, for all kinds of rights of authors in Article 13 of the TRIPs Agreement and in the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty for author's rights and for the rights of performing artists and phonogram producers, respectively. The three-step-test under paragraph (5) applies to all exceptions listed in Article 5.

3. Concept of partial harmonization and its criticism

As regards the voluntary exceptions, the Directive has chosen the concept of partial harmonization. Accordingly, it sets out the outer limits of permitted exceptions. It contains a closed list of permitted exceptions, which means, that Member States may not provide for any other, additional exceptions to the rights covered by the Information Society Directive, nor may they provide for any exception that is principally covered by the list of Article 5 but is broader than permitted under Article 5. Accordingly, Member States may not go beyond the exceptions and their conditions as provided in Article 5, while they have a partial discretion of choosing the exact conditions for the application of exceptions, and of not providing a permitted exception at all, within the framework of Article 5 (2) – (4).

While this concept has been criticised by some who would prefer an open list, which would give more flexibility to Member States to provide for exceptions beyond those and beyond the conditions set out in the Directive, such open list would not even lead to a partial harmonization and thus would mean «no harmonization»; accordingly, such provision would seem to be obsolete and simply not mean any harmonization, leaving total freedom to Member States and describing the status quo before harmonization. Others have criticised the fact that most exceptions are voluntary and have purported that therefore, the Directive has not at all harmonized exceptions. However, this is not true, given the character of a closed list of exceptions permitted under particular conditions, there has been partial harmonization as to the kind of exceptions that may be

provided at all and as to the conditions to be fulfilled at a minimum. One also has to acknowledge that Member States never aimed at completely harmonizing exceptions, as is confirmed in Recital 31 of the Information Society Directive. Moreover, the EU may not in all cases have the legislative competency, which is still based on the internal market concept. Furthermore, given the quite strong differences of national laws on exceptions in detail, a complete harmonization may seem highly difficult, if not impossible (already in 2001, Article 5 was the utmost degree of harmonization that could be achieved among even many less Member States than today); this is also one reason for which the idea of further harmonizing exceptions by a regulation of code may not be very fruitful. Finally, one has to recognise that, as a consequence of implementation of Article 5 in Member States' laws, exceptions to authors' rights and related rights are more harmonized today than before the implementation of the Directive.

IV. NATIONAL LAWS IN SELECTED MEMBER STATES BEFORE AND AFTER HARMONIZATION

1. Brief remarks on Article 5 (1) and 5 (5) of the information society directive

As mentioned above, Article 5 (1) on transient reproductions is the only mandatory exception of the Directive. Since it is quite detailed and technical, Member States generally have implemented this paragraph simply by introducing it verbatim into their national laws. One should recall that this exception is, like the others, subject to the three-step-test in Article 5 (5) and must be interpreted in the light of this test. In this context, it is worth noting that the Netherlands have implemented this provision not in the framework of exceptions to the reproduction right but as a part of the definition of the reproduction right, from which the uses set out in Article 5 (1) are carved out from the outset. Accordingly, in the Dutch law, this exception, which has not been implemented as an exception, is not subject to the three-step-test; in this regard, it is likely that Dutch law does not comply with the Directive.

As regards the three-step-test and its implementation itself, it should only be noted briefly that Member States have chosen different approaches. For example, France has explicitly inserted the three-step-test into its national law, while Germany and the United Kingdom have considered Article 5 (5) of the Directive as a simple order to the legislature to take into account this provision when drafting the individual exceptions. For more detail, reference is made to the intervention of Professor Lucas.

2. General concepts under selected national laws before harmonization

2.1. France

Traditionally, France always has had only a very limited list of exceptions; they were (and are) even 'hidden' within title II, chapter II under the subtitle 'Economic Rights ('droit patrimoniaux') without a separate title on 'exceptions'. In particular, under the intellectual property code in the version of 1992, only Article L.122-5. contained the exceptions, namely: exceptions relating to private and gratuitous presentations in a family circle; for purposes of private reproduction; certain analyses and short quotations, press reviews; the diffusion by the press and television of certain public speeches for information on current events; and for parody, pastiche, and caricature; also the exception of a back-up copy of a computer program was inserted according to the Computer Program Directive. At the same time, at a conference organized in March by Professors Lucas and Sirinelli in Paris, we could learn from the presentation of Professor Alleaume that, according to his experience as a pupil at school, certain uses for illustration of teaching, which were not covered by the law, were nevertheless effectuated in practice and such habits simply were generally accepted. Accordingly, the law alone does not always seem to reflect related practice.

2.2. Germany

Germany always has had a quite detailed list of specific exceptions. The general background thereof is Article 14 of the Constitution (Grundgesetz) on the fundamental right of property, which has been recognised by case law to include authors' rights. According to this provision, the property right is granted within the limits stipulated by the legislature («The contents and the limitations are determined by the legislative acts»). The Constitutional Court has developed its own 'three-step-test' in this regard as a guideline for the legislature. Accordingly, a full exception (without compensation) may only be provided where the interests of the author are relatively marginal as compared to a strong («gesteigert») interest of the general public. On a second step, a less strong but still sufficiently important interest of the general public may justify an exception to the property right, but where the interest of the author is thereby negatively affected, such exception is permitted only in combination with the provision of a statutory remuneration right for the author as a compensation. Finally, if the interest of the general public is minor as compared to a strong interest of the author, no exception may be provided at all. Accordingly, a system of balancing the different interests and of proportionality underlies the permitted exceptions to the fundamental right of property under the Constitution and, thus, the exceptions to author's rights in the law on authors' rights. Traditionally, these specific exceptions under German author's rights law always have been interpreted narrowly, given their character

as exceptions; only exceptionally and for specific reasons have judges applied an extensive interpretation.

2.3. United Kingdom

The UK law is characterised by a combination of the so-called fair dealing on the one hand and a long list of very specific exceptions, which are often even more detailed than under German and other laws. Fair dealing provisions are different, in particular narrower, from fair use, which exists worldwide only in the USA and, since recently, in Israel. Fair dealing has been provided only in three cases, namely, regarding uses for the purposes of research or private study (Section 29 (1) and (1 C)), for the purposes of criticism or review (Section 30 (1)), and for the purposes of reporting current events (Section 30 (2) of the UK CDPA). This restriction is particularly different from fair use under US law, which is a general defence. Yet, the UK courts have interpreted the above mentioned purposes liberally. At the same time, they have applied an objective approach to deciding on whether the relevant purpose was at stake. Accordingly, an infringer may not successfully argue that he was simply misguided in believing that he would make a use for such purpose. Furthermore, while the word 'dealing' is so broad as to encompass any use made of the work, it is more difficult to determine whether such use was 'fair.'

Under UK law (including case law), there are no precise guidelines in this respect, but certain factors may generally influence the determination of whether an act is fair. In particular, the fact that a work that is being used has not been published or made available to the public to a large extent will make it more unlikely that the dealing is considered as being fair. Still, the judge may, in taking into account the nature of the work, decide for an unpublished work being used as fair dealing as regards official reports containing information of public interest rather than as regards private letters. Another factor to be taken into account for considering a dealing as being fair or not is the way in which the work used has been obtained – whether lawfully or, as in the case of a theft, unlawfully. In addition, the quantity and quality of the part of a work used has to be taken into account. In general, there is no fair dealing if the entire work has been used; also, the parts taken must be of a limited extent and not represent the main quality of the work and in general not undermine the purpose of copyright protection. If a part has been taken, any additional, own contribution of the user to that part, such as a supplement or the use in a different context, will play in favour of fair dealing, especially in the case of criticism and review. A factor that plays against fair dealing is any commercial benefit that the user derives from it, and the actual or potential negative impact of such dealing on the market for the work, especially where the author of the work is in competition with the user thereof. Another factor, which has been applied by judges, is the fact of whether the purpose could also have been achieved by different

means than by making such use. Finally, judges would take into account in favour of fair dealing any altruistic or noble reason for such use as opposed to dishonest or egoistic motives. Overall, in addition to such factors being taken into account by judges when applying fair dealing provisions, the provisions as mentioned above contain further details, for example, regarding particular cases in which copying for research and private study are not considered by law to be fair dealing; accordingly, such specifications must be complied with in addition to the application of the mentioned factors.

As regards the quite long list of very specific exceptions under UK law, this specific way of drafting may reflect the common law tradition of the United Kingdom. In general, historically, common law was the main body of law while statutes were only the secondary means and had to specify the principles established by case law and thus were interpreted restrictively. Consequently, statutes have to be as specific as possible. Even if today, statutes have become much more common, this tradition of legislative drafting has been continued. This tradition may explain the quite specific provisions in the UK CDPA on exceptions.

3. National laws in these countries after harmonization (examples)

3.1. France

The French bill to implement the Information Society Directive first only proposed the introduction of three new exceptions: The mandatory exception of Article 5 (1) of the Directive, an exception for the benefit of disabled persons according to Article 5 (3) (b) of the Directive, and an exception regarding the consultation on sight for the benefit of researchers. However, the French Parliament then proposed to add further exceptions, namely, for the proper functioning of parliamentary proceedings according to Article 5 (3) (e) of the Directive; an exception to the reproduction right of both authors and related rights holders for the purpose of conservation by publicly accessible libraries, museums, or archives, if they do not seek any economic or commercial advantage. In contrast, another exception has been introduced only in respect of author's rights, namely, regarding the use of graphic, plastic, or architectural art through the press, whether print, audiovisual, or online, for the purpose of providing immediate information and with a direct bearing thereon. In this case, the author's name must be clearly indicated. However, the exception does not apply to works intended to report information themselves, such as photography or illustrations.

Another exception was introduced to the rights of reproduction and communication to the public, both as regards authors' rights and related rights, for the purposes of teaching and research, on the basis of Article 5 (3) (a) of the

Information Society Directive; it does not apply, however, to works conceived for educational use, musical scores, and works made for the digital edition of written text. This exception was introduced, although beforehand, the government had successfully encouraged the conclusion of specific agreements between right owners and the Ministry of National Education on educational and research uses. While the National Assembly after the conclusion of such agreements did not consider necessary the introduction of such an exception, the Senate considered such agreements as not fully satisfactory and was followed by the Joint Committee, so that the exception was finally adopted, in combination with a statutory right of remuneration as compensation. Another new exception related to the authorization of television broadcasting, which was deemed to include non-commercial (re-)diffusion of broadcasts through internal networks within collective residential buildings so as to enable residents in such apartments to receive television broadcasts that are anyway receivable in the area (Article L.132-20 (4) of the IP-Code). Doubts have been raised on whether by this provision, which might be interpreted as an exception to an act of communication separate from television broadcasting rather than a mere rule of contract law, is compatible with the Directive, which does not include this provision.

3.2. Germany

As EU Member States in general, also Germany has implemented Article 5 (1) of the Directive word by word. As a consequence of the Directive, it introduced the following new exceptions: An exception to the reproduction right in favour of disabled persons, based on Article 5 (3) (b) of the Directive and combined with a statutory remuneration right to be administered by the relevant collecting society; an exception to the making available right (as far as necessary to fulfil the relevant purpose and as far as justified with a view to a non-commercial purpose) regarding published small parts of a work, small works or individual contributions from newspapers or magazines for illustration for teaching at schools or universities and certain other non-commercial educational establishments, exclusively for the limited circle of students, or, regarding the same objects, exclusively for a concretely limited circle of persons for their own scientific research. Under the same conditions, this exception applies to the act of reproduction needed for the making available. Also this exception is combined with a right to equitable remuneration, which can be asserted only through a collecting society. The provision explicitly exempts from this limitation the making available to the public of a work which is designated for educational use at schools; regarding audio-visual works, the making available is permissible only after the expiration of two years from the start of the usual, regular exploitation in cinemas in Germany. This provision has been disputed, in particular because publishers favoured a full exclusive right to any such limitation, whereas authors were in favor of the limitation combined with the remuneration right (since

they expected a benefit from this use in the latter case rather than in the first one). Therefore, the provision was first grandfathered until the end of 2006, then until the end of 2008 and, since a final evaluation was not yet possible, again until the end of 2012.

Other amendments of limitations deal with the extension of existing limitations to the right of making available. This applies to the following limitations: § 46 CA on the exploitation of designated works or parts of works as an element of collections designated for educational use or church use, such as school books or song books for worship (combined with a right to equitable remuneration); the exploitation of public speeches under specified circumstances (§ 48 (1) no. 1. CA); the use for the purpose of reporting on current events, which has been extended to the exploitation on »other supports of data» in addition to printed material etc. (§ 50 CA); the use for demonstration and repair of equipment such as video-recorders, radio- and television-sets or computers, in the relevant shops (§ 56 CA); and the exploitation of catalogues, for art exhibitions or auctions for the purpose of advertising of the event (§ 58 CA).

Other amendments of limitations deal with the quality of the relevant works as having been made available to the public. § 6 CA distinguishes between works made available to the public and the publication («Erscheinen») thereof. A number of limitations have been extended to works made available to the public in order to cover also those works which have been made available to the public exclusively in intangible form via the internet rather than in form of copies by distribution. Such extension has been applied to §§ 46, 52 and 53 (3) CA regarding collections for educational and church use, certain non-commercial communications to the public and the own use for the purpose of education and state examinations.

Yet other, smaller amendments that aimed at fine-tuning the German provisions on limitations, in particular regarding reproduction for private and own use (§ 53 CA) to the conditions of the Directive have been introduced but will not be dealt with in this short report.

Finally, three other interesting issues are worth mentioning. Firstly, the existing compulsory licence for mechanical reproduction under § 61 in the preceeding version of the German Copyright Act has been placed from the section on limitations into the section on dealings with rights in copyright («Rechtsverkehr»), subsection on the exploitation rights, as a new § 42a CA. The background of this amendment is the fact that the compulsory licence (which is based on Article 13 Berne Convention) is not included in the exhaustive catalogue of permitted exceptions and limitations of Article 5 of the Information Society Directive and should have been deleted from the German law if it were considered to be an exception or limitation. However, as stated by the explanatory memorandum of the draft law, this compulsory licence must be regarded only as the regula-

tion of the exercise of rights and therefore correctly placed into the section on dealings with rights in copyright.

Secondly, the existing exception to the reproduction right in respect of private use, combined with the right to equitable remuneration, continues to apply both to analogue and digital copies. The government motivated this decision by the fact that to date, there are not yet any reliable technical protection measures which would allow the exercise of an exclusive right in the area of private reproduction. The legislature rather has introduced a new paragraph (4) to § 13 Act on the Exercise of Authors' Rights and Related Rights according to which the tariffs established on the basis of §§ 54 and 54a CA regarding the remuneration for private reproduction must take into account the extent to which technical protection measures are applied. In addition, the Government argued on the basis of the interest of consumers. Finally, the important remark has been made that an exclusive right covering the private reproduction would in the end be less useful for authors and performing artists than a statutory right of remuneration, because the remuneration right would usually allow a higher participation of authors and performers than an exclusive right. The reason is that the remuneration right would be administered by collecting societies to result in direct benefits for authors and performers, whereas the exclusive right would have to be licensed to the exploiting business which regularly has a much stronger negotiation power than the authors and performers. Consequently, the government also rejected the claim of the Federal Council to permit private digital reproduction only on the basis of legal copies, because the consumer would not be able to distinguish between a legal and illegal digital copy as a basis for private reproduction and because, therefore, such a claim would result in a *de facto* exclusive right of private digital reproduction. However, at a very late stage of the legislative procedure, the Federal Council succeeded in introducing into § 53 (1) CA on private reproduction a half phrase according to which the private reproduction is permitted unless a copy which has been produced obviously by illegal means is used for the reproduction.

In the frame of the «second basket», Germany added amendments to the exception to private reproduction, and introduced new limitations: first, a limitation of the right of making available works, based on Article 5(3) n) of the Information Society Directive. Accordingly, publicly accessible libraries, museums, or archives, which do not pursue any indirect or direct economic or commercial purpose, may make available works for research and private study exclusively in the premises of the relevant establishment and at specifically designated, electronic reading desks, to the extent that there are no contractual provisions to the contrary. However, as a matter of principle, they may not simultaneously make available more copies of a work in this way than copies that are available in stock at the establishment. For example, if a library has in stock two copies of a particular book, it may not make available this book to the public at more than two reading desks at the same time. In fact, this provision aims

at offering the same (but not any further reaching) possibilities in the digital world as they exist in the analogue world. As it is quite common in the German Law on authors' rights, this exception is combined with a statutory right to an equitable remuneration for such making available of works, subject to collective administration (§ 52b, sentences 3 and 4, of the CA).

Another new limitation consists in a mere explicit recognition of the judgement of the BGH on the delivery of copies made by public libraries on demand of users (§ 53a of the CA). The BGH had held that, in the given circumstances, the making and delivery of copies on request by its users was covered by the exception under § 53 of the CA (exception to the reproduction right in respect of private and other personal use) but had to be compensated by a remuneration right that was subject to mandatory collective administration; the BGH had drawn the latter conclusion from the constitutional guarantee of authors' rights under the fundamental right of property (Article 14 of the Constitution), international provisions, and an analogue interpretation of certain other provisions of the Law on authors rights. In following this court case, the new § 53a of the CA makes it permissible for public libraries to reproduce and communicate to the public individual contributions published in newspapers and periodicals as well as small parts of published works by mail or fax and on request by individual persons who are permitted to use the work under § 53 of the CA. Electronic reproduction and transmission is permitted only in form of an image file and for illustration for teaching purposes or for purposes of scientific research, to the extent justified by the non-commercial purpose. The reproduction and transmission in another electronic form is permissible only if the contributions or small parts of works are not obviously made available to the public by means of a contractual agreement on reasonable terms (§ 53a(1) of the CA). Also following the BGH, the law has combined this limitation with a statutory right to obtain an equitable remuneration, subject to mandatory collective administration (§ 53a(2) of the CA).

3.3. United Kingdom

Also the UK has implemented Article 5 (1) verbatim into its national law. Overall, unlike Germany and France, the United Kingdom has not introduced any new or wider exceptions as a consequence of the implementation of the Directive; however, it had to adapt the existing exceptions to the conditions of the Directive, which mostly resulted in narrowing down their scope. In particular, the fair dealing exception in respect of research and private study was restricted to non-commercial purposes, and sufficient acknowledgment of the source was made necessary. However, 'fair compensation' for the exception for private study was not introduced. Similarly, exceptions regarding educational copying were reduced to non-commercial purposes and made subject to acknowledgment of the source as required by the Directive; in addition,

on the basis of Article 5 (3) (d) of the Directive, fair dealing is permitted for the purposes of instruction (be it commercial or non-commercial). Also, the existing exceptions in favour of libraries and archives were made subject to the condition of a non-commercial purpose of the research or private study. The exception regarding criticism, review, and news reporting was restricted to works that have been lawfully made available to the public. Also other exceptions, including in respect of related rights, were restricted in order to comply with the conditions of the Directive.

V. OTHER CONCEPTS RECENTLY DISCUSSED

1. Background and Evaluation of calls for fair use in europe

Recently, one could observe at political level (such as in the Hargreaves Report in the UK), followed by some academics, calls for introducing the concept of fair use in European copyright law. Such expressions of opinion may have to be seen in context with a campaign of Google in EU Member States, where this company is trying to exercise its influence in manifold ways in order to represent its interests, for example, by approaching leading academics or institutions in the Member States for the purpose of cooperation; as an example, they are co-funding a research institution in Berlin for the purpose of promoting research into questions of internet and society. One may wonder whether any research results of such efforts may be considered as neutral and objective. It is evident that the introduction of the fair use defence in Europe would enable Google to argue, as it has done in the USA, in defence of its activities, such as the Google book digitisation (even if it is still questionable whether this activity would be covered by fair use under US law). At state level, the 'exportation' of US law to third countries via free trade agreements and the like arguably has already brought a competitive advantage of US industries over other exporting industries, because it is an advantage for exporting countries to be subject, in foreign countries, to legal rules that are similar to the domestic ones. Google seems to follow the same way at industry-level, after it has already tried, in the frame of its book digitisation project, to change de facto the existing copyright law by trying to force upon right owners the opt out-model, which is diametrically opposed to the fundamental right of authors to be asked for permission to use the works before any such use. It may seem attractive for Google 'to hide' behind the public interest in whose favour fair use has been conceived, while pursuing under this cover its own, pure business interests.

This latter fact has to be kept in mind when discussing about such calls for fair use. In addition, the introduction of fair use in Europe would require an amendment of the Information Society Directive, the Directives on Computer Programs and Databases, and the Rental Directive, which would be a quite challenging task by itself. More importantly, one has to consider that fair use is

a concept that is embedded in the tradition of US law but alien to legal traditions in Europe – not only in continental law countries but even in the United Kingdom – and thus difficult to be applied, even if once introduced. Even if fair use were introduced in the EU, one would have to expect a huge diversity of national courts' interpretations and, possibly, a wave of referrals for preliminary judgment to the European Court of Justice, which would in the end decide on copyright issues though its judges are experts in European law rather than in copyright law. Furthermore, as set out in a profound analysis by Professor Sam Ricketson, the fair use concept is arguably not compliant with the first step of the three-step-test of the Berne Convention and other international copyright treaties, since it does not establish, in the law, 'certain special cases.'

The vagueness of the concept of fair use would also pose problems in respect of the application of criminal law, which requires clear rules to be applied. Also, the lack of predictability is a disadvantage for users who need to know what uses are legal or not. Finally, this concept, which leaves a very large discretion to the judges, lacks democratic legitimacy; in democratic systems, it should be the legislature who takes the decision on the contents of the rights of authors and the permitted uses rather than the judiciary. If any new situations for which the need to modify the balance struck by the legislature between authors and users may appear, it should be up to the legislature – as set out for example in Article 14 of the German Constitution – to decide on whether an adjustment is in fact necessary and if so, in which way. Accordingly, it does not seem advisable to follow the wishes of a major US company by introducing fair use in Europe.

2. Proposal for and Evaluation of a mixed concept as part of a regulation/code

The idea of introducing a regulation instead of or in addition to directives in the field of author's rights and related rights (including for exceptions to protection) has been voiced by some. Since a regulation would be directly applicable, it would have to be sufficiently detailed. Given the nature of exceptions (as opposed to rights), namely, of being very specific and detailed, and given the diversity of national traditions and provisions even after the partial harmonization of the Information Society Directive, the reduction of such diversity in detail to one precise text governing the situation in all Member States seems not only a strong challenge, but one may also wonder (keeping in mind the subsidiarity principle), whether there is a need in this regard. In addition, as far as new ideas relate to the creation of a European, uniform title of authors' rights based on Article 118 of the TFEU, major doubts remain on whether this provision at all applies to authors' rights rather than to industrial property rights only.

As far as the proposal for a European Copyright Code drafted by certain academics envisages a regulation or a measure based on Article 118 of the TFEU, the same concerns apply. That draft, also called 'Wittem'-project, proposes among

others a number of provisions on exceptions. Only a few remarks are made on these provisions; an overall critical analysis of the draft would go far beyond the scope of this presentation. The relevant provisions are often drafted in even broader terms and with less specific conditions when compared to the existing directives; it is not clear whether more specific conditions would be allowed, so that harmonization may not even be stronger than under the existing directives in all cases. At the same time, they do not seem to be voluntary, but force Member States to provide all of them in their national laws; the same doubts as expressed above thus also apply here. In addition to these exceptions spelt out in the draft, the draft provides for an open clause, which would oblige Member States to allow any uses that are comparable to those enumerated, subject to the corresponding requirements of the relevant exceptions and the second and third steps of the three-step-test. Such a clause would give judges far more discretion to apply exceptions which have not been explicitly provided and thus would contradict the legal systems of most Member States to provide only for explicit, well defined exceptions, which principally must be interpreted strictly and do not allow for any analogy. Moreover, similar doubts as expressed above in respect of fair use (in particular, compliance with the first step of the three-step-test, predictability and application of criminal law, democratic legitimacy, growing importance of European Court) also apply to this – though less sweeping – clause). Furthermore, it is not clear whether such a code should replace the existing directives, and whether it should apply only to situations where the internal market is concerned (as one may presume, given the limited competency of the European Union versus the Member States), or in parallel with national laws – which would lead to an even more complex situation as existing to date. Finally, to the extent that a regulation would be a comprehensive set of directly applicable law, any perceived need for modification of an exception, which may well occur, given the dynamic evolution of copyright-related situations nowadays, would require the cumbersome legislative procedure at EU level and make copyright laws thus less flexible and less well-suited to quickly react to factual changes than today.

VI. OUTLOOK

The fact that Article 5 of the Information Society Directive has only partially harmonized exceptions in the EU has in part been criticized; however, one may well ask whether a full harmonization is needed. A justified criticism is the fact that its provisions in relation to each others as well as in relation to exceptions provided in other directives are not always clear, sometimes inconsistent and often complex. The advantages lie in the choice of the legal instrument, because the directive allows the legislature to respect grown differences in national laws, as confirmed in Recital 31, and thus to avoid the introduction of too many inconsistencies within national laws of Member States. Likewise, the concept of partial harmonization leaves Member States a certain freedom

to take account of specific national circumstances and more quickly to react to new factual situations, within the framework given by the Directive.

To conclude, while it may seem useful to clarify certain provisions within Article 5 of the Information Society Directive, one should refrain from rushing into a modification of that article and in particular from trying to make the exceptions mandatory, since this would take away from Member States the current and necessary flexibility; one should also consider in this context that at the time, it was quite difficult to arrive at the compromise reflected in Article 5 of the Directive, although it then had to be adopted only among 15 Member States. Also, there is a natural tendency to maintain one's own national law, at least as regards concepts and drafting style; Article 5 was the utmost degree of harmonization that could be and was achieved at the time. Thus, it seems rather unlikely that full harmonization especially in form of a regulation could be reached today with 27 Member States; furthermore, it is doubtful whether this would be necessary or at least bring about sufficient advantages as compared to the current situation.