

Interest of stakeholders and copyright law



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Introduction

Copyright law has been developed into major issue when it comes to the interest between the stakeholders as the technologies today are evolving in decent speed. Copying an intellectual property without the authorisation of the owner is an infringement under the law of United Kingdom and European Union. Under European copyright law, art. 2 of Directive 2001/29/EC stated that authors, producers and performers will possess the “ exclusive right” for the reproduction of their own works.[1] However, when it comes to private copying, there is an exception under the directive with certain conditions. This could be said as the balance of the interest between the copyright owner and user of the products. A private copy is defined as any copy for non-commercial purposes neither directly or indirectly by a natural person for personal use.[2]

The private copy exception is provided in the art. 5(2)b of the DIRECTIVE 2001/29/EC, where Member States may provide for exceptions or limitations to the reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;[3] The would permit someone to “ format shift (i. e. shift content from one format to another); or “ space-shift” (i. e. move content to different personal devices or media); and “ back-up” copies that they have acquired.[4]

As a mechanism for “ fair compensation”, 22 out of 27 European Union members have chosen to meet the requirement through a levy system[5]The fair compensation or the levy system of private copying mainly to compensate the copyright owner for the potential harms to their works due to private copying.[6]In *Padawan SL v Sociedad General de Autores y Editores de Espana (SGAE)*, the court held that held that ‘ fair compensation’ is an autonomous concept of EU law which had to be interpreted uniformly in all the Member States that had introduced a private copying exception:

“ although it is open to the Member States, pursuant to Article 5(2)(b) of Directive 2001/29, to introduce a private copying exception to the author’s exclusive reproduction right laid down in European Union law, those Member States which make use of that option must provide for the payment of fair compensation to authors affected by the application of that exception. An interpretation according to which Member States which have introduced an identical exception of that kind, provided for by European Union law and including, as set out in recitals 35 and 38 in the preamble thereto the concept of ‘ fair compensation’ as an essential element, are free to determine the limits in an inconsistent and un-harmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive “ [7]

The exception had to satisfy a three-step-test provided in art. 5 of the Directive (also in Art. 9. 2 of the Berne Convention, Art. 10 of the WIPO Copyright Treaty and Art. 13 of the TRIPS Agreement).[8]The exception can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably

prejudice the legitimate interests of the right holder.[9] Legislators of Member States must take into account the criteria provided in the test when implementing the exception to the copyright in national legislation.[10]

There are still uncertainties in the scope of this exception. When it comes to the second step of the test, the phrase “ normal exploitation” remain as a broad and unclear concept.[11] To prevent most of the infringement of exploitation, the definition of the phrase need to be interpreted in clear and restrictive approach to limit certain range of exploitation of works. reference is often made to the WTO Panel’s report, in which the criterion of normal exploitation was deemed to involve consideration of the forms of exploitation that currently generate an income for the author as well as those which will be probably important in the future.[12]

, it could impose a *status quo* and prevent any extension of exceptions to new situations unforeseen by the letter of the text, but which could derive from its spirit. On the other hand, reference to future exploitations runs the risk of paralyzing exceptions every time a technical evolution allows to control previously uncontrollable uses, and thus creates new possibilities for exploitation. [13] As concerns the control by right holders of the uses of their works through technical measures, this could even lead, in the long run, to the disappearance of limitations in the digital environment. [14] , a conflict with the normal exploitation can only occur if “ the author is deprived of a current or potential market of considerable economic and practical importance”. [15]

One of the issue regarding this point is that art. 5(2)(b) didn't expressly state that whether the private copy exception only refer to copies from lawful sources, or involving the copies from illegal sources. Due to this uncertain area, the exception does not actual provide the copyright holders to authorise or prohibit the users from making a private copy. Nonetheless, the uncertainty could not be leading to the meaning of that the provision could demand the copyright holders to tolerate with the infringement of rights within private copy.

This issue occurs in Netherland, where the Government of Netherland stated that the source of copy is irrelevant despite it is unlawful. The reason provided by the Government is that mere downloading is not a form of reproducing or making available. However, the Government held that the damages caused by illegal downloading to the copyright holder will be compensated by blank levies. The Government confirmed that only the act of uploading the unlawful content would be considered as an act of infringement, instead of mere downloading the work. The blank levies provided for illegal downloading could seen as protecting the interest of copyright holders as it would be practically impossible to enforce copyrights within the private copy area.[16]

However, the legality of the sources of reproduction is matter to private copy exception. Court of Justice of European Union(CJEU) in the case of *ACI Adam BV v Stichting de ThuisKopie* [17]mentioned that Member States should not permitting private copy exception for any reproductions from unlawful sources as it could lead to negative impact on the functioning of the internal market[18]. In fact, tolerate to the unlawful distribution of illegal works would

only legalize the act of infringement and will not minimising the act of illegal downloading. Thus, the CJEU said, art. 5(2)(b) seek to ensure the proper functioning of the internal market and ensuring proper support for the dissemination of cultural works.[19]

Why illegal downloading from unlawful sources shall not be legalised? First, legalising the act of illegal downloading would promote piracy, which would reduce the sales of the works from lawful sources and contravene the normal exploitation of works. Allowing illegal downloading would put the copyright holders in a position where they have to unreasonably tolerate the act of infringements, and this is clearly discriminating their legitimate interests.[20]

To clearly distinguish copying from unlawful sources from private copy exception, the national legislators could achieve it by implementing a condition into the law that prohibit the acts of reproduction from the source that is “ obviously unlawful”.[21]This approach has been taken by certain Member States to clarify the downloading act from unlawful sources not to be recognised as private copy. The German legislator expressly did in his first implementation act of the Directive (s. 53(1) of the law of September 13, 2003, also called the “ first basket”). Spain adopted a similar solution in the law of July 7, 2006, stating in Art. 31. 2 that the reproduction must be made from a “ legally accessed” source to qualify as private copy.[22]

Still today, it remains uncertain whether private copying is a mere defence or is actually enforceable against undue restrictions[23]. In fact, even where private copying is statutorily permitted, right holders may foreclose its exercise by relying upon technological protection measures or through

licensing terms. To develop this interesting thesis more in detail, as the perspective adopted is mainly an EU one, it would have been interesting to include a discussion on the history behind the drafting of art. 5 of the InfoSoc Directive (this is the relevant provision on copyright exceptions and limitations, including private copying).[24]

However, the problem with the three-step test is probably to be found elsewhere: in the Directive of 2001. There, the test seems to be addressed not only to the national legislature but also to national judges. 36This gives it a broader scope than in the international conventions. 37Judges may be required to examine whether the application of a limitation in a specific case respects the conditions of Art. 5. 5. National courts in Europe have already analysed the application of national limitations to copyright in the light of the three-step test. 38Indeed, it is difficult to dispute judicial reliance on the test where it has been implemented in national law. 39

The danger of such an approach is obvious: the private copy is at risk of being challenged by judges. Its scope risks dramatic reduction. The decision of February 28, 2006 of the French Supreme Court delivers an outstanding example. 40In this much commentated decision, the Supreme Court applied for the first time Art. 5. 5 of the directive in order to overcome the application of an exception in favour of a technical protection measure, arguing abstractly and generally that the private copy of a DVD conflicts with the normal exploitation of the work, without providing a definition of this term at any time. 41To avoid such misuse of the test, some guidelines *E. I. P. R. 128 for the judges of how to interpret the test in a more balanced way should urgently be worked out. The Max Planck Institute for Intellectual <https://assignbuster.com/interest-of-stakeholders-and-copyright-law/>

Property and the Queen Mary University of London jointly put in place a working group of European scholars that are currently working on this issue.

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Private Copy Exception in United Kingdom

Copyright law in the United Kingdom has been evolving in recent years and the changes started to get significant since the *Gowers Review of 2006* and the *Hargreaves Review of 2011*, gathering pace with the Enterprise and Regulatory Reform Act 2013.[25]The report in Hargreaves Review of intellectual property and the digital market in May 2011, recommend that the UK should implement the exception to ensure that the law kept up with digital copyright use.[26]For the first time, the UK legislator had implement the private copy exception into the national law. The exception was introduced by s. 28B of the Copyright, Designs and Patents Act(CDPA) of 1988. This section of CDPA was enforced on October 1, 2014.[27]The new act implemented only allow copy from lawful sources for private purpose of individual concerned only. This exception does not include the passing of copy to family and friends which was allowed in the Directive. Such an exception would permit people legally to copy any work that they had access to and it would be easy to obtain copies of works without paying for them. [28]As to the narrower implementation, the Government stated that such implementation would cause no more than minimal or zero harm to the copyright holders. Based on this condition, there were no compensation provided for copyright holders in S. 28B CDPA by the UK Government.[29]

Problem with S. 28B of CDPA

The exception provided by the Directive allow the passing of copies to family or friend but the exception implemented in UK legislation prohibited such act. Professor Hargreaves suggested the Government should introduce an exception to allow individuals to make copies for their own use and that of their immediate family on different media. Importantly, Professor Hargreaves thought that the question of compensation was wrapped up in the copyright holders' freedom to choose an appropriate price:

“ Rights-holders will be free to pursue whatever compensation the market will provide by taking account of consumers' freedom to act in this way and by setting prices accordingly.”[30]

The biggest issue in the S. 28B of CDPA is that the fair compensation as provided by the directive is not implemented into the exception. Based on the directive, fair compensation to the copyright holders only could be exempt if the damage caused would be *de minimis* or minimal.[31] However, the UK Government commissioned a research study and impact assessment that showed the harm that would likely cause to the copyright holders due to the private copying acts permitted in S. 28B of CDPA would be minimal. The main reason is that the exception only applies to rightfully acquired copies which the copyright holders would receive the sufficient remuneration at the sales of the works, which the compensation was already priced in.[32]

Quashing of S. 28B CDPA

The exception introduced by UK Government had been challenged after it had been introduced by British Academy of Songwriters, Composers and Authors, Musicians' Union and UK Music 2009 Limited. The parties had

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applied for judicial review on the newly introduced exception on the basis that it failed to provide “ fair compensation” as in the Directive to the copyright holders which would be unlawful.[33]

The main issue leads to the quashing of the Regulation is that whether there is evidence of the harm to the copyright holders which would be minimal to determine that compensation scheme is not required as provided by the Regulation.[34]The judge reviewed the evidence provided in Government’s Updated Impact Assessment and stated that evidence to prove the harm is minimal do not meet the satisfactory level.[35]The judge also criticised the IPO Research Report provided as evidence that lack of consumer surveys, price analysis and comparative analysis with other Member States.[36]

How the Exception Affect the Interest of Stakeholders

When it comes to the interest of the copyright holders, we would straight pinpoint to the “ fair compensation” issue. The reproductions of works are getting easier and wider due to advancement of technology. As downloading from unlawful sources would not be considered as private copying, CJEU in its decision in ACI Adam stated that the levy system would not be applied to illegal downloading from unlawful sources.[37]Such development had great impact on certain countries which don’t distinguish between lawful and unlawful sources for private copy exception.[38]

However, as large part of copies made online from unlawful sources, the levy system should be implemented to compensate such condition as only compensating copies made from lawful resources would left the copyright holders to bear the losses. Copyright holders had to prosecute the users to

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get remuneration for copies from unlawful sources. Such approach does not balance the interest of copyright holders if the users continue to access the unlawful sources instead of the legal online services provided.

[39] Distinguishing illegal downloading from the exception would make the law serve better, but it taken away the minimum damages to be suffered by the copyright holder as online piracy and illegal downloading would not reduce merely due to removing such act from private copy exception. The decrease of compensation for copyright holders would not be a reasonable solution as private copying is increasing. The interest of the copyright holders would be harmed due to such limitation instead of getting protected.

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Recent Development

In *Entidad de Gestion de Derechos de los Productores Audiovisuales (EGEDA) v Administracion del Estado*, the funding scheme of Spanish for private copy exception was criticised by the ECJ, where the court held that the scheme does not guarantee the cost of such compensation would solely bear by the user who made private copy.[41]

In Case C-521/11 *Amazon. com* (11th July 2013) at paragraph [20], in relation to the person who has to pay, the Court confirmed that "...since the provisions of Directive 2001/29 do not expressly address the issue of who is to pay that compensation, the Member States enjoy broad discretion when determining who must discharge that obligation"[42]

However, the ECJ held that the Copyright Directive shall precludes budgetary scheme such as the scheme established in Spain to work as fair

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compensation to the copyright holders due to the private copy of their works as such scheme would involve a legal person who did not conduct such reproduction to bear the funding with those who make reproduction of works for private purpose. As the scheme could not guarantee the cost of that fair compensation is ultimately borne solely by the users of who make private copies, it shall not be treated as the fair compensation to the copyright holders even though Member States have the discretion to determine the legal person to bear such obligation.[43]

[1]European Competition Law Review 2011 Case Comment Copying levies: moving towards harmonisation? The European Court rules on the concept of fair compensation for rightholders Bill Batchelor Tom Jenkins Matthew Butter

[2]International Survey on Private Copying Law & Practice 2015

[3]Art. 5(2)b of DIRECTIVE 2001/29/EC

[4]Paragraph 91 R. (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills Queen's Bench Division (Administrative Court)

[5][https://www.gov.](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310183/iprese-arch-faircomp-201110.pdf)

[uk/government/uploads/system/uploads/attachment_data/file/310183/iprese-arch-faircomp-201110.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310183/iprese-arch-faircomp-201110.pdf)

[6]Entertainment Law Review 2009 Finland: copyright Mikko Manner

[7]Paragraph 36 Padawan SL v Sociedad General de Autores y Editores de Espana (SGAE) (C-467/08)

[8]European Intellectual Property Review 2008 The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment Christophe Geiger

[9]Art. 5(5) of DIRECTIVE 2001/29/EC

[10]Refer to no. 8

[11]Refer to no. 8

[12]THE ROLE OF THE THREE-STEP TEST IN THE ADAPTATION OF COPYRIGHT LAW TO THE INFORMATION SOCIETY Christophe Geiger

[13]In this sense also M. Buydens and S. Dusollier, Les exceptions au droit d'auteur : évolutions dangereuses: *Comm. com. électr.* Sept. 2001, p. 13; J. C. Ginsburg (*prec . note 20*), p. 48, which underlines the risk that “ the traditionally free uses, such as for training purposes or parody, be considered as normal exploitations, supposing that right holders manage to implement a profitable collecting system.”

[14]See also in this sense M. Buydens and S. Dusollier (*prec . note 30*), p. 12. For more developments, see C. Geiger (*prec . note 8*), n° 418 and s.

[15]International Review of Intellectual Property and Competition Law 2006 The private copy exception, an area of freedom (temporarily) preserved in the digital environment Christophe Geiger

[16]Entertainment Law Review 2008 Case Comment Netherlands: copyright – home copying Diederik Stols

[17]ACI Adam BV v Stichting de ThuisKopie

[18]Entertainment Law Review 2014 Case Comment Private copying levies, illegal online sources and the private use defence: Case C-435/12 ACI Adam BV v Stichting de ThuisKopie¹ Kirsten Toft

[19]Refer to no. 18

[20]International Review of Intellectual Property and Competition Law 2015 Case Comment Private copying and downloading from unlawful sources Joao Pedro Quintais

[21]Refer to no. 8

[22]Refer to no. 8

[23]European Intellectual Property Review 2013 Publication Review Private Copying: The Scope of User Freedom in EU Digital Copyright Stavroula Karapapa Reviewed by Eleonora Rosati*

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[25]Entertainment Law Review 2015 Case Comment You say you want a revolution: judicial review of the UK's private copying exception James Sead Rebecca Pakenham-Walsh

[26]European Intellectual Property Review 2015 Case Comment A pause in private copying: judicial review holds the UK private copying exception to be <https://assignbuster.com/interest-of-stakeholders-and-copyright-law/>

unlawful because there was no evidence to support the decision not to provide compensation to rights holders Joel Smith Heather Newton*

[27]s. 28B of the Copyright, Designs and Patents Act of 1988

[28]Para 71 R. (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills Queen’s Bench Division (Administrative Court)

[29]European Intellectual Property Review 2015 Case Comment A pause in private copying: judicial review holds the UK private copying exception to be unlawful because there was no evidence to support the decision not to provide compensation to rights holders Joel Smith Heather Newton*

[30]Paragraph 53 of R. (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills Queen’s Bench Division (Administrative Court)

[31]Recital (35) of Directive 2001/29/EC

[32]European Intellectual Property Review 2015 A comparative study on the “reproduction by natural persons for private use” exception to copyright in the UK and France Myriam Otaola Allende*

[33]European Intellectual Property Review 2015 Case Comment A pause in private copying: judicial review holds the UK private copying exception to be unlawful because there was no evidence to support the decision not to provide compensation to rights holders Joel Smith Heather Newton*

[34]Entertainment Law Review 2015 Case Comment You say you want a revolution: judicial review of the UK's private copying exception James Seadon* Rebecca Pakenham-Walsh

[35]European Intellectual Property Review 2015 Case Comment A pause in private copying: judicial review holds the UK private copying e