

STRENGTHS AND WEAKNESSES OF THE EU INFOSOC DIRECTIVE WITH AN EMPHASIS ON THE PROVISIONS OF COPYRIGHT EXCEPTIONS AND LIMITATIONS

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Abstract: Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society also known as the InfoSoc Directive, entered into force on 22 June 2001.⁶²⁵ In the language of the European Union “information society” means the internet. In order to respond to the new forms of exploitation of the copyright works, the law on copyright and related right needed to be adapted. These economic challenges require a new and flexible Community legal framework, so that the information society could be maintained and developed. However, the objectives of the Copyright Directive resulted in providing measures that concern both the analog and the digital environment, and is further questioned whether the objective of harmonizing the copyright laws has been met. So in this paper the strengths and the weaknesses of certain provisions of the Directive will be briefly summarized.

Keywords: copyright, EU InfoSoc Directive

1. GENERAL INSIGHTS

There were originally twofold objectives for the creation of this Directive. First objective was to bring the Community law in line with the WIPO Internet treaties⁶²⁶ in order for the Member States to ratify in their national law the WCT and WPPT treaties (adopted within the framework of the World Intellectual Property Organization – WIPO, in December 1996).

The second objective is the process of harmonizing the copyright laws. A number of issues, as the applicable law, moral rights, the scope of the economic rights, exhaustion, administration of rights and technical protection are the key issues to be harmonized. But it should be said that instead of dealing with the aforementioned issues, the Directive rather deals extensively with the issue of copyright exceptions.

Article 5 is the main source of the provisions on copyright exceptions. This article is providing an exhaustive list, which means that Member States may not provide for exceptions other than the ones provided in the Directive. Between the time of the first proposal (December 1997) and the time when the final text of the Directive was adopted in 2001, what had originally been a list of seven exceptions had grown into a full list of 21, of which 20 of them are optional. The harmonization of limitations appeared to be a highly controversial issue, which was followed by delaying of the implementation process of the Directive by the Member States. Choosing and defining the scope of the limitations and exceptions on copyright and related rights that would be applicable to all Member States is very difficult to achieve, considering the many different types of works or uses of works and established practices in each Member State.

This regime of limitations and exceptions leaves Member States to decide in their own discretion which exceptions contained in article 5 could be implemented in the national law. Just one of the twenty-one exceptions enumerated in the Directive is mandatory, and the other twenty are optional. There are not strict rules on how the Member States shall implement these provisions. As a consequence, the Member States are interpreting these provisions and transposing them in national legal order, with respect to their traditions connected with this matter. As a result there are a number of various lists of limitations and exceptions throughout the European Community and thus a variety of different rules applicable to a single situation across the European Community, which could constitute a serious obstruction of the cross-border markets.

While the exemption of certain acts of temporary reproduction in Article 5(1) is mandatory, Member States are free to make an individual choice from the optional exceptions in Article 5(2) and (3) ISD. This brings the question of whether this exhaustive enumeration leads to harmonization of the European internal market. This is hardly compatible with the aim of establishing and maintaining smooth functioning of the internal market.

As stated in the Information Society Directive itself, it “serves to implement a number of the new international obligations,”⁶²⁷ particularly those resulting from the WIPO Internet Treaties(WCT and WPPT). For this reason the

⁶²⁵ **The Official Journal of the European Union (OJ) 2001, L 167 of 22.6.2001, p. 10.**

⁶²⁶ WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty, signed at the WIPO Diplomatic Conference in Geneva, 20 December 1996.

⁶²⁷ **InfoSoc Directive, Recital 15.**

mandatory and optional exceptions and limitations recognized in the InfoSoc Directive shall only be applied in accordance with the three-step-test set forth in Article 5(5). Any exception provided in the Article 5 “shall 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 rightholder.”⁶²⁸ This three-step-test corresponds to the international provisions with the same criteria in Article 9(2) BC, Article 13 TRIPS and Article 10 WCT.

2. SUMMARIZING THE STRENGTHS AND WEAKNESSES OF INFOSOC DIRECTIVE

a) Strengths

The positive impact of the Directive or particularly of Article 5 is that every EU Member State can choose which of the enumerated exceptions and limitations to implement into their national law. The legislators are free in the process of choosing exceptions from the given exhaustive list in Article 5 in accordance with the domestic needs. As a consequence, the scope of the national exceptions based on the catalogue of Article 5 of ISD is differing among the national copyright laws of the Member States. If we closely analyze the listed exceptions in Article 5 ISD, we can see that many exceptions consists inherent flexibility and generally leaves room for national law making, instead of being precisely defined and circumscribed. So there are a wide variety of exceptions and limitations that reflects the diversity of domestic copyright traditions and practices. “This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market.”⁶²⁹

There is also the impact of the three-step-test. The flexible nature of the exhaustive list of exceptions and limitations provided in ISD, should be further considered in respect with the three-step-test included in the fifth paragraph of Article 5. The three-step-test, containing three open criteria, leads to semi-open system of defense which is similar to the open-ended system defense of the fair use doctrine in the US. We say semi-open because the Member States are not permitted to identify new permissible uses or exceptions, apart from the ones listed in the Directive. The Member States should apply the three-step-test as additional assessment and investigation on whether the implemented exceptions from the exhaustive list permitted under the ISD, are in compliance with the requirements of the test. As Hugenholtz and Senftleben argue, “further requirements to be found in the relevant provisions of Article 5 ISD, such as use ‘in accordance with fair practice’⁶³⁰...can be understood to be covered anyway by the elements taken from the three-step test.”⁶³¹ Therefore the test should not be seen as an obstacle to the listed exceptions in ISD. Moreover, in the case where the legislators broadly defined the exceptions in the national law, this test could also be considered and understood as an additional control over the justification of the exceptions provided.

ISD itself, explicitly states that the provided exceptions and limitations should be exercised in accordance with international obligations.⁶³² Again, it turns out that the three-step-test included in the Article 5(5) was designed to ensure compliance with the relevant international obligations, specifically the international three-step tests. The first three-step-test in international copyright law was anticipated in the Berne Convention⁶³³ and proposed at the 1967 Stockholm Conference for its Revision. This perception of the three-step-test and further of Article 5(5), indicates that the test must not be understood as a straitjacket of national defined exceptions and limitations. Moreover, the InfoSoc Directive previously states that the aim of the provision of the three-step-test, as noted in the Recital 15, is to comply and implement the new international obligations resulting from the WIPO Internet Treaties. With this flexible framework, EU is making a compromise with the Berne Union Members and with the Member States which legislation is complied with the WCT and WPPT Internet Treaties.

b) Weaknesses

First weakness that comes to mind in regard of the InfoSoc Directive is the lack of sufficient flexibility for the Member States, emphasizing that the permissible exceptions in the Directive must be additionally examine in the light of the three-step-test, which is the negative point of view considering the application of the test in this situation. The implemented exceptions from the exhaustive list permitted under the ISD should be in compliance with all of

⁶²⁸ Ibid, Article 5(5).

⁶²⁹ InfoSoc Directive, Recital 32.

⁶³⁰ InfoSoc Directive, Article 5(3)(d).

⁶³¹ Hugenholtz. P.B. and Senftleben. M., *Fair Use in Europe. In Search Of Flexibilities*, Amsterdam Law School Research Paper, No. 2012-39, Amsterdam, 2012, p. 18 (internal quotation omitted).

⁶³² InfoSoc Directive, Recital 44.

⁶³³ Berne Convention (BC) for the Protection of Literary and Artistic Works, 1886, as revised in Stockholm 1967, Article 9(2).

the three requirements of the test, and not just to one or two. Additionally, Member States are not allowed to find and identify other exceptions and limitations, beside the ones already enumerated in the ISD.

Even though the InfoSoc Directive could simply not deal with the issue introduced in the Article 5, the EU Commission anyway penetrated in the issue of exceptions and limitations and further complicates the situation. Instead of dealing with the exceptions and limitations, the broadly classified exclusive rights and with the sui generis protection of TPMs (Technological Protection Measures), the Directive should more strictly deals with the challenging digital environment. The exclusive rights under ISD, are also accompanied by exhaustion provision which does not comply to the digital works. The harmonization of online markets as a legal basis for the Directive, was introduced in the Article 114 of TFEU. So, although the InfoSoc was formulated and brought to combat the challenges in the Information Society in the first place, the Directive did not provide harmonizing measures which will restrain territorial obstacles and thereby will harmonize the online market and facilitate the free movement and uses of works through the Internet. Plus, the exhausted list of exceptions and limitations does not achieve the aim of harmonizing them on national level. This maybe would be the case if 20 of the 21 exceptions were not optional, but rather mandatory. Now Member States are not obliged to provide for the same permissible exceptions of the enumerated list, and thereby follows the conclusion that the dissemination of digital works on the Internet (as online market), which is impeded with a lot of cross-border barriers is inevitable.

If we analyze the exclusive rights provided by this Directive, we can observe that ISD attempt to harmonize only a few types of rights, including the right of reproduction, the right of communication to the public, the right of making available to the public and the right of distribution. “Other exclusive rights fall outside the scope of the Directive and, thus, outside the EU *acquis* insofar as they are not covered by one of the more specific Directives in the field of copyright.”⁶³⁴

As a result, in some cases the three-step-test is not applicable and thus its impact is not visible. Generally, in theory is made a distinction between the right of reproduction and the right of adaptation. The distinction is also established by the international copyright law, specifically by BC, which in separate articles establishes both the right of reproduction and the right of adaptation.⁶³⁵ Even some national implementation practices and case law of Member States, are confirmation of this distinction. The adaptation right covers changes to the intellectual substance of the original work which are also considered as transformations, while reproduction concerns the mere copying of a particular protected work. In other words, it could be said that the scope of the right of reproduction does not covers such transformations. And since the right of adaptation is not itself provided as an exclusive right within the framework of ISD, the regulation of the adaptations or transformations of original works is left in the hands of the national law makers. Therefore, in respect of the exceptions and limitations to the exclusive right of adaptation which are defined by national legislations, the EU three-step-test incorporated in Article 5(5) ISD does not apply.

Under the principle of adaptation, German courts traditionally exempt parodies and even other transformations of a work from the exclusive rights of the copyright owner, on the basis that they satisfy the requirements of having new features, different from the features of the original work.⁶³⁶ Hence, the international three-step tests do not apply to such national exceptions of parody uses provided under the concept of adaptation. Even if we take the three-step-test as applicable to these kind of national rules or principles, the parody exception defined in Article 5(3)(k) ISD may additionally offer more broad space with regard to cases where a parody, caricature or pastiche could not be exempted as adaptations under the national rules or principles. Within the exclusive rights provided by ISD, the parody could be identified as exception to the right of reproduction. This brings us to the conclusion that besides the parody exceptions based on the national adaptation principles, national law makers could exempt parody uses as acts of reproduction under the exclusive right of reproduction in ISD, which means that this could lead to a really high number of exceptions and thus to nonsense of the aim and existence of the exclusive rights of copyright holders.

CONCLUSION

It is clear that the exceptions and limitations on the protection of copyright are necessary in order to encourage an author or artist to express the inspiration derived from a preexisting copyrighted work. But for a unified and harmonized legislation on copyright in the EU Member States, such exceptions and limitations, in my opinion, should be mandatory. It is true that ISD and its list of non-mandatory exceptions, leaves room for Member States to

⁶³⁴ Hugenholtz. P.B. and Senftleben. M., *Fair Use in Europe. In Search Of Flexibilities*, Amsterdam Law School Research Paper, No. 2012-39, Amsterdam, 2012, p. 26.

⁶³⁵ Berne Convention, Article 9(1) and Article 12.

⁶³⁶ See Geller. P.E., *A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?*, Journal of the Copyright Society of the USA, Vol. 57, 2010, p. 901.

define which of them would be more applicable on their ground, considering their previous experience and tradition, but even though, this approach somehow contradicts the aim of the exceptions and the aim of harmonization in general, which is at the very foundation of the ISD itself. Even more, the incorporated three-step-test in Article 5 (5) is further complicating the situation, because Member States are obliged to evaluate the implemented exceptions in accordance with the rules of the test in any particular case. In other words, even if a use of a copyrighted work is found as non-infringing under some of the exceptions, it doesn't mean that the copyright infringement does not exist, if additionally the use is not in line with the three-step-test. This once again contradicts the aim of harmonized copyright law, so the need of changes should be considered.

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