The International Framework and the reality of Copyright Determination

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1. US – EU: Comparing the two copyright frameworks

2. A transatlantic perspective of recent developments
   • Case-law (parallel cases in the US and the EU)
   • Policy reform (announced copyright form in the EU)
   • WIPO (the promising momentum of the Marrakech Treaty)

3. Conclusions/Questions
1. US – EU: COMPARING THE TWO COPYRIGHT FRAMEWORKS
COPYRIGHT FRAMEWORKS.

- Same basic considerations (Input – Digitization & Output – Access)
- Copyright status dictates accessibility and freedom of use (Three categories)
- Difference in Orphan Works regulation: Directive 2012/28/EU and depository
- List of exceptions and limitations v. fair use doctrine
- Three steps test v. fair use
- Is there European Copyright law? (InfoSoc Directive 2001/29/EC, umbrella to national copyright laws)
- Towards harmonization – importance (CRMS)
- Common law v. Civil law copyright tradition
- Fair use in Europe?
- Liabilities: are librarians (or lawyers) in Europe more conservative? (eg. EUI Library)
- Digital exhaustion: a potential difference
2. A TRANSATLANTIC PERSPECTIVE OF RECENT DEVELOPMENTS
- Authors Guild, Inc. v. Google Inc. (2005-today)
- Authors Guild, Inc. v. HathiTrust (2011-2014)

- Eugen Ulmer v. TU Darmstadt (C-117/13)
- Vereniging Openbare Bibliotheek – Dutch Association of Public Libraries (C-174/15, now heard from the CJEU, 3rd chamber)
Conclusions:

Digitization
- Partnering with private companies to digitize
- Preservation
- Digitization of owned works without licensing
- Full collections? US v. EU

Access
- Full-text search databases
- Access to print disabled
- Dedicated terminals in the premises (no USB – unclear about printing)
- E-lending (?) – replicating physical lending
EU:
- Commission & ‘Comitology’
- Consultations
- December Press Release: priorities
  1. Cross-border portability
  2. ‘Modernizing’ copyright framework in view of the single Digital Market
     Widening access to content
     Rethinking exceptions (!)
     Rights of print disabled (Marrakesh)
WIPO-Marrakech Treaty.

• A new international exception
• HathiTrust case already on the same direction
• Up to this date in its 16/20 ratifications towards entering into force (not yet EU or US)
3. **CONCLUSIONS/ QUESTIONS**
THE GOOD, THE BAD, AND THE CONFUSING:
Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

[Renting directive now repealed and replaced by Directive 2006/115/EC.]
[exclusive public lending right: Member States can derogate from it, provided that at least authors obtain remuneration for such lending]
Public Renting Right.

- Practically exempting all institutions engaged in public lending, with the consequence that no remuneration at all is actually being paid to right-holders (Commission report 2002)
- Far-reaching exceptions to the public rental right in practice from member states [Commission v. Portugal, C-53/05: by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, Portugal failed to satisfy its obligations under the Directive]
Member States may provide for exceptions and limitations to the reproduction right... in the following cases:

(a) ..

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders 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;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
Member States may provide for exceptions and limitations...in the following cases:

... 

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
THREE STEPS TEST – ARTICLE 5 (5).

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 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 right-holder.

[US equivalent: Fair Use (4 criteria)]

1. the purpose and character of the use, (including use of a commercial nature or for nonprofit educational purposes);
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.