TOWARDS A LIMITATION-BASED REMUNERATION FOR CREATIVE USE

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Introduction

- Copyright law – a tool to provide incentives for authors to create for the benefit of society, by securing them a fair remuneration for the use of their works.

- In order to enable future creativity, some uses are kept outside the control of the right owner through limitations to the exclusive right. These limitations thus serve as incentives for follow-up creativity.

- **More limitations, less innovation? Exclusivity the only way?**

- A well-designed limitation system can have beneficial consequences on innovation and creativity, while also readjusting the copyright balance in favour of creators.

- B. Gibert (2015): *Countries that employ a broadly **"flexible"** regime of exceptions in copyright saw **higher rates of growth** in value-added output throughout their economies.*
- Computer & Communications Industry Association (2017): *The combined value added by industries that are the most reliant on **fair use and other limitations and exceptions** to copyright protections has **more than tripled** in size over 2002.*

- Sean Flynn and Michael Palmedo, PIJIP, American University Washington College of Law: "The User Rights Database: Measuring the Impact of Copyright Balance", 30 October 2017
- Study maps changes to copyright limitations and exceptions and other "user rights" from 1970 through 2016 in 21 countries of different development levels around the world. Based on a test of "copyright limitation openness", they found:

- *More open user rights environments are associated with higher firm revenues in information industries, including software and computer systems design.*
- *More open user rights environments are not associated with harm to industries known to rely upon copyright protection, such as publishing and entertainment.*
- *Researchers in countries with more open user rights environments produce more scholarly output and more highly-cited output.*

I. The problem with the currently existing solutions

At present, no limitation for creative use is available. Very limited options exist to protect such uses:

1. Already existing limitations to copyright law such as:

- quotations (*but*: often restricted to the field of text), quotations for artistic purposes mostly not allowed
- parody (*but*: often requires a humorous or satirical view; frequently strictly interpreted)
- free use ("Freie Benutzung") (*but*: interpreted very strictly as well, and not sure if it will still be admissible, as not mentioned in the 2001 directive), etc.

- Further uncertainties created by the recent approach towards interpreting E&Ls in the AG Szpunar's Opinions on *Funke Medien* (C-469/17, 2018), *Pelham* (C-476/17, 2018), and *Spiegel Online* (C-516/17, 2019).

- In particular with regards to creative reuses: **AG Opinion on *Pelham* (C-476/17, 2018)** suggests that music sampling, unless licensed, should not be permitted in the EU.

2. Introduction of a specific limitation for User Generated Content (ex. Section 29.21 of the Canadian Copyright Modernization Act (S.C. 2012, c. 20))

- The main problem with each of these solutions – they are *all free of charge!* Thus, they might be unsuitable in the context of commercial uses.

3. Other solutions:

- a "competition/ antitrust exception" to copyright (ECJ, C-241/91 P and C-242/91 P, *Magill* [1995]; Art. 5.4(2) of the proposed Wittem European Copyright Code);
- drawing a parallel with patent law – a compulsory license based on reasons of dependency (Sec. 24(2) of the German Patent Act; Art. L. 613-15 of the French IP Code; Art. 31 TRIPs; Art. 12 of Directive 98/44/EC on the legal protection of biotechnological inventions [1998]).

- The main disadvantage in these cases – the license has to be ordered by a judge.

- Therefore, it seems that legal regulations for non-voluntary licenses based on a right to remuneration should be explored.

II. "Limitation-based remunerations"

- Copyright limitations on no account mean that works can always be used free of charge. See e.g. most limitation provisions in German law or Recital 36 to the InfoSoc Directive [2001]:

> *"The Member States may provide for **fair compensation** for rightholders **also when applying the optional provisions** on exceptions or limitations which do not require such compensation."*

- One of the ways to secure such fair remuneration (while avoiding at the same time the blocking effect of exclusivity) are the so-called "limitation-based remuneration rights" – i.e. "**statutory licenses**".

- J.C. Ginsburg (2014): statutory licenses ensure that "uses the legislator perceives to be in the public interest proceed free of the copyright owner's veto, but with compensation – in other words: **permitted-but-paid**".

- This option is long-established in many European countries for certain limitations: e.g. the private copy exception or reproductions for education and research purposes.

- "Limitation-based remunerations" can provide significant revenues for creators, they constitute interesting tools for legislators to ensure that creators can participate fairly to the creative reuse of their works.

- **"Limitation-based remunerations" in many cases much <u>more interesting for the authors</u> than the royalty payments they receive from contracting parties:**

- See, showing that the current system of exclusive rights only rewards the top-selling authors and that other remunerations avenues have to be found: M. Kretschmer, A. Azqueta Gavaldon, J. Miettinen and S. Singh, *UK Authors' Earnings and Contracts 2018: A survey of 50,000 writers* (CREATe, 2019):

- "Surveys of creators' earnings consistently demonstrate the presence of **<u>winner-take-all markets</u>**" (at p. 19)
- "[T]here is a large gap between the earnings of successful writers and the rest. […] **<u>The top 10% of writers still earn about 70% of total earnings in the profession</u>**" (at p. 20)

- "Limitation-based remunerations" are sometimes considered *inalienable* for creators. E.g.:

- ✓ Sec. 63a of the German Copyright Act: "*Statutory remuneration rights as provided in this Section **may not be waived** by the author in advance.*"
- ✓ Art. 5(2) of Directive 2006/115/EC on rental right and lending right [2006]: "*The right to obtain an equitable remuneration for rental **cannot be waived** by authors or performers*"
- ✓ CJEU, C-277/10, *Luksan* [2012], [105]: "*[W]ith regard to the right to the fair compensation payable to authors under the private copying exception, it does not follow from any provision of Directive 2001/29 [InfoSoc] that the European Union legislature envisaged the possibility of that right **being waived** by the person entitled to it*".

- "Limitation-based remunerations" are, alongside copyright contract law, additional suitable instruments to achieve a reasonable balance of interests between authors and exploiters.

If a limitation-based remuneration scheme is in place, can sufficient funds for remuneration be realistically raised?

Private copying levies as an example:

- *Approx. 600 million euros per year: average amount of private copying levies collected between 2007 and 2015 in 31 countries across the world covered by the survey (**de Thuiskopie and WIPO (2016), International Survey on Private Copying, pp. 15-17**)*
- *Levy schemes exist now in 23 out of 28 EU Member States (with only the UK, Ireland, Malta, Cyprus and Luxembourg remaining outside) (**de Thuiskopie and WIPO (2016), p. 3**)*
- *"Following the Directive of 2001, total collection from levies on copying media and equipment in the EU tripled, from about €170m to more than €500m per annum." (**M. Kretschmer (2011), Private Copying and Fair Compensation: An empirical study of copyright levies in Europe, UK Intellectual Property Office, p. 7**)*

III. How to secure a "fair remuneration"?

- By providing for an unwaivable right to equitable remuneration for the initial creator *when the derivative work generates revenues*. However, how to calculate the share? It could be:

1) established by law (the solutions might be less nuanced) or
2) negotiated (the amount of remuneration could still be negotiated). If no solution can be found, a regulation authority could step in and mediate.

- In this spirit, a specific provision on orphan works in the Canadian copyright law permits anyone who wants to make use of a work and cannot locate the copyright owner to petition the Canadian Copyright Board for a license. Copyright Act, R.S.C. 1985, c C-42, s. 77 (Can.).

- Other alternatives:

- Alternative dispute resolution (ADR) mechanisms to assist in determining fair remuneration (J. Ginsburg, "Fair Use for Free, or Permitted-but-Paid?" 29 BERKELEY TECH. L.J. 1383, 1441-45 (2014))
- A less "intrusive" alternative – Subordinating creative uses to the **mandatory collective administration** of works, as this would not be a limitation, but a way of exercise of the exclusive right (more likely to be compatible with the three-step test). The tariffs asked by the collecting society could be regulated or checked by an independent authority (regulation authority or Copyright board could serve as a mediator).

Implementation of an independent regulation authority (such as an "EU Copyright council"):

Proposals:

- Ch. Geiger (2018): Set up an "Observatory on access to copyrighted work" (on the model of some European competition authorities)
- Franciska Schönherr, *The Construction of an EU Copyright Law, Towards a Balanced Institutional and Legal Framework* (Oct. 10, 2017) (unpublished Ph.D. thesis, University of Strasbourg): Proposal to set up an "EU Copyright council"

Role:

- This authority could check that access is granted at a fair price, taking into account the specificity of the work in question (potential market for the derivative work, fame of the original creator or work used, etc.).
- This would allow adapting the remuneration on a case-by-case basis

Conclusions

- Freedom of artistic creativity can be reconciled with copyright law.
- In this respect, a remunerated statutory limitation could be a workable option for certain (commercial) creative uses, provided that a fair remuneration is secured **to the creators**.
- Such a statutory limitation can be administrated by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation.
- A more general solution – development in Europe of an open-ended exception to copyright codifying the factors used by the European Court of Human Rights, in the spirit of other open-ended provisions such as the US fair use clause. (**C. Geiger and E. Izyumenko, "Towards a European 'Fair Use' Grounded in Freedom of Expression"**, 35(1) *American University International Law Review* (forthcoming 2019), available at the SSRN)
- Such a **freedom-of-expression-grounded "fair use"** would subsist in the Article 10 (freedom of expression) ECHR balancing factors.

Proposed wording:

1. Any other proportional use for the purpose of freedom of expression and information is permitted. In determining whether the use made of a work in any particular case is proportional, the factors to be considered shall include:

1) the character of the use, including whether such use is commercial or transformative;

2) the purpose of use (in the common interest or not);

3) the nature of the information at stake;

4) the degree of interference with the property of copyright-holder, including **whether the fair remuneration was paid**;

5) availability of alternative means of accessing the information; and any other factor that might be relevant for the circumstances of the case.

2. All factors are considered in an overall assessment. In the case of 1.4), **the payment of a fair remuneration subsequent to the use can reestablish its proportionality** when otherwise freedom of expression and information would be unduly restricted.

Thank you!

- Ch. Geiger and E. Izyumenko, "Towards a European 'Fair Use' Grounded in Freedom of Expression", 35(1) *American University International Law Review* (forthcoming 2019), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379531
- Ch. Geiger and E. Izyumenko, "Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way", 41(3) *European Intellectual Property Review* 131 (2019)
- Ch. Geiger, "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?", Centre for International Intellectual Property Studies Research Paper No. 2017-08 ; 8/3 U.C. Irvine L. Rev. 101 (2018), available at SSRN: https://ssrn.com/abstract=3053946.
- Ch. Geiger, "Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests", in: R. Giblin and K.G. Weatherall (eds.), "What if We Could Reimagine Copyright?", ANU Press, 2017, 73.
- Ch. Geiger, "Statutory Licenses as Enabler of Creative Uses", in: R.M. Hilty and K.-C. Liu (eds.), "Exploring Sensible Ways for Paying Copyright Owners", Springer, 2017, 305.