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Remix Allowed - Avenues for copyright reform inspired by Canada

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ABSTRACT

This paper seeks the most promising approach for reforming the European copyright regime to introduce more flexibility for transformative uses. We will consider two reform proposals, both inspired by Canadian law: first, the introduction of a specific exception for user generated content and second, a more ambitious transition to a semi-open “fair dealing” exception. We will finally argue in favor of this second proposal, in the footsteps of the reasoning of the Supreme Court of Canada following its landmark CCH Canadian decision.

In our previous paper (Remix prohibited: How rigid EU copyright laws inhibit creativity), we discussed how rigid EU copyright laws were inhibiting creativity. To substantiate our claim, we discussed the many legal issues with transformative uses under EU law, as well as french and belgian national laws. Our overview led to the conclusion that the combination of the broad interpretation of the various exclusive rights and doctrines as well as the strict interpretation of exception or limitations left few breathing space for transformative uses.

One might hope that this excessive rigidity will be partially addressed by the increasing role of the fundamental rights paradigm in copyright law. Indeed, these last few years the two higher European courts have increasingly invoked fundamental rights, and freedom of expression in particular, as external limits to copyright law¹. While this fundamental rights paradigm certainly acts as a useful corrective for the imbalances of copyright law, it is clearly insufficient. First,

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¹ CJEU, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, 1 December 2011, C-145/10, § 134. CJEU, *Deckmyn v. Vandersteen and others*, 3 September 2014, C-201/13, § 27.

because it lacks legal certainty for aspiring transformative users. From their standpoint, the prospect of being granted protection under freedom of speech is highly uncertain, especially since the courts have yet to develop a coherent case law on the limits that fundamental rights impose on copyright law. Second, it is only a marginal solution, since the Courts will probably curtail the cases where free speech trumps copyright law to those where a particularly important speech interest is at stake. But there are many conceivable reuses practices that would not easily fit in the freedom of expression “trump” on copyright (e.g. because they do not constitute political speech, worthy of a higher level of protection) but that a reasonable copyright regime has no good reason to prohibit: these include subversive or playful cultural practices such as Appropriation Art, collage, remix, mash-ups, etc., that have become increasingly accessible and popular with the advent of digital technologies.

Therefore, this external corrective brought by the fundamental rights paradigm should not exempt us of finding a structural solution to improve the internal balance of copyright law. It is thus appropriate to consider what are the avenues of reform for limitations or exceptions to copyright law.

In this respect, two proposals have mainly been discussed in the European literature. The first, considered for some time by the European Commission, is the introduction of an exception for User Generated Content². The second, advocated by certain European copyright scholars, is the introduction of an open norm for exceptions and limitations, often inspired by the American Fair Use exception³.

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- 2 See e.g. the recent Public Consultation on the review of the EU copyright rules, p. 28, available on: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf (accessed March 11, 2014); the UK Recommendation 11 of the Gowers Review of Intellectual Property, December 2006, p. 68, No. 4.88, available on https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf; in France, cf. Recommendation 69 in P. Lescure, Mission “Acte II de l’exception culturelle” – Contribution aux politiques culturelles à l’ère numérique, May 2013, p. 432, available on http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescurer/index.htm (accessed December 19, 2014); in the Netherlands, cf. Commissie Auteursrecht, Advies aan de Staatssecretaris van Veiligheid en Justitie over de mogelijkheden van het invoeren van een flexibel systeem van beperkingen op het auteursrecht – Deel 1: Een flexibele regeling voor user-generated content, March 21, 2012, available on <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/10/30/advies-een-flexibele-regeling-voor-user-generated-content.html> (accessed December 19, 2014)
- 3 See e.g. M. Senftleben, “Bridging The Differences Between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine”, 57 *J. Copyright Soc’y U.S.A.* 521 (2010); Cf. M. Senftleben, “Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law”, in G. Dinwoodie, *Methods and Perspectives in Intellectual Property*, Northampton, Edward Elgar Publishing, 2013, p. 30; Dnes, “Should the UK move to a Fair-Use Copyright

We will consider these two avenues for reform in light of recent developments in Canadian copyright law, which might prove particularly interesting for European lawyers, since it comes from a mixed system of civil and common law. For each of our proposals, we will assess both their desirability and their degree of conformity with positive law (and thus the level of difficulty in implementing them).

Our first proposal is to extend the current closed list of exceptions that we have in Europe, either by enlarging existing ones, or by adding a new exception to the list, modeled on the new Canadian exception for non-commercial User Generated Content introduced in 2012.

Our second, more ambitious proposal attempts to draw a middle-ground between the European closed list model and the American fair use doctrine, by complementing the current list of exceptions with a semi-open norm⁴ similar to the new extended Canadian fair dealing doctrine resulting from the landmark CCH decision by the Supreme Court of Canada.

Admittedly, none of these proposals constitute a panacea. In particular, none of these proposals addresses the issue of the unreasonable interpretations of moral rights doctrines that often causes a significant barrier for transformative uses in Belgian and French copyright law. However, this issue would require extensive developments that clearly exceeds the scope of this article. A potential mitigating factor to this hurdle is the observation that strong findings of moral rights generally involve commercial uses, broadly defined⁵. Therefore, to the extent that non-commercial uses are concerned, it might prove easier to overcome the constraints of the strong moral rights regimes of French or Belgian law.

a. Extending the closed list of exceptions: quotation, parody, and the Canadian UGC exception

The first approach that we will consider attempts to introduce more flexibility for transformative uses inside the current European framework for exceptions or limitations. At the national level, that can only be achieved by implementing and interpreting the

Exception”, IIC, 2013, p. 418.

4 The idea of a semi-open norm in European copyright law has been prominently defended by P.B. Hugenholtz, M.R.F. Senftleben, “Fair use in Europe. In search of flexibilities”, Amsterdam Law School Legal Studies Research Paper No. 2012-39, Institute for Information Law Research Paper, available on www.ssrn.com (accessed March 11, 2014).

5 For a review of case law regarding moral rights and transformative uses, cf. our previous paper, J. Cabay & M. Lambrecht, « Remix prohibited - How rigid EU copyright laws inhibit creativity », forthcoming in *JIPLP*, 2015, text accompanying notes 72 and following.

exceptions purposes provided by the InfoSoc directive to their fullest extent; at the European level, however, it is of course possible to introduce a new exception altogether by amending the directive.

- i. An extensive implementation of the quotation and parody exception?

National law. – Recently, the “Lescure report” commissioned by the French Government⁶, called for securing and encouraging new practices of digital transformative creation, and suggested a number of ways to do so at the national level. Noting that the French implementation of the quotation exception is far more restrictive than what the directive allows⁷, the report suggests relying on the flexibility allowed by article 5.3(d) (providing that quotations shall be made “for purposes *such as* criticism or review”⁸) to include another specific purpose in the French quotation exception for “creative or transformative purposes”. In order to comply with the three-step test, the report adds, it might be preferable to limit that new purpose of the quotation exception to “non-commercial” uses⁹.

Such a solution is astute, but requires quite a stretch from the ordinary meaning of the words used by the exception. A quotation, in the ordinary meaning of the term, is an exact excerpt of an original work. Introducing apparently contradictory concepts such as a “creative or transformative quotation” does not seem like good legislative practice.

However, removing the additional restrictions in the French implementation of the quotation exception (such as the requirement that the quotation be “short”), or reversing the judicial interpretation that restricts the quotation exception to literary works (apparently excluding sounds¹⁰ and pictures¹¹), would certainly increase the

6 P. Lescure, Mission “Acte II de l’exception culturelle” – Contribution aux politiques culturelles à l’ère numérique, May 2013, p. 428, available on http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm (last accessed December 23, 2014).

7 As we have showed in J. Cabay & M. Lambrecht, *op. cit.*, text accompanying notes 104 to 124.

8 Directive 2001/29, art. 5.3(d) (emphasis ours).

9 Lescure Report, p. 432.

10 However, some French scholars have suggested that quotation from musical and audiovisual works is nowadays permitted, see B. Galopin, *Les exceptions à usage public en droit d’auteur*, Paris, LexisNexis, 2012, p. 296, n° 401; A. Lucas, H.-J. Lucas, A. Lucas-Schoeltter, *Traité de la propriété littéraire et artistique*, 4th ed., Paris, LexisNexis, p. 395, n° 429. However, the case law they refer to appears to be at odds with this claim, because the courts mostly reject findings of quotation.

11 Some European courts have already allowed the use of thumbnails by search engines, but on quite obscure grounds, absent sufficient flexibility in national law. Indeed, these cases were pointed as examples of “makeshift and evasive solutions” by courts to authorize such practice despite the straightjacket of the European exception framework (M. Leistner, “The Germany Federal Supreme

flexibility with regard to the reuse of (excerpts of) existing works.

With regard to transformative uses, it would probably require less of a stretch to cover them under the umbrella of the parody exception, as a parody can certainly be defined as a transformative use of an existing work. However, the wording of the parody exception in the directive does not present the same flexibility as the quotation exception, as it does not contain the words “such as”. While the recent CJEU decision in the Deckmyn case considerably relaxed the application of the parody exception, by dismissing a number of restrictive conditions imposed by national courts, and including the finding of parody in the freedom of expression framework, it also constrained its application by determining a number of essential characteristics of parody, including that it must “constitute an expression of humour or mockery”¹². Granted, national courts will enjoy a certain margin in determining what constitute an expression of humour or mockery. But seeing that courts have often used this humour criterion to dismiss findings of parody, it is likely that the parody exception post-Deckmyn will continue to be of little use in many cases of “serious” transformative uses¹³. Moreover, in the current state of the law, the strict interpretation doctrine will probably stand in the way of an extensive interpretation of the parody exception¹⁴.

- ii. Introducing a specific exception to cover User Generated Content?

Proposals at the EU level. – At the European level, a more straightforward approach to introduce more flexibility for

Court's Judgement on Google's Image Search – A Topical Example of the 'Limitations' of the European Approach to Exceptions and Limitations”, IIC, 2011, 42, p. 417). These far-fetched solutions include using the doctrines of implied consent or abuse of right (BGH, I ZR 69/08, 29 april 2010, “Vorschaubilder I”, and BGH, 19.10.2011 - I ZR 140/10 “Vorschaubilder II), (mis)applying the lex loci delicti to invoke the US fair use exception (Cf. TGI Paris, 20 may 2008, “SAIF c. Google”), or relying on an analogy with the safe harbour provisions to exempt the search intermediary from any liability (Cf. Court of Appeal of Paris, 26 january 2011, “SAIF c. Google”). For further reading, see M. Leistner, “The German Federal Supreme Court's Judgement on Google's Image Search. . .”, IIC, 2011, p. 417; A. Strowel, *Quand Google défie le droit*, p. 128-134; B. Hugenholtz and M. Senftleben, *Fair Use in Europe: In Search of Flexibilities*, Amsterdam Law School Research Paper, Institute for Information Law, 2011.

12 CJEU, September 3, 2014, Deckmyn v. Vandersteen and others, C-201/13

13 A recent ruling of the Court of First Instance of Antwerpen continues this tendency: while the judge never mentions the Deckmyn decision, he consistently rejects a finding of parody in the case of a painting derived from a picture of a belgian politician, arguing that the contested work does not display a humorous character. Court of First Instance of Anvers, *Van Giel v. Tuymans*, 15 janvier 2015 (pending appeal).

14 However this strict interpretation doctrine is not unchallengeable, as we will see below when discussing the new developments of the Canadian fair dealing exception: cf. *infra*, b).

transformative uses would consist of introducing a new exception in article 5 of the InfoSoc directive¹⁵. In the context of emergent creative practices in the digital environment, the idea of introducing an exception for “user created content” has been around at least since 2008, when it was suggested by Green Paper by the European Commission on “Copyright in the Knowledge Economy”¹⁶. Drawing conclusions from the subsequent public consultation, the Commission decided not to decide at this point. It however maintained its intent “to further investigate the specific needs of non-professionals that rely on protected works to create their own works”¹⁷. After that, the Barroso Commission has mainly focused on promoting voluntary stakeholder dialogue with its “Licences for Europe” initiative¹⁸, with rather underwhelming results¹⁹. Since then, the new Juncker Commission has promised to deliver an overhaul of the InfoSoc directive, but as of today there has been scant details the content of such reform, notably with regards to exceptions or limitations on copyright.

The Canadian UGC exception. – The Commission's investigations on its awaited copyright reform could probably be nourished by an analysis of the implementation of the new Canadian exception for “non-commercial user generated content” (hereafter “UGC exception”), introduced by the Canadian Copyright Modernization Act of 2012. The text of the Canadian UGC exception is quite long²⁰. Essentially, the exception provides that it is not an infringement of copyright for an individual “to use an existing work (...) in the creation of a new work”, and to disseminate it (or to authorize an intermediary to disseminate), provided that four conditions are met :

- (a) it is made for non-commercial purposes
- (b) proper attribution is given, “if it is reasonable in the circumstances to do so”
- (c) the original work can be reasonably taken to come from a lawful source
- (d) the use respects a condition of “non substantial adverse effect” on the “exploitation or potential exploitation” of the work, which recalls the third condition of the three-step test

15 As noted by the Lescure Report, *op. cit.*, p. 432.

16 European Commission, “Copyright in the Knowledge Economy”, green paper, July 16, 2008, COM(2008) 466/3.

17 European Commission, “Copyright in the Knowledge Economy”, communication from the commission, October 19, 2009, COM(2009) 532 final.

18 Licences for Europe, “Ten pledges to bring more content online”, November 13, 2013, available on:

http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

19 Indeed, the “Ten pledges to bring more content online” on which the participants agreed consist of rather weak commitments (stakeholders “will continue to work towards”, “continue promoting”, “find solutions to”, ...) on rather marginal issues, as far as user generated content is concerned.

20 See Art. 29.21 of the Canadian Copyright Act.

provided by international copyright law.

The conditions of the Canadian UGC exception. – Here is not the place for a detailed discussion of this interesting but somewhat puzzling provision²¹. We will limit ourselves to a few comments. Broadly speaking, the text of the exception seems mainly concerned with guaranteeing certain legitimate interests of the right-holders: first, the moral interest that proper recognition is given to the creator/performer, and second, the economic interest that the copyright holder still has an opportunity to enjoy the proper level of reward he could legitimately expect and that incentivized him to create the work²². Indeed, this is a fundamental concern in copyright law, one that the Canadian Supreme Court acknowledged in the *Théberge* case²³. Arguably, this can also be considered as capturing the core concern of the three-step test²⁴.

The moral interest is explicitly guaranteed by condition b) of the UGC exception, to the extent that “it is reasonable to do so”²⁵.

But to ensure the protection of the economic interest, the Canadian legislator has followed a more tortuous way, combining two different

21 But see T. Scassa, “Acknowledging Copyright's Illegitimate Offspring – User Generated Content and Canadian Copyright Law”, in M. Geist (ed), *The Copyright Pentology*, 2013, p. 431; D. Gervais, “User-Generated Content and Music File-Sharing” in M. Geist (ed), *From “radical extremism” to “balanced copyright”: Canadian copyright and the digital agenda*, Toronto: Irwin Law, p. 447.

22 Indeed, copyright law does not entitle to a guaranteed reward for creators, but merely an *opportunity* to be rewarded by the successful exploitation of one's work. For simplicity purposes, we will refer to this interest as the interest of the author “to have a legitimate opportunity for reward”.

23 Cf. Supreme Court of Canada, “*Théberge v. Galerie d'Art du Petit Champlain inc.*”, 2002, 2 S.C.R. 336 : “The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)”

24 Although we will not attempt to demonstrate this point here, as entering into the exegesis of the three-step test would clearly lead us beyond the scope of this article. For a detailed interpretation of the three-step test, see Cf. M. Senftleben, *Copyright, Limitations and the Three-Step Test*, The Hague, Kluwer, 2004.

25 Admittedly, this level of requirement appears weaker than the requirement provided by the European quotation exception in art. 5, d), of the InfoSoc directive : “unless this turns out to be impossible, the source, including the author's name, is indicated” (our emphasis) ; Compare with the Canadian wording of art. 29.21 (1) b) : “ the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so” (our emphasis).

However, other European exceptions are less demanding. For example, the CJEU recently confirmed that the parody exception did not contain such requirement of attribution: See CJEU, *Johan Deckmyn v. Helena Vandersteen and others*, 3 September 2014, C-201/13, §21.

approaches, which causes some redundancy. Indeed, to guarantee the protection this economic interest, we can conceive two approaches: a *result-oriented* criterion, or a *process-oriented* criterion.

The first approach, including a *result-oriented* criterion, implies providing for a direct legal requirement that the economic interest of the author or rightholder be respected. This is the approach adopted by the second step of the three-step test, requiring that the use “does not conflict with a normal exploitation of the work”²⁶. Such phrasing directly requires that the use does not harm the interest of the author to have the opportunity to enjoy the level of reward that copyright law enables. The Canadian exception provides such result-oriented criterion, with the requirement that the use does not have “substantial adverse effect” on the “exploitation or potential exploitation” of the work. This condition however falls prey to the same objections than the second step of the three-step test, which has been harshly criticized as unclear and potentially over-reaching²⁷.

Another conceivable approach is to use proxies, i.e. indirect, *process-oriented* criteria. Such an approach does not directly focus on the desired result, which is that the interest of the author to enjoy an opportunity for a proper reward be respected. Instead, it uses a range of substitute criteria, which guarantees that in effect, that interest will almost always be respected. In a sense, this is what most traditional European exceptions do, by spelling out a set of conditions for the authorized use of the work, approximating for the desired result. The Canadian UGC exception also exhibits certain process-oriented criteria, notably the requirement that the authorized use is made for “non-commercial purposes”.

The Canadian legislator did feel the need to provide a definition of such “non-commercial purposes”²⁸, even though the notion is central to

26 See article 9(2) of the Berne Convention, art. 13 of the TRIPS Agreement, and art. 10 of the WIPO Copyright Treaty.

27 Cf. e.g. A. Kur, “Of oceans, islands and inland water”, *Richmond Journal of Global Law and Business*, 8/3, 2009, p. 287, esp. p. 317-321; J. Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions”, *RIDA*, 187, 2001, p. 2; K. J. Koelman, “Fixing the Three-Step Test”, *European Intellectual Property Review*, 28, 2006, p. 407.

28 The preparatory works also lacks any comprehensive definition. At most, one can find a few illustrations, such as Canadian Industry Minister Paradis : “It will also be legal to integrate protected works into a work generated by a user for non-commercial purposes. That would include recording a home video of a child dancing to a song, or creating original mixes of songs and videos” (referring to the “dancing baby” case *Lenz v. Universal Music Corp.* on an alleged abusive DMCA takedown notice, with an appeal still pending before the United States Court of Appeal for the Ninth Circuit) Cf. Canadian House of Commons, Official Report (Hansard), vol. 46, n°141, 41st Parl., 1st sess., October 18, 2011. That lack of definition has been a subject of complaint from certain stakeholders during parliamentary hears (cf. for example the intervention from André

other parts of the Bill²⁹. Tentative definitions have been proposed elsewhere: the Lescure Report defines non-commercial use as uses “whose dissemination does not provide any direct or indirect revenue to their authors”³⁰; Creative Commons' popular “NC” license defines it as “not primarily intended for or directed towards commercial advantage or monetary compensation”³¹. Admittedly, we are still far from a unanimous agreement on the meaning of “non-commercial”, and interpreting that notion will probably quite challenging. But it does not seem by any means impossible. Indeed, most copyright regimes already rely on similar criteria, such as the assessment of the “commercial nature” of the use in the fair use doctrine³², or the requirement by certain national courts that a use is not primarily driven by commercial purpose in order to be protected by the parody exception³³.

But the problem with the Canadian UGC exception is that it tries to follow both approaches at the same time. Not only does it resort to two indirect, *process-oriented* proxies: first, the condition that the use can only be made by *an individual* (which limits the potential reach of the derivative works) and second, the requirement of a non-commercial purpose (which limits the risk of an effect on the author's market); but it also resort to a direct, *result-oriented* criterion, which is the “substantial adverse effect” condition, that largely overlaps with the two aforementioned proxies. While the advantage of combining both types of criteria is unclear, it undoubtedly has the

Cornellier (Canadian Association of Professional Image Creators), discussing the definition of “private or non-commercial purpose” in art. 32.2(1)(f) on the exception for personal photographs, cf. Canadian House of Commons, Legislative Committee on Bill C-11, Evidence of Committee, available on :

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5403199&Language=E&Mode=1&Parl=41&Ses=1>

29 Notably the interesting reform of Canadian statutory damages, limited to a maximum of \$5,000 “if the infringements are for non-commercial purposes” (rather than the \$20,000 maximum for “commercial” infringement). Cf. Canadian Copyright Act, art. 38.1 (1).

30 Lescure Report, *op. cit.*, p. 432 (our translation).

31 Cf. <http://creativecommons.org/licenses/by-nc/4.0/legalcode>

See also the discussion by the Copyright Office of the meaning of “noncommercial” in the context of an exemptions of anti-circumventions provisions (where the Copyright Office recognizes that the category might includes certain works created “pursuant to a paid commission”, but dismisses the distinction between “primarily noncommercial” and “noncommercial”). Copyright Office, Library of Congress, “Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies”, Federal Register, Vol. 77, No. 208, October 26, 2012, available on: <http://www.copyright.gov/1201/>

32 Cf. the first factor listed in the fair use exception : “The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes”. Admittedly, the interpretation of this criterion is no less controversial in American law, some authors the blame on the Supreme Court's inconsistent opinions in cases like *Sony* or *Harper v? Row* for enhancing that ambiguity. cf. W. Fisher, “Reconstructing the Fair Use Doctrine”, Harvard Law Review, 1988, p. 1673.

33 Cf. J. Cabay & M. Lambrecht, *op. cit.*, text accompanying note 176.

disadvantage of damaging the exception's clarity and flexibility.

Moreover, as already mentioned, another issue with the “no substantial adverse effect” condition is that it closely resembles to the second step of the three-step test, but in an even stronger language, apparently inspired by the (in)famous WTO panel report³⁴. Indeed, art. 29.21 d) of the Canadian Copyright Act provides the condition that:

“(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one”³⁵

As with the second step of the three-step test, it is questionable whether the law should protect any commercial exploitation that the copyright holder *could* cover, or rather what the copyright holder *should* cover. If copyright law is not an absolute property right but rather a right justified by the need to incentivize creation, we should only protect the copyright holder against uses that would substantially impair *the incentive to create new works*, and not any potential market that it could develop³⁶.

In any case, while it is already questionable whether compliance with the three-step test requires implementing it in national law itself³⁷, it appears clearly overzealous for the Canadian legislator to use its most stringent interpretation as a template, especially when it is strongly disputed by a wide range of copyright scholars³⁸. It might also prove

34 Report of the WTO Panel in the dispute “United States – Section 110(5) of the US Copyright Act”, 17 march 2000, WT/DS160/R.

35 Canadian Copyright Act, Art. 29.21 d).

36 In favor of such normative interpretation of the « norma exploitation » criterion, see notably : S. Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Brussels, Larcier, 2007, n°570 ; P. N. Leval, « Toward a Fair Use Standard », *Harvard Law Review* 103(5), 1990 (in the context of the fourth factor of the American fair use exception).

37 Indeed, the inclusion of the three-step test in the InfoSoc Directive and in some European national law was criticized by some: cf. Ch. Geiger, “From Berne to national law, via the copyright directive: the dangerous mutations of the three-step test”, *E.I.P.R.*, 12/2007, p. 486; S. Dusollier, “L'encadrement des exceptions au droit d'auteur par le test des trois étapes”, *I.R.D.I.*, 2005, p. 213.

38 Ch. Geiger, J. Griffiths, R. Hilty et al., “Declaration on a Balanced Interpretation Of The "Three-Step Test" In Copyright Law”, *jipitec*, nol. 1, n°2, 2010 ; D. Gervais, “Towards a New Core International Copyright Norm: The Reverse Three-Step Test”, 9 *Intellectual Property L. Rev.* 1 (2005) ; S. Dusollier, *I.R.D.I.*, “L'encadrement des exceptions au droit d'auteur par le test en trois étapes”, 2005, p. 216 ; A. Lucas, “Pour une interprétation raisonnable du triple test, ou pourquoi il faut éviter d'ajouter le flou au flou”, *A&M*, 3/2009, p. 228 ; Ch. Geiger, “The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society”, *Copyright e.Bulletin*, Unesco, jan-march 2007 ; A. Kur,

self-defeating to adopt such an overly-stringent approach in an exception that aims to introduce more flexibility in copyright law.

Compatibility with international law. – With or without the redundant “no substantial adverse effect” condition, it seems the Canadian UGC exception would satisfy the three-step test, even in the stringent interpretation advocated by the WTO panel.

First, it constitutes almost certainly a “special case”, a requirement interpreted (in an overtly stringent manner, in our opinion) as “clearly defined” and “narrow in its scope and reach”³⁹: arguably, user generated content is as clearly defined and narrowly limited as the parody exception, or only slightly larger. The expression “user generated content”⁴⁰ does not encompass a general case for any transformative uses but usually refers to specific genres, such as remix, mash-ups⁴¹, memes⁴², or machinima⁴³, just as the parody exception, refers to the (not so clearly defined) sub-genres of “caricature, parody or pastiche”⁴⁴.

“Of oceans, islands, and inland water – how much room for exceptions and limitations under the three-step test?”, 8 Rich. J. Global L. & Bus., 2008-2009, p. 287.

39 Report of the WTO Panel in the dispute “United States – Section 110(5) of the US Copyright Act”, 17 march 2000, WT/DS160/R, 6.112

40 The Canadian Copyright Act does not define the notion of “user generated content” in detail, apart from the basic conditions of art. 29.21 : it must be made by an individual, it consists of using an existing work (or other subject-matter) to create a new work (or other subject-matter) in which copyright subsists. For a more general definition of “user generated content”, see Daniel J Gervais, “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content”, *Vand J Ent & Tech L*, 2009, 11, p. 842 : “content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools”. The Canadian UGC exception in art. 29.21 concerns only one category of UGC in Gervais' typology : “content derived by users”. Cf. T. Scassa, “Acknowledging Copyright’s illegitimate Offspring: User-Generated Content and Canadian Copyright Law”, in M. Geist (ed.), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, University of Ottawa Press, 2013, p. 432-433.

41 For contrasting definitions of the practices of remix and mashup (distinguishing between the alterative logic of the former and the aggregative logic of the latter), see S. Sonvilla-Weiss, in S. Sonvilla-Weiss (ed), *Mashup Cultures*, Vienne, Springer, 2010, p. 9.

42 The Oxford Dictionnary defines a meme as “An element of a culture or system of behaviour passed from one individual to another by imitation or other non-genetic means” (cf. <http://www.oxforddictionaries.com/definition/english/meme>). These “meme” practices are often realized in the form of pictures or videos, which constitutes variations on a common theme, and can itself constitute a remix, a mashup, or an original work (when it does not borrow existing expressions but merely imitates them).

43 Reynolds defines Machinima as “an art form broadly defined as the creation of films within video games” ; G. Reynolds, “All the Game’s a Stage: Machinima and Copyright in Canada”, *The Journal of World Intellectual Property* (2010) vol. 13, no. 6, pp. 729.

44 Although, admittedly, these genres are not explicitly stated in the text of

Second, the indirect conditions that a) the user be an individual and b) the use be made for non-commercial purposes seems sufficient to satisfy the economic dimensions embodied by the second and three-step of the test (no conflict with the normal exploitation of the work, and no unreasonable prejudice to the legitimate interests of the author/right holder). Whether the requirement of attribution is sufficient, or even necessary, to comply with the three-step test⁴⁵, depends on the (rather confusing) issue of the strength of the moral interests covered by the three-step test⁴⁶. In any case, the Canadian UGC exception seems to constitute no more a violation of the stringent interpretation of the three-step test than the parody exception. And if the UGC exception satisfies the stringent interpretation of the three-step test, then *a fortiori* it will satisfy a more balanced interpretation of the test⁴⁷.

Desirability. – Having considered the compatibility of such an exception with international law, what can we say about its desirability? Does it provide enough breathing space for transformative use practices? It would certainly be a welcome addition, allowing for some emergent digital practices that are gaining social acceptance. Moreover, to the extent that they are non-commercial, these practices seems hardly objectionable from the author's point of view.

However, it has been argued that the far-reaching anti-circumvention rules introduced in the 2012 reform constituted a major blow to the effectiveness of the new UGC exception⁴⁸. For any exception to be effective, it is clear that anti-circumvention rules should provide for sufficient exemptions, allowing the user to circumvent technical protection measures for the purpose of benefiting from the exceptions to copyright⁴⁹.

the UGC exception.

45 Note that not all European exceptions contain such requirement of attribution; See *supra*, note 22, for the case of the parody exception.

46 For a comparative assessment of this issue under the Berne Convention, TRIPS and WIPO treaty, see M. Senftleben, "Copyright, Limitations, and the Three-step Test", The Hague, Kluwer Law International, 2004 p. 219-226.

47 Cf. *supra* note 32, for such proposal of a more balanced interpretations of the three-step test.

48 See for example Carys Craig, who recognizes that the law provides exceptions to the anti-circumvention rules, but argues that they are overly complex and too limited to guarantee the effective benefit of fair dealing and other exceptions (p. 193-196) : C. Craig, "Locking Out Lawful Users – Fair Dealing and Anti-Circumvention in Bill C-32", in M. Geist (ed), *From "Radical Extremism" to "Balanced Copyright"*, Toronto, Irvin Law, 2010, p. 177 (while Craig discusses an earlier version of the final bill adopted by the Canadian Parliament (bill C-11), her remarks remain largely relevant with regard the mostly unchanged provisions on technological protection measure in the final bill).

49 Recently, the U.S. Copyright Office made a modest move in that

Moreover, it is unclear whether the exception applies to other, more “traditional” types of transformative uses, such as Appropriation Art in the context of visual arts⁵⁰. When these uses are part of a professional artistic practices, the determination of their (non-)commercial character can be quite thorny. Would a conceptual art happening such as *Kijkverbod* constitute a commercial exploitation⁵¹? Does the public display of work of arts in a gallery, as in the Ahlberg⁵² or Kate Moss tattoo cases⁵³ qualify as commercial? In other cases, the issue is clearer: in the Ensor case⁵⁴, the litigious transformative use was reproduced in a (commercial) literary catalogue, which would probably constitute a commercial use.

These types of transformative uses would probably be more appropriately covered by an exception that displayed a greater flexibility toward commercial use, such as the parody exception. But as we have seen, this solution is not without its own problems. To cover a broader range of transformative uses, we probably need to consider a more ambitious approach, which questions the principles of the European closed-list exception system.

direction, by exempting “noncommercial videos” from anti-circumvention rules in the US DMCA. Cf. Copyright Office, Library of Congress, “Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies”, Federal Register, Vol. 77, No. 208, October 26, 2012, available on: <http://www.copyright.gov/1201/>

- 50 Whether these use fall into the very scope of the UGC exception would also be open to discussion : while the wording of the exception does not exclude non-digital uses per se, we have argued above that respecting the three-step test might require defining the expression “user generated content” with regard to existing online practices.
- 51 Cour of Appeal of Antwerp, March 29, 2010, A&M, 2010, p. 489, note Ph. Campolini, B. Michaux. In that case, the defendant contended that the art project was a non-profit and didn't pursue any commercial goal. The Court answered it was not relevant and could not bar a finding of infringement.
- 52 In that case, Danish artist Ole Ahlberg wanted to display his work in a gallery, a series of surrealist paintings borrowing from Hergé and René Magritte, but was pressured in not doing so by the right holders. Cf. Court of Appeal of Brussels, June 14, 2007, A&M, 2008, p. 23, note D. Voorhoof. Court of cassation, June 18, 2010, A&M, 2010, p. 323, note B. Michaux and D. Voorhoof.
- 53 This case involved works by a belgian artist which consisted of drawings with a felt pen on advertising posters. Cour of Appeal of Paris, January 13, 2010, unpublished, Moerman et Galerie Gokelaere et Janssen c/ Sarl L'Office et Isserman, P.I., 2010, p. 716 (comments by A. Lucas).
- 54 Cf. Court of First Instance of Brussels, March 2, 1999, A&M, 1999, p. 367.

b. Towards a semi-open exception? The case of the new Canadian fair dealing

Open “fair use” exceptions. – The American fair use exception⁵⁵ provides that some uses do not constitute infringement of copyright if they are found to be “fair”, according to four factors (“the purpose and character of the use (...)”, “the nature of the copyrighted work”, “the amount and substantiality of the portion used (...)”, and “the effect of the use upon the potential market for or value of the copyrighted work”).

The most remarkable feature of a fair use exception, which distinguishes it from European-style exceptions as well as traditional fair use exception, is that the list of authorized purposes is open. The wording of the American fair use exception makes clear that the enumerated list of purposes is illustrative, not comprehensive: “the fair use of a copyrighted work (...) for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”. This is why fair use is often described as an “open” exception.

The idea of adopting open exceptions, modeled on the American “fair use” exception, seem to be gaining traction. Faced with the restrictive character of the European-style closed list exception systems, European commentators are increasingly considering the adoption of an open “fair use” exception⁵⁶.

Internationally, there is a clear tendency towards the adoption of open “fair use” exceptions, with countries such as South Korea⁵⁷,

55 United States Code, Title 17, § 107.

56 Cf. references *supra*, note 4.

57 Cf. Korean Copyright Law, art. 35-3 : “Except for situations enumerated in art. 23 to art. 35-2 and in art. 101-3 to 101-5, provided it does not conflict with a normal exploitation of copyrighted work and does not unreasonably prejudice the legitimate interest of the copyright holder, the copyrighted work may be used, **among other things**, for reporting, criticism, education, and research. (...)” (our emphasis), unofficial translation by J. Cho, “As Korea Implements Fair Use, Two Cases Offer Precedent for Flexible Copyright Exceptions and Limitations”, *Infojustice.org*, <http://infojustice.org/archives/28561>

Singapore⁵⁸, Malaysia⁵⁹, Taiwan⁶⁰ and Israel⁶¹ having more or less recently reformed their copyright law to introduce such an exception. In Brazil, an ambitious ongoing copyright reform also includes a “fair use” exception⁶². In Australia, the Law Reform Commission recently recommended replacing the Australian closed exceptions system by a flexible exception comparable to fair use⁶³.

The Canadian semi-open “fair dealing”. – Although the open exception model is certainly interesting and worth considering, we want to discuss an alternative approach, also pointed out in the literature on fair use⁶⁴: a semi-open exception, that constitutes a “third way” between the closed list of European exceptions and the open norm of American fair use. In particular, we want to focus on the case of Canada, where the Supreme Court in a landmark decision “CCH Canadian Ltd. v. Law Society of Upper Canada” in 2004, adopted an interpretation that radically changed the way the Canadian fair dealing exception was conceived⁶⁵. The Canadian case

58 Cf. Singapore Copyright Law, art 35 (1) : “Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work. 24”, available on : <http://www.wipo.int/wipolex/en/details.jsp?id=3680>

59 Malaysian Copyright Law, art. 13 (2): “Notwithstanding subsection (1), the right of control under that subsection does not include the right to control— (a) the doing of any of the acts referred to in subsection (1) by way of fair dealing **including** for purposes of research, private study, criticism, review or the reporting of news or current events (...)” (our emphasis), unofficial translation available on <http://www.cric.or.jp/db/link/doc/malaysiaCopyrightAct1987asat1-7-2012.pdf>; The word “including” was introduced in a 2012 reform, opening up what was previously a closed-list exception. Cf. <http://www.worldipreview.com/article/amendments-to-the-malaysian-copyright-act>

60 Art. 65 of the Taiwanese Copyright Law, does not mention any particular purpose : “Fair use of a work shall not constitute infringement on economic rights in the work. (...)” (suivi des facteurs du *fair use*). Cf. The translation provided by the Taiwanese Office for Intellectual Property, available on: <http://www.tipo.gov.tw/ct.asp?xItem=364328&ctNode=6825&mp=2>.

61 Israeli Copyright Law, art. 19: “(a) Fair use of a work is permitted for purposes **such as**: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution. (...)”, (our emphasis) available on: http://www.wipo.int/wipolex/en/text.jsp?file_id=202010

62 Cf. P. Mizukami, “A Comparative Table of Brazilian Copyright Reform Draft Bills”, August 15, 2012, available on: <http://infojustice.org/archives/26900>. Let us note that the latest released drafts of the Brazilian copyright reform tended rather towards a semi-open exception than a fully open “fair use”- like exception.

63 Australian Law Reform Commission, Copyright and the Digital Economy, ALRC Report 122, February 13, 2014.

64 Cf. references *supra*, note 4.

65 M. Geist, “Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use”, in M. Geist (ed.), *The Copyright Pentology*, Ottawa, University of Ottawa Press, 2013; A. Katz, “Fair Use 2.0: The Rebirth of Fair Dealing in Canada”, in *ibidem*; G. D'Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair

appears particularly instructive because it exemplifies how a copyright regime that shares a number of common characteristics with the European regime can transition towards a more flexible and balanced regime.

i. How the Canadian Supreme Court changed fair dealing

The traditional fair dealing doctrine in Canada. – The Canadian Copyright Act presents both a list of specific exceptions, such as the exception in favor of libraries, archives and museums (art. 30.1 and 30.2) or the exception for persons with perceptual disabilities (art. 32), and a fair dealing exception (articles 29, 29.1, 29.2). However, the Canadian fair dealing provisions (as well as similar provisions in the UK⁶⁶ or in Australia⁶⁷) was traditionally closer from a European-style specific exceptions regime, than to the American fair use regime. Indeed, although both fair use and fair dealing provisions rely on a “fairness” standard (according to a number of codified or judicial factors), unlike their fair use cousin, fair dealing exceptions are not open with regard to the purposes of the use: they specify an exhaustive list of purposes, just as European exceptions do⁶⁸. Moreover, it was generally admitted that Canadian fair dealing (as well as the other exceptions) had to be interpreted restrictively⁶⁹. Otherwise, a common characteristic between Canadian fair dealing, American fair use and European exceptions is that all of them are generally considered as mere defense against copyright infringement.

The Supreme Court reinterpretation of fair dealing. – In its CCH case⁷⁰, the Supreme Court of Canada radically altered this state of the law, by making two significant moves.

The first move was to declare *fair dealing* as a user's right:

“the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defense. Any act falling within the fair dealing exception will not be an infringement of copyright. *The fair dealing exception, like other exceptions in the Copyright Act, is a user's right*⁷¹

Having said that, the Court made its second move, arguing that “in order to maintain the proper balance between the rights of a copyright owner and users' interests, *it must not be interpreted*

Use”.

66 United Kingdom Copyright, Designs and Patents Act, art. 29 and 30.

67 Australian Copyright Act, Section 40-42.

68 G. D'Agostino, 2008, *op. cit.*, p. 319.

69 G. D'Agostino, 2008, *op. cit.*, p. 329.

70 For a description of the findings of the case, see *infra*.

71 Supreme Court of Canada, “CCH Canadian Ltd”, 2004 SCC 13, para 48 (emphasis ours).

*restrictively*⁷². Endorsing the words of copyright scholar David Vaver, the Court added that “Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation”⁷³. Furthermore, proceeding to the application of this reasoning to the circumstances of the case, the Court noted that the word “research” in the fair dealing exception “must be given a *large and liberal interpretation* in order to ensure that users’ rights are not unduly constrained”⁷⁴.

The reasoning of the Court is quite straightforward: if copyright exceptions are not mere defenses, but constitute legitimate user's rights, their interpretation should not be anymore restrictive than the copyright owner's prerogative. They must even be given a “large and liberal interpretation”, to preserve user's rights.

Although it has been said that under this new reading, Canadian fair dealing “appears to be inching closer to fair use”⁷⁵, it hasn't quite turned into a truly open exception: the list of purposes is still considered as exhaustive. However, the constraints of that exhaustive enumeration have been clearly relaxed by the “large and liberal interpretation”. Although a use still needs to be connected to one of the purposes enumerated by the fair dealing exception (eight, as of today), these enumerated purposes are not restrictive boundaries but rather flexible templates, that could be applied to other related or analogous cases. The new Canadian fair dealing post-CCH can therefore be described as a “semi-open” exception.

How a semi-open fair dealing increases flexibility. – Let us now illustrate how this semi-open exception provides increased flexibility in Canadian copyright law, by shortly reviewing the recent Supreme Court case law. Although for each of these cases, we will focus on the purpose of the dealing (subject to the Court's “large interpretation” doctrine), it should be noted that this is only the first of the six factors that the Court examines to assess the fairness of the dealing⁷⁶.

In CCH, the Court relied on its “large and liberal interpretation” of the purpose of “research” provided by the fair dealing exception, to conclude that the Law Society of Upper Canada did not breach copyright by maintaining self-service copiers available to its members,

72 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 48 (emphasis ours).

73 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 48.

74 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 48 (emphasis ours).

75 M. Geist, “Fairness Found :...” in Copyright Pentalogy, p. 159.

76 In CCH, the Canadian Supreme court presented the six fairness factor applicable to fair dealing : Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 53.

nor by providing them with a service of copy-on-demand⁷⁷ : “Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. (...) Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law”.

In *SOCAN v. Bell*⁷⁸, the Court considered that the practice of offering short previews to consumers of online music services was to be considered a fair dealing for the purpose of “research”⁷⁹, as consumers “consumers used the previews for the purpose of conducting research to identify which music to purchase”⁸⁰.

Finally, the *Alberta (Education) v. Access Copyright*⁸¹ case constitutes perhaps the most striking illustration of the failings of the strict interpretation of exceptions, and the advantages of the Canadian approach. Indeed, in that case, the strict interpretation by the Copyright Board of Canada⁸² of the expression “private study” led to the absurd conclusion that the photocopies of excerpt of textbooks made by teachers at the student's initiative fell under fair dealing, while those made at the teacher's initiative did not (because it did not amount to *private* study but “instruction”). The Court criticized the Copyright Board's distinction by considering it drove “an artificial wedge” into the unified purpose of “research/private” study in the school context⁸³, and added :

“the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers’ instruction from the students’ studying.”⁸⁴

77 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*

78 Supreme Court of Canada, “SOCAN v. BELL”, *op. cit.*

79 The Court here decided that the purpose of the use must be considered “from the perspective of the user or consumer’s purpose”, not that of the service providers.

80 Supreme Court of Canada, “SOCAN v. Bell”, *op. cit.*

81 Supreme Court of Canada, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*

82 The Canadian Copyright Board is “an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society”. Cf. Copyright Board of Canada, “Our mandate”, cf. <http://www.cb-cda.gc.ca/about-apropos/mandate-mandat-e.html>

83 Supreme Court of Canada, *Alberta (Education) v. Access Copyright*, *op. cit.*, para 24.

84 Supreme Court of Canada, *Alberta (Education) v. Access Copyright*, *op. cit.*, para 27.

On the basis of that large interpretation of the purpose of “private studying”, the court therefore overturned the Copyright Board decision.

Admittedly, in all of these cases, the Supreme Court's application of the fair dealing exception tends to rely heavily on the expression “research or private study”. Let us note however that before the 2012 copyright reform (introducing the purposes of “education, parody or satire”), the available purposes in the fair dealing exception were rather scarce, as the law only allowed fair dealing for purposes of “research or private study”, “criticism or review”, and “news reporting” (the two latter purposes having only been introduced in 1997). It is therefore not surprising that the Court used the legal ground available to it. Of course, in the hypothesis of a transposition of such a semi-open exception regime in Europe, with up to 21 possible exceptions available for interpretation, such an over-emphasis on one particular purpose appears implausible.

We have another (minor) complaint about the Supreme Court's reasoning : in CCH, the Court seems to suggest a particular priority order for considering the various exceptions, with fair dealing coming first : “It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption”⁸⁵. However, this consideration by the court seems misguided⁸⁶. It would certainly undermine legal certainty if the courts did not address whether any specific exceptions applies before considering a large interpretation of the fair dealing purposes. Therefore a clear limit of the semi-open exception should be that the courts should only resort to large interpretation of the fair dealing exception if the use at stake is not covered by another, specific exception⁸⁷.

Similar proposals. – This kind of semi-open exception exhibited by the Canadian approach is comparable to a number of legislative proposals made by European scholars. The proposal for a European copyright code, issued in 2010 by a group of high level copyright scholars (called the “Wittem Group”), contains exactly that kind of mechanism. After the enumeration of a list of exceptions, the text

85 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 49.

86 However, for an interpretation of that statement as underlying a hierarchy of exceptions in Canadian law, see D. Gervais, “Canadian Copyright Law Post-CCH”, *Intellectual Property Journal*; 2004/2005, p. 131

87 However, in the CCH case, although neither the Federal Court of Appeal nor the Supreme Court touched on the issue, some have raised doubt on whether the library exception provided by article 30.2 of the Canadian Copyright Act was available to the Great Library since the facts of the case were litigated before the introduction of that specific exception in Canadian law. Cf. Wilkinson, “Filtering the Flow from the Fountains of Knowledge”, in *In the Public Interest: The Future of Canadian Copyright Law*, p. 345.

features an additional article entitled “Art. 5.5 – Further limitations”:

“Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or right-holder, taking account of the legitimate interests of third parties.”⁸⁸

According to its authors, this provision reflects, “a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration”⁸⁹. It also features a reversal of the three-step test as an instrument of flexibility, as some have advocated⁹⁰.

A similar proposal has also been made by Martin Senftleben, who suggested to rewrite the beginning of article 5.5 of the InfoSoc directive (that provides the European version of the three-step test) as follows:

“In certain special cases *comparable to* those reflected by the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4, the use of works or other subject-matter may also be exempted from [the rights in article 2 and 3], provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the right-holder”⁹¹

ii. Transposing the Canadian approach in Europe

Regardless of the respective merits of these different proposals, what is particularly interesting with the Canadian approach is that transposing it in European law would require only minimal changes. The Canadian Supreme Court did it in two moves: first, by characterizing the exceptions and limitations as user's rights, and second, by rejecting the restrictive interpretation doctrine.

88 Wittem Code, art. 55.

89 Wittem Code, note 48.

90 Cf. D. Gervais, “Towards a New Core International Copyright Norm: The Reverse Three-Step Test”; Ch. Geiger, “The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society”, e-Copyright Bulletin, Unesco, jan-march 2007, p. 18; C. Geiger, “Constitutionalising » Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, IIC 2006, p. 371.

91 cf. Senftleben, “Comparative Approaches...”, p. 19 (our emphasis). Senftleben uses the three-step test as a “balancing tool” to implement a new exception regime that he describes as “semi-open”, because “it cannot empower judges to identify new use privileges on the basis of abstract factors”, but must have a comparable purpose to the exceptions enumerated in article 5 of the directive.

1. The first move: a protected status for exceptions and limitations

If we wanted to transpose the Canadian approach in EU law, the first move would be to recognize a protected status for exceptions and limitations. The exact status of exceptions and limitations under European law as well as under French or Belgian copyright law, has always been rather unclear. For a major part of the doctrine, their status is quite precarious: exceptions and limitations are often considered as mere legal forbearances, or at most as an affirmative defense⁹². While others defend the idea that exceptions and limitations should be considered as user rights⁹³, this interpretation has been clearly rejected by the French Court of cassation⁹⁴.

Arguments for a protected status for exceptions and limitations. – There are at least two arguments to support that limitations and exceptions should be awarded a protected status, rather than being

92 For a summary of these doctrinal interpretations of limitations and exceptions, see S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'environnement numérique*, Brussels, Larcier, 2007, p. 479

93 Benabou “Les routes vertigineuses de la copie privée au pays des protections techniques... A propos de l’arrêt Mulholland Drive”, p. 4-5 ; Vivant & Vercken, *Légipresse*, n°227, 2005, p. 238.

94 The French Court of cassation, has indeed decided that the exception for private copying was not a right, but a mere defense : Cour de cassation de France, “*UFC Que-Choisir c. Universal Pictures Video Fr et autres*”, n° 549, 28 february 2006. This holding has been further confirmed by a second decision of the Court of cassation in the same case, : cf. Cour de cassation de France, “*UFC Que choisir c/ Soc. Universal Pictures Vidéo France et autres*”, 19 june 2008. This followed a surprising decision by the Court of Appeal of Paris, which, while explicitly rejecting the definition of exceptions as a user's rights, prohibited the defendant to use a technological protection measure that prevented the plaintiff to enjoy its private copying exception, which was not very different, in practice, from granting the plaintiff a right to private copying. (Cf. S. Dusollier, “Le "droit à la copie privée" Le débat est-il clos ?”, *RDTI*, 23/2005, p. 75).

In Belgium, the question remains open, since in the only case that touches on this question, the Court of Appeal is concerned by another, specific question (whether the private copying exception can itself be defined as an “author's right” - to which the answer was, unsurprisingly, no), but does not address the issue of whether it can be defined as a *user's right*. Cour d'appel de Bruxelles (9th ch.), September 9, 2005, For an elaboration of that argument, see E. Wéry, “La copie privée au centre de toutes les attentions : la cour d'appel et le Parlement se penchent sur la question”, *Droit & Technologies*, available on:

http://www.droit.be/actuality-904/doc/commission_consultative_copie_privée.pdf.

treated as mere forbearances upon which exclusive rights always take precedence.

The first argument stems from the relationship between copyright and fundamental rights. If the function of exceptions and limitations is to strike a balance between copyright and fundamental rights, then it is hard to see how they could have an inferior status. If they stem from the duty of states to protect, promote and implement fundamental rights, then surely exceptions and limitations should enjoy a certain level of protection. Admittedly, this argument would only hold for those exceptions and limitations that *do* have a basis in fundamental rights, which could be only a subset of existing exceptions and limitations, depending on their interpretation⁹⁵.

The second argument follows the reasoning of the Supreme Court of Canada in its CCH ruling⁹⁶. Indeed, the Court draws a strong link between the necessity of a “proper balance between the rights of a copyright owner and users’ interests” and the recognition of exceptions as users’ rights. This relies on the Court statement in the *Théberge* case⁹⁷ that the Copyright Act was “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”⁹⁸.

A gap between legal traditions? – Certain European scholars might object that this reasoning relies (at least partially) on an instrumental justification specific to an Anglo-American tradition, and fundamentally at odds with the purely “natural rights” justification of a continental European tradition. However, the alleged gap between these two traditions is often exaggerated. At their origins, both traditions result from a compromise between natural law and instrumental rationales, between the private and public interest. Ginsburg suggests that this private versus public interest tension was resolved by the French legislator “by casting copyright as an aid to the advancement of public instruction”⁹⁹. The “personalist doctrines” usually invoked as the foundations of French or Belgian copyright law

95 For a conservative view on which exception appear to derive from fundamental rights, see

96 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 48

97 Supreme Court of Canada, “Théberge v. Galerie d’Art du Petit Champlain Inc.”, 2002, 2 S.C.R. 336.

98 Supreme Court of Canada, “Théberge v. Galerie d’Art du Petit Champlain inc.”, *op. cit.*, para 30. Cf. also the restatement in Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 23 : “As mentioned, in *Théberge*, *supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”

99 J. Ginsburg, “A Tale of Two Copyrights : Literary Property in Revolutionary France and America”, *Tulane Law Review*, 64 (5), May 1990, p. 1014.

emerged much later, at the end of the 19th century¹⁰⁰.

Broadly speaking, not only has the opposition between these two traditions been overestimated¹⁰¹, but today they are largely converging under the pressure from international and European harmonization. This observation also applies to the justifications for copyright law, which sees the erosion of the influence of the “personalist” justification, and the rising influence of the instrumental justification¹⁰². Moreover, today even in countries like Belgium and France the idea that the legal system is driven by a purely author-centric view, is increasingly giving way to a framing in terms of a “fair balance” between rights and interests between users and right-holders, as provided by the recital 31 of the InfoSoc directive¹⁰³, or stressing “the need to maintain a balance between the rights of authors and the larger public interest” as the WIPO Copyright Treaty preamble puts it¹⁰⁴.

Therefore, if we admit that copyright law must strike a balance between protection and limitations, between the interest of right-holders and the interest of users (a conclusion that even the Lockean natural law justification must concede, as some have argued¹⁰⁵), then this balance cannot be precluded by assigning an inferior status to the user's claims.

Admittedly, the Canadian Supreme Court does not give a detailed account of what claims (and correlative duties) might be encompassed by these “users' rights”¹⁰⁶. As different rights can have different

100 J. Ginsburg, “A Tale of Two Copyrights : Literary Property in Revolutionary France and America”, *Tulane Law Review*, 64 (5), May 1990, p. 996.

101 Cf. generally A. Strowel, *Droit d'auteur et copyright – Divergences et convergences. Étude de droit comparé*, Bruxelles, Bruylant, 1993.

102 Cf. Ch. Geiger, *Droit d'auteur et droit du public à l'information*, p. 44.

103 Cf. Directive 2001/29, recital 31 : “A fair balance of rights and interests between the different categories of right-holders, as well as between the different categories of right-holders and users of protected subject-matter must be safeguarded (...)”

104 WIPO Copyright Treaty, adopted in Geneva, December 20, 1996.

Cf. also article 7 of the TRIPS treaty, adopted in Marrakesh, 15 april 1994, that provides : “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

105 Cf. W. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property”, *Yale Law Journal*, 1993, p. 1535: “Natural rights theory, however, is necessarily concerned with the rights of the public as well as with the rights of those whose labors create intellectual products”; and p. 1539: “the very arguments that proponents of intellectual property use to defend more extensive owner control (...) fairly understood, (...) lead instead to limited property rights for individual proprietors- and to significant property rights for the public”.

106 On this notion of users' rights advanced by the Canadian Supreme Court, cf. D.

implications, users' rights might merely take the form of mere rights of peaceful enjoyment, or of strong positive rights against the right-holder. This issue remains largely open. But at the very least, the recognition of exceptions as users' right makes clear that exceptions and limitations, are no less legitimate or important than author's rights. In other words, both authors' and users' rights have an equal status¹⁰⁷.

2. The second move: exceptions and limitations should not be interpreted restrictively

Challenging the strict interpretation doctrine. – This conclusion that author's and user's right have an equal status has an important implication, embodied in the Court's second and final move towards a semi-open exception: since exceptions and limitations must be considered as user's rights, “[b]oth owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation”¹⁰⁸, and exceptions “must not be interpreted restrictively”¹⁰⁹. If we admit, following the Canadian Supreme Court, that the purpose of copyright is to strike a fair balance between authors' rights and users' rights, we must therefore reject the strict interpretation doctrine.

The CJEU's justification of the strict interpretation doctrine. – In EU law, the strict interpretation doctrine has been notoriously endorsed by the CJEU in its *Infopaq I* decision¹¹⁰. The Court invokes two arguments to support the idea that exceptions and limitations must be interpreted strictly: the first argument relies on a formal principle of interpretation; the second is based on the three-step test.

Exceptio est strictissimae interpretationis. – The first argument relies on the premise that, “according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly”. According to the Court, this

Gervais, “Canadian Copyright Law Post-CCH”, *Intellectual Property Journal*, 2004/2005, p. 131 (esp. p. 157, on the relation between users' rights and users' interest) ; M. J. Tawfik, “International Copyright Law and 'Fair Dealing' as a 'user right'”, *e-Copyright Bulletin*, Unesco, April June 2005, available on : http://portal.unesco.org/culture/en/files/27422/11514150881Myra_e.pdf/Myra_e.pdf

107 The symbolic force of recognizing exceptions as user's rights cannot be overemphasised, even if such users' rights might not qualify as a full “subjective right” in the civil law sense, as some have contended. Cf. T. Léonard “Mulholland Drive chute sur l'épine du droit subjectif”, *RDTI*, 29/2007, p. 357; S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'environnement numérique*, *op. cit.*, p. 483; C. Colin, *Droit d'utilisation des œuvres*, Brussels, Larcier, p. 529.

108 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 48.

109 Supreme Court of Canada, “CCH Canadian Ltd”, *op. cit.*, para 48 (emphasis ours).

110 CJEU, *Infopaq International A/S v. Danske Dagblades Forening* (hereafter *Infopaq I*), 16 July 2009, C-5/08.

principle is applicable to the exception at stake (article 5(1), exception for transient or incidental copy of a work), because it is “a derogation from the general principle established by that directive, namely the requirement of authorization from the rightholder for any reproduction of a protected work”¹¹¹.

The strict interpretation doctrine for limitations and exceptions is well-known in many copyright law regimes. The CJEU presents it as deriving from a more general principle in EU law¹¹², which could be considered a variant of the Roman law maxim *exceptio est strictissimae interpretationis*¹¹³. However, in the legal literature, this interpretation principle is increasingly disputed, as some argue that legal methodology does not generally prescribe that exceptions be interpreted strictly merely because of their status as exceptions¹¹⁴. A more radical critique would point out that such a principle of interpretation reflects the tendency to privilege syntax over the meaning and purpose of the law which is a major shortcoming of legal formalism, that will often lead to contradictions¹¹⁵.

In our opinion, this issue is not a mere question of formalistic interpretative niceties, but a matter of normative choice: between exclusive rights and exceptions and limitations, which of the two (if any) must bear the burden of strict judicial interpretation in case of lack of clarity?

Traditionally, the answer to this question has been that the legislator, by introducing *author's* rights has decided that the interpretation must favor the author, not the users.

But if exceptions or limitations are not mere forbearances or loopholes in the law, but are actually embedding a concern for fundamental rights in copyright law, or if exceptions or limitations actually result from the necessary balance between the public and the private interests, it seems unlikely that they should be restricted. Indeed, it

111 CJEU, *Infopaq I*, *op. cit.*, para 56-57.

112 It seems indeed to be a recurring principle in the CJEU case law, cf. e.g. CJEU, *Kapper*, 29 April 2004, C476/01, para 51; CJEU, *Ambulanter Pflegedienst Kügler v. Finanzamt für Körperschaften I in Berlin*, 10 September 2002, C-141/00, para 28; CJEU, *SDC v. Skatteministeriet*, 5 June 1997, C-2/95, para 20.

113 Or, in an alternate wording, *exceptiones non sunt extendendae*.

114 Cf. M. Leistner, “The German Federal Supreme Court's Judgement on Google's Image Search...”, *IIC*, 2011, p. 426-427, and references to the German literature on note 36.

One could argue that the *exceptio est strictissimae interpretationis* principle can be found in the European Convention for Human Rights, where exceptions to fundamental rights are to be narrowly interpreted; but that narrow interpretation principle is justified by a normative choice to give precedence to the fundamental rights at stake, not by a mere procedural rule.

115 For such a critique, cf. E. Engle, “Environmental Protection as an Obstacle to Free Movement of Goods: Realist Jurisprudence in Articles 28 and 30 of the E.C. Treaty”, *Journal of Law and Commerce*, Vol. 37, p. 113.

appears that exceptions and limitations are a rather central part of the definition of the general principle of copyright law: they define the scope of the exclusive rights of the author, and of the correlative rights of the public. If copyright law is defined by a balance of interest, shouldn't we abandon the idea of deciding *ex ante* which interest will prevail?¹¹⁶

Another possible answer stems from the reasoning of the ECHR in its recent *Ashby Donald v. France* decision, where the Court considers that copyright law can itself be an exception to freedom of expression. This parallels the traditional holding by doctrine and jurisprudence that copyright law is an exception to a more general principle of freedom, an “island of property in an ocean of liberty”¹¹⁷. Framed in that way, the issue of the strict interpretation doctrine would lead to surprising conclusions. Indeed, if copyright is the exception and freedom to use works the rule, shouldn't strict interpretation apply to the former rather than the latter ?

The strict interpretation doctrine is required by the three step test. – The second justification advanced by the CJEU for the strict interpretation doctrine takes the form of an *a fortiori* argument: “This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases (...)”¹¹⁸. The inference is that since the exceptions and limitations must respect the three-step test, then *a fortiori* they must be interpreted strictly.

This argument is highly questionable. First, it relies once again on the most stringent interpretation possible of positive law. It assumes a restrictive interpretation of the three-step test, where “special cases” is taken in a quantitative interpretation, as “clearly defined” and “narrow in its scope and reach”¹¹⁹, and not in a qualitative

116 Granted, renouncing to any priority rule might make the task of the judge more difficult in certain hard cases, and a priority rule might be justified on a purely pragmatic grounds. However, according to Leistner, even if exceptions should “neither (...) be construed strictly, nor extensively”, they can still be “constructed according to the general rules of interpretations” (M. Leistner, “The German Federal Supreme Court's Judgement on Google's Image Search...”, *IIC*, 2011, p. 426-427).

117 Cf. J. Foyer and M. Vivant, *Le droit des brevets*, Paris, PUF, 1990, p. 9 ; F. Gotzen, “De norm van de eerlijke gebruiken en de intellectuele rechten”, in J. Stuyck et P. Wytinck (ed), *De nieuwe wet handelspraktijken*, 1992, p. 263. Cf. également Geiger, *Droit d'auteur et droit du public à l'information*, Paris, Litec, 2004, p. 197, note 1. In Belgium, the Court of appeal of Ghent has held numerous times that “intellectual property rights are an exception to the freedom of commerce and in particular to the freedom to copy”, see *e.g.* Court of Appeal of Gent, 25 january 2010, *Auteurs & Médias* 2013/2, p. 105-106 (our translation).

118 CJEU, *Infopaq I*, *op. cit.*, para 58.

119 Report of the WTO Panel in the dispute “United States – Section 110(5) of the US Copyright Act”, 17 march 2000, WT/DS160/R, 6.112

interpretation advocated by some¹²⁰, according to whom it should be understood as “justified by some clear reason of public policy or some other exceptional circumstance”¹²¹. Moreover, it condones a reading where article 5(5) also binds the judge, and not only the legislator. Although the peculiar wording of the test in the EU directive gives some weight to that interpretation, it is not clear whether such a departure from the standard three-step test in copyright treaties was intended by the EU legislator absent any explicit mention in preparatory works of the directive¹²². Moreover, member-states are divided on that issue: while certain member-states, including France, have included it in their national legislation, it has been rejected by a number of European member-states, including Belgium, which have decided that only the national legislator shall be bound by the test of article 5(5)¹²³.

Moreover, even if we admitted this particularly strict reading of article 5(5), it would still not follow that the (alleged) application of the three-step test by the judge requires a strict interpretation of the exception at stake. Admittedly, an overly broad interpretation, that extends the scope of a well defined exception to a larger set of cases, might contradict the strict requirement of a special case that is “narrow in scope and in reach” (e.g. extending the private copying exception to allow any type of copying). But even if the three-step test would prohibit such an overly broad interpretation, it does not follow that it requires a strict interpretation. Indeed, the three-step test does not itself address which interpretation technique should be used, but rather focuses on the result of the interpretation of exceptions: is it such that does not cover certain special cases, or that it would conflict with the normal exploitation of the work, etc. Therefore, strictly speaking, the strict interpretation doctrine is not even required by the most stringent interpretation of the three-step test.

Subsequent CJEU case law. – Fortunately, the Court itself seems to be backing off from the radical position put out in *Infopaq I*. In two

120 Cf. M. Senftleben, *Copyright, Limitations and the Three-Step Test*, The Hague, Kluwer, 2004, p. 138; M. Ficsor, “Combien de quoi ? Les ‘trois conditions cumulatives’ et leur application dans deux affaires récentes de règlement de différends dans le cadre de l’OMC”, *RIDA* 2002, n° 192, p. 132; Cf. S. Dusollier, “L’encadrement des exceptions au droit d’auteur par le test des trois étapes”, *IRDI* 2005, p. 218 (noting that this qualitative interpretation is supported by preparatory works of the Stockholm conference for the revision of the Berne convention)

121 Cf. Ricketson, 1987, p. 482. Let us note however that Ricketson no longer advocates such qualitative interpretation of the expression “special cases”; cf. S. Ricketson, “WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment”, WIPO publication SCCR/9/7, Geneva 2003, p. 22. Moreover, see above note 251 for references to a number of authors arguing for a more balanced interpretation of the three-step test.

122 Cf. Geiger, 2007, p. 13-14.

123 Cf. Geiger, 2007, p. 15; Cf. Collin, p. 550 ; Dusollier, *IRDI*, 2005, p. 216

ulterior cases, although formally reasserting its strict interpretation doctrine, the CJEU has invoked the requirement of a “fair balance” between the right and interests of right-holders and those of users provided by recital 31 to relax considerably the interpretation of the exceptions at stake. In Premier League, the CJEU stated that it resulted from recital 31 that the interpretation of the exception “must enable the effectiveness of the exception (...) to be safeguarded and permit observance of the exception’s purpose”¹²⁴. In *Painer*, the Court supplemented the resort to recital 31 with the reinforcement of the right to freedom of expression, stating that the quotation “intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors”¹²⁵. It further decided that the balance was struck, in that case, “by favouring the exercise of the users’ right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work”¹²⁶. Admittedly, in a recent case *ACI Adam*, the Court got back to an unqualified version of the strict interpretation doctrine from *Infopaq I*¹²⁷. However, the Court does not repudiate its *Painer* and Premier League rulings, and its holding in *ACI Adam* do not necessarily mean that the Court has operated a complete return to the orthodoxy on the strict interpretation doctrine.

From this overview, the Court's reasonings with regard to the interpretation of exceptions appears largely inconsistent. On the one hand the Court, unwilling to appear to retract from its ruling in *Infopaq I*, reasserts the principle that exceptions must be interpreted strictly. On the other hand, it uses overarching principles, such as the “fair balance” requirement or the right to freedom of expression, to neutralize that strict interpretation doctrine, and relax the interpretation of the exception at hand. While the Court seems formally committed to the orthodoxy of the strict interpretation doctrine, it is in fact alternatively invoking it and neutralizing it, depending on the cases. It is as if the Court realized that the strict interpretation doctrine, applied as a general rule of interpretation, was imposing an unreasonable straitjacket on the exceptions and limitations to copyright law. One might argue that the Court should stop its ambivalent attitude towards the strict interpretation doctrine, and finally recognize it as both unjustified and untenable.

Therefore, if our analysis is sound, there is a real possibility for the CJEU to reverse its jurisprudence, and follow a similar path than the

124 CJEU, *Football Association Premier League Ltd and Others v. QC Murphy and Others*, 4 October 2011, joined cases C-403/08 and C-429/08, para 163-164.

125 CJEU, *Eva-Maria Painer v Standard Verlags GmbH and Others*, op. cit., para 134.

126 *Ibidem*.

127 CJEU, *ACI Adam v. Stichting de Thuiskopie*, 10 April 2014, C-435/12, para 22-23, para 22-31

Canadian Supreme Court since its CCH ruling. The CJEU could make the first move, recognizing a protected status to exceptions and limitations (possibly as user's rights) by acknowledging their function as protecting fundamental rights, in continuity with its requirement of striking a fair balance between the rights and interests of users and copyright-holders. From there, the Court could easily make the second move and reject the strict interpretation doctrine. The CJEU could then walk in the footsteps of the Canadian Supreme Court, and affirm that a fair balance of interests implies taking users' rights seriously, which requires, if not "a large and liberal interpretation", at least an interpretation broad enough to allow for interpretation by analogy of the cases of exception provided by the directive.

Of course, the point is not to say that the Court will inevitably follow that course. Rather, it seems that the positive law is not as unequivocally determinate as is generally assumed, and actually gives the Court more than enough leeway to introduce more flexibility in European copyright law.

Would that constitute illegitimate judicial activism on the part of the CJEU? We think not. Legislation itself does not specifically require that the exceptions or limitations should have a subordinate status, nor that they should be interpreted strictly: these are all (mostly) the result of the courts' doings. And what the courts have done, they could also undo. Moreover, with the prevalence of such open-ended principles as the proportionality test or the balancing of rights and interests of users and right-holders, the CJEU is entirely in position to contribute defining the equilibrium that a reasonable copyright system should strike.

Of course, such evolution could also be implemented by the European lawmakers. They could for example decide to amend article 5 of the directive, by taking inspiration from the legislative proposals mentioned above¹²⁸. And it is not implausible that the momentum created by the adoption of fair use provisions by an increasing number of countries will generate the impulse for the European lawmakers to take action. But as many have noted, European copyright lawmaking is a very slow process, with the length of the legislative cycle possibly exceeding ten years¹²⁹.

128 Cf. *supra*, text accompanying notes 83 to 86.

129 Cf. B. Hugenholtz, M. Senftleben, "Fair Use in Europe: In Search of Flexibilities",

CONCLUSION

European copyright law is mostly inhospitable to transformative uses, as a review of positive law at the EU level and in national jurisdictions easily demonstrates. In our previous paper¹³⁰, we saw the multitude of broadly defined exclusive rights constitutes a tremendous hurdles for creators of transformative works, as they can most of the time be found to infringe at least some of them. We also saw that the European framework of limitatively enumerated and strictly interpreted exceptions and limitations was way too narrow to compensate for the far-reach of exclusive rights.

The issue of transformative uses has largely been a neglected issue in copyright law. Not only does it appear that the spaces for many emerging practices are lacking, but even the more traditional practices of quotation or parodies are often excessively difficult to exercise without incurring legal hazards. This critical situation cannot be left unchanged. Imposing all the burden of legal uncertainty on authors of transformative works and confining them in a legal grey area hardly seems like a satisfying solution.

A semi-open exception appears the most promising way forward for European copyright law. Admittedly, it does not go all the way towards an American-style fair use exception. A semi-open exception would still be constrained by the template cases provided by law: the judge could only apply the exception to cases analogous to those provided by law, not entirely new ones. This allows for a reasonable division of labor between the judge and the legislator in adapting the law to the technological evolution and emergent social and cultural practices. It also allows for a compromise between the legal certainty of a closed system of exception and the flexibility of an open exception, a solution that might be more appealing for European lawyers. If such a compromise is indeed possible, then it could no longer be argued that introducing more flexibility in the European exception framework would be fundamentally incompatible with European copyright traditions.

After the harmonization initiated by the InfoSoc directive, European copyright law is only a decade old. Too young to rust, it has no good excuse to ignore the pleas for more flexibility and legal certainty for transformative users. In an era of legitimacy crisis, it is particularly crucial for copyright law to prove that it can evolve, and accommodate the evolution of social and cultural practices regarding intellectual creation.

IViR, University of Amsterdam, 2011, available at:
<http://ssrn.com/abstract=1959554>

130 Cf. J. Cabay & M. Lambrecht, *op. cit.*