



A systematic approach to exceptions in the EU

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Copyright in favour of education
and science

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Key issues for education and science

- Limited exceptions - lack of flexibility
 - Dependant on some contexts or technology vs evolving practices
- Unharmonised exceptions
 - Cross-border projects of distance learning
- Unclear status of research exception
- Specific situation and needs of developing countries



Current initiatives

- **WIPO**

- An international framework for limitations and exceptions?

- WIPO Standing Committee on copyright and related rights, nov. 2008
- B. Hugenholtz & R. Okediji, *Conceiving an international instrument on Limitations and exceptions to Copyright*, 2008
- Forthcoming study on education exceptions

- **The Development Agenda**

- Flexibilities namely for exceptions
- Public domain



Current Initiatives

- European Union
 - Green paper on copyright in the knowledge economy
 - Recommendation 2006/585 on digitisation
 - High Level Group on Digital Libraries



Principles for a system of exceptions

- Clusters of exceptions based on objectives not on types of users / uses
- Closed list + open exception
- Principle of interpretation
- The three-step test
- The interface with contract and licensing
- The interface with DRM and technological measures
- The interface with other IP rights
- Developing countries



Other key principles

- Reassessment of the copyright regime as a whole
- A solution for orphan and out-of-print works
- A status for open access works



Exceptions based on objectives

- Clustering education, research and library exceptions
 - Access to knowledge and educational material
 - Use of works within the teaching, learning, research environment
 - Preservation and transmission of knowledge
- Need for a dynamic evaluation and a functional definition
- Including needs of visually impaired people



Open exception

- The principle of fair use (US Law) ?
 - Pros and cons
- Or some flexibility around limited exceptions



Interpretation of the exception

- Admitted principle; exceptions should be strictly construed
- But
 - free copying is the principle
 - Fundamental justifications of exceptions
- No need for a strict interpretation



Three step-test

- 9(2) Berne Convention, 13 TRIPS, 5(5) Copyright directive
 - Exceptions only
 - In certain special cases
 - Should not conflict with a normal exploitation of the work
 - Should not unreasonably prejudice the legitimate interests of the author



Three step test

- Normative approach of the 3 steps, not empirical
- Notion of normal exploitation
- Aimed at the lawmaker, exceptionally at the judge
- A positive test rather than a restrictive one
 - Gervais : a reverse three step test
 - 3 test as the basis for an open fair use exception
- Declaration of academics on the 3 test



Interface with contract

- Uncertain under EU law
 - 6(4) 4 Copyright Directive
 - Green Paper on Copyright in Knowledge Economy
- Exception should not be contracted out
 - All or those that enshrine fundamental grounds ?
 - Licensing conditions for libraries or education institutions
 - Some advantages



Interface with DRM

- EU law
 - 6(4) Copyright Directive
 - Diverse implementation leads to uncertainty
 - Not applicable to on-line works
- Ensure the benefit of exceptions to lawful users
 - On-line works too
 - Not subject to licensing conditions
 - Effective remedy for users
 - Curtail the very design of DRM



Interface with other IP rights

- Exceptions for education/libraries
 - Copyright, related rights, sui generis right for databases
 - Protection of software by copyright and by patent
- Exceptions for scientific research
 - Copyright and patent
 - Database protection



Developing countries

- Technological constraints
- Issue of access to works (material, translation, etc...)
- International distribution of works



Copyright regime

- Exclusions of protection
 - Limited in current copyright law
- Scope of exclusive rights
 - Notion of public exploitation
 - No access right



Orphan & Out-of-print works

- EU-based legislative solution
- Principles
 - Diligent search depending on the nature of the user
 - Dedicated databases on orphan works



Open access and public domain

- Repositories of
 - Open access works
 - Public domain material
- Marking the public domain
- Legal status for the public domain



Let's work now...