BEST CASE SCENARIOS FOR COPYRIGHT

FREEDOM OF PANORAMA, PARODY, EDUCATION, AND QUOTATION

COMMUNIA

BEST CASE SCENARIOS FOR COPYRIGHT: FREEDOM OF PANORAMA, PARODY, EDUCATION, AND QUOTATION

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PREFACE

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Limitations and exceptions are the last vestige of unharmonized national copyright law in the EU. Whereas the main economic rights have been firmly and fully harmonized in the 2011 Information Society Directive, leaving the Member States no choice but to implement, codifying the user freedoms that serve a crucial function in counterbalancing these rights has been largely left to the discretion of the Member States. National legislatures may select from a 'shopping list' of some 20 limitations and exceptions broadly defined in article 5(2) and (3) of the Directive, but are under no obligation to actually do so, save for the transient copying exemption of article 5(1). The predictable result of this lopsided harmonization process has been that only few states have implemented the entire list of limitations rubberstamped by the EU legislature. For example, a specific parody exemption currently exists in only a handful of Member States.

This normative asymmetry may have been made some sense in the days of old, when limitations and exception catering for diverging national tastes and cultures arguably justified some measure of normative differentiation. For example, while Italy would allow military marching bands to play copyright music without obtaining permission, Dutch law permitted singing copyright protected works during religious ceremonies.

In today's digital networked environment, however, using copyright works almost always has spillover effects across national borders. Differences between limitations and exceptions at the national level inevitably have a negative impact on the internal market. Indeed, a functional Digital Single Market is hardly imaginable without a set of fully harmonized limitations and exceptions, or at least a number of core exceptions that are mandatory for all Member States.

The increasingly important role of fundamental rights and freedoms, as enshrined in the EU Charter of 2000, has made full harmonization of limitations and exceptions even more urgent, and inescapable, as recent case law of the CJEU illustrates. If according to the European Court in *Deckmyn* parody is a form of freedom of expression protected under article 11 of the EU Charter, it is hard to comprehend how a parody exemption could remain an optional limitation.

Pending comprehensive harmonization of limitations and exceptions, however, it remains important for all Member States to take full advantage of the discretionary freedoms offered by the current EU legal framework to optimally balance author's rights and user freedoms at the national level. In this brochure the COMMUNIA network offers 'best practices' in respect of four essential limitations: freedom of panorama, parody, education, and quotation, from four different jurisdictions. May the European Commission be inspired by these good examples in making copyright limitations and exceptions mandatory across the EU.

INTRODUCTION

Teresa Nobre

In the past decades the European Union has witnessed the formation of European Copyright Law[1]. There have been nine EU directives on copyright law and a horizontal directive on enforcement of intellectual property rights, as well as a growing body of decisions by the European Court of Justice ("ECJ") on the interpretation of such directives that are binding in all member states.

The path to harmonising copyright laws across the EU is remarkable from the perspective of authors, performers and other beneficiaries of copyright and neighbouring rights. Surely, there are still differences between national copyright laws, namely with regard to moral rights, ownership of copyrighted works and copyright contracts. Nevertheless, it is undisputable that the proprietary interests of those parties enjoy a "high level of protection"[2] in all member states, and that EU lawmakers have treated the harmonisation and convergence of national laws in this field as a priority.

Unfortunately, when it comes to users' rights, harmonization has been severely lacking, with member states mostly being given the freedom to decide whether—or how—to implement the EU legal provisions that protect public interests such as access to knowledge and education, freedom of expression, and freedom of creation.

Since 22 May 2001 exceptions and limitations to copyright have been regulated by Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"). This directive offers member states an exhaustive list of 21 exceptions and limitations[3]. However, only one of those provisions—the exception for ephemeral copies—is mandatory. Member states can choose whether to implement the remaining 20 exceptions, including the freedom of panorama exception, the parody exception, the exception for educational purposes, and the quotations exception.

The result of this partial harmonisation of laws is an EU copyright system that does not offer a fair balance between author rights and exceptions.

COMMUNIA's policy recommendation #3 posits that the copyright exceptions and limitations embedded in the InfoSoc Directive should be harmonised in the member states, and that this exhaustive list should be expanded to align user prerogatives to ongoing technological progress[4].

Most of the exceptions listed in the InfoSoc Directive do not restrict the beneficiaries, the types of acts of uses and the categories of protected works covered by the exception.

1 See e.g. Lucas-Schloetter (2014).

2 Achieving a "high level of protection" is an objective that is stated in the recitals of many of the EU directives on copyright.

3 This list is a set of provisions that existed in the various Member States prior to 2001.

4 See http://www.communia-association.org/recommendations/

This may lead to a flexible "semi-open norm that comes close to open-ended defences"[5]. Surely, some of the EU exceptions (namely the library-related exceptions) are outdated and need to be improved, but the majority is drafted in a fairly open and flexible way. Making that majority mandatory across the EU would provide for adequate protection of the public interests at issue in those exceptions and limitations to copyright.

In this publication we present four national exceptions and limitations to copyright, which, like the EU exceptions, are embodied in abstract norms that allow for a wide spectrum of uses of all categories of copyrighted works by all sorts of users. These exceptions are considered the best examples of national exceptions or limitations to copyright in their fields because they take "full advantage of all policy space available"[6] under the InfoSoc Directive, while fully exploring the "flexibility (that lies) outside the EU *acquis*"[7]. In other words, they are at least as broad as the EU exceptions in relation to the rights harmonised under the InfoSoc Directive (reproduction, communication to the public, making available to the public, and distribution), and they are fairly broad in relation to the unharmonised rights (such as the right of adaptation)[8].

We believe that, by harmonising copyright exceptions and limitations across Europe, using the best examples that are permitted under EU law as a model, the EU would reinforce users' rights.

5 Hugenholtz and Senftleben, 2011: 17.

6 Hugenholtz and Senftleben, 2011: 2.

7 Hugenholtz and Senftleben, 2011: 26.

8 When implementing exceptions and limitations to the exclusive rights harmonised by the InfoSoc Directive, Member States must respect the limits imposed by EU policymakers. Outside the EU acquis, i.e. in relation to the rights not harmonised by the InfoSoc Directive, Member States are free to design their own exceptions and limitations to copyright.

FREEDOM OF PANORAMA IN PORTUGAL

Teresa Nobre

Freedom of panorama derives from the German term *Panoramafreiheit*, and generally refers to the rights to photograph, film or otherwise reproduce copyrighted works that are located in public places, and to publish or otherwise share such reproductions without the author's consent. In Portugal, the freedom of panorama exception[9] covers also the creation and sharing of adaptations of publicly placed works.

Generally, transformative uses are not contemplated by the freedom of panorama exceptions of EU member states[10]. National exceptions across Europe tend to have a limited scope of application, covering only the rights harmonised under the InfoSoc Directive. In contrast, the Portuguese legal provision applies to all exclusive rights, meaning that such uses are permitted in Portugal.

Portugal has virtually transposed the literal wording of the InfoSoc "prototype"[11] into national law, meaning that the Portuguese exception covers exactly the same works as the EU exception, i.e. works permanently located in public places.

Some national legislators have opted to include an exhaustive list of works in their legal provisions that can be used under the pertinent freedom of panorama exceptions. The Portuguese legislator adopted the open-ended formula used in the InfoSoc, referring to works in general and giving two examples of publicly placed works (architecture and sculptures). These examples are merely illustrative, and do not mean to restrict the scope of the exception to three-dimensional works. In fact, several national copyright laws specifically refer to different types of two-dimensional works, thereby supporting the position that the InfoSoc provision covers all categories of works.

It also seems uncontentious that the EU provision covers public interiors. Some national provisions clarify that public spaces include public interiors. The Portuguese lawmaker did not feel the need to make that clarification, as the wording chosen to translate "public spaces" clearly includes public interiors. Needless to say, the CJUE can, at any time, consider the concept of "public place" found in the InfoSoc Directive an "autonomous concept of Union law" and provide for a different binding interpretation of this concept.

In sum, Portugal has rendered the most flexible implementation of the InfoSoc freedom of panorama exception and that is why this national model was selected to serve as the best example of a freedom of panorama exception in the EU.

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9 The Portuguese legislator does not use the term "freedom of panorama".

10 See Janetzki and Weitzmann (2014) and Popova (2014). These reports were both commissioned by Wikimedia Deutschland.

11 The optional exceptions embedded in the InfoSoc "constitute prototypes for national law making rather than precisely circumscribed exceptions with no inherent flexibility" (Hugenholtz and Senftleben, 2011: 14). The way to achieve the most flexible implementation of such exceptions is by means of "literal copies" of such prototypes (Hugenholtz and Senftleben, 2011: 17).

1. TEXT OF THE COPYRIGHT EXCEPTION OR LIMITATION

All provisions mentioned herein are from the Portuguese Code of Authors' Rights and Neighbouring Rights (*Código do Direito de Autor e dos Direitos Conexos*) ("Portuguese Code") introduced by the Decree-Law no. 63/85 of 14 March 1985 (as last amended by Law no. 49/2015 of 5 June 2015).

An official and updated original version of the Code is available at www.pgdlisboa.pt[12]. There are no official translations into English available.

1.1. Main legal provision

The freedom of panorama exception or limitation[13] was introduced by Law no. 50/2004 of 24 August 2004[14], which implemented the InfoSoc Directive. The wording used in the national legal provision is nearly the same as the wording used in article 5, paragraph 3, point h) of the InfoSoc Directive[15].

The freedom of panorama exception is foreseen in article 75.º, paragraph 2, point q) of Chapter II (On Free Uses) of Title II (On Uses of the Work) of the Portuguese Code. This provision (as well as the remaining provisions in this title) only regulates the uses of works protected by "*direito de autor*" (authors' rights), i.e. literary and artistic works:

Artigo 75.º
Âmbito

(...)

2. São lícitas, sem o consentimento do autor, as seguintes utilizações da obra:

(...)

q. A utilização de obras, como, por exemplo, obras de arquitectura ou escultura, feitas para serem mantidas permanentemente em locais públicos;

(...)

3. É também lícita a distribuição dos exemplares licitamente reproduzidos, na medida justificada pelo objectivo do acto de reprodução.

12 http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=484&tabela=leis&ficha=1&pagina=1&

13 Portuguese law applies the term "utilização livre" ("free use"). No reference is made to the terms "exceptions" or "limitations". These terms refer to different legal concepts: "exception" is generally understood as a derogation from a rule; "limitation" often refers to legal provisions that exclude certain subject matters from the protection of copyright. In Portuguese legal literature we find different scholars rejecting the term "exception" in favour of the term "limitation" (e.g. Ascensão, 2003: 89-90; Vieira, 2009: 443-444; Vicente, 2011: 258-260). In joined cases C-457/11 to C-460/11 *VG Wort*, 27 June 2013, the Court of Justice of the European Union (CJEU) held that "the exclusive right may, depending on the circumstances, be either, as an exception, totally excluded, or merely limited". In this study, the terms "exception" and "limitation" will be used interchangeably, for purposes of simplicity.

14 Available at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=503&tabela=leis&ficha=1&pagina=1&so_miolo=

15 Portugal has transposed into national law almost all the optional exceptions listed in the InfoSoc Directive (Gonçalves, 2006: 252). The only exception that was left aside was the parody exception – parody is considered to be secured by freedom of speech (Pereira, 2008: 866-860) and by the rule that protects parodies as new original works (Associação Portuguesa de Propriedade Intelectual, 2004). About half of the optional exceptions were implemented into Portuguese law by literally copying the text of the InfoSoc Directive.

Article 75.º
Scope

(...)

2. The following uses of the work are legal, without the author's consent:

(...)

q. the use of works, such as, for instance, works of architecture or sculpture, made to be located permanently in public places;

(...)

3. The distribution of the legally reproduced copies, to the extent justified by the purpose of the act of reproduction, is also legal.

1.2. Other relevant legal provisions

The conditions applicable to the freedom of panorama exception are foreseen in article 75.º, paragraph 4 (which lays down the so-called three-step test), and in article 76.º, paragraph 1, point a) (which refers to the right of attribution):

Artigo 75.º
Âmbito

(...)

4. Os modos de exercício das utilizações previstas nos números anteriores não devem atingir a exploração normal da obra, nem causar prejuízo injustificado dos interesses legítimos do autor.

(...)

Article 75.º
Scope

(...)

4. The ways of exercising the uses foreseen in the preceding paragraphs shall not be contrary to the normal exploitation of the work, nor cause an unjustified prejudice to the legitimate interests of the author.

(...)

Artigo 76.º
Requisitos

1. A utilização livre a que se refere o artigo anterior deve ser acompanhada:

a) Da indicação, sempre que possível, do nome do autor e do editor, do título da obra e demais circunstâncias que os identifiquem;

(...)

Article 76.º
Conditions

> The free uses mentioned in the preceding article shall be accompanied of:
>
> a) the indication, wherever possible, of the name of the author and of the editor, the title of the work and other circumstances that identify them;
>
> (...)

The Portuguese Code envisages the right to translate or otherwise transform a work that is used under any exception or limitation to authors' rights (including without limitation the freedom of panorama limitation) in article 71.º:

Artigo 71º
Faculdade Legal de Tradução

> A faculdade legal de utilização de uma obra sem prévio consentimento do autor implica a faculdade de a traduzir ou transformar por qualquer modo, na medida necessária para essa utilização.

Article 71.º
Statutory Right of Translation

> The statutory right to use a work without the author's previous consent includes the statutory right to translate or otherwise transform, to the extent necessary to such use.

A definition of the term "*lugar público*" ("public place") is provided for in article 149.º, paragraph 3 of Section VI (On Broadcasting and other processes aimed at reproducing signals, sounds and images) of Chapter III (On Uses in special) of Title II (On Uses of the Work) of the Portuguese Copyright:

Artigo 149.º
Autorização

> (...)
>
> 3. Entende-se por lugar público todo aquele a que seja oferecido o acesso, implícita ou explicitamente, mediante remuneração ou sem ela, ainda que com reserva declarada do direito de admissão.

Article 149.º
Permission

> (...)
>
> 3. A public place is understood as a place to which access is offered, explicitly or implicitly, for remuneration or without it, even if the right of admission is reserved.

Free uses of performances, phonograms, films and broadcasts are regulated in Title III (On Neighbouring Rights) of the Portuguese Code. The freedom of panorama exception to authors' rights is applicable *mutatis mutandis* to "*direitos conexos*" (neighbouring rights), according to article 189.º:

Artigo 189.º
Utilizações Livres

1. A protecção concedida neste título não abrange:

(...)

f) Os demais casos em que a utilização da obra é lícita sem o consentimento do autor.

(...)

3. As limitações e excepções que recaem sobre o direito de autor são aplicáveis aos direitos conexos, em tudo o que for compatível com a natureza destes direitos.

Article 189.º
Free Uses

1. The protection granted in this title does not include:

(...)

f) The other situations where the use of a work, without the author's consent, is legal.
(...)

3. The limitations and exceptions that are applicable to authors' rights are applicable to neighbouring rights, in so far as this is compatible with the nature of these rights.

2. ANALYSIS OF THE SCOPE OF THE EXCEPTION OR LIMITATION

As mentioned above, the Portuguese legislator decided to implement the optional exception or limitation foreseen in article 5(3)(h) of the InfoSoc Directive using nearly the same wording as the text of the Directive. Although the text of the Directive employs a number of openly formulated concepts, which can give national courts some flexibility, one should be aware that these concepts may also be considered "autonomous concepts of Union law"[16]. So far, the CJEU has not pronounced any decisions on freedom of panorama, but at any time the CJEU may be asked to interpret this legal provision and, subsequently, impose a uniform interpretation of its notions.

There are no known decisions by the Portuguese courts on this matter. There is also no legal literature on the topic. Nevertheless, some of the concepts contained in the provision are used in other legal provisions of the Portuguese Code and have been widely discussed by national scholars. A systemic analysis of the Portuguese Code can, therefore, help us interpret the freedom of panorama limitation.

16 In Case C-510/10 TV2 *Danmark*, 26 April 2012, and also in Case C-201/13 *Deckyman*, 3 September 2014, the CJEU considered certain expressions contained in different optional exceptions to be autonomous concepts of Union law. In the *Deckyman* decision, the CJEU went even further, by defining the specific conditions that a parody must fulfil.

2.1. Acts

The Portuguese exception covers all acts of use, including without limitation, reproduction, communication to the public, making available to the public, distribution and alteration or transformation of protected works.

Article 5(3)(h) and article 5(5) of the InfoSoc Directive allow member states to introduce into their national copyright laws an exception or limitation to the rights provided for in articles 2 (reproduction right), 3 (right of communicating to the public and right of making available to the public) and 4 (distribution right) of the Directive. The Portuguese law is not, however, restricted to such rights.

The Portuguese Code – as is the standard in the *droit d'auteur* systems – gives the owners of authors' rights a broad exclusive right with examples in the law. The term "*utilização*" ("*use*"), which can be found throughout the Code[17], refers to such broad economic right. Various legal provisions stipulate that the author generally has the exclusive right to use, including all the specific exclusive rights. When referring to a specific right, and not to the general one, the legislator never applies the word "*utilização*" ("*use*").

In the context of exceptions and limitations, the legislative technique is no different: when the national legislator wants to exempt only certain acts of use, it expressly says so. Actually, there are only a few exceptions and limitations in the Portuguese law that are applicable to all acts of use and that, thus, apply the term "*utilização*" ("*use*"). In sum, there are absolutely no doubts that the freedom of panorama exception covers all exclusive rights.

Article 71.º, which is applicable to all exceptions and limitations listed in the Code, further reinforces that the right to use a work without the author's previous consent includes the right to translate or otherwise transform, to the extent necessary to such use.

Article 75.º(3), which is also applicable to all exceptions and limitations listed in the Code, clarifies that all copies of a protected work made under an exception can be legally distributed.

2.2. Object

The Portuguese limitation applies to all works made to be permanently located in public places. This covers works protected by authors' rights, as well as subject matter protected by neighbouring rights, since the legal provision dealing with the latter says that all exceptions to authors' rights are applicable *mutatis mutandis* to neighbouring rights.

The exception is applicable to all categories of works. The legal provision refers to publicly-placed works, and gives two examples of such works: works of architecture and sculpture. Although the examples provided for in the law are three-dimensional works, there is no reason to exclude two-dimensional works from the scope of the provision, such as graffiti, murals, literary works, etc. Indeed, the wording used in the legal provision – "*obras*" ("*works*") – makes it clear that there is no limitation on the categories of works that can be used under this exception. Following the continental law tradition, the

17 Namely in articles 9.º (Authors' rights content), 40.º (Exploitation of economic rights) and 68.º (Forms of use) of Chapter I (On Protected Works) of Title I (On Protected Works and Authors' Rights) of the Portuguese Code.

Portuguese law provides for an open-ended definition of protected works, with examples in the law, which are purely illustrative[18]. The term "*obras*" ("*works*"), thus, refers to all categories of works.

The fact that the norm illustrates the types of works that can be covered by the exception cannot alone be construed as a limitation of such works. If the legislator had intended to limit the scope of application of the exception in that way, it would have used a different wording, such as "three-dimensional works" or something similar. Moreover, by saying "*tais como*" ("*such as*") and adding "*por exemplo*" ("*for instance*"), the national legislator reinforces the idea that architecture and sculpture are merely examples of publicly-placed works. The only criterion is, thus, as we see it, whether those works are permanently located in a public place or not.

The freedom of panorama norm does not specify what can be considered to be a public place, but the meaning can be inferred from other legal provisions in the Portuguese Code. Actually, a similar term – "*lugar público*"[19] ("*public place*") – is used in the context of theatrical performance[20] and broadcasting[21]. In broadcasting, there is a definition of the term "*lugar público*" ("*public place*"). Although the definition is contained in a provision dealing with a specific right of authors, Portuguese scholars share the conviction that this constitutes a general definition of public place and may therefore be applied in other contexts[22].

According to the aforementioned legal definition, a public place is a place that is publicly accessible, even if access to the public is implicit and/or an entrance fee is charged and/or the right of admission is reserved. This clearly includes public interiors. But even if this definition were not applicable in the context of freedom of panorama, there would be no doubt that this exception covers public interiors. Indeed, if it had intended to confine the freedom of panorama to the outdoors, the lawmaker would have certainly used the wording "*via pública*" ("*public highway*") or something similar. The term "*locais públicos*" ("*public places*") in Portuguese is commonly used to refer to all sorts of places accessible to the public, and not only streets, squares and other open public places.

Finally, the Portuguese law does not offer any guidance as to what it means by a work made to be permanently located in a public place. It seems clear to us that this entails an element of intentionality: the provision says that the works must be "*made to be located permanently in public places*" ("*feitas para serem mantidas permanentemente em locais públicos*"). This means that is irrelevant whether the work is, in fact, permanently placed in a public place or not for the entire duration of its existence. What is relevant is the intention of the author when making the work, or at least when placing the work in such place. If he or she intended to leave the work in a public place for the lifetime of the work or at least for an indefinite period of time, then one should consider this work to be a permanent, publicly-placed work.

18 See article 1.º (Definition), article 2.º (Original works) and article 3.º (Works deemed to be original), all from Chapter I (On Protected Works) of Title I (On Protected Works and Authors' Rights) of the Portuguese Code.

19 The terms "*local*" and "*lugar*" are synonyms.

20 See article 108.º of the Portuguese Code.

21 See article 149.º, no. 3 of the Portuguese Code.

22 Ascensão, 1992: 279; Rebello, 2002: 168

In what is known as the *Wrapped Reichstag* decision[23], the German Federal Supreme Court of Justice held that the relevant criterion is, indeed, the original intention, but as perceived by an "objective observer". Based on this, the Court considered that the national freedom of panorama exception could not be applicable to photographic reproductions of a temporary art installation. Although it could be argued that the work ceased to exist at the time of dismantling the installation (indeed, the work had only been created for the purpose of the exhibition and was destroyed afterwards), the Court ruled that the temporary nature of the installation clearly demonstrated that no permanent presentation was intended. Again, there is no case law in Portugal on the subject, so we do not know if the Portuguese courts would favour such a restrictive interpretation of the word "permanent".

2.3. Purposes

The Portuguese Code does not limit the purposes covered by the freedom of panorama limitation. While in other provisions the legislator explicitly delimits the purposes of the uses made under a certain exception, the same does not happen with the freedom of panorama provision. As we will see below in sub-section 3.6, the application of the three-step test may obviously limit the purposes of the uses, but the wording of the provision itself does not exclude *a priori* any purposes (including without limitation any commercial purposes).

2.4. Beneficiaries

There is no legal limitation as to the potential beneficiaries of the freedom of panorama exception. Any individual and any entity, regardless of its legal nature, can benefit from the exception.

2.5. Remuneration

No remuneration is due for uses made under the freedom of panorama limitation.

2.6. Other conditions

(a) The three-step test

All uses made under an exception or limitation – including without limitation the freedom of panorama – are subject to the three-step test, which the Portuguese legislator has partially incorporated into national law[24].

Only the second ("no conflict with normal exploitation") and third ("no unreasonable prejudice to legitimate interests") steps of the test have been implemented into the Portuguese Code. The first step ("certain special cases") has not been incorporated – most probably because it was deemed unnecessary. In fact, in one of the legal opinions regard-

23 BGH, I ZR 102/99 (KG) – Verhüllter Reichstag, 24 January 2002.

24 See article 75.º paragraph 4 of the Portuguese Code.

ing the national implementation of the InfoSoc Directive, it was argued that the closed list of cases covered by the national legal provision could be regarded as "certain special cases"[25].

The implementation of the three-step test into law has been criticized by some Portuguese scholars on the grounds that the three-step test should not be directed to courts (Vieira, 2009: 456-458)[26]. Others, however, perceive its ability to give courts some flexibility when determining the scope of application of a given exception or limitation[27].

There are only a few cases dealing with exceptions or limitations within Portuguese case law, and of those we only know one that makes a reference to the test to assess whether a specific use is lawful or not[28]. Therefore, it is not possible to evaluate the impact of the implementation of the test into national law. Nevertheless, it is worth mentioning that, in a couple of cases, national courts have stated that authors' rights also serve public interests and are, thus, limited rights[29].

Internationally, positions on the interpretation of the three-step test vary, but the idea that the test can be used as a balancing tool, and does not need to be perceived as a restrictive control mechanism, has been gaining ground in recent years. The European Court of Human Rights held in the Ashby Donald decision[30] that derogations to the freedom of expression principle by copyright law need to be prescribed by law when they are absolutely necessary. The CJEU, for its part, ruled in the *Painer* decision that the exception embedded in article 5(3)(d) of the InfoSoc Directive must allow for a fair balance between the interests of the right holders, on one hand, and the right to freedom of expression of the users of the work, on the other hand[31]. These decisions seem to convey the idea that the correct application of the three-step test must not overlook the interests of the general public, particularly if these public interests are connected with fundamental rights[32].

In sum, in order to assess if an individual use made under the freedom of panorama limitation is lawful, one must ascertain if such use is in conflict with the normal exploitation of the work and unreasonably prejudices the legitimate interests of the right holder. Since freedom of panorama is justified by freedom of expression and public interest considerations, one may expect that, when applying the test to specific freedom of panorama uses, national courts will balance the interests of authors and rights holders with public interest considerations.

25 See Associação Portuguesa de Propriedade Intelectual (2004).

26 Alberto Vieira even suggests that it is not possible in practice to apply the three-step test to individual uses, as the impact of a certain exception or limitation on the commercial exploitation of a work or on the interests of a right holder can only be determined if all uses made under such exception or limitation are taken into account. (Vieira, 2009: 456-458).

27 Pereira, 2008: 863

28 See Ac. TRC 30 March 2011.

29 See Ac. TRC 30 March 2011 and Ac. TRP 6 December 2006.

30 Ashby Donald and others v France, appl. No. 36769/08, 10 January 2013.

31 Case C-145/10 Painer, 1 December 2011.

32 See Geiger, Hilty, Griffiths and Suthersanen (2010).

(b) Attribution

Users must indicate, wherever possible, the name of the author and editor, the title of the publicly placed work and other circumstances that identify them[33].

3. ANALYSIS OF THE IMPACT OF THE EXCEPTION OR LIMITATION

There are no studies on the social or economic impact of the freedom of panorama limitation in Portugal.

4. EXAMPLES OF USE

In 2008, the **Lisbon Municipality** started a project called GAU – *Galeria de Arte Urbana* (GAU – Urban Art Gallery) displaying graffiti, street art and other urban artworks located in public spaces all over Lisbon to the public. The project includes:

- semestral free-to-read publications on street-art, made available online at Issuu[34];
- a Facebook page where images of urban art works by the Lisbon Municipality and fans are regularly posted[35];
- a Youtube channel[36] and a Google+ page[37], where videos featuring urban art events and works are frequently uploaded;
- a Google Art Project page that exhibits high-resolution images of urban artworks[38].

On 20 July 2016, the journal ***Expresso*** released an interactive map of street art in Portugal[39], containing more than 600 photographs of graffiti and other forms of street art located in Portugal.

The Portuguese tourist board, **Turismo de Portugal, I.P.**, runs an official website for Portugal as a tourist destination, visitportugal.com, which contains images of copyrighted works located in public places in Portugal, e.g.:

- pictures of buildings, tiles and temporary art installations uploaded by users[40];
- several publications with recommendations on what to do in the different regions and cities of Portugal, with images of buildings and artworks, e.g. a publication on street art in Lisbon[41].

33 See article 76.º paragraph 1, point a) of the Portuguese Code.

34 https://issuu.com/galeriadearteurbana

35 https://www.facebook.com/galeriadearteurbana

36 https://www.youtube.com/channel/UCKC6CMfyLkE3IW4_FtRCcnQ

37 https://plus.google.com/+GAUGaleriadeArteUrbanalx/videos

38 https://www.google.com/culturalinstitute/collection/galeria-de-arte-urbana

39 http://expresso.sapo.pt/sociedade/2016-07-20-Nao-existe-nada-do-genero-em-Portugal-mapa-interativo-da-street-art-nacional

40 https://www.visitportugal.com/pt-pt/recordar-e-partilhar/imagens

41 https://www.visitportugal.com/en/destinos/lisboa-regiao/244385

The Portuguese **Calouste Gulbenkian Foundation Art Library**[42] has posted nearly 18,000 pictures on Flickr, including pictures of publicly-placed works that are still protected by copyright, such as:

- Untitled (1956) by Rogério Ribeiro, a mural on the interior of Alto dos Moínhos School, Lisbon, photographed by Ana Lopes de Almeida[43];
- Untitled (1959) by Rogério Ribeiro, a mural on the interior of Avenida Metro Station, Lisbon, photographed by Ana Lopes de Almeida[44];
- "O Mar" (1960) by Maria Keil, a mural on the façades of a building located at Infanto Santo Avenue, Lisbon, photographed by Ana Lopes de Almeida[45];
- Untitled (1982?) by João Abel Manta, a mural located at Calouste Gulbenkian Avenue, Lisbon, photographed by Ana Lopes de Almeida[46].

Several Portuguese artists have reported to us that when they capture images of publicly placed works (e.g. architecture, sculptures, graffiti, etc.) in their own artistic works (e.g. photographs, films, etc.), they do not ask the authors of the featured works for permission before releasing their own works, because they understand that such uses are legal. For instance, several works of **Mónica de Miranda**[47] – a Portuguese artist whose work is based on themes of urban archaeology and personal geographies – rely partially or totally on the freedom of panorama provision, e.g.:

- "Hotel Globo" (2015) is a photography work[48] and a video work[49] depicting a modernist architectural work (including its interiors) located in Luanda, Angola. The works were exhibited in MNAC – Chiado Contemporary Art Museum, Lisbon, Portugal. A book from the homonymous exhibition, containing said-photographs, was released and sold during the exhibition.
- "Underconstruction" (2009) is an art project by Mónica de Mirada, curated by Paul Goodwin, which comprises different artworks, including panoramic photographs of neighbourhoods located in the suburbs of Lisbon, photographs of buildings located in those neighbourhoods, and the video work "Military Road" (2009)[50], which presents a panoramic video journey across a road in Lisbon, Portugal. The works were exhibited in Pavilhão 28, Lisbon, Portugal. A book from the homonymous exhibition, containing said-photographs, was released and sold during the exhibition.

42 http://gulbenkian.pt/biblioteca-arte/en/

43 https://www.flickr.com/photos/biblarte/25100318391/

44 https://www.flickr.com/photos/biblarte/24566743493/

45 https://www.flickr.com/photos/biblarte/24428504969/

46 https://www.flickr.com/photos/biblarte/24167999793/

47 http://www.monicademiranda.org

48 http://www.monicademiranda.org/hotel-globo/

49 http://www.monicademiranda.org/hotel-globovideo/

50 http://www.monicademiranda.org/military-road/

- "Tuning" (2007), "Tuning Lisboa" (2008), and "Tuning" (2010)[51] are video installations that consist of panoramic video journeys across different cities, including Lisbon, Portugal. "Tuning Lisboa" was exhibited in Plataforma Revólver, Lisbon, Portugal.
- "Panorama" (2009, ongoing)[52] is a series of panoramic photographs taken in different locations, including Lisbon, Portugal.

Several **Wikipedia** pages about famous Portuguese artists display pictures of some of those artists' works that are located in public places, e.g.:

- **Joana de Vasconcelos** Portuguese page contains a picture of the art installation "Néctar" (2006)[53], which is placed in front of the main entrance of The Berardo Collection Museum, in Lisbon;
- **Alexandre Farto a.k.a. Vhils** Portuguese page[54] contains several pictures of his street art, including a picture of a wall carving located at Calouste Gulbenkian Avenue, in Lisbon, alongside a mural by João Abel Manta[55];
- **José de Guimarães** Portuguese page[56] contains a picture of the sculpture "Lisbon"[57] that is located in 25 de Abril square, in Lisbon.

51 http://www.monicademiranda.org/tuning/

52 http://www.monicademiranda.org/panorama/

53 https://pt.wikipedia.org/wiki/Joana_Vasconcelos#/media/File:Nectar_de_Joana_Vasconcelos.jpg

54 https://pt.wikipedia.org/wiki/Vhils

55 https://pt.wikipedia.org/wiki/Vhils#/media/File:Diorama_-_4_(8126256825).jpg

56 https://pt.wikipedia.org/wiki/José_de_Guimarães

57 https://pt.wikipedia.org/wiki/José_de_Guimarães#/media/File:Praça_25_de_Abril.jpg

PARODY IN FRANCE

Alexandra Giannopoulou

Parody is a term whose roots can be traced to ancient Greece. Etymologically, parody is derived from the Greek word "π(parodia)" whose meaning evolved over time not only to include works of mockery but also the simple quotation of an older work to a more modern one.

France's treatment of parody, pastiche and caricature as an exception to copyright was used as a model in the InfoSoc Directive.

Only a few countries have implemented the parody exception provided for in the InfoSoc Directive. That does not mean, however, that parodies are not exempted in countries that have not transposed the EU parody exception. Parodic uses of copyrighted works are normally justified by freedom of expression, and case law in different EU countries shows that national courts may resort to freedom of expression and freedom of the arts in the absence of an explicit parody exception. Some countries, such as Germany, permit parodies on the basis that adaptations are permitted under certain conditions. Others exempt parodies if they constitute a new original work – that was the case of the Netherlands prior to the transposition of the InfoSoc Directive.

The problem with these approaches is that if the parody work does not meet the conditions to be considered a free adaptation or a new work, it will infringe on the exclusive rights of the author, including the right of reproduction. In the EU member states that have implemented the EU parody exception in their national laws in full, this issue does not exist as the exception applies to all the rights harmonized under the InfoSoc Directive, including the reproduction right. Thus, parodies constituting relevant reproductions of protected works may also be exempted.

Since the implementation of a parody exception into its national law, in 1957, France has always exempted parodies that involve an act of reproduction of a copyrighted work. Moreover, France has a long tradition of parody, with plenty of examples of commercial and non-commercial parodic uses of copyrighted works found in national case law. Finally, the key criteria developed by French courts for assessing whether a given parody work that builds upon a copyright protected work is permitted or not seems to be aligned to the recent EUCJ decision on the EU parody exception. That is the reason why this national model was selected to serve as one of the best examples of a parody exception in Europe.

1. TEXT OF THE COPYRIGHT EXCEPTION OR LIMITATION

All provisions mentioned herein are from the French Code of Intellectual Property (*Code de propriété intellectuelle*) created by the law of 1 July 1992 (as last amended on 25 April 2016), available at legifrance.gouv.fr[58]. No official translations into English are available.

1.1. Main legal provision

Article L 122-5[59] of the French Intellectual Property Code recognises an exception for uses of a work protected by authors' rights (*droit d'auteur*) in parody, pastiche or caricature:

Article L.122-5

> Lorsque l'œuvre a été divulguée, l'auteur ne peut interdire:
>
> (…)
>
> (4°) La parodie, le pastiche et la caricature, compte tenu des lois du genre;
>
> (…).

Article L.122-5

> When the work has been disclosed, the author may not prohibit:
>
> (…)
>
> (4) parody, pastiche and caricature, taking into account the rules of the genre;
>
> (…)

Article L.122-5 of the code of intellectual property belongs to chapter II of the first part of the first book related to intellectual property. The chapter is entitled "Patrimonial rights (*droits patrimoniaux*)". The parody exception first appeared in article 41[60] of the French intellectual property law of 11 March 1957 and it was later codified in the Code of Intellectual Property by the law of 1 July 1992. The parody exception has remained unchanged since; its validity has been encouraged by the inclusion of a quasi-identical text in article 5.3.k of InfoSoc Directive.

1.2. Other relevant legal provisions

Article L 211-3[61] of the French Code of Intellectual Property recognises an exception for uses of a work protected by neighbouring rights (including performers' rights) in parody, pastiche or caricature:

58 https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414

59 https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006278917

60 https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000315384#LEGIARTI000006466389

61 https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006279028

Article L.211-3

Les bénéficiaires des droits ouverts au présent titre ne peuvent interdire:

(…)

(4°) La parodie, le pastiche et la caricature, compte tenu des lois du genre;

(…)

Article L.211-3

The beneficiaries of the rights available in the present title may not prohibit:

(…)

(4°) parody, pastiche and caricature, taking into account rules of the genre;

(…)

2. ANALYSIS OF THE SCOPE OF THE EXCEPTION OR LIMITATION

2.1. Acts

The law does not expressly specify which acts of use are exempted. The intention of the legislator was to facilitate the creation of parody works. The exception can thus cover all acts that are necessary in parody, pastiche and caricature, including without limitation reproduction, public performance, adaptation and transformation of the protected work.

The level of adaptation and transformation of work is irrelevant to the legislator and the author cannot *a priori* object to a specific use as long as the parody work is created with the specific intention to make people laugh by deriding the parodied works and as long as the two works are distinguishable in the eyes of the public (see sections 2.3. and 2.6. below).

Although the terms parody, pastiche and caricature do not appear in the Berne Convention, they are used in the InfoSoc Directive. Inspired by the French text, the InfoSoc Directive describes the same three acts as exempted from the exclusive rights of the author.

Once a parody work is created, the legislator does not expressly limit the uses allowed for parody work. So, all uses can be considered as exempted. Thus, a parody work can be published, performed, made available online or otherwise used without infringing the rights to the parodied work.

2.2. Object

All protected works are covered by the exception. The legislator does not limit the type of works that can be used under the parody exception. More specifically, the chosen wording of the relevant article (*oeuvres divulguées*) shows that the intention of the legislator was to include all types of works that have been disclosed (by publication or otherwise) to the public.

French case law has also included trademark parody in the realm of exempted uses. Parody has been thus recognised not only for uses of pre-existing works protected by the *droit d'auteur* but also for uses of trademarks with the goal of parody.

The law itself does not impose any limits on the portion of the work that can be used for the parody work. The extent to which a protected work can be used will vary according to the needs of the parodist considering the specific purpose of the parody, and always taking into account the rules of genre (see section 2.6 below). It is thus safe to assume that it is possible to make a parody of an entire work as long as there is no risk of the public confusing the parody and the work forming the object of the parody.

Courts have also clarified that the parody exception can be used to defend acts of parody where the parodied work is already humorous or where the parodied work is already a parody of another[62].

2.3. Purposes

The legislator has not provided a definition for the terms parody, pastiche and caricature. According to some legal scholars, the three uses are distinguished because each one relates to a different corresponding genre. As such, musical works could be used to characterise parody, literary works for pastiche and graphic works for caricature[63]. At the same time, courts have ruled on the distinct differences between parody and pastiche. According to the *Cour de cassation*, parody permits the immediate identification of the parodied work while the goal of pastiche is to make fun of a character through the caricatured work[64]. This distinction has been recently qualified as unconvincing and irrelevant[65]. The generic term used for all exempted uses is parody.

The characterisation of parody requires two conditions: first, an element regarding the intention of the use and second, a material element.

The parody exception may only be invoked if a humorous intention is established, which implies a subversion of the work parodied. Admittedly, the margin of appreciation by the courts is narrow. According to the *Tribunal de Grande Instance de Paris*, "parody implies the intention of having fun without hurting (the original work)"[66]. Parodists may find themselves having trouble convincing the court of the satiric effect sought.

Uses with goals differing from humorous intent are not covered by the exception. For example, advertising parodies are not exempted uses and are still dependent on prior authorisation from the author of the parodied work because their goal is not to provoke laughter or to criticize but to promote a product or a service. The *Tribunal de Grande Instance de Paris* ruled that if an ad borrows from the original work with an intention not to provoke laughter but to divert it '"for commercial purposes, to promote the agency"[67],

62 *Tribunal de Grande Instance de Paris*, 3e ch., 18 March 2005

63 Desbois, 1978, n°254; Durrande, 1995, p.133

64 1re Civ., 12 January 1988

65 Vivant and Bruguière, 2015

66 "La parodie suppose l'intention d'amuser sans nuire." 3e ch., 13 February 2001

67 3rd Ch., 13 February 2001

the prior authorisation of the work's author is necessary and the use is not exempted by the parody exception.

The material element refers to the idea that creating a parody work implies borrowing elements from the parodied work or adapting it in a way that still reveals the link between the two works. However, the parody work should be distinctive enough in order to avoid competition with the parodied work. Also, in case of a parody, authors of the parody works are not limited to non-commercial uses only. Case law has clarified that commercial use of a work is not incompatible with the qualification of that work being a parody[68]. As long as the exempted use is found to be a parody, the authors of the parody work are free to benefit from the work commercially.

The *Cour de cassation* has ruled multiple times in favour of parody uses of trademarks as long as the disputed use is not motivated by the intention to harm the trademark. For example, in a case involving the critical use of the brand Esso by Greenpeace France the judges ruled that the disputed use of the trademark with the purpose of criticism is not incriminating[69]. This ruling was confirmed by the *Cour de cassation*, which found a "proportional expression of critique" to the brand[70]. However, in a similar case involving a company specialising in nuclear waste treatment called Areva, the court found the modification of its logo denigrating to the "activities and services" of the company[71]. It is worth mentioning that in the second case the court rejected the defamation claims of Areva and did not find an abusive exercise of freedom of expression by Greenpeace.

At the European level, the CJEU[72] recently defined the conditions for the application of the parody exception. The court considers the latter "an autonomous concept". According to the decision, there are two conditions to qualify for the parody exception. First, the parody must "evoke an existing work, while being noticeably different from it" and second, the work must "constitute an expression of humour or mockery".

2.4. Beneficiaries

Due to the nature of the exception, anyone can benefit from it as long as the conditions of the exception are respected. This means that the exception is not only applicable for uses made by individual artists, but also for those made by organisations or companies.

2.5. Remuneration

The exempted use does not require any form of remuneration to the rights holders of the parodied work.

68 *Cour d'appel de Paris*, 4e ch., 13 October 2006

69 *Cour d'appel de Paris*, 14e ch., 26 February 2003

70 Com., 8 April 2008

71 *Cour de cassation*, 1e ch., 8 April 2008

72 C-201/13, *Deckmyn et a. c/ Vandersteen*, 3 September 2014

2.6. Other conditions

The French exception has a limitation that restricts its applicability in cases in which the debated use collides with other rights related to the author of the original work. The condition is described in abstract terms in the second half of the article L. 122-5, (4°) (see section 2.1. above).

In practice, case law has shown two types of limits to the parody exception. First, use is not exempted if it violates the author's moral right of respect of the original work. For example, a French court recently ruled against the application of the parody exception because it qualified the use as "hate parody (...) violating the author's moral rights"[73]. Another case pointed out that the goal of parody is not to "degrade" the interpretation of an artist[74]. Similarly, a French court found that the moral rights of a musician were infringed when a comedian published on TV some excerpts of one of his sound recordings with an audio commentary that was ruled as denigrating[75]. Second, the exempted use is balanced with the personality rights of the author. The goal is to develop a balance between the right to laugh and personality rights of the author chosen as the target, taking into account the French tradition of satire.

The *Cour de cassation* emphasizes that the parody exception constitutes a valid legal defence only when the author of the parody has made it clear to the audience that the presented work is not the parodied work or an extract thereof[76]. Similarly, it has been decided that the parody use of the trademark Citröen by a satirical show is an exempted use and cannot be punished as long as no "confusion between reality and satirical work" is created[77]. The exempted acts are not restricted to the genre of the parodied work[78]. The parody work can be a result of transformative acts resulting in a work of different genre. For example, a song can be a parody of a play or an image can be a parody of song lyrics.

The key factor is to avoid any confusion between the parody work and the work being parodied. In practice, the appreciation of that confusion is subject to subjective interpretation by courts[79]. This condition is considered necessary because even if the parody work implies borrowing from the original work, the first must also stand independently enough to avoid competition with the work parodied. It should also be clarified that the appreciation of that condition does not require the parody work to meet the originality threshold in order to be qualified as such.

As mentioned above, in the *Deckmyn* ruling, the CJEU described the limits of the parody exception as an autonomous concept of EU law. Although the InfoSoc Directive does not provide for any further conditions to the application of the parody exception, the court stated that the application of the parody exception is conditional to striking "a fair balance" between the authors' rights and users' freedom of expression rights on which the parody exception rests. The European judges note that when a parody sends a discrimi-

73 *Tribunal de Grande Instance de Paris*, 3e ch., 15 January 2015

74 *Cour de cassation*, 1e ch., 10 September 2014

75 *Cour d'appel de Paris*, 4e ch., 18 September 2002

76 *Cour de cassation*, 1re civ., 27 March 1990

77 *Assemblée Plenière* of the *Cour de cassation*, 12 July 2000

78 *Cour d'appel de Paris*, 2e ch., 18 February 2011

79 *Cour de cassation*, 1e ch., 10 September 2014

natory message, the application of the exception for parody must strike a fair balance between the competing interests of those concerned, including the legitimate interest of the rights' holder of the parodied work that their work is not associated with such a message. Finally, it was clarified that it is not necessary for the parody work to fulfil the originality condition and that the parodist is not obligated to credit the parodied work.

Following the CJEU ruling, French judges must comply with the interpretation given by the European courts to the autonomous notion of parody. However, existing case law has already shown that French judges adopt a position aligned to the arguments expressed by the European judges. Consequently, the European interpretation of the parody exception does not alter the application of the parody exception in France.

3. ANALYSIS OF THE IMPACT OF THE EXCEPTION OR LIMITATION

France is amongst the few countries in the European Union that have implemented a parody exception to copyright law. Modern empirical studies concerning the social and economic impact of the parody exception are mostly found in other countries considering implementing a parody exception into their laws. In 2013, the UK Intellectual Property Office commissioned an empirical study on the treatment of parodies in seven jurisdictions, including France[80]. The study has shown an overall positive impact of parodies, both economically and socially. For example, the study did not find any empirical evidence implying that parody causes economic harm from substitution to the parodied work. It has also shown that parody works improve creative incentives, especially online. For example, the amount of creative elements added by parodists varies from adding new lyrics, new video recording or even remixing. As a consequence of the highly creative work of parody, the study observed a small though significant number (6.5%) that displayed commercial production value.

4. EXAMPLES OF USE

The famous character of *Tintin* is very often involved in copyright infringement cases[81]. An interesting decision emerged from these cases when the parody exception was used as a defence and prevailed. The defendant is an author who described the adventures of the famous reporter *Tintin* but in the context of ironic jokes on current geopolitical events. The rights holders of the copyright to the Tintin series, the Moulinsard Foundation sued the publishers of the defendant's stories for copyright infringement. Both the *Tribunal de grande instance d'Evry*[82] and the *Cour d'appel de Paris*[83] accepted the defence of the parody exception regarding the disputed works. The lower court's decision accepted the parasitism claim that the parody work tried to benefit economically from the notoriety of the *Tintin* heroes. The decision was overturned by the *Cour d'appel* that reaffirmed the application of the parody exception. As the court pointed out, the parody exception is

80 See Mendis and Kretschmer, 2013.

81 See http://ipkitten.blogspot.pt/2013/11/the-affairs-of-tintin-in-court.html

82 8e ch., 9 July 2009

83 2e ch., 18 February 2011

applied when there is no risk of confusion between the parody and the original work. The notoriety of the main character is so great that it excludes the possibility of such confusion. Also, the clear differentiation in the stories created by the parody and the original work supported the claim of no possible confusion when distinguishing the two works.

The journal Charlie Hebdo has also on multiple occasions benefited from the parody exception in its publications. The satiric covers[84] have included adaptations of the comic series Asterix and Obelix as well as Batman and famous movies.

When it comes to related rights, the *droits voisins* of French intellectual property, a recent case recognised unequivocally that the appreciation of the parody criteria varies when it comes to parodies relating to copyrights and related rights. The *Cour de cassation*[85] accepted the parody exception in a case involving the reuse of a famous TV character called "Commissaire Maigret" in a comic book series. The court ruled that the creation of the fictional parody character called "Comissaire Cremer" (from the name of the actor interpreting the role of Maigret in the original series and the plaintiff in the case) meets the conditions of humorous purpose and absence of risk of confusion and can be thus qualified as a parody interpretation of the character. The qualification of the parody exception in this case showed the latitude of appreciation that the set criteria give to the courts with regards to the parody exception.

In conclusion, the French experience has shown that courts have proven to make well informed decisions when it comes to "balancing the rights of the authors of the parodied work and the freedom of expression" while also respecting the limits set by the "rules of the genre" as described by the European courts and affirmed by the copyright evaluation report (paragraph 48) by the rapporteur Julia Reda and adopted by the European Parliament in June 2015.

84 See https://scinfolex.com/2015/01/14/liberte-dexpressionla-caricature-est-aussi-une-exception-au-droit-dauteur/

85 1e civ., 10 September 2014

EDUCATION IN ESTONIA

Teresa Nobre and Alari Rammo

COMMUNIA has long argued that the best way to treat the public interest in education vis-à-vis the interests of authors and copyright owners is through the adoption of an exception or limitation to copyright for educational purposes that is flexible, neutral with regard to media type, format, and technology, and that covers all necessary uses by all sorts of users provided they are in accordance with fair practice[86].

The national exceptions and limitations dealing with uses of protected works for educational purposes in the EU form a patchwork of various solutions that are often incomplete when considering the needs of teachers, students and educational institutions[87]. The EU education exception, in its turn, is a "categorically worded prototype"[88]that does not restrict the beneficiaries, the types of activities or the categories of works covered by the exception. The only conditions are that the activity in question must be of a non-commercial nature and that the source must be indicated.

As far as we are aware, Estonia is the EU country that has come the closest to making a literal transposition of the InfoSoc provision, adopting a similar structure and using the same wording as in the EU exception. This has been done, however, without restricting the scope of application of the legal provision to certain exclusive rights. As a result of this national strategy, we now find in Estonia a relatively abstract norm allowing for a broad spectrum of uses – including transformative uses, such as translations and adaptations to local needs, provided that the three-step test criteria are met. That is the reason why this national model was selected as one of the best examples of an extensive education exception to copyright in the EU.

In order to select which EU member state offers the best education exception to copyright, we only compared specific exceptions provided for in the national laws for educational purposes[89].

86 See COMMUNIA, Policy Paper 11 (January 2016).

87 See Nobre, 2014.

88 Hugenholtz and Senftleben, 2011: 2.

89 There are different categories of exceptions and limitations that may be relevant for conducting certain educational activities. For instance, the exceptions for private use/copying are relevant in the context of personal education and research; library-related exceptions are also closely related to educational activities. Comparing individual exceptions is already a complex exercise, due to the use of abstract terms or unclear language and to the lack of national case law and legal literature. If we were to compare all the different categories of exceptions that are closely related to educational activities, we would probably not be able to isolate a copyright law that could be considered the best case from all these different angles. That does not mean, however, that we did not look into other exceptions. As we will see in the study of the Estonian education exception, Estonian copyright law has overlapping exceptions for educational purposes, and we had to delve deeper into different legal provisions to grasp those specific education exceptions better.

1. TEXT OF THE COPYRIGHT EXCEPTION OR LIMITATION

All the provisions mentioned here are from the Estonian Copyright Act (*Autoriõiguse seadus*) adopted on 11 November 1992 (as last amended on 10 April 2016), available at:

https://www.riigiteataja.ee/akt/101042016004

An official translation into English is available at:

https://www.riigiteataja.ee/en/eli/506042016003

1.1. Main legal provision

The current exception or limitation to copyright for educational purposes was introduced with the implementation of the InfoSoc Directive in 2004. The structure of the main legal provision and the wording used by the national legislator resembles the structure and wording of article 5, paragraph 3, point a) of the InfoSoc Directive.

§ 19 subsection 2 is the main legal provision allowing uses of works protected by authors' rights for educational purposes:

§ 19. Teose vaba kasutamine teaduslikel, hariduslikel, informatsioonilistel ja õigusemõistmise eesmärkidel

> Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime, kui see on teosel näidatud, teose nimetuse ning avaldamisallika kohustusliku äranäitamisega on lubatud:
>
> (...)
>
> 2) õiguspäraselt avaldatud teose kasutamine illustreeriva materjalina õppe- ja teaduslikel eesmärkidel motiveeritud mahus ja tingimusel, et selline kasutamine ei taotle ärilisi eesmärke;
>
> (...)

§ 19. Free use of works for scientific, educational, informational and judicial purposes

> The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication:
>
> (...)
>
> 2) the use of a lawfully published work for the purpose of illustration for teaching and scientific research to the extent justified by the purpose and on the condition that such use is not carried out for commercial purposes;
>
> (...)

1.2. Other relevant legal provisions

§ 19 subsection 3 further allows acts of reproduction in educational and research institutions:

§ 19. Teose vaba kasutamine teaduslikel, hariduslikel, informatsioonilistel ja õigusemõistmise eesmärkidel

Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime, kui see on teosel näidatud, teose nimetuse ning avaldamisallika kohustusliku äranäitamisega on lubatud:

(...)

3) õiguspäraselt avaldatud teose reprodutseerimine õppe- ja teaduslikel eesmärkidel motiveeritud mahus haridus- ja teadusasutustes, mille tegevus ei taotle ärilisi eesmärke;

(...)

§ 19. Free use of works for scientific, educational, informational and judicial purposes

The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication:

(...)

3) the reproduction of a lawfully published work for the purpose of teaching or scientific research to the extent justified by the purpose in educational and research institutions whose activities are not carried out for commercial purposes;

(...)

Reproductions for private study and research are foreseen in § 18:

§ 18. Teose vaba reprodutseerimine ja tõlkimine isikliku kasutamise eesmärkidel

(1) Autori nõusolekuta ja autoritasu maksmiseta on lubatud õiguspäraselt avaldatud teost füüsilisel isikul reprodutseerida ja tõlkida isikliku kasutamise eesmärkidel tingimusel, et selline tegevus ei taotle ärilisi eesmärke.

(2) Autori nõusolekuta ja autoritasu maksmiseta ei ole isikliku kasutamise eesmärkidel lubatud reprodutseerida:

1) arhitektuuri- ja maastikuarhitektuuriteoseid;

2) piiratud tiraažiga kujutava kunsti teoseid;

3) elektroonilisi andmebaase;

4) arvutiprogramme, välja arvatud käesoleva seaduse §-des 24 ja 25 ettenähtud juhtumid;

5) reprograafilisel viisil noote.

§ 18. Free reproduction and translation of works for purposes of personal use

(1) A lawfully published work may be reproduced and translated by a natural person for the purposes of personal use without the authorisation of its author and without payment of remuneration on the condition that such activities are not carried out for commercial purposes.

(2) The following shall not be reproduced for the purposes of personal use without the authorisation of the author and without payment of remuneration:

1) works of architecture and landscape architecture;

2) works of visual art of limited edition;

3) electronic databases;

4) computer programs, except the cases prescribed in §§ 24 and 25 of this Act;

5) notes in reprographic form.

The Estonian Copyright Act also embodies a wide quotation exception, under which works can be reproduced in the form of quotations:

§ 19. Teose vaba kasutamine teaduslikel, hariduslikel, informatsioonilistel ja õigusemõistmise eesmärkidel

Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime, kui see on teosel näidatud, teose nimetuse ning avaldamisallika kohustusliku äranäitamisega on lubatud:

1) õiguspäraselt avaldatud teose tsiteerimine ja refereerimine motiveeritud mahus, järgides refereeritava või tsiteeritava teose kui terviku mõtte õige edasiandmise kohustust;

(...)

§ 19. Free use of works for scientific, educational, informational and judicial purposes

The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication:

1) making summaries of and quotations from a work which has already been lawfully made available to the public, provided that its extent does not exceed that justified by the purpose and the idea of the work as a whole which is being summarised or quoted is conveyed correctly;

(...)

Estonian law also allows public performances of protected works in front of a limited school-related audience, under § 22:

§ 22. Teose vaba avalik esitamine

Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime või nimetuse, kui see on teosel näidatud, kohustusliku äranäitamisega on lubatud teose avalik esitamine õppeasutustes vahetus õppeprotsessis nende asutuste õpetava personali ja õpilaste poolt ning tingimusel, et kuulajaskonna või vaatajaskonna moodustavad õpetav personal ja õpilased või teised isikud (lapsevanemad, eestkostjad, hooldajad jne), kes on otseselt seotud õppeasutusega, kus teost avalikult esitatakse.

§ 22. Free public performance of works

The public performance of works in the direct teaching process in educational institutions by the teaching staff and students without the authorisation of the author and without payment of remuneration is permitted if mention is made of the name of the author or the title of the work used, if it appears thereon, on the condition that the audience consists of the teaching staff and students or other persons (parents, guardians, caregivers, etc.) who are directly connected with the educational institution where the work is performed in public.

The Estonian Copyright Act defines the term "published work" in § 9:

§ 9. Avaldatud teosed

(1) Teos loetakse avaldatuks, kui teos või teose mis tahes vormis reprodutseeritud koopiad on autori nõusolekul antud üldsusele kasutamiseks koguses, mis võimaldab üldsusel sellega tutvuda või seda omandada. Teose avaldamiseks loetakse muu hulgas teose trükis väljaandmist, teose eksemplaride panemist müügile, jaotamist, laenutamist, rentimist ja muul viisil tasuta või tasu eest kasutada andmist.

(2) Teos loetakse avaldatuks, kui see on salvestatud arvutisüsteemi, mis on üldsusele avatud.

(3) Teose avaldamiseks ei loeta draamateose ja muusikalise draamateose ning muusikateose esitamist, audiovisuaalse teose demonstreerimist, kirjandusteose avalikku esitamist, kirjandus- ja kunstiteose edastamist raadios ja televisioonis või teose edastamist kaabellevivõrgu kaudu, kunstiteose eksponeerimist ja arhitektuuriteose ehitamist, välja arvatud käesoleva paragrahvi 2. lõikes toodud juhul.

§ 9. Published works

(1) A work is deemed published if the work or copies of the work, whatever may be the means of manufacture of the copies, are placed, with the consent of the author, at the disposal of the public provided that the availability of such copies has been such as to enable the public to examine or obtain the work. Publication of a work includes also publication of the work in print, offering original copies of the work for sale, distribution, lending and rental of the work and placing the work at the disposal of the public in any other manner for a charge or free of charge.

(2) A work is deemed published if it is recorded in a computer system accessible to the public.

(3) The performance of a dramatic, dramatico-musical or a musical work, the presentation of audiovisual works, the public recitation of a literary work, the broadcasting or cable transmission of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication, except in the case specified in subsection (2) of this section.

The exceptions and limitations to copyright listed in § 19 subsections 2 and 3 and in § 22 are limited by the three-step test, through the following provision:

§ 17. Autori varaliste õiguste piiramine

Erandina käesoleva seaduse §-dest 13–15, kuid tingimusel, et see ei ole vastuolus teose tavapärase kasutamisega ega kahjusta põhjendamatult autori seaduslikke huve, on lubatud teose kasutamine autori nõusolekuta ja autoritasu maksmiseta ainult käesoleva seaduse §-des 18–25 otseselt ettenähtud juhtudel.

§ 17. Limitation to economic rights of authors

Notwithstanding §§ 13 – 15 of this Act, but provided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, it is permitted to use a work without the authorisation of its author and without payment of remuneration only in the cases directly prescribed in §§ 18 – 25 of this Act.

The Estonian Copyright Act offers an exception to related rights that is similar to §19 subsection 2. § 75 subsection 1 (2) sets forth the education exception to related rights of performers, phonogram producers, film producers, broadcasting entities and other right holders, subjecting it to the conditions of the three-step test:

§ 75. Autoriõigusega kaasnevate õiguste piiramine

(1) Teose esitaja, fonogrammitootja, televisiooni- ja raadioteenuse osutaja, filmi esmasalvestuse tootja, samuti isiku, kes pärast autoriõiguse kehtivuse tähtaja lõppemist esimesena õiguspäraselt avaldab või suunab üldsusele varem avaldamata teose, ja isiku, kes annab välja autoriõigusega mittekaitstava teose kirjanduskriitilise või teadusliku väljaande, loata ning tasu maksmiseta on lubatud teose esituse, fonogrammi, raadio- või telesaate ning nende salvestiste ja filmi kasutamine, sealhulgas reprodutseerimise teel:

(…)

2) illustreeriva materjalina hariduslikel või teaduslikel eesmärkidel nende eesmärkidega motiveeritud mahus ja tingimusel, et selline kasutamine ei taotle mis tahes ärilisi eesmärke ning tingimusel, et märgitakse ära allikas, kui see on võimalik;

(…)

(2) Käesolevas paragrahvis ettenähtud vaba kasutamine on lubatud vaid tingimusel, et see ei ole vastuolus tavapärase kasutamisega ega kahjusta põhjendamatult autoriõigusega kaasnevate õiguste omaja seaduslikke huve.

§ 75. Limitation of related rights

(1) Without the authorisation of a performer, producer of phonograms, broadcasting service provider, producer of the first fixation of a film and a person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully directs at the public a previously unpublished work or of a person who publishes a critical or scientific publication of a work unprotected by copyright, and without payment of remuneration, it is permitted to use the performance, phonogram, radio or television broadcast or recordings thereof, or the film, including by reproduction:

(…)

2) for the purpose of illustration for teaching or scientific research to the extent justified by the purpose and on condition that such use is not carried out for commercial purposes and on condition that the source is indicated, if possible;

(...)

(2) The free use prescribed in this subsection is permitted only on the condition that that this does not conflict with normal use and does not unreasonably harm the legitimate interests of holders of related rights.

The rule that uses made under the exceptions and limitations listed in §§ 18–25 and in §75 are not subject to remuneration has a few exceptions, with regards to the reproduction of audio-visual works and sound recordings of works for private studies and research, and others related to the reprographic reproduction of works:

§ 26. Audiovisuaalse teose ja teose helisalvestise kasutamine isiklikeks vajadusteks

(1) Autori nõusolekuta on lubatud reprodutseerida audiovisuaalset teost või teose helisalvestist kasutaja enda isiklikeks vajadusteks (teaduslikuks uurimistööks, õppetööks jms). Autoril, aga samuti teose esitajal ja fonogrammitootjal on õigus saada õiglast tasu teose või fonogrammi sellise kasutamise eest (§ 27).

(2) Käesoleva paragrahvi 1. lõige ei laiene juriidilistele isikutele.

§ 26. Private use of audiovisual works and sound recordings of works

(1) Audiovisual works or sound recordings of such works may be reproduced for the private use (scientific research, studies, etc.) of the user without the authorisation of the author. The author as well as the performer of the work and the producer of phonograms have the right to obtain equitable remuneration for such use of the work or phonogram (§ 27).

(2) Subsection (1) of this subsection does not apply to legal persons.

§ 27. Tasu audiovisuaalse teose ja teose helisalvestise kasutamise eest isiklikeks vajadusteks

(1) Käesoleva seaduse §-s 26 nimetatud tasu maksavad salvestusseadmete ja salvestuskandjate tootja, importija, müüja, isik, kes toob salvestusseadmeid ja -kandjaid Euroopa Ühenduse tolliterritooriumilt EÜ Nõukogu määruse 2913/92/EMÜ ühenduse tolliseadustiku kehtestamine (EÜT L 302, 19.10.1992, lk 1–50) mõistes Eestisse.

(...)

§ 27. Remuneration for private use of audiovisual works and sound recordings of works

(1) The manufacturers, importers, sellers of storage media and recording devices, persons who bring storage media and recording devices from the Community customs territory into Estonia within the meaning of the Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 302, 19.10.1992, pp. 1–50) shall pay the remuneration specified in § 26 of this Act.

(...)

§ 27¹. Tasu teose reprograafilise reprodutseerimise eest

(1) Autoril ja kirjastajal on õigus saada õiglast tasu teose reprograafilise reprodutseerimise eest käesoleva seaduse § 18 1. lõikes ja § 19 punktis 3 nimetatud juhtudel.

(...)

§ 27¹. Remuneration for reprographic reproduction works

(1) Authors and publishers are entitled to receive equitable remuneration for the reprographic reproduction of their works in the cases specified in subsection 18 (1) and clause 19 (3) of this Act.

(...)

2. ANALYSIS OF THE SCOPE OF THE EXCEPTION OR LIMITATION

The Estonian Copyright Act, developed in the early 1990s, is based on the 1971 Paris Act of the Berne Convention and on the Tunis Model Law on Copyright for Developing Countries (1976)[90]. The World Intellectual Property Organization, in turn, recommended the Estonian Act to serve as a model to Central and Eastern European countries and former Soviet republics[91].

Estonian copyright law was influenced by two different legal systems: continental European and Soviet legal systems[92]. This means that, while Estonian copyright law is based on the person of the author, culture is also seen as part of its political and philosophical foundations[93]. That cultural dimension justifies its broad exceptions and limitations to copyright[94].

The Estonian Copyright Act has embraced education-related exceptions since its adoption in 1992. The main provision, inspired by the Tunis Model Law, covers all acts of use of protected works in publications, radio and television broadcasts, and sound and video recordings, for educational purposes. In addition to this main provision, there was another legal provision in the original version of the Estonian Act that dealt with reprographic reproductions of periodicals. After the transposition of the InfoSoc Directive, the structure has remained the same: one provision dealing with all acts of use, and another dealing with certain reproductions. These two provisions did not overlap in a problematic way in the earlier version; however, their confluence does pose some interpretation problems in the current version.

The structure of the main legal provision and the wording used by the national legislator resembles the structure and wording of article 5, paragraph 3, point a) of the InfoSoc Directive. The Directive has a number of openly formulated concepts (such as "illustration for teaching" and "non-commercial purpose"), which may give national courts some flexibility, but the CJEU may impose a uniform interpretation if it is asked to interpret the EU education exception[95].

90 See Pisuke 1994: 167.

91 See Pisuke 2004: 48.

92 See Pisuke 2004: 45-48.

93 Ibid.

94 See Hoffman and Kelli, 2013.

95 So far there are no decisions of the CJEU on the EU education exception. Nevertheless, in Case C-510/10

2.1. Acts

Both § 19 subsection 2 and § 75 subsection 1 (2) apply the verb *use*, which is the wording that – as is commonplace in *droit d'auteur* systems – is applied throughout the Estonian Copyright Act to refer to the broad economic right of the author. § 13 [Economic Rights], for instance, starts by stating that the author "*shall enjoy the exclusive right to* ***use*** *the author's work in any manner, to authorise or prohibit the* ***use*** *of the work in a similar manner by other persons and to receive income from such* ***use*** *of the author's work*" (emphasis added). The Estonian legislator then provides a non-exhaustive list of rights included in such broad right to use.

Regarding subject matter protected by related rights, such as phonograms, films and broadcasts, it is, therefore, clear that § 75 subsection 1 (2) – the only provision dealing with exceptions and limitations for educational purposes – covers all acts of use, including without limitation, reproduction, communication to the public, making available to the public, distribution and translation and other alterations of the work.

Regarding works protected by authors' rights, the general exception for teaching purposes foreseen in § 19 subsection 2 is accompanied by two other legal provisions: § 19 subsection 3 and § 22, which cover, respectively, reproductions and public performances for educational purposes. We need therefore to analyse how these overlapping exceptions work together, to understand fully the acts of use covered by the general teaching exception embodied in § 19 subsection 2.

Section § 22 allows for public performances of works protected by authors' rights *in the direct teaching process* in educational institutions by teaching staff and students. Under Estonian law, public performance is a right that is distinct from the rights of communication to the public and making available to the public and also from the right of public display. The Copyright Act clarifies that a work is deemed to be publicly performed if it is recited, played, danced, acted or otherwise performed directly or indirectly by means of any technical device or process (see § 10 subsection 3).

The idea underlying § 22 seems to be to allow students and teachers to perform works in public for a limited audience consisting of teaching staff and students or other persons (including parents) who have direct ties to the educational institution. That is, in school events and celebrations, which usually go beyond mere instruction – although, in Estonia, the law specifically requires the performance to be directly connected with the teaching process.

In any event, the fact that the Estonian Copyright Act contains a provision dealing with public performances of works in educational institutions does not necessarily mean that § 19 (2) does not cover performances in public for educational purposes. The notion of public encompasses any "unspecified set of persons outside the family and immediate circle of acquaintances" (see § 10 subsection 2 (1)). Teachers and students normally form a circle of persons larger than the circle of family and friends. This means that any live performances (reciting a poem, playing music, etc.) that take place in a classroom or in any other educational setting are deemed to be performed in public. Provided that such

TV2 Danmark, 26 April 2012, and also in Case C-201/13 *Deckyman*, 3 September 2014, the CJEU considered that certain expressions that were contained in different optional exceptions foreseen in the InfoSoc Directive to be "autonomous concepts of Union law".

public performances are made for educational purposes, there is no reason to exclude them from the scope of § 19 subsection 2. In other words, public performances can occur outside the premises of a formal educational institution under § 19 subsection 2. But if the performance goes beyond the instruction itself, i.e. if it is made in front of an audience that is not involved in the teaching or learning processes, then it can only be made in a formal educational institution and under the conditions described in § 22.

Let us now turn to § 19 subsection 3. This subsection relates to the reproduction of works *for the purpose of teaching or scientific research* in educational and research institutions. § 13 subsection 1 (1) defines reproduction as *making copies in any form or by any means*.

There is no case law on the scope of application of § 19 subsections 2 and 3 and legal scholars have very different views on the issue: a) most Estonian scholars seem to consider that § 19 subsection 3 only covers reprographic reproductions[96], and that reproductions made by other means are still covered by subsection 2; b) a minority believes that reproductions by all means are excluded from the scope of application of subsection 2[97]; c) others think that subsection 2 covers reproduction by any means but only for "illustrative" purposes since the legislator refers to "illustration for teaching" therein, while in subsection 3 it says "for teaching"[98].

As we will see, when analysing the purposes covered by the Estonian education exception (subsection 2.3 below), the term *illustration for teaching* is used in art. 10(2) of the Berne Convention, and the general understanding is that such term is in no way different from the concept of '*educational purposes*'. So, we will rule out that last interpretation.

To understand the interpretations mentioned in a) and b) above, we need some historical background. Before the transposition of the InfoSoc Directive, § 19 subsection 3 only dealt with reprographic reproductions of newspapers, journals and other periodicals and extracts from published works[99]. At that time, it was clear that any reproduction by reprographic means of such kinds of works could only be made under that subsection "in educational and research institutions the activities of which do not serve direct or indirect commercial gains". Reproductions of works by other means would still be covered by subsection 2, and were thus not limited to the beneficiaries listed in subsection 3.

After the transposition of the InfoSoc Directive, the Estonian legislator sustained two legal provisions: the general teaching exception in § 19 subsection 2, now broader in terms of the scope of unauthorised uses, but more limited in terms of the purposes of the use[100]; and an exception dealing with reproductions made in not-for-profit educational institutions in § 19 subsection 3. However, it is no longer contended that those reproductions are only those made by reprographic means, leading us to consider that reproductions by any

96 See Kelli and others, 2013: 70.

97 See Jents, 2012: 503.

98 A few Estonian scholars told us that, at first reading, that was their interpretation.

99 Until 2004, §19(3) provided for the right "to reproduce articles published in newspapers, journals or other periodicals and extracts from published works by reprographic means exclusively for purposes of teaching and scientific research in educational and research institutions whose activities do not serve direct or indirect commercial gain".

100 Prior to the transposition of the EU exception into national law, §19 (2) permitted "to use a lawfully published work or parts thereof by way of illustration in publications, radio and television broadcasts, sound and video recordings for teaching purposes to the extent justified by the purposes".

and all means could only be made under § 19 subsection 3, and no longer under subsection 2. Yet, the fact that § 27[1] makes a reference to the reprographic reproductions made under § 19 subsection 3 have led (or so we think) several Estonian scholars to consider that the intention of the national lawmaker was to cover only reprographic reproductions in § 19 subsection 3.

The truth is that it is strange, to say the least, that the Estonian lawmaker has opted to retain its tradition of exempting a broad spectrum of unauthorised uses for educational purposes in one subsection, just to reduce significantly the scope of application of such exception in the following subsection. After all, the reproduction right is the most important of all the economic rights, and the legislator could have simply excluded it, by listing all the other remaining rights in subsection 2.

As we have said before, courts have not been asked to interpret these provisions. In practice, non-reprographic reproductions of protected works have been carried out by teachers and students, and not only in formal educational institutions. This practice has not been repealed so far, which could suggest that right holders also accept the understanding that reproductions can be made under § 19 subsection 2. On the other hand, it is has been suggested for future law-making to merge § 19 subsection 2 and 3 to cover all uses in one single subsection that is not limited to educational institutions only[101].

In any case, we should draw the following conclusion: in the best case scenario, except for reprographic reproductions, reproductions are not limited to any specific persons or entities; in the worst case scenario, reproductions by any and all means can only be made by not-for-profit educational institutions. It is worth mentioning that, in any case, students and individuals in general can always make reproductions, by any means, of protected works and related-subject matter in the course of their private studies and research, under the private copying exception embodied in § 18. Moreover, works can also be reproduced for educational purposes under the quotation exception (see § 19 subsection 1).

2.2. Object

All legal provisions of the Estonian Copyright Act dealing with permitted uses of copyrighted works for educational projects apply to all categories of works. Indeed, the term used – *works* – means any original results in the literary, artistic or scientific domain that are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation (§ 4 subsection 2). A non-exhaustive list of works in which copyright subsists is provided in the act (§ 4 subsection 3). § 5 lists the results of intellectual activities to which the Copyright Act does not apply.

The legal provision dealing with permitted uses of subject matter protected by related rights specified the subject matter that is covered: performance, phonogram, radio and television broadcasts and recordings thereof. All types of subject matter protected by related rights are listed there.

§ 19 subsections 2 and 3 and § 75 subsection 1(2) further state, respectively, that the copyrighted works and related subject matter must have been lawfully published, in order to

101 Kelli and others, 2013: 67.

be used under those provisions. Moreover, those works and related subject matter can only be used to the extent justified by the purpose of illustration for teaching or scientific research.

A work is deemed *lawfully published* if it has been placed, with the consent of the author, at the disposal of the public in any manner, including via Internet (see § 9 subsections 1, 2). The performance of a dramatic, dramatic-musical or musical work, the presentation of audio visual works, the public recitation of a literary work, the broadcasting or cable transmission of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture do not constitute publication, unless the same are recorded in a computer system accessible to the public (see § 9 subsection 3).

The extent justified by the purpose has neither been defined in the law nor tried in court in Estonia. It seems reasonable to consider that a copyrighted work or related subject matter could be used in its entirety if it is justified by the permitted purpose. Indeed, several international scholars have expressed the understanding that, although the wording "by way of illustration" purports to establish a limitation on the scope of use of the work, it does not bar the use of the entire work if such use is needed for the relevant educational purposes[102].

2.3. Purposes

Save for § 22, all other provisions of the Estonian Copyright Act dealing with educational uses of protected works and related subject matter, state that the permitted uses are limited to the *purpose of illustration for teaching or scientific research* and on the condition that such uses or activities are not carried out for commercial purposes.

The terms *purpose of illustration for teaching* and *commercial purposes* have not been defined in any way in Estonian law. Nevertheless, the term *illustration for teaching* is used in art. 10(2) of the Berne Convention, and has been extensively analysed by international experts. The general understanding is that such term "cannot further restrict the original scope of '*educational purposes*'"[103] previously stated in art. 10(2) of the Berne Convention. The words "by way of illustration" were introduced in the Berne Convention in an attempt to respond to concerns about the extent of use (though, as we saw, uses of whole works are still permitted), and not to narrow the scope of "educational purposes"[104].

Estonian scholars concur with international copyright experts who say that "[b]oth illustration for teaching and scientific research must be the sole purpose of the use for which the exclusive rights may be restricted. Accordingly, when the reproduction or other use also fulfils an additional purpose, the exception or limitation must not apply"[105].

§ 22 is applicable to public performances in educational institutions directly connected to the *teaching process* made by teaching staff and students in front of a limited audience consisting of teaching staff and students or other persons (including parents) who have

102 See Ricketson, 2003: 14; Ricketson and Ginsburg, 2006: § 13.45; Xalabarder, 2009: 16.

103 Xalabarder, 2009: 15.

104 Ibid.

105 Walter, MM. and S. von Lewinski, European Copyright Law: A Commentary (Oxford University Press 2010), p. 1044 cited by Kelli, Tavast and Pisuke, 2012: 46.

direct ties to the educational institution. Although this legal provision does not further restrict the purposes of the use, the application of the three-step test may lead to further limitations. In fact, there is pending litigation in the Estonian courts that may lead to the application of the three-step test to assess whether a concert held in the municipal secondary school called Miina Härma Gümnaasium is a use permitted under § 22 or not. The Estonian Authors Society is suing the school for not paying any remuneration in relation to concerts to which tickets were sold. In its preceding non-binding opinion, the Estonian Ministry of Justice agreed with the applicant's view that such use of works could conflict with normal exploitation and may have a commercial purpose, therefore not passing the three-step test and falling outside the scope of the exception provided for in § 22[106].

2.4. Beneficiaries

Neither § 19 subsection 2 nor § 75 subsection 1 (2) imposes any limitations as to the persons or entities that can benefit from those exceptions or limitations. Therefore, it is clear that anyone can benefit from the general education exceptions.

Both § 19 subsection 3 and § 22 have limitations as to the beneficiaries of the uses foreseen therein: the first only benefits educational and research institutions *whose activities are not carried out for commercial purposes*, whereas the second benefits educational institutions.

The legislator has not provided any definition for *educational or research institution* in the Copyright Act. Estonian law allows private companies and civil society organizations to manage all types of educational institutions as long as their curriculum is registered with the Ministry of Education and Science. The point has been raised that the list of educational institutions defined in other acts could discriminate non-formal educational institutions (e.g. entities offering lifelong-education): "This list does not include, for example, classical museums or libraries or any other non-profit organizations that do not directly identify themselves as a hobby school, and are registered as such."[107] Moreover, the Ministry of Justice has suggested that the exception should under no circumstances include business organizations even if they run an educational institution since commercial purposes are prohibited.[108]

The definition of *educational institution* has been tried in court once in Estonia. In the case *Estonian Performers Association vs. Sports Club Reval-Sport*[109] the applicant requested remuneration for the use of phonograms during training sessions. The court of first instance rejected the defendant's main argument, according to which the right to benefit from the exception derives merely from possessing training licences. In the court's view, the fact that the defendant has registered curriculum for recreational sports was insufficient to consider that their use had an educational purpose. The defendant's status of a charitable non-profit organization without any commercial purposes was also not found to be rele-

106 Response to the request for explanation, Ministry of Justice, 08.05.2015.

107 Kelli and others, 2013: 71.

108 Explanatory letter of the draft of Copyright Act, version 21.07.2014 (legislative proceedings postponed) https://ajaveeb.just.ee/intellektuaalneomand/wp-content/uploads/2014/08/Autori%C3%B5iguse-seletuskiri-21-7-2014.pdf

109 Tallinn District Court 2-12-4019 04.06.2013

vant to the case. On 2013 the Tallinn District Court confirmed the judgement pronounced by the court of first instance.

The Estonian Performers Association is currently involved in a similar on-going dispute with a dance school. To clarify the parties' rights, the Ministry of Justice commissioned Professor Aleksei Kelli to produce a brief legal analysis of the relevant legal provisions. Recognising the lack of clarity present in the legal definitions, Prof. Kelli found that the current law imposes a restrictive interpretation of the term, thus limiting the concept of *educational institution* to general education institutions only[110].

2.5. Remuneration

According to § 17, the prevailing rule is that authors are not entitled to any remuneration for the educational uses of copyrighted works in the cases prescribed in §§ 18–25. The same rule applies to uses of subject matter protected by related rights made under § 75.

However, there are exceptions to this rule. Authors and publishers are entitled to receive equitable remuneration in the following situations: for the reprographic reproduction of their works made for educational and research purposes under § 19 subsection 3 (see § 27^1); for the reprographic reproduction of their works made for private studies and research under § 18 subsection 1 (see § 27^1); and for the reproduction of audio visual works and sound recordings of works for private studies and research (see § 26).

The amount of remuneration payable to the author under § 27^1 is calculated on the basis of the state budget funds allocated for remuneration in the financial year and the number of works registered in the database of the national bibliography. The amount of remuneration payable to the publisher is calculated on the basis of the state budget funds allocated for remuneration in the financial year and the number of works with an ISBN and ISSN number published during the ten calendar years preceding submission of the application. The remuneration is paid by the legal person who represents the authors or the authors' organisations and determined by the minister responsible for the area.

2.6. Other conditions

All the exceptions and limitations for educational purposes analysed here are subject to the three-step test. The Estonian Copyright Act has partially embodied the test in § 17 and § 75 subsection 2. These legal provisions state that permitted use cannot conflict with normal exploitation of the work (step two) or unreasonably prejudice the legitimate interests of the author (step three).

The inclusion of the three-step test in the national law transformed its function: its role now is "to guarantee that the author's rights are not violated even in cases in which the use of a copyright-protected work is formally covered by an exception, where it still has an extremely adverse impact on the author's legitimate interests and there are no justifying circumstances"[111].

110 See Kelli, 2015.

111 Kelli, Tavast and Pisuke, 2012: 45.

Although the three-step test raises a number of questions about the limits of permitted uses, answers have not yet been found to these questions. Case law is almost non-existent in the Estonian judicial arena.

Nevertheless, it is worth mentioning that renowned Estonian scholars have praised the position taken by a World Trade Organization panel on the second step, according to which an exception or limitation rises to the level of a conflict with the normal exploitation of a work "if uses that in principle are covered by that right but exempted under the exception or limitation enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains"[112]. Following that approach, those authors – who analysed whether the use of written and oral texts in the development of databases for scientific purposes would conflict with the normal exploitation of such works or not – concluded that there was no such conflict because right holders extracted the value of such works mostly through selling the texts as literary works or offering of advertising on a website or blog[113].

3. ANALYSIS OF THE IMPACT OF THE EXCEPTION OR LIMITATION

There are no studies on the social or economic impact of the education-related exceptions and limitations in Estonia.

4. EXAMPLES OF USE

Copyrighted works are widely copied, adapted, performed, compiled, distributed and made available not only in closed e-learning environments (protected by passwords) but also publicly. On the adverse side, the awareness of copyright regulation among teaching staff is poor in Estonia.[114]

The Estonian quasi-governmental Information Technology Foundation for Education (HITSA) keeps a digital repository[115] of thousands of teaching materials from more than 60 vocational schools and universities. As a leading promoter of digital skills, HITSA strongly suggests sharing new original materials under Creative Commons licences. Nevertheless, not all materials are licensed with CC, and probably most materials contain copyrighted works.

For example, course material for a marketing and sales course included in that repository from the Estonian Business School includes diagrams, pictures and scanned extracts from a book with all of them probably being copyrighted works, even though not all instances of use mention the author[116]. Nevertheless, there are also materials in which authors and the legal provisions are properly mentioned, e.g. 'Advanced study of International Intellectual Property Law'[117].

112 Kelli, Tavast and Pisuke, 2012: 46.

113 Ibid.

114 According to interviews with teaching staff members in secondary schools and universities.

115 www.e-ope.ee/en/repository

116 http://www.e-ope.ee/repositoorium?@=8ni8#euni_repository_10890

117 http://www.e-ope.ee/en/repository/search?@=7hv8#euni_repository_10897

The other main online sources are Koolielu (School Life, also managed by HITSA)[118] and e-koolikott (e-school bag)[119]. These sites use mixed methods of linking to other online sources and uploading original or compiled materials directly.

Educational institutions also upload materials onto their own public websites. Laagna Secondary School has uploaded tens of files[120], including, for example, a slideshow with many artworks.[121]

One history teacher has created her own separate weblog[122] to share a wide variety of materials with students, some of which are students' own works. The latter practice is not rare since it is easier for a teacher to manage his/her own website than it is to edit a school's official homepage.

118 www.koolielu.ee

119 https://e-koolikott.ee

120 http://laagna.tln.edu.ee/?page_id=876

121 http://www.laagna.tln.edu.ee/wp-content/uploads/2014/02/POPKUNST.pptx

122 http://laagna.tln.edu.ee/?page_id=1337

QUOTATIONS IN FINLAND

Teresa Nobre

Based on research by Maria Elisabeth Rehbinder

All EU member states exempt quotations; however, several national legal provisions embracing the quotation exception contain some sort of a drawback[123]. The main problems found in national legal provisions are as follows: the legal provision specifies the categories of works that can be quoted, this way excluding quotations of other protected works (namely quotations of audio visual works); the legal provision is construed in a way that precludes the quotation of entire works (e.g. entire images or entire short works); the legal provision specifies the context in which a quotation can be made; the wording used is not neutral with regards to technology, excluding quotations made in digital formats and/or online quotations; the legal provision lists the acts of exploitation (e.g. reproduction) that can be made under the exception, this way excluding other important acts, such as translations or communication to the public (an act that is essential to make quotations in online contexts); the exception requires or implies that the quoted work is included or somehow used in a new work, not exempting quotations that do not result in a new work (e.g. "mere" quotations done in the context of face-to-face teaching activities).

In Finland, the quotation exception is presented with regards to a "relatively open rule of reason"[124]. The Finnish quotation exception is a norm that is flexible and open to acts of exploitation and technological means, kinds of works and extent of quotation, beneficiaries, and purposes. In this member state, the quotation exception is not subject to strict conditions: the only requirement is that the quotation is made "in accordance with proper usage". This reference to ethical standards is in line with art. 5(3)(d) of the InfoSoc Directive, which refers to "fair practice".

The main difference between the Finnish quotation exception and the EU quotation exception is that the latter lists two examples of the context in which quotations can be made: criticism or review[125]. Uses for purposes that are comparable to criticism or review are, nevertheless, also understood as falling within the scope of the EU quotation exception[126].

The fact that the Finnish exception is embodied in a relatively abstract norm that permits uses that "exceed the traditional connotation of 'citation'"[127] (including uses of a transformative nature) makes this exception the best example of a quotation exception in Europe. All the Nordic countries[128] have identically worded quotation exceptions. We have selected Finland for this study solely for practical purposes.

123 See Nobre, 2014, for a comparative analysis of the quotation exception in Europe.

124 Hugenholtz and Senftleben, 2011: 15. The authors make a reference here to Ole-Andreas Rognstad, Opphavsrett, Universitetsforlaget 2009, p. 241-252.

125 "(Q)uotations for purposes of criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose".

126 Hugenholtz and Senftleben, 2011: 15. See also Xalabarder, 2009: 108.

127 Hugenholtz and Senftleben, 2011: 15.

128 Including those that are part of the EU: Denmark, Finland and Sweden.

1. TEXT OF THE COPYRIGHT EXCEPTION OR LIMITATION

Except as otherwise noted, all provisions mentioned herein are from the Finnish Copyright Act (Tekijänoikeuslaki), approved by 8.7.1961/404, amendments up to (155/2016) included.

The original version of the Act can be found here:

http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#L2P22

An English version of the Act (with amendments up to 608/2015) can be found here:

http://www.finlex.fi/en/laki/kaannokset/1961/en19610404

1.1. Main legal provision

The quotation exception was first introduced in Finland in 1961, and the wording has remained unchanged ever since. Its wording resembles art. 10(1) of the Berne Convention[129].

The current version of the Finnish Copyright Act regulates the quotation exception in Section 22. This legal provision only refers to works protected by copyright; nevertheless, it is applicable to subject matter protected by related rights, by means of references to this legal provision throughout the Act[130]:

22 § (24.3.1995/446[131])
Sitaatti (22.5.2015/607[132])

> Julkistetusta teoksesta on lupa hyvän tavan mukaisesti ottaa lainauksia tarkoituksen edellyttämässä laajuudessa.

22 §
Quotation

> A work made public may be quoted, in accordance with proper usage to the extent necessary for the purpose.

129 "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form or press release".

130 Section 22 is applicable to performances of literary or artistic works or folklore [see Section 45 (7)], sound recordings [Section 46(3)], video recordings [Section 46a(3)], sound recordings and music recordings containing images [Section 47], radio and television transmissions and any other programme-carrying signal [Section 48(4)], a substantial part of a catalogue, a table, a program or any other product in which a large number of information items are compiled or of a database the obtaining, verification or presentation of which has required substantial investment [Section 49(3)], and to photographic pictures [Section 49a(3)].

131 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a24.3.1995-446

132 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a22.5.2015-607

1.2. Other relevant legal provisions

Although Section 22 does not limit the categories of works that can be quoted without permission of the author, being virtually applicable to all types of works, without restriction, it is worth mentioning that Section 25 covers reproductions of works of art in pictorial form:

25 § (24.3.1995/446[133])
Julkistetun tai luovutetun taideteoksen käyttäminen (22.5.2015/607[134])

Julkistetuista taideteoksista saa ottaa tekstiin liittyviä kuvia:

1) arvostelevaan tai tieteelliseen esitykseen; sekä

2) sanomalehteen tai aikakauskirjaan selostettaessa päiväntapahtumaa, edellyttäen ettei teosta ole valmistettu sanomalehdessä tai aikakauskirjassa toisinnettavaksi. (14.10.2005/821[135])

25 §
Use of a work of art that has been made public

(1) Works of art made public may be reproduced in pictorial form in material connection with the text:

1. in a critical or scientific presentation; and

2. in a newspaper or a periodical when reporting on a current event, provided that the work has not been created in order to be reproduced in a newspaper or a periodical.

Section 8 of the Finnish Copyright Act provides for a definition of a work "made public". This definition is also applicable in the context of subject matter protected by related rights[136]:

8 §
Julkistaminen ja julkaiseminen (22.5.2015/607[137])

Teos katsotaan julkistetuksi, kun se luvallisesti on saatettu yleisön saataviin.

Julkaistuksi teos katsotaan, kun sen kappaleita tekijän suostumuksella on saatettu kauppaan tai muutoin levitetty yleisön keskuuteen. (31.7.1974/648[138])

133 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a24.3.1995-446

134 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a22.5.2015-607

135 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a14.10.2005-821

136 Section 8 is applicable to performances of literary or artistic works or folklore [Section 45 (7)], sound recordings [Section 46(3)], video recordings [Section 46a(3)], radio and television transmissions and any other programme carrying signal [Section 48(4)], a substantial part of a catalogue, a table, a program or any other product in which a large number of information items are compiled or of a database the obtaining, verification or presentation of which has required substantial investment [Section 49(3)], and to photographic pictures [Section 49a(3)].

137 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a22.5.2015-607

138 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a31.7.1974-648

8 §

Made public and publishing

(1) A work shall be considered to have been made public when it has lawfully been made available to the public.

(2) A work shall be regarded as published when copies thereof have, with the consent of the author, been placed on sale or otherwise distributed to the public.

Unauthorized uses made under Section 22 and Section 25 are subject to the conditions specified in Section 11 of the Finnish Copyright Act. This section is also applicable to subject matter protected by related rights[139]:

11 § (14.10.2005/821[140])
Yleiset säännökset (22.5.2015/607[141])

Tämän luvun säännöksillä ei rajoiteta tekijälle 3 §:n mukaan kuuluvaa oikeutta laajemmin kuin 25 e §:stä johtuu.

Jos tämän luvun säännöksen nojalla teoksesta valmistetaan kappale tai teos saatetaan yleisön saataviin, tekijän nimi ja lähde on mainittava siinä laajuudessa ja sillä tavoin kuin hyvä tapa vaatii. Teosta ei saa tekijän suostumuksetta muuttaa enempää kuin sallittu käyttäminen edellyttää.

Tässä luvussa säädetyn tekijänoikeuden rajoituksen nojalla valmistetun teoksen kappaleen saa rajoituksen mukaisessa tarkoituksessa levittää yleisölle ja kappaletta käyttää julkiseen esittämiseen.

Mitä 3 momentissa säädetään, sovelletaan vastaavasti myös sopimuslisenssin nojalla tapahtuvaan käyttämiseen.

Tässä luvussa säädetyn tekijänoikeuden rajoituksen nojalla ei saa valmistaa kappaleita sellaisesta teoksen kappaleesta, joka on valmistettu tai saatettu yleisön saataviin 2 §:n vastaisesti tai jota suojaava tekninen toimenpide on 50 a §:n 1 momentin vastaisesti kierretty. Mitä tässä momentissa säädetään, ei kuitenkaan koske teosten käyttämistä 11 a, 16, 16 a–16 c tai 22 §:n tai 25 d §:n 2 tai 5 momentin nojalla.

11 §
General provisions

(1) The provisions of this Chapter[142] do not limit the rights conferred to the author by section 3 to a larger degree than as provided in section 25 e.

139 Section 11 is applicable to performances of literary or artistic works or folklore [Section 45 (7)] and photographic pictures [Section 49a(3)]. Section 11 (2-5) is applicable to sound recordings [Section 46(3)], video recordings [Section 46a(3)], radio and television transmissions and any other programme-carrying signal [Section 48(4)], and to a substantial part of a catalogue, a table, a program or any other product in which a large number of information items are compiled or of a database the obtaining, verification or presentation of which has required substantial investment [Section 49(3)].

140 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a14.10.2005-821

141 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a22.5.2015-607

142 Chapter 2 — Limitations on copyright and provisions concerning extended collective license (14.10.2005/821).

(2) If a work is reproduced or made available to the public under the provisions of this Chapter, the author's name and the source must be indicated to the extent and in a manner required by proper usage.

The work may not be altered without the author's consent more than necessitated by the permitted use.

(3) A copy of a work made by virtue of a limitation on copyright as provided in this Chapter may be, for the purpose determined in the limitation, distributed to the public and used in a public performance.

(4) The provisions of subsection 3 shall correspondingly apply to use by virtue of extended collective licence.

(5) A limitation on copyright as provided in this Chapter does not permit the reproduction of a copy of a work which has been made or made available to the public contrary to section 2 or whose technological measures have been circumvented in violation of section 50a(1). The provisions of this subsection shall not, however, pertain to the use of works under sections 11a, 16, 16a–16c or 22 or under section 25d(2) or (5).

Section 11 of the Finnish Copyright Act states that the moral rights of the author conferred by Section 3 cannot be limited by the legal provisions dealing with unauthorised uses:

3 §[143]
Moraaliset oikeudet (22.5.2015/607[144]**)**

Kun teoksesta valmistetaan kappale tai teos kokonaan tai osittain saatetaan yleisön saataviin, on tekijä ilmoitettava sillä tavoin kuin hyvä tapa vaatii.

Teosta älköön muutettako tekijän kirjallista tai taiteellista arvoa tahi omalaatuisuutta loukkaavalla tavalla, älköönkä sitä myöskään saatettako yleisön saataviin tekijää sanotuin tavoin loukkaavassa muodossa tai yhteydessä.

Oikeudesta, joka tekijällä on tämän pykälän mukaan, hän voi sitovasti luopua vain mikäli kysymyksessä on laadultaan ja laajuudeltaan rajoitettu teoksen käyttäminen.

3 §
Moral rights

(1) When copies of a work are made or when the work is made available to the public in whole or in part, the name of the author shall be stated in a manner required by proper usage.

(2) A work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation, or to his individuality; nor may it be made available to the public in such a form or context as to prejudice the author in the manner stated.

(3) The right conferred to the author by this section may be waived by him with binding effect only in regard of use limited in character and extent.

143 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a404-1961

144 http://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a22.5.2015-607

2. ANALYSIS OF THE SCOPE OF THE EXCEPTION OR LIMITATION

2.1. Acts

The legal provision is silent about the acts covered by the exception. This silence must be construed to include any acts of exploitation: reproduction, distribution, communication to the public and making available to the public, as well as translations and other adaptations[145].

The legal provision is technologically neutral, allowing quotations made in digital formats, as well as quotations made in online contexts. In a case dealing with quotations of music, the Finnish Copyright Council[146] noted that it does not matter whether the quotation is done using a wav, streaming, audio or mp3 format, as long as the general conditions set for the legitimate use of a quotation are met[147]. In another opinion, where the Council analysed the possibility of using quotations of video clips for educational purposes on a teaching website, this entity considered that online uses of quotations are covered by the exception[148].

2.2. Object

The Finnish Copyright Act allows quotations of all categories of copyrighted works, as well as of all types of subject matter protected by related rights (performances of literary or artistic works or folklore, sound and video recordings, sound and music recordings containing images, radio and television transmissions and other broadcasts, compilations, databases protected by *sui generis* rights, and photographic pictures[149]).

Only works or other subject matter that have been lawfully made available to the public can be the subject of quotation. Lawfully shall be deemed to refer to the fact that the work was made public with the author's or right holder's permission[150]. The means by which the work is made (publication or otherwise) are irrelevant.

Provided that the work has been made public, it is also irrelevant whether the quotations are made from a legal or illegal source (see 11§ 5 mom. of the Finnish Copyright Act). The

145 This is how art. 10(2) of the Berne Convention, which, similarly, does not specify the rights covered by the exception, is interpreted by Prof. Raquel Xalabarder (Xalabarder, 2009: 18).

146 The Finnish Government appoints a Copyright Council composed of representatives of the major right holders and users of protected works to assist the Ministry of Education and Culture in copyright matters and to issue opinions on the application of the Copyright Act. Anyone can request an opinion to the Copyright Council. The opinions are non-binding. See http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/index.html?lang=en

147 See Copyright Council Statement 2002:11 issued on 20.08.2002.

148 See Copyright Council Statement 2002:16 issued on 5.11.2002, in which the Council states that "*storing a copyright protected work somewhere on a web server is a copyrighted relevant operation, namely an act of reproduction, which is part of the author's exclusive right and requires his permission, unless that measure is permitted, for example, by the exception for quotation in the Copyright Act 22 §*" (translation by Maria Rehbinder).

149 Photographs that are not considered photographic works protected by copyright because they do not reach the originality required of works are protected by a right related to copyright, under which the photographer has the exclusive right to decide on the use of the photo, with or without modification, by reproducing and making it available to the public.

150 See Copyright Council Statement 2002:16 issued on 5.11.2002.

author's consent is only required for disclosing the work to the public for the first time; the copy of the work then used to make the quotation can be a copy made available without such consent.

The extent to which a work can be quoted is determined on a case-by-case basis, since there are no general rules on the length or the number of quotations[151]. The Finnish Copyright Council has noted that the permitted scope and use of quotations vary depending on the type of work in question and on the context of the use[152]. For instance, with regards to photographs, the opinion of the Council is that there are no obstacles to the quotation of entire photographs, but that in those cases the exception must be interpreted with restraint[153]. For cinematographic works, the length of the quotation is generally viewed by the Council to be a clip from a movie lasting a few seconds[154]. It should be noted, however, that the opinions of the Council are not binding. One should also keep in mind that reproductions of whole works of art in pictorial form can also be done in scientific or critical presentation according to section 25 § 1 mom. of the Copyright Act.

2.3. Purposes

The Finnish quotation right is not subject to any "context requirement". In other words, the Copyright Act does not specify or even exemplify the context within which quotations are legitimate. The InfoSoc Directive, on the contrary, prescribes that quotations can be made for purposes *such as* criticism or review. Uses for purposes that are comparable to criticism or review are, nonetheless, understood as falling within the scope of the EU quotation exception[155].

The only condition imposed by the Finnish Copyright Act is that quotations are made "in accordance with proper usage". Proper usage refers to general ethical standards and is somehow similar to the idea of 'fair practice" found in art. 10(1) of the Berne Convention and in art. 5(3)(d) of the InfoSoc Directive.

According to the Finnish Copyright Council, the "right to quote is intended primarily as a way to support intellectual creation, not as a way to take advantage of works or other protected items as materials to a new work or for the creation of multimedia components"[156].

It should be noted that the language of the Finish quotation exception does not require or imply that the quoted work must be used or incorporated in a subsequent "work". "Mere" quotations (e.g. in face-to-face teaching activities) that do not produce a new work are also covered by this legal provision. If the quoted work is incorporated in a new work, the relationship between the quotations and the final result is, according to the Finnish Copyright Council, essential to determine whether it is permissible to use the quotation

151 Ibid.

152 Ibid.

153 Ibid.

154 Ibid.

155 Hugenholtz and Senftleben, 2011: 15.

156 See Copyright Council Statement 2002:16 issued on 5.11.2002 (translation by Maria Rehbinder).

right[157]. For this entity, it is clear that a product consisting purely of quotations cannot be allowed under the quotation exception[158]. The Council has also held the opinion that quotations are not permitted if their aim is only to make the new work appear more interesting[159].

In a recent opinion of the Copyright Council regarding the use of quotations in a book, the Council found that the quotations were not in accordance with the law because they were not marked and because no credits were given to the author; the fact that the book was published and commercially distributed was not pointed out by this entity as being a problem[160]. It should be noted that commercial purposes are not expressly excluded in Section 22, which means that, provided that the commercial use is in accordance with proper usage, it should be permitted. Some Finnish scholars consider, however, that "in accordance with proper usage" should be interpreted as meaning that uses for advertising or other commercial purpose are not allowed[161].

2.4. Beneficiaries

Section 22 does not exclude any types of beneficiaries, meaning that any individual or entity can make unauthorised quotations under this exception.

2.5. Remuneration

Quotations are not subject to remuneration.

2.6. Other conditions

Users must indicate the author's name and the source to the extent and in a manner required by proper usage.

The work may not be altered without the author's consent more than necessitated by the permitted use. This means that translations and other transformative uses are permitted as long as they are needed in the context of the quotation and provided that they are in accordance with proper usage.

3. ANALYSIS OF THE IMPACT OF THE EXCEPTION OR LIMITATION

There are no studies on the social or economic impacts of the quotation exception in Finland.

157 Ibid.

158 Ibid.

159 Ibid.

160 See Copyright Council Statement 2015:13 issued on 1.12.2015.

161 Harenko, Niiranen and Tarkela, 2006: 175.

4. EXAMPLES OF USE

I. Opera that quotes large amounts of text without identifying the sources

Lapualaisooppera (1996)[162] is a notable new opera by Arvo Salo, consisting of a radical performance critical of contemporary society and expressing a political viewpoint. In this play, Arvo Salo made quotations of large amounts of the literary work "Kolme kuukautta Kosolassa" (1931) by Artturi Vuorimaa, without naming the source. Nevertheless, the Supreme Court of Finland judged the quotations legal[163].

II. E-learning materials that quote musical notes and music recordings

A university prepared e-learning materials with quotations of musical notes and fragments of music recordings with the aim to explain the differences between various musical works, artists and musical styles. The Finnish Copyright Council held the opinion that this use was legal[164].

III. Open educational resources that quote song lyrics

A high school teacher rendered learning materials analysing the life of the Finnish singer Juice Leskinen[165] as reflected by his work, and included quotations of his lyrics while analysing the same. These materials were published in the Internet as open educational resources[166] intended for high school use. The Finnish Copyright Council found that this use was permitted[167].

162 https://fi.wikipedia.org/wiki/Lapualaisooppera

163 See Supreme Court 1971 II 44, 11.05.1971.

164 See Copyright Council Statement 2002:11 issued on 20.08.2002.

165 https://en.wikipedia.org/wiki/Juice_Leskinen

166 http://materiaalit.internetix.fi/fi/opintojaksot/2uskonto/juice/sisalto

167 See Copyright Council Statement 1998:17 issued on 10.11.1998.

NOTES

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168 Available at http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/a67b13b71f10a3828025786c0049150c?OpenDocument

169 Available at http://www.dgsi.pt/jtrp.nsf/d1d5ce625d24df5380257583004ee7d7/e4f52e454586cc018025724200437e47?OpenDocument

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Tribunal de grande instance de Paris, 3e ch., 18 March 2005

Tribunal de grande instance d'Evry, 8e ch. 9 July 2009

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ABOUT THE INITIATIVE

Best Case Scenarios for Copyright is an initiative by COMMUNIA, presenting these best examples of copyright exceptions and limitations found in the national laws of European Union member states. We believe that, by harmonising copyright exceptions and limitations across Europe, using the best examples that are permitted under EU law as a model, the EU would reinforce users' rights in access to culture and education.

ABOUT THE LEADS OF THE INITIATIVE

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Alari Rammo has been working on communications management and policymaking with the Network of Estonian Nonprofit Organizations (NENO) since 2004. He has a degree in journalism from the University of Tartu, and has held positions at several newspapers and radio channels. In addition, he has held marketing jobs in the private sector and public relations posts at the Estonian Parliament. He obtained a master's degree in law from the Tallinn University of Technology in 2013.

Maria Elisabeth Rehbinder works presently as Legal Counsel IP for Aalto University and for the University of the Arts Helsinki. She has been responsible for translating the Creative Commons 4.0 licenses and CC0 waiver into Finnish, and for a project providing IP related open educational resources. She is a member of the Copyright Council of the Ministry of Education and a member of the Copyright Commission of the Ministry of Education and Culture in Finland. She studied art history and law at Helsinki University, graduating from the Faculty of Law in 1992. She has previously worked as a lawyer and general manager for a CISAC collecting society, the Visual Artists Copyright Society Kuvasto, and for Digikuvasto, a digital image company.

Culture, education and science require a "breathing space" within the copyright system. In this space, secured by exceptions and limitations, we learn, create art, appreciate culture and conduct research. It is also in this space that public institutions can fulfill their missions, to the benefit of the society. User rights are an essential part of a balanced copyright system, secured by a social contract between rights owners and users.

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