

*Fair DRM:
Can Digital Locks Be Persuaded To Respect Copyright Exceptions?
(first part: Which Exceptions?)*

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Abstract

DRM and its digital locks (the technological protection measures) are increasingly raising the tension among copyright players. Rightholders claim that users of copyright works picked up naughty habits with the advent of the Digital Era; the reproduction and communication of the work, once exclusive rights of the owner, are increasingly violated by the facility of copy and sharing offered by the advancements of the networked technology. But against this wave of unauthorized uses, rightholders, in order to protect the recoup of their relevant investments, came up with a solution; the digital lock.

On the other side of the wall, digital users revolted indignant; even in the digital world they still have copyright exceptions to protect their fundamental rights, like circulation of culture and freedom of expression. The digital locks, they argue, risk to become a “digital lock-up”.

Copyright scholars and information technology researchers are struggling to suggest fine-tuning solutions to persuade technological protection measures (TPMs) to comply with copyright exceptions; our work takes position between them. Since in fact the problem involves both legal and technological issues, our firm belief is that no viable solution is possible if not one that keeps in close relation legal and technical contrivances.

This work, therefore, is a first of two inter-twined papers; the first has the aim of clarifying with which copyright exceptions the locks have to comply; the second attempts to understand where the current technology stands in terms of compliance with those copyright exceptions. In this first work, since we are focussed on the European panorama, our starting point will necessary be last EU Copyright Directive (EC/29/2001). We will argue that neither the facultative list of 21 exceptions of the copyright directive (Art.5) nor the shorter compulsory list specifically drafted for TPMs (Art. 6.4) can be deemed ideal candidate for a compliant DRM system. In this regard, we will attempt to obtain from the current legislation and its legal history a more consistent shortlist of permitted uses.

A. INTRODUCTION

Digital Rights Management (DRM), we are told, is a direct consequence of the peculiar features of the digital environment. In the digital world copyright users burn, duplicate, upload, download and share, without paying the due to the rightholder; therefore the latter had no choice but locking its products.

Promoted initially as a weapon in the crusade against digital piracy, DRM ended up assisting the lords of copyright in “keeping honest people honest”; that is, fighting mostly against the occasional infringement by the army of the peer to peer initiates. Through DRM, every reproduction of a copyright work, legal or illegal, has to be authorized by the owner. Exclusive rights of the owner, though, even more than property rights, suffer from limits. Intellectual property rights handle delicate objects like circulation of culture, transmission of knowledge, advancement of science and progress; therefore a few boundaries have been imposed on them. A limited duration, the first sale doctrine, exhaustion, and exceptions are appointed sentinels of the fundamental rights of the public at large. Many copyright scholars expressed concern that technological protection measures, implemented within DRM, do not respect those boundaries¹.

For the mainstream copyright doctrine² all the weaknesses of the copyright regulatory system in Europe are to be found in the European Union Copyright Directive of 2001³. This happens because the EUCD indiscriminately protects technological measures, without a corresponding mandate for them to comply with the copyright limits and exceptions⁴. Moreover, in the context of copyright exceptions in particular, there is a general concern that the almost entirely facultative “shopping list” of exceptions makes the acclaimed goal of harmonisation of the directive⁵ extremely difficult to achieve.

We shall see in the following that there appears to be an inconsistency in the law due to the presence of two separate lists of exceptions, one for technological protection measures (TPMs) and one for the traditional exclusive rights of the owner (reproduction and communication). TPMs, in fact, are supposed to protect those exclusive rights and therefore they should comply with *all* copyright exceptions. The problem is that we can not ask TPMs to observe the long and articulate list of article 5, which moreover have been absorbed differently by member states. And we can not even be satisfied with a

¹ See for example Bernt Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, 11 *European Intellectual Property Review* (2000), pp. 501-502; Alain Strowel, ‘Droit D’auteur et accès à l’information’, in *Cahier du CRID* n° 18 (Bruylant, 2000) ; Guido Westkamp, “Transient Copying And Public Communications: The Creeping Evolution Of Use And Access Rights In European Copyright Law” 36 *George Washington International Law Review* 1057, at 1078; Kamiel J. Koelman, ‘A Hard Nut to Crack: the Protection of Technological Measures’ 22(6) *European Intellectual Property Review* pp.272-288, at p. 275; Severine Dusollier, (2003): Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions’, in E. Becker, W. Buhse, D. Günnewig, N. Rump (Eds.), *Digital Rights Management. Technological, Economic, Legal and Political Aspects*, (Springer-Verlag, Berlin, 2003) pp.462-478;

² *Supra* n.1.

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *Official Journal L* 167, 22/06/2001 P. 0010 – 0019.

⁴ See for example Severine Dusollier, ‘Fair Use by Design in the European Copyright Directive Of 2001: an Empty Promise’, *Communications of the ACM* April 2003/Vol. 46, No. 4.

⁵ See also Lucie Guibault, ‘The Nature And Scope Of Limitations And Exceptions To Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their Adaptation To The Digital Environment’, *E-Copyright Bulletin*, October-December 2003.

separate list of exemptions specifically reserved to TPMs⁶, because this would imply the acknowledgement that a TPM represents a right in itself (the right to control access and use of copyright works). Moreover, the selection of items to be enclosed into the compulsory list, as we will observe, is debatable.

In conclusion, since a practical harmonization is crucial for a consistent and complying DRM system, we need a short list of fundamental exceptions which has to be common to exclusive rights and TPMs, and it has to be compulsory at least for the latter. The goal of this paper is to attempt a draft of such a list. We will start with a brief analysis of the legal history of article 5⁷ of the EUCD and subsequently we will take in exam the national implementations of the final draft of the article, currently in force; we are looking for a lowest commune denominator among copyright exceptions implemented in Europe. This will help us to understand which fundamental freedoms and which cases of public interests would be more readily accepted as compulsory copyright exceptions in *all* EU countries. And since we expect to end up with a much shorter list than that of 21 items from the EU legislator, this would greatly facilitate the compliance of TPMs with them.

B. WHICH COPYRIGHT EXCEPTIONS?

1. The shopping list⁸.

The European Commission, with the aim of harmonizing copyright exceptions, started with comparing the existing legislation across EU countries⁹. Afterwards, it compiled the above-mentioned list with 21 exceptions¹⁰, which is meant to be exhaustive; therefore, it covers all cases already existing in the copyright regulations of EU countries. But, the commission was unable to decide which exceptions had to be compulsory and which facultative; it left them (almost) all facultative. Therefore, when member states implemented the directive, they kept their new law as close as possible to the old one.

In its Article 5, The EUCD enlists a detailed series of cases in which reproduction and communication rights, privileges of the rightholder, suffer from limitations. The list replaces a previous series of exceptions consisting of merely four cases, which were provided for in the previous directive¹¹. The struggle of the EU legislator to cover every possible exception already existing in European local legislations is further demonstrated by last item of the list, the sub-paragraph (o), which covers a “use in certain other cases of minor importance where exceptions or limitations already exist under

⁶ Council Directive 2001/29/EC, Article 6(4)

⁷ In particular, in the first proposal of the directive, COM(97) 628 final-1997/0359/COD, *Official Journal C 108/6*, 7/4/1998; and in the Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society COM/99/0250 final - COD 97/0359 - *Official Journal C 180*, 25/06/1999 P. 0006

⁸ See Dusollier, ‘Fair use by Design’, *supra* n.4, at 12.

⁹ See the workshop sponsored by WIPO and conducted in 1999 by Professor Sirinelli. The definitive list of the EUCD tries to cover all possible existing European exceptions, because of the choice of a exhaustive system. Available on the WIPO website (www.wipo.org), document code: WCT-WTTP/IMP/1.

¹⁰ Council Directive 2001/29/EC, Article 5.2.

¹¹ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. *Official Journal L 346*, 27/11/1992 P. 0061 - 0066

national law”; this disposition, as we see, refers as well to the *iure condito* of national regulations, not to perspective new cases which are not covered by the list.

The present regulation, therefore, according to many commentators¹² is unsatisfactory. The Dutch advisory Board, for example, before the implementation of EUCD in the Netherlands, deemed that a list of exceptions could not realistically be exhaustive, and suggested a safety clause on the model of American fair use¹³.

But the search for completeness of the list is not its main drawback. Another problem is that only the exemption for caching copies¹⁴ is compulsory and has been implemented by all Member States. The rest of the list can be defined as a set of tips, which Member states are free to follow or not. Somebody has defined it as a mere shopping list¹⁵, from which national legislators are free to purchase this or that exemption. As a practical outcome, every country has implemented a different list of copyright exceptions, thwarting the aim of harmonization of the directive¹⁶.

It is not difficult to imagine how so many differences among regulations, in time of networked community, are likely to create disruptions in the Internal Market. From a DRM point of view, moreover, a heterogeneous spectrum of copyright exceptions makes it extremely difficult for technological protection measures to comply with all of them.

In the EU panorama, the trade-off between flexibility and effectiveness is well-known¹⁷. The Coexistence of several countries with different backgrounds suggests that a flexible solution is more likely to succeed than a rigid one¹⁸; but if too flexible, it would not achieve the goal of homogenising national legislations.

The alternatives to an endless compulsory list or an endless facultative list are either a lone flexible exception on the model of the American fair use¹⁹, or a short list of fundamental exceptions, with a closing clause which protects all other cases not mentioned but based on the same principles.

To follow the first solution, it would be necessary to individuate the common ratio underlying all exemptions, and create only one rule, compulsory²⁰ for all Member States. The three-step test sanctioned by article 9(2) of the Berne Convention could be a starting point to model the wildcard exception. Every use which does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rightholder²¹ could be exempted. But different interpretations of the

¹² See generally Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, *supra* n.1. See also Michael Hart, ‘The Copyright in the Information Society Directive: An Overview’ 2002, 24(2) *European Intellectual Property Review*, 58-64. The author says: “What is clear is that Article 6.4 is a highly unusual and unclear provision and very much the creature of political compromise”

¹³ CPB Netherlands Bureau for Economic Policy Analysis, ‘Copyright protection: not more but different’, Centraal Planbureau, <<http://www.cpb.nl/nl/pub/werkdoc/122/cr/>>

¹⁴ These are temporary copies that serve the purpose of facilitating networking communications.

¹⁵ See Bernt Hugenholtz, ‘The Future Of Copyright Limitations’ at Infoethic 2000, Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace, Paris, 13-15 November 2000.

¹⁶ Council Directive 2001/29/EC, Recital 31.

¹⁷ See generally Antoaneta Dimitrova, ‘The Search for Convergence of National Policies in the European Union: An Impossible Quest?’, *European Union Politics*, Vol. 1, No. 2, 201-226 (2000).

¹⁸ See Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, *supra*, n.1.

¹⁹ American scholars despair of conceiving a TPM compliant with fair use, because of the very nature of the fair use exception, which has to be delineated *a posteriori* by a judge, rather than *a priori* by a virtual machine. See Cohen, Julie E. and Burk, Dan L, ‘Fair Use Infrastructure for Copyright Management Systems’, *Harvard Journal of Law & Technology*, Volume 15, Number 1 Fall 2001, available at <<http://jolt.law.harvard.edu/articles/pdf/15HarvJLTech041.pdf>>.

²⁰ See Thomas Heide, ‘The Approach To Innovation Under The Proposed Copyright Directive: Time For Mandatory Exceptions’, 2000, 3 *Intellectual Property Quarterly* 215-23.

²¹ Berne Convention, Article 9(2). The first “step” requires the exception to embody “certain special cases”, but Prof Ginsburg, whose opinion we share, maintain that the speciality of those cases will be

concept of “normal exploitation” have hitherto demonstrated the difficult viability of this solution²².

In fact, the solution of a lone exception will be subject to the same drawbacks of the American fair use, which can be interpreted either broadly or restrictively; and this affects its reliability. Patterson and Lindberg, for example, when they talk of the interpretation that the American fair-use exemption should have, they propose that “one may make a use of the copyright of a work to the extent that such use does not unduly harm the copyright owner”²³. The authors, we recall, maintain that copyright has essentially the function of promoting the public learning. In order to fulfil this purpose the fair use exception has to be interpreted with a certain degree of flexibility. Currently, section 107 of U.S. Copyright Act of 1976 enlists four factors that courts may use in determining whether fair use recurs: 1) the purpose of the use, 2) the nature of the work, 3) the amount used and 4) the effect for the potential market of the work. All these can be flexible or rigid criteria, depending on courts interpretation. In particular, the authors²⁴ suggest that if those criteria would be interpreted by judges in the light of the constitutional public function of copyright, the result would be optimal to boost knowledge and culture, and therefore to achieve the real ultimate goal of copyright protection.

As we see, a lone exception on the model of the fair use can be an extremely flexible tool, fine-tuned on the public interest; but it can be also an intolerably rigid one, as the American jurisprudence demonstrated²⁵. Moreover, a determinant susceptible only to be interpreted *ex post*, by its nature, does not offer any chance to be technically compatible with TPMs²⁶.

However, the provision of a clause which saves every use that does not involve commercial exploitation and does not affect the exclusive interest of rightowners appears to be advisable²⁷ under another form; it could have the role of a safety clause to a compulsory list of exemptions. In fact, some commentator maintains that given the EU traditional background, the adoption of fair use immunity, after decades of exceptions lists, would appear as an electroshock²⁸. Much safer appears the second

interpreted in the light of the second and third step, which are the relevant requirement to comply with. See Jane Ginsburg, “Towards supranational Copyright Law? The WTO panel; Decision and the ‘Three-step test’ for Copyright Exceptions” [2001] *RIDA* January 2001, 1-65.

²² See the different interpretations of the French courts on the topic: *Stéphane P, UFC Que Choisir v. Universal Pictures Video France et Autres* - Tribunal de la Grande Instance de Paris, 3ème chambre, 2ème section, Jugement du 30 avril 2004 and Cour d’appel de Paris, 4ème chambre, section B, Arrêt du 22 avril 2005 and Cour de cassation - Première chambre civile Arrêt du 28 février 2006; *Christophe R., UFC Que Choisir / Warner Music France, Fnac* - Tribunal de grande instance de Paris 5ème chambre, 1ère section Jugement du 10 janvier 2006 -. They are all available on <<http://www.legalis.net>>

²³ See Patterson L. Ray and Lindberg, Stanley W. *The Nature of Copyright: a Law of Users’ Rights*, (University of Georgia Press, 1991), at 200.

²⁴ *Ibid*, at 200.

²⁵ They say that the bid belongs to copyright scholars, who should carry the burden of extensive research and study in order to enlighten juridical courts, too busy for that. See Patterson and Lindberg, *supra* n. 23, at 213.

²⁶ See Nic Garnett, ‘Automated Rights Management Systems And Copyright Limitations And Exceptions’, for the WIPO- Standing Committee On Copyright And Related Rights, Fourteenth Session, Geneva, May 1 to 5, 2006, at viii.

²⁷ See Cornish and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks And Allied Rights*, V edition, Sweet & Maxwell, London 2003, at 815, arguing that is required a ruling that indicates precisely how far an exception should be brought; this, in the authors’ view, is better handled by a Court than by Legislatures.

²⁸ See Robert Burrell and Alison Coleman, *The Copyright Exception: the Digital impact* (Cambridge University Press 2005), chapter 9.

option, which consists in a compulsory short list of fundamental copyright exceptions, grounded on civil rights and freedoms, completed by a wildcard clause.

2. Re-drafting the selection

As we said in the introduction of this work, the final aim of reviewing all existing copyright exceptions, as well as their the legal history, is to come up with a shorter list that both exclusive rights of the owner and TPMs have to comply with. We observed that in order to be viable (especially regarding TPMs compliance) the list should include only the most fundamental exceptions and be compulsory for all member states²⁹.

2.1 The legal history

Copyright exceptions, in the EUCD, receive a first coverage in Recital 34. The recital says that “Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings”³⁰. Probably in consideration of their major importance, a few exceptions are already enlisted here, among the general aims of the directive. We can individuate eight exceptions: teaching; research; libraries; news; quotation; disability; public security and public administration. They all are on the list of article 5 EUCD, but none of them has to be statutorily implemented by member states. Conversely, recital 34 ignores the “caching” copy exception³¹, which is the only compulsory permitted use provided for by the EUCD. This is not surprising, if we consider the legal history of the exceptions’ list.

When initially the EUCD was proposed, in 1997³², a list of copyright exemptions much shorter than the one in force was outlined. Among limits to reproduction and communication rights there were photocopy³³, personal copy³⁴, libraries³⁵, teaching and research³⁶, handicap³⁷, news³⁸, quotation³⁹, and public security/administration⁴⁰.

²⁹ The point for the compulsivity of copyright exceptions is made very well by Heide, ‘The Approach To Innovation Under The Proposed Copyright Directive: Time For Mandatory Exceptions’, *supra*, n.20.

³⁰ Council Directive 2001/29/EC, Recital 34.

³¹ Caching copy is the transient reproduction as a part of technological process.

³² COM(97) 628 final-1997/0359/COD, *Official Journal C 108/6*, 7/41998.

³³ Council Directive 2001/29/EC proposal 1997, Article 5(2) (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects;

³⁴ *Ibid*, (b) in respect of reproductions on audio, visual or audio-visual recording media made by a natural person for private use and for non-commercial ends;

³⁵ *Ibid*, (c) in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage;

³⁶ *Ibid* 5(3)(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

³⁷ *Ibid*, (b) for uses for the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

³⁸ *Ibid*, (c) use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informative purpose;

³⁹ *Ibid*, (d) quotations for purposes such as 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 the source is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

Essentially, those are the same exceptions as in Recital 34, with the addition of the exception for photocopies.

An amended proposal⁴¹ expanded the number and scope of exceptions and modified *all* the subsections previously drafted. Its explanatory memorandum affirmed that it is important to distinguish between digital and analog copy⁴²; it stressed the necessity of fair compensation for the author in most cases, such as “reproduction on paper, private [digital] copying and illustration for teaching and scientific research”⁴³. The amended draft extended to all disabilities⁴⁴ the corresponding exception and introduced new permitted uses, for example for parliamentary proceedings/report and ephemeral reproduction for broadcasters. The Commission, interestingly, did not accept a modification that would have subjected “every main use” of a work to the authorization of the rightholder⁴⁵. After the mentioned amendments, the copyright directive resulted rather different. For reproduction rights were provided five exemptions: photocopies⁴⁶ (subject to author’s compensation); audio/video analog recording⁴⁷ (subject to compensation); audio/video digital recording⁴⁸ “without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders” (subject to compensation); archiving by cultural institutions (libraries, etc. - with compensation)⁴⁹; ephemeral fixation by broadcasters⁵⁰. For both reproduction and communication rights there were, likewise, five exemptions: teaching/researching⁵¹; disability⁵²; news⁵³; quotation⁵⁴; public security/administration⁵⁵.

Subsequently, other modifications have been proposed and accepted. The current version of the Copyright Directive, in force from 2001, has as much as twenty-one exemptions, of which only the first is compulsory⁵⁶, the caching copy exception.

After clarifying the exact definition of the caching copy exception, the current Article 5, on the reproduction right, provides for five exemptions:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

⁴⁰ *Ibid*, (e) use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure.

⁴¹ COM/99/0250 final - COD 97/0359, *Official Journal C 180*, 25/06/1999 P. 0006

⁴² Explanatory memorandum, COM/99/0250 final - COD 97/0359, *Official Journal C 180*, 25/06/1999 P. 0006, at 2(1).

⁴³ *Ibid*, at 2(2)

⁴⁴ *Ibid*, at 2(4).

⁴⁵ *Ibid*, at 4. 5. : “The amendments or parts of amendments not accepted by the Commission for reasons of substance relate to: (1) The introduction in Article 5(1) of the condition that the main act of use of a work should be authorized by the rightholders or permitted by the law”..

⁴⁶ *Ibid*, Article 5(2a).

⁴⁷ *Ibid*, 2b.

⁴⁸ *Ibid*, 2b bis.

⁴⁹ *Ibid*, 2c.

⁵⁰ *Ibid*, 2d.

⁵¹ *Ibid*, Article 5(3a).

⁵² All disabilities, *ibid*, 3b.

⁵³ *Ibid*, 3c.

⁵⁴ *Ibid*, 3d.

⁵⁵ *Ibid*, 3e.

⁵⁶ See the workshop, *supra* n.9 on the WIPO website, document code: WCT-WTTP/IMP/1.

- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

On the other hand, referring to both reproduction and communication right, the EUCD provides for the following exceptions:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (d) quotations for purposes such as 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;
- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
- (g) use during religious celebrations or official celebrations organised by a public authority;
- (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
- (i) incidental inclusion of a work or other subject-matter in other material;
- (j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
- (k) use for the purpose of caricature, parody or pastiche;
- (l) use in connection with the demonstration or repair of equipment;
- (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
- (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

Caching copies are temporary reproductions performed by software to ensure circulation of works on networks. This is the only exception that has to be statutorily implemented by Member States⁵⁷.

Optionally exempted are the followings: photocopies (with “fair compensation”); personal copy (regardless if analog or digital – with compensation); libraries, schools museums and archives, with no commercial purposes; broadcasting organizations and no-profit institutions like hospitals or prisons (with compensation); teachers and researcher, who have to quote source and author and to the extent of the function pursued; disabled people, within the limits of their disability; news and quotation for

⁵⁷ Council Directive 2001/29/EC, *supra* n.3, Article 5.1.

criticism, specifying source and author; and public security⁵⁸. As we see, there are nine more exceptions, in the final draft of the directive, which provides for a meticulous list of practical situations in which, however, the user does not have to pay any royalty to the author; politic speeches, public lectures, religious or official celebrations, pictures of sculptures⁵⁹, private study and many others, plus other “minor” exceptions already provided for by national laws.

Interestingly, the EUCD included the parody exception in the list. The parody was unevenly present in national laws before the EUCD implementation, and it kept the same pattern afterwards. The exception for parody is present, for example, in the French, Belgian, Dutch and Luxembourg legislation, but not in the UK⁶⁰, Germany, Denmark, and Italy. In all versions of the Copyright Directive, moreover, there is a closing clause which applies the three-step test of the Berne Convention to all above listed exemptions⁶¹.

This list of exemptions appears particularly long especially if compared with that – all facultative for Member States- provided for by the previous directive 92/100/EEC⁶² that the EUCD replaced. According to the old directive, exceptions to copyright were the followings:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.⁶³

As we can observe, the legal history of copyright exceptions shows an embryonic, short and general list which has gradually mushroomed into one extensive and almost neurotically detailed. The EU Legislator, probably, thought that a longer and more faceted list of exceptions would have provided the user with a wider coverage of protection: a bigger shield that the consumer is paying in term of “fair compensation”, previously not provided for.

It is difficult to see the efficacy of such contrivance, given that almost all exceptions are facultative. The seven exceptions the EUCD shortlisted to be observed by technological protection measures, on the contrary, are all compulsory. The permitted uses with which TPMs have to comply⁶⁴ are: photocopy⁶⁵; reproduction made by libraries and archives⁶⁶; ephemeral recordings by broadcasting organizations⁶⁷; reproductions of broadcasts by social institutions⁶⁸; teaching or research⁶⁹; disables⁷⁰; public security/administration⁷¹.

⁵⁸ Council Directive 2001/29/EC, *supra* n.3, Article 5.2, 5.3

⁵⁹ In the United States the situation is different. Particularly curious is the case of the Chicago bean - thus nicknamed by Chicago citizens, a sculpture exposed in Chicago’s Millennium park, by the British artist Anish Kapoor, that can not be photographed without paying a fee to the author. *See* Massimo Mantellini, ‘Il Fagiolo del Copyright’ [Copyright’s bean], 21/02/2005, on Interlex at <<http://www.interlex.it>>

⁶⁰ *See* generally Christian Rutz, ‘Parody: A Missed Opportunity’, *I.P.Q.* 2004, 3, 284-315

⁶¹ Council Directive 2001/29/EC, *supra* n.3, Article 6.4.

⁶² Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. *Official Journal L 346*, 27/11/1992 P. 0061 – 0066, Article 10.

⁶³ Directive 92/100/EEC, Article 10.

⁶⁴ Council Directive 2001/29/EC, Article 6(4)

⁶⁵ Council Directive 2001/29/EC, Article 5(2)a.

⁶⁶ Council Directive 2001/29/EC, Article 5(2)b

⁶⁷ Council Directive 2001/29/EC, Article 5(2)c.

⁶⁸ Council Directive 2001/29/EC, Article 5(2)e.

What strikes immediately is the absence of quotation and news reporting, which are traditional testimonials of the freedom of information⁷². Less surprising, on the contrary, is the absence of private copy, which is the most controversial of the copyright exceptions. The exception for personal copy is problematic because its grounds divide the legal doctrine, swinging from a simple market failure⁷³ to a fundamental right⁷⁴. More precisely, the second sub-paragraph of Article 6.4 says that member states could include private copy among the privileged exceptions, unless the rightholders have already made available the work for reproduction in ensuring respect for private copy or the three-step test of Berne convention. The injunction to member states to take appropriate measures to force rightholders to comply with the exception of private copy, unless they have already complied, seems at least redundant. It shows clearly the wrestling that the EU legislator has to face every time it tackles the exception for personal copy.

The presence of the ephemeral broadcasting and of the broadcasting from public institutions, moreover, is at least debatable; especially if contrasted with the exclusion of exceptions like news reporting and quotation, which are present in every version of the directive. Moreover, as we will see, quotation and news reporting have been implemented by the majority of member states. We need to highlight that broadcasting exceptions, unlike several others (among which the two excluded) are not grounded on fundamental liberties⁷⁵. Moreover, it is difficult to see how TPMs can be expected to achieve, in practice, compliance with those two cases. The exception for ephemeral broadcasting requires, after all, only the possibility to perform back up copies. But if news reporting or private copy (including archiving purpose) were exempted, ephemeral broadcasting would be covered indirectly. Broadcasting by public institutions, further more, could be covered by the exemption for libraries or teaching. It seems, in short, that European lobbying groups have been successful in excluding two fundamental exceptions in stead of two less significant.

All above considered brings us to be inclined towards a replacement of the list with which TPMs have to comply, and to allow technical measures to operate only within the boundaries of copyright protection; the list of copyright exceptions should be the same both for TPMs and exclusive rights.

The legal history of copyright exceptions gives us an idea of which permitted uses recur more frequently in many drafts of the legislation, most likely because of their major significance. The national implementations are a second source of information in this sense. We will analyze them in the next sub-section.

2.2 Fundamental exemptions.

In matter of fundamental copyright exemptions, a strong indication can be given by the study of the permitted uses that are more evenly present in the legal culture and in the positive law of national states.

⁶⁹ Council Directive 2001/29/EC, Article 5(3)a.

⁷⁰ Council Directive 2001/29/EC, Article 5(3)b

⁷¹ Council Directive 2001/29/EC, Article 5(3)e.

⁷² Together with parody. See Dusollier, 'Tipping the Scale in Favour of the Right Holders', *supra* n.1, at 473.

⁷³ See Wendy Gordon, 'Fair Use as Market Failure: a Structural and Economic Analysis of the Betamax case and its Predecessors' (1982) 82 *Columbia Law Review* 1600-1657

⁷⁴ See Bernt Hugenholtz, 'Fierce Creatures Copyright Exemptions: Towards Extinction?' at the IFLA/IMPRIMATUR Conference 30-31 October 1997, Amsterdam, The Netherlands

⁷⁵ See Dusollier, 'Fair use by design', at 12.

We compiled a synoptic table which aims to give an overview of the *status quo*⁷⁶ in the EU after the implementation of the EUCD. It is necessary to premise that the compilation was made particularly difficult by the different wording that national legislators adopted to define each exception; it must be stressed, therefore, that since the work required homogenizing the data in our possession, some simplification may have occurred. We tried to individuate the similarities mostly through teleological interpretation, rather than literal. This might appear lacking precision; but given our goal, which is to individuate the general sensitivity of EU countries on each exception, it should not invalidate the findings.

In general and preliminarily, we will state what the table excludes. For some exceptions, many countries prescribed a “fair compensation” for the author, as provided by the directive⁷⁷. We overlooked in the table every disposition in matter of fair compensation, because not immediately useful for our discourse.

Some member states, moreover, added new exemptions, tailored on their specific socio-economic context and very likely on the need of the most powerful lobbies⁷⁸. For example France and Luxembourg included a database exception in their copyright law; we excluded from the table those too. Furthermore, despite the fact that the exceptions in the directive are worded quite exhaustively, some member states phrased them in a more detailed way. For example, Article 5.2(c) of the EUCD allows limitations of exclusive rights for reproductions made by public accessible libraries or similar institutions. Some countries interpreted that disposition in a more restrictive way, allowing, for example, only one copy⁷⁹. We have been forced to overlook all those nuances, in order to be able to schematize the regulation.

The linguistic barrier was also a hurdle in the analysis, because few countries have not translated in English their copyright legislation⁸⁰. In place of the original text of the law which we were no able to read (mainly in German), we have compared papers written by local scholars in English⁸¹. A case particularly difficult was presented by the exception of personal copy, which, as we already observed, has undergone a completely different discipline from country to country. But despite all the above-mentioned difficulties, we believe to sight a common pattern in the choices of national legislators; some common position can be individuated, among different legal tradition and cultures.

Exemptions	 AT	 BE	 DK	 FR	 DE	 GR	 IE	 IT	 LU	 NL	 PT	 UK	TOT 12
5(2)a photocopy	X	Xx	X		X	X	Xx	Xx			Xx		8
5(2)b priv.copy	X	X	Xx	Xx	Even analog	Even analog	xTime shifting	xEven analog	Xx	X	Xx	xTime shifting	12
5(2)c libraries	X	Xx	Xx	Xx	X	X	Xx	Xx	Xx	X	Xx	Xx	11
5(2)d ephim/broadc		x	Xx				Xx			X	Xx	Xx	4
5(2)e broadc.rep by instit.		x	Xx	Xx	X		Xx	Xx			Xx	Xx	7

⁷⁶ Table A 2.2.

⁷⁷ Council Directive 2001/29/EC, Article 5.2(a)(b)(e)

⁷⁸ See Hugenholtz, ‘Fierce Creatures’, *supra* n.74.

⁷⁹ Italian Copyright Act, art. 70(1-2) and Austrian Copyright Act, §42(6).

⁸⁰ We have been able to read the original versions of Belgian, Portuguese and Italian legislation, but not the German and the Austrian.

⁸¹ In particular, a study by the Foundation for Information Policy Research, ‘Implementing the European Copyright Directive’, available at < <http://www.fipr.org/copyright/guide/>> accessed 24/11/05 and the project EuroCopyright.org by the Free University of Amsterdam, available at <http://www.euro-copyrights.org>.

5(3)a teaching/ research	X	Xx	Xx	xOnly small quotation	X	X	Xx	Xx	Xx	X	Xx	Xx	11
5(3)b disables		Xx	Xx	Xx	X	X		Xx	Xx	X	Xx	X	10
5(3)c news	X	X	X	Xx	X	X		X	X	X	X	Xx	11
5(3)d quotation/critic		Xx	Xx	Xx	X	X	Xx	Xx	X	X	X	Xx	11
5(3)e pub security/ administer.	X	X	Xx		X	X	Xx	Xx	Xx	X	Xx	Xx	11
5(3)f speech/ lectures			X		X			X	X				5
5(3)g celebrations			Xx			X							3
5(3)h architecture/ sculpture		X	X			X			X				4
5(3)i incidental		X	X				Xx			X		Xx	5
5(3)j advertising			X	Xx						X	X		4
5(3)k parody		X		Xx					X	X			2
5(3)l demonstration													0
5(3)m building/drawing			X										0
5(3)n private networking			X								X		1
5(3)o others			X					X					n/a
Three-step		X		X	X			X	X		X		

Table A 2.2 – The copyright exemptions among member states

Label: X= exception for exclusive rights; x= exception for TPM

At a first analysis of the results, the most universally recognised exceptions appear to be the purpose of teaching/research and the public security/judicial-administrative proceeding. All examined countries implemented them. Very much respected were also the quotation for criticism and review purpose, the reproduction by public libraries/cultural institutions, the exception for the needs of disables, and the news reporting. The exception for reprography, directly or indirectly, found also a place among exemptions, even when not explicitly mentioned; in fact, reproduction on paper is embedded in the exception for libraries, in the private copy or in the teaching/research exceptions⁸². The most controversial, not surprisingly, was the personal copy, which can be said to win the award for the less “harmonized” of all. Every country seems to have different opinions on the subject, and the discontinuous adoption of levies among member states does not help. Some countries content their users with only an analog copy⁸³ and some others specify the use of it (time shifting⁸⁴). But most of them recognize the possibility of making personal copies, in a way or another.

What goes almost unnoticed, on the other hand, is the “extension” of nine exceptions which were added in the most recent amendment of the directive. Among them, quite disappointing is the discontinuous adoption of the parody exception,

⁸² Like in Austria (section 42, subsection 6) and Germany (§53(a)1)

⁸³ Germany and Italy.

⁸⁴ Ireland and the UK.

indicated by several scholars⁸⁵ like an important carrier of freedom of expression (like news reporting or critic/quotation).

In conclusion, with the approximation of which we warned above, it seems that the most uncontroversial exceptions are no more and no less than those that were drafted in the first proposal of the EUCD. In the first draft of the directive⁸⁶, we recall, the following exemptions were included: photocopy;⁸⁷ personal copy⁸⁸; reproduction by libraries⁸⁹; teaching and research⁹⁰; disables⁹¹; news reporting⁹²; quotation⁹³; public security/administration⁹⁴.

On the contrary, the exception with which TPMs have to comply⁹⁵, according to the EUCD, are: photocopy⁹⁶; reproduction made by libraries and archives⁹⁷; ephemeral recordings by broadcasting organizations⁹⁸; reproductions of broadcasts by social institutions⁹⁹; teaching or research¹⁰⁰; disables¹⁰¹; public security/administration¹⁰². As we already observed, the absence of quotation and news reporting, grounded on the freedom of information¹⁰³, is striking. Conversely, the absence of private copy is not surprising, because it is the exception most opposed by stakeholders, given the alleged losses caused by “domestic” duplication of CD/DVDs, made more threatening by the phenomenon of peer to peer file-sharing.

It is evident, from the above, that the EUCD made compulsory for TPMs few exceptions chosen arbitrarily, rather than those universally recognised as most fundamental. And at national level there is even more disruption, because members states decided autonomously which exceptions they wanted to be respected by TPMs, if

⁸⁵ See Lucie Guibault, ‘The Nature And Scope Of Limitations And Exceptions To Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their Adaptation To The Digital Environment’, *E-Copyright Bulletin*, October-December 2003; Dusollier, ‘Tipping the scale in Favour of the Right Holders’, *supra* n.1; Christian Rutz, ‘Parody: A Missed Opportunity’, 2004, 3 *Intellectual Property Quarterly* 284-315

⁸⁶ COM(97) 628 final-1997/0359/COD, *Official Journal C 108/6*, 7/41998.

⁸⁷ Council Directive 2001/29/EC proposal 1997 (COM (97) 62), Article 5(2) (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects;

⁸⁸ *Ibid*, (b) in respect of reproductions on audio, visual or audio-visual recording media made by a natural person for private use and for non-commercial ends;

⁸⁹ *Ibid*, (c) in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage;

⁹⁰ *Ibid* 5(3)(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

⁹¹ *Ibid*, (b) for uses for the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

⁹² *Ibid*, (c) use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose;

⁹³ *Ibid*, (d) quotations for purposes such as 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 the source is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

⁹⁴ *Ibid*, (e) use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure.

⁹⁵ Council Directive 2001/29/EC, Article 6.4.

⁹⁶ Council Directive 2001/29/EC, Article 5(2)a.

⁹⁷ Council Directive 2001/29/EC, Article 5 (2) b

⁹⁸ Council Directive 2001/29/EC, Article 5 (2) c.

⁹⁹ Council Directive 2001/29/EC, Article 5(2)e.

¹⁰⁰ Council Directive 2001/29/EC, Article 5 (3)a.

¹⁰¹ Council Directive 2001/29/EC, Article 5(3)b

¹⁰² Council Directive 2001/29/EC, Article 5(3)e.

¹⁰³ Together with parody. See Dusollier, ‘Tipping the Scale in Favour of the Right Holders’, *supra* n.1 at 473.

any; some required TPMs to comply with all exceptions, other only with some of them. The selections, among those members that chose to shortlist, are different from country to country. Even with a compulsory disposition, therefore, the directive failed its harmonizing goal¹⁰⁴.

In conclusion, the list outlined in the first draft of the directive, which matches perfectly with the copyright exceptions that are already *de iure condito* in most western EU member states¹⁰⁵, appears a more logical candidate as a compulsory list for both TPMs and exclusive rights. Naturally, as we said, the list should be completed with a safety clause that encompassed all minor exceptions left out of the list; the implementation of minor particular cases in some countries suggests that a need in that sense would be felt.

C. CONCLUSION

The analysis above appears to show that a balance of rights among users and producers of copyright goods has not yet been achieved. The unbalance starts at European level and goes down through the national law repeating in most cases the same mistakes.

The European Union Copyright Directive of 2001 grants full protection to technological measures¹⁰⁶, irrespective of their implementation within the purview of copyright law¹⁰⁷. More precisely, the letter of the Directive appears to allow every use of TPMs to every owner of exclusive rights¹⁰⁸. This is confirmed by the provision that TPMs have to comply with a limited number of exemptions¹⁰⁹. If technological means could be used only within the limits of copyright law, they would automatically be bound to comply with all copyright exemptions devised for exclusive rights. The technological measure, in order to be protected by law, has to be only “effective”. The effectiveness consists, by express definition of law, in being an anti-copy or anti-access device involving encryption or other technology¹¹⁰.

At national level, TPMs are protected in every country, but with very different sanctions, which range from civil remedies to several years in jail. It is obvious that in a global market characterized by the absence of geographical boundaries, where users can buy everything from everywhere, such a mixed regulation can only create disruption.

The actions that rightholders have to take in order to have TPMs compliant with copyright exceptions are, in most EU countries, “voluntary measures”. No member state obliges the owner to implement only TPMs which respect automatically those exceptions. Few countries corrected the “oversight” of the EUCD specifying that TPMs

¹⁰⁴ The incongruence of a compulsory norm that recalls a facultative one is stressed also by Dusollier, ‘Tipping the Scale in Favour of the Right Holders’, *supra* n.1, at 474.

¹⁰⁵ About non-EU countries, it is interesting that the Australian Attorney-General Philip Ruddock has just announced new reforms in the field of copyright law. In particular, he anticipated the introduction of new copyright exceptions to replace the fair use clause. The exceptions at hands are: private copy for time-shifting; private copy for format-shifting (copy from a carrier to another, e.g. from music CD to iPod); libraries and educational institutions; disables; parody or satire. See <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006>

¹⁰⁶ Declaring outlaw every circumvention. See the Council Directive 2001/29/EC, 6.1.

¹⁰⁷ See for example Maciej Barczewski .’ International Framework for Legal Protection Digital Rights Management Systems’ 2005 27(5) *EIPR* 165-169, arguing that “protection should focus on the infringement of copyright only”, at 168.

¹⁰⁸ Council Directive 2001/29/EC, 6(3), first paragraph.

¹⁰⁹ Council Directive 2001/29/EC, 6(4).

¹¹⁰ Council Directive 2001/29/EC, 6(3), second paragraph.

have to protect only the exclusive rights of the owners. But many member states draw on from the letter of the directive, establishing the same iniquity.

The legal history of the Article 5 shows how the EU legislator went from a logic and consistent draft, with few, clear and basic exceptions, to the variegated cascade that is in force today. The facultative list brought member states to absorb each different exception, in the attempt to disrupt as little as possible the pre-existing regulation. And the result was that they remained essentially in their previous un-harmonized condition.

But a synopsis of the current situation in national countries, after the implementation, shows a greater consistency around those exemptions which are envisaged to protect fundamental liberties or the public interest¹¹¹. Since those fundamental principles, therefore, are evenly valued by EU countries, it would not be difficult to convince all member states to comply with them. Given the purpose of harmonization claimed by the directive, a shorter list covering fundamental rights and made flexible by a closing clause¹¹² would be more effective¹¹³.

Particularly worrisome, thanks to the ineffectiveness of the EU directive and to the heterogeneity of national implementations, is the case of private copy. While the other exceptions can boast notable allies such as fundamental liberties or private interest, private copy has nothing more to recommend it than a simple market failure. Thousands of users, convinced that they have the right of doing with their legally purchased goods what they like best, are living a confusing experience. The leap from a right to a crime, in truth, is quite a dizzy one. Some countries have been consistent with the fight to counterfeiting, principal aim of a tougher copyright legislation, introducing criminal sanctions only against “professional” infringement. In some other countries, on the contrary, stakeholders have taken advantage of a successful lobbying exercise; they have seen the new regulation, combined with the new technological possibilities, as an opportunity to increase their revenues, obtaining criminal repression of behaviours hitherto tolerated. Professional criminals and school kids, as a result, share a common fate, depending on the country in which they have the venture to be resident. To see how the internal market¹¹⁴ could take advantage from such situation is really impossible, even if we choose not to consider the deep injustice of it.

In conclusion, a revision of all European legislation referring to copyright exceptions and to technological protection measure appears to be highly recommendable¹¹⁵. Not only copyright regulation needs to be simplified and homogenised among all directives that cover copyright works¹¹⁶; but some substantial modifications need to be performed to allow a better respect of the right of the user in matter of DRM. A modification of the current legal framework should involve a more coherent drafting of the list of copyright exceptions and a legal provision of technical specifications in the field of TPMs. The law, in short, should impose to DRM

¹¹¹ *Supra*, B.2.2.

¹¹² See CPB Netherlands Bureau for Economic Policy Analysis, ‘Copyright protection: not more but different’, Centraal Planbureau, at <<http://www.cpb.nl/nl/pub/werkdoc/122/cr/>>.

¹¹³ See Patterson and Lindberg, ‘*The Nature of Copyright*’, *supra* n. 23, at 200..

¹¹⁴ In its introductory recitals, the EU CD claims to aim to harmonization in order to benefit the internal market. See in particular Recital 6: “Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.”

¹¹⁵ Our recommendations are towards substantial modifications, rather than little adjustments, as suggested by the EU commission. See Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, at <http://europa.eu.int/comm/internal_market/copyright/docs/review/sec-2004-995_en.pdf>. Here, the Commission seems to be more concentrated towards the process of consolidation and simplification of the European *aquis*, than to get to the heart of the rights at stake.

¹¹⁶ Such as the software directive and the Database directive. *Ibid*.

developers the amount of flexibility necessary to comply with copyright most fundamental exceptions.

As for the technical specifications, a broad allowance of reproduction and excerption is very likely to comply with almost all fundamental copyright exceptions. The research should be pushed to develop flexible and versatile TPMs, which encompass a set of usage rules with a *generosity inversely proportional to its flexibility*. In other words, whenever the state of technology will allow a perfect licensing system, producers will carve out of the boundaries of copyright exceptions as much revenues as they like. But till then, they better calibrate their DRM as broad as possible, so to enclose, together with some unfortunate unauthorized uses, all actions permitted by copyright limits.