What Limitations to Copyright in the Information Society? Comment of CEIPI on the European Commissions Green Paper "Copyright in the Knowledge Economy"*

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On 16 July 2008, the European Commission adopted a vast consultation on the future of copyright in the knowledge economy by means of a Green Paper, with the objective to collect the different points of view of all interested parties "on the dissemination of knowledge for research, science and education but also on the current legal framework in the area of copyright and the possibilities it can currently offer to a variety of users (social institutions, museums, search engines, disabled people, teaching establishments)"(Press release of the European Commission, IP/08/1156). This ambitious document raises a lot of interesting questions regarding the future of copyright limitations and exceptions in the European Union. This article reacts to the Green Paper by proposing a certain number of comments and recommendations addressed to the community legislator.

Introduction

On 16 July 2008, the European Commission has adopted the Green Paper on Copyright in the Knowledge Economy in order to "foster a debate on how knowledge for research, science and education can best be disseminated in the online environment. The Green Paper aims to set out a number of issues connected with the role of copyright in the "knowledge economy" and intends to launch a consultation on these issues"[1]. The displayed goal is thus very wide.

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[1] Green Paper of the Commission of the European Communities, "Copyright in the Knowledge Economy", Brussels, COM (2008) 466/3 final. For other interesting comments to the Green Paper, see R.M. Hilty, S. Krujatz, B. Bajon, A. Früh, A. Kur, J. Drexl, Ch. Geiger, N. Klaas, "European Commission-Green Paper: Copyright in the Knowledge Economy, Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law", Nov. 2008, available at www.ip.mpg.de; L. Guibault, S. van Gompel, M. van Eechoud, N. Helberger, P. B. Hugenholtz, "Response to the Green Paper on Copyright in the Knowledge Economy", Nov. 2008, available at www.ivir.nl; "Copyright in the Knowledge Economy, Response from the IP Foresight Forum (a grouping of independent intellectual property academics in the UK)", available at www.ipforesightforum.ac.uk; Jerome H. Reichman and Ruth L. Okediji, "Sustainable Innovation in the Digital

Nevertheless, it will be seen that the consultation is in fact limited to the delicate, but crucial problem of exceptions and limitations to copyright within the digital environment. First, the European Commission should be congratulated for its initiative. It must be recognized that the past attempts to adapt copyright to the knowledge economy were difficult, and one can see today a certain "désamour" of copyright in the public opinion and some interested circles. More and more often, they point out to its maladjustment to the digital environment and the fact that the existing legal rules do not take into account in a satisfactory way the requirements of research and education, and do not allow the making of new creative contents. This is shown by the success of the movements such as "creative commons" or of the so called "open" sources, which are using the rules of copyright in an alternative manner. Therefore, the initiative of the Commission comes at the right moment.

In this scope, the wish to strike a balance, clearly stated by the Commission several times, should be underlined: the recent evolutions of the copyright have often been perceived as being "one way", aiming at strengthening the rights of derivative right holders without sufficiently taking into account the interests of the creators and those of the society. It must however be noted that the creators are, once again, surprisingly absent in the motivations of the community legislator, which is regrettable. In fact, the aim of the Green Paper as defined by the Commission, is to deal with the problems "taking into account the point of view of the publishers, historians, education bodies, museums, archives, researchers, disabled people, and the public at large"[2]. Certainly, researchers are also creators, but creators of a very specific kind, since they take their income mainly from other sources and depend on copyright only at the edge.

It may thus be understood that researchers are mentioned at this point as an example of a category of users of protected works, rather than as creators. This may be seen as a new example of the carrying out in EC law of a "droit d'auteur sans auteur" ("authors right without authors"), statement which has been often used by scholars to qualify the past action of the Commission in this area. It should also be appreciated that the Commission insists on the need to foster a better dissemination of knowledge. Indeed, the Green Paper opportunely underlines the fact that "wide dissemination of knowledge contributes to more inclusive and cohesive societies fostering equality of opportunities in line with the priorities of the forthcoming renewed Social Agenda"[3].

It is thus reminded that the challenges facing copyright are not only economic ones, and that their social aspects should not be underestimated. As a matter of fact, several doctrinal opinions have recently underlined the insufficient taking into account in the development of the pertinent rules of freedom of speech and of the public's right to information[4]. The

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Environment: The Crucial Role of Copyright Law's Limitations and Exceptions" (Paper submitted to the European Commission, Nov. 28, 2008).

[2] Green Paper, supra note 1, p. 3. It is also underlined that "the legislation on copyright traditionally seeks to strike a balance between the compensation for past creations and investments and the dissemination of knowledge" (p. 4).

[3] Green Paper, supra note 1, p. 4.

[4] P.B. Hugenholtz, Copyright and Freedom of Expression in Europe, in: R.C. Dreyfuss, D.L. Zimmerman and H. First (eds.), Expanding the Boundaries of Intellectual Property, Oxford, Oxford University Press, 2001, p. 343.- A. Strowel and F. Tulkens (eds.), Droit d'auteur et liberté d'expression, Brussels, Larcier, 2006.- ALADDA (ed.), Copyright and Freedom of Expression, ALAI Study Days 2006, Barcelona, Aladda, 2008.- Ch. Geiger, Droit d'auteur et droit du public à l'information, Approche de droit comparé, Paris, Litec 2004 and from the same authors : Author's Right, Copyright and the Public's Right to Information: A Complex Relationship, in: F. Macmillan (ed.), New Directions in Copyright Law, Vol. 5, Cheltenham (UK)/Northampton, MA (USA),

Commission seems to be aware of this aspect. However, one may be more doubtful when the Green Paper asserts that "a rigorous and effective system for the protection of copyright and related rights" is necessary to deal with those problems. Whereas an "effective" system is certainly required, it is doubtful whether a "rigorous" one is the best solution in the present circumstances. At least if the adjective "rigorous" is used as a synonymous of rigid ; in order to facilitate the adaptation of copyright to the fast developments of society and technology, it seems that a more flexible system should be carried out. We will come back to this point.

According to the Commission, the exceptions and limitations to copyright allow to ensure the dissemination of knowledge and are at the core of the balance aimed at by the legislator. As a consequence, the Green Paper is devoted to them, and separates general issues from specific ones. We are going to use the same outline.

I. Limitations to copyright : general issues

The Commission is perfectly right to insist on the urgency of solving the problem of the exceptions and limitations to copyright. As a matter of fact, those mechanisms are of prime importance and are, according to Professor Caron's statement, "the barometer of the congruent reception of copyright in the social order"[5]. Exceptions and limitations appear as the best means to be used by the national and Community legislations to foster the famous "balance of interests"[6] and above all, to protect collective interests within the system. They are inherent to the exclusive rights and define their content and scope in a negative way. In this view, it may be deplored that the Commission did not use this opportunity in order to define the legal nature of the limitations to copyright, especially the difference between the words "exception" and "limitation", which the Commission always uses together. As a matter of fact, it is possible that these terms designate different meanings of these legal instruments[7]. At least, in our opinion, the close link between exclusive rights and their borders (to use a more neutral word) should not lead to accept the primacy of one of them upon the other. It should not be forgotten that intellectual property rights are themselves exceptions to a principle of freedom, either freedom of enterprise and competition or freedom of expression.

In this scope, it should be underlined that the Commission seems finally to admit that its efforts in this area have been clearly insufficient until now. First, it is known- and the Commission recognizes it implicitly[8]- that the Community harmonisation of exceptions and limitations has been a total failure[9]. The directive of May 22, 2001[10] only provides for an

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Edward Elgar Publishing, 2007, 24.- S. Carre, L'intérêt du public en droit d'auteur, Ph.D. dissertation, University of Montpellier 2004, p. 85 sq.

[5] Ch. Caron, Les exceptions, L'impact sur le droit français, Propr. intell. 2002, n°2, p. 25.

[6] R.M. Hilty and Ch. Geiger (eds.), The Balance of Interests in Copyright Law, Munich 2006 (published online on the website of the Max Planck Institute: http://www.ip.mpg.de/ww/de/pub/forschung/publikationen/online_publikationen/the_b.cfm

[7] See in detail on this issue Ch. Geiger, De la nature juridique des limites au droit d'auteur, Propr. intell. 2004, n° 13, p. 882.

[8] The Green Paper states that "the Directive has introduced an exhaustive list of exceptions and limitations. These exceptions are not mandatory for the Member States however, and even if exceptions are adopted at a national level, Member States have often formulated exceptions narrower than those permitted in the Directive" (p. 4).

[9] This was noted by many authors: i.a.: P.B. Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, 2000 EIPR 501; M. Vivant and R. M. Hilty, La transposition de la directive sur le droit d'auteur et les droits voisins dans la société de l'information en France et en Allemagne, Analyse critique et prospective, in: Ch. Geiger, M. Bouyssi-Ruch, R.M. Hilty (eds.), Perspectives d'harmonisation du droit d'auteur en Europe,

exhaustive and (excepted for one of them) optional list, in which national legislators have been able to choose what they found convenient, being also allowed to adopt more restrictive provisions. In order to achieve a true harmonisation, it would have been necessary to set forth a list of mandatory exceptions and limitations and to enjoin its introduction as such into the national laws; it is thus advisable that a new directive amends this mistake[11].

In order to allow a real adaptation to social and technical needs and to ensure the taking into account of fundamental values in cases not listed, it would be advisable to introduce some flexibility, by "opening" the system[12], e.g. by closing the list by a general provision with clear and well defined criteria.

Paradoxically, the Commission has probably unintentionally already introduced such flexibility, by including the famous "three step test" in article 5.5 of the directive of 2001. According to this provision, exceptions and limitations set forth under the directive "are applicable only in certain special cases which do not conflict with the normal exploitation of the work and do not entail an unreasonable prejudice to the legitimate interests of the right holders". This rule has been introduced into some national laws and is used by the courts in order to allow more flexibility into their systems[13]. The Green Paper underlines the importance of the "three step test" in this scope, by stating that "it has become a benchmark for all copyright limitations"[14]. However, as for its understanding, it only refers to the very limiting interpretation given by the WTO Panel in a dispute related to Article 13 of the Trips Agreement, which carries the test in a similar wording as in the directive.

As underlined by the Commission, "the Panel held that the scope of any permissible exception under article 13 should be narrow and should be limited to the minimum use. The three conditions are cumulative"[15]. This interpretation is not convincing, as it takes into account only the right holder's interests and does not ensure a fair balance between all interested parties[16]. We would prefer the wiser interpretation offered by a group of European and international experts, which has drafted a balanced guide of interpretation of the "three step test" under the impulse of the Max Planck Institute for the IP Law in Munich and the Queen Mary Institute in London[17]. It would be advisable that the Commission adopts the main

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Paris, Litec, 2007, p. 87 and 61 ; L. Guibault, Le tir manqué de la directive européenne sur le droit d'auteur dans la société de l'information, Les Cahiers de propriété intellectuelle 2003, Vol. 15, n° 2, p. 563.

[10] Directive of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJEU, L. 167, June 22, 2001, p. 10.

[11] See the interesting study conducted by the IViR of the Amsterdam University at the Commission's command: The Recasting of Copyright and Related Rights for the Knowledge Economy, Nov. 2006, p. 75.

[12] See also the study by the IViR, supra, note 11, p. 75: "Certain measures could be considered in the long term in order to foster a flexible and forward looking regime of limitation on copyright and related rights which would be capable of taking technological changes and new business models into account"; C. Geiger, "Flexibilising Copyright", IIC 2008, 178.

[13] E. g., Swiss Federal Court, 1st civil div., June 26, 2007, IIC 2008, 990. For a comment of this important decision, see Ch. Geiger, Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way, IIC 2008, p. 943.- Federal German Court, July 11, 2002, GRUR 2002, p. 963.- Madrid Court, June 12, 2006, La Ley 2006, p. 1192.-Barcelona Court, Sept. 17, 2008 (yet unpublished).

[14] Green Paper, supra note 1, p. 5.

[15] Green Paper, supra note 1, p. 5, note 9.

[16] Although this aim is asserted several times by the Commission.

[17] Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law/ Déclaration en vue d'une interprétation du "test en trois étapes" respectant les équilibres du droit d'auteur, published in English in: IIC 2008, p. 707, EIPR 2008, p. 489 and Auteurs-, Media- & Informatierecht (AMI) 2009, p. 8; in French in: Propr. intell. 2008, n° 29, p. 399; in German in GRUR International 2008, p. 822; in Spanish in Actas de derecho

features of this document by providing guidelines for the interpretation of Article 5.5, respecting all the interests at stake[18].

Apart from the necessary adaptability of the system, the importance of exceptions and limitations for the development of the knowledge society also implies that they are considered mandatory, so that it should not be possible to set them apart by contracts, nor to block their use by technical protection measures (TPM).

The areas of freedom conferred law should not be left at right holders' discretion. Also from this point of view, the system implemented under Article 6.4 of the 2001 Directive is not satisfactory, as it does not ensure to the users a peaceful enjoyment of limitations and exceptions[19] and leaves to the national legislators the task of keeping the balance between the former and the TMP. This also permits different approaches by the Member States and thus implies a lack of harmonisation.

Finally, whereas the Commission must certainly be congratulated for this consultation, it may be complained that the Green Paper follows a partial approach of the problem, citing only certain exceptions and limitations considered as important for the knowledge economy. Instead, a general review of the exceptions and limitations in the knowledge society should have been undertaken. Indeed, the Commission forgot to include in its list a limitation as fundamental as the right of quotation, which is essential for the democratic debate and free criticism. Private copy is also carefully omitted. It is understandable that the Commission wishes to avoid the delicate questions linked to this exception, but it may not be ignored that private copy may also be an efficient way to access knowledge, especially through the copy of information works. Let's think for example about the photocopy of an article of a scholar, which falls into the scope of the exception in many European legal systems. For all these reasons, it would be advisable to initiate a true fundamental study of the whole system of exceptions and limitations, by opening a transparent public debate, allowing each interested group to present its point of view. In fact, the present rules are strongly influenced by requirements expressed by some specific interest groups, without the collective interests being sufficiently taken into account. Such a consultation would strengthen the citizen's approval of an efficient and balanced system of protection of author's rights in the European Community.

<u>Recommendations:</u>

1- To provide for a mandatory list of exceptions and limitations and to enjoin their introduction into the national laws as such. Their efficacy will have to be fully ensured through appropriate and simple mechanisms against the TPM. The directive of 2001 will have to be reassessed and adapted to these aims.

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industrial y derecho de autor; in portugese (Brazil) in Revista Trimestrial de Direito Civil, Nov/Dec. 2008 and Portugal in Direito da Sociedade da Informaçao ; in Italian in Diritto informazione e informatica.

[18] See the conclusions of a study made for the Commission by the Institute for Information Law of the University of Amsterdam: Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Final Report, Amsterdam, Feb. 2007, p. 168: "The European legislator could consider clarifying that national lawmakers and, where relevant, national courts apply the three-step test in a flexible and forward looking manner".

[19] The Directive provides for the possibility to set aside the exceptions by agreement in case of "access on demand" and gives priority to the technical measures through the prohibition of their bypassing when they block the effective benefit of the exceptions.

2- To allow the adaptation of the system to technical and social change by adding to the mandatory exhaustive list an "open" general provision with clear and precise criteria in order to avoid misuse.

3- To propose a guide for interpretation of the "three step test" in the respect of all the interests at stake.

4- To initiate a true fundamental debate on the whole system of exceptions and limitations, by opening a public transparent debate allowing each interested group to assess its interests.

II. Limitations to copyright : specific issues

We will study the various exceptions and limitations dealt with by the Green Paper in the respect of the order chosen by the Commission: first, exceptions for libraries and archives (1); then exceptions for the benefit of people with a disability (2); exceptions allowing dissemination of works for teaching and research purposes (3); and finally, a possible exception for user-created content (4).

1- Limitations for libraries and archives

In this scope, the first question is the one of the possible adaptation of the provision of Article 5.(2)C) of the Directive 2001/29/CE which provides for an exception "to the reproduction right for specific acts of reproduction for non-commercial purposes by public libraries, establishments of higher education, or museums or archives"[20]. The optional character of this exception is questionable in view of a better harmonization in the internal market. On the other hand, it is generally accepted that a change of the existing legislation should be undertaken only in case of a "structural market failure". In this view, the main question is whether the Commission's Recommendation 2006/85/CE of August 24, 2006 on "digitalisation and accessibility online of cultural works and digital preservations"[21] is sufficient in view of the aim of development of a digital European library, revealing the specific problems of orphan works.

1.1 Digital preservation

As for the definition of the exception under Article 5.(2) C) of the Directive, it is unsure whether it would be possible to extend its scope beyond the "specific reproduction cases", because of the necessity to take into account the "three step test" and especially the criterion of the "special case" contained in Article 9.2 of the Berne Convention[22]. The extension of the exception to private persons willing to put a work online does not seem compatible with the international norms, whether the present meaning of the exception is construed as limited to a "special aim" or as a quantitative limitation[23]. The promotion of solutions drafted on a

[20] See also: the exception to the exclusive rights "as for the use, by communication or placing at public disposal for research aims or private studies by the means of specific terminals, for private persons on the premises of these establishments" (Art. 5.3, n of the Directive).
[21] OJ, L 236, Aug. 31, 2006, p. 28.
[22] Provision extended to all the economic rights under Art. 13 of the TRIPS-Agreement and Art. 10 of the WIPO Copyright Treaty.
[23] See the decision of the WTO Panel of June 15, 2000 (WT/DS160/R). Other interpretations may be proposed and it is not certain if the one used by the Panel as for Article 13 of the TRIPS may be transposed as such into

consensual basis could be sufficient for the moment, to the fulfilment of the desired aims (as noted by the high level expert group)[24]. In this scope, the Commission's recommendation to the Member States "to encourage cooperation between cultural institutions and private sector"[25] seems to be effectively followed by the creation of a new "sub-group : partnership public-private"[26].

As for "format-shifting" of works in order to preserve the archiving of digital works, the Directive limiting the exception "to specific reproduction acts" and does not seem to forbid the making of several successive copies if necessary. The Member States having limited the exception as to the number of copies seem to back from this position[27], following the Commission's recommendation to "allow the reproduction of several copies"[28]. It should be noted that the constraint of such operations may be limited or cancelled by the technical choice of digital formats using open international standards, which are de facto permanent and should be encouraged as such. Nevertheless, the difficulties related to the obsolescence of the digital carriers might remain, and it is necessary to provide for a criterion of evaluation of the number of copies allowed within the frame of the exception. In this scope, the aim of the exception -the preservation of the works- should be kept in mind. Acts of reproduction, even multiple, must be necessary to this aim. In this view, acts of reproduction are accessory to the act of conservation and thus remain within the limits of the exception as long as they keep their accessory character. The criterion of the act of reproduction made for the sake of preservation could be the one proposed by the "sub-group copyright"[29] : non-increase of the number of access for the final users. Thus, within this strict limit, no authorisation from the right holder should be required, this being also true for the implementation of Article 5.2 (c) and Article 5.3 (n). Such an interpretation of the Directive would permit to escape a new legislative act and would simply be made by the way of an opinion or a recommendation of the Commission or its services. It would also dispense the libraries from the burden of securing numerous authorisations from right holders. A higher legal certainty would thus be provided to the interested parties.

This would however leave the question of acts of reproduction made on demand of end users by libraries, museums and archives. As a matter of fact, such reproductions allow many students and researchers to access certain documents important for their works, without physically visiting the places where the books are kept (these books are not always accessible to the public). Such acts of reproduction must be facilitated in view of securing access to information. However, it is proposed to deal with this problem not under Article 5(2)c, but on the occasion of a revision of the exception of private copy. It could then be stated, for instance, as it is already the case in some Member States, that a copy may be made by a library or archives, under condition it is only for information aims. This example shows the difficulty to deal with the exceptions in a partial way, and reconfirms the need for a global treatment of the question (see above).

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the Community system, because of the socio-cultural dimension of copyright. See: the Declaration relating to the interpretation of the "Three step test" respectful of the balance of interests in copyright, cited supra, note 17, at § 3.

[24] High Level Expert Group, i2010: digital libraries, Report on the digital preservation, orphan works and exhausted editions, April 18, 2007.

[25] Recommendation, *supra* note 21, No. 3.

[26] Report of the 3rd meeting of the High Level Group of Experts on the digital libraries, April 18, 2007.

[27] E.g., works in the United Kingdom as for the amendment of Art. 42 of the statute on copyright.

[28] Recommendation, *supra* note 21, No. 9.

[29] Report, *supra* note 24, at 4.

1.2 Orphan works

The case of orphan works, "works still protected by copyright, but the right holders of which may not be identified or located"[30], is especially important, because of the high number of such works, which could be made accessible within the digitalisation project. First, should be checked the necessity of a "new legislative act more ambitious than the recommendation 2006/585/CE[31]. From an economic point of view, such a new act is not indispensable, since according to the Commission itself: "the scope of the impediment to the use of orphan works is not yet precisely known. The economical statistics necessary to quantify the problem on the European scale are not sufficient"[32]. Such a statistic study seems however to be an indispensable preliminary to a legislative decision; an earlier initiative may seem presently premature. Moreover, the extent of the problem might be reduced by the development of data bases facilitating the search for right holders, as recommended by the "sub-group Droits d'auteur"[33]. The European project "Arrow" (Accessible Registry of Rights and Orphan Works in Europe) is developed in this perspective. Since a better quality of the meta-data allowing the identification of the right holder leads to an increased efficacy of such data bases, such "a better labelling by meta-data of the digitalised materials" is to be pursued[34]. If the right holders do not sufficiently participate in the diffusion of such data, the solution would be to subordinate the protection of TPM to the registration of the right holder within a database accessible to the public; Article 7 of the Directive "Information society" could be amended to this aim[35]. Practical aspects should also be taken into account in order to evaluate the scope of the problem. Especially, the practice of "reservation of rights" is well known by the operators. In any case, the whole set of conditions might be implemented by agreement, as set forth under the protocol signed by the representatives of libraries, archives and right holders. Moreover, since it is unsure whether the problem of orphan works has an influence upon the functioning of the internal market, this could set aside the preparation of a new directive or the adaptation of the directive of 2001[36].

Thus, the solutions would have to be elaborated at the national level[37], in the respect of certain common criteria which should not be imposed by a statute, in view of keeping some flexibility[38]. The main question is the one of the definition and thus of the criterion of the orphan work. The impossibility of identification of the right holder should be assessed after a "reasonably diligent search"[39]; the proposed criteria generally refer to the "reasonableness"[40].

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[30] Green Paper, No. 3.1.3, at 10.
[31] Green Paper, question No. 10.
[32] Green Paper, p. 10.
[33] Report, *supra* note 24, at 6.
[34] Ibid.
[35] See IViR, The Recasting of Copyright & Related Rights for the Knowledge Economy, final report, Nov. 2006, www.ivir.nl, p. 179 *sq*. The study further recommends the implementation in the countries of the EU of a system permitting a public authority to grant a compulsory licence to the user of an orphan work. It also envisages the creation of an exception for the use of such a work, which would have to provide for a payment to the right holder if he or she should reappear (at p. 188). *Cf.* on this issue also the article of one of the author of the IViR study S. VAN GOMPEL, "Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?", 38 IIC 2007, 669 (2007). Such a very interesting solution could be envisaged after a clear need has been identified. In absence of precise economic studies on the issue, such action might be- at least today- a little premature.
[36] See: Report by IviR, cited above.
[37] "Copyright Subgroup", Report *cited supra* note 24, 10.
[38] Ibid, and n° 4.4.
[39] United States Copyright Office, Report on Orphan Works, Jan. 2006, precisely listing elements allowing such a search.

It is probably possible to look for a more requiring criterion if the exception is to be expressly stated. The criterion of "serious and established searches"[41] seems to better account for the conditions generally required for the qualification of an orphan work. As for the method, negotiated and agreed mechanisms should be favoured, complying with point 6 of the Recommendation 2006/585 of the Commission. In any case, experiments made in the United States should be carefully viewed, especially because an international discussion should be engaged. It would have to be clarified that such mechanisms comply with the Berne Convention asserting the exclusive character of copyright[42]. This legal uncertainty leads to carefully examine the above mentioned technical and economical considerations.

Recommendations:

1- As for the limitation of Article 5.2 c of the Directive, to continue to promote mechanisms staying on a voluntary basis (group i2010). To adopt an opinion or a recommendation favouring a "reasonable" interpretation of the provision, under the criterion of non-increase of the number of accesses for the end-users of libraries, without limitation of the number of copies for preservation. Eventually to modify the Directive as follows : "Acts of specific reproduction under Article 5(2)c should be understood as not prohibiting several copies, as long as such copies are made for the purpose of preservation and do not entail an increase in the number of accesses for the end-users".

2- To deal with the question of copies made on request by libraries and archives for the users in the frame of another limitation, such as private copy, while promoting a global study on the whole system of exceptions and limitations to copyright.

3- As for the orphan works, to make a serious and independent economic study on the question, as well as on the legal feasibility of the national solutions in view of the international conventions.

2- Limitations for the benefit of disabled persons

The Directive 2001/29 of May 22, 2001 (Article 5.3 b) allows the member states to implement exceptions or limitations to the reproduction right and the communication to the public right for the benefit of "persons with a disability" for "non-commercial uses directly related to the disability". It should be reminded that the implementation of almost all the exceptions under the Directive was optional for the Member States. Moreover, as noted by the Green Paper[43], the Directive leaves a large freedom to the States which may even implement the exceptions

[40] E.G., Canadian law refers to "reasonable efforts"; in the U.K., the Gowers Report refers to "reasonable search".
[41] Opinion of the specialised Commission of the CSPLA on orphan works, April 10, 2008.
[42] According to some scholars, an amendment of the conditions of exercise of copyright protection, such as compulsory collective management systems, would be contrary to the Berne Convention. E. g.: M. Ficsor, Collective management of copyright and related rights at a triple crossroads: should it remain voluntary or may it be extended or made mandatory?, Copyright Bulletin, Oct. 2003. Anyhow, some other scholars strongly defend a contrary opinion: S. v. Lewinsky, Mandatory collective administration of exclusive rights: a case study on its compatibility with international and EC copyright law, Copyright Bulletin Jan.-March 2004; Ch. Geiger, The Role of the three-step test in the adaptation of copyright law to the information society, Copyright Bulletin Jan.-March 2007.
[43] Green Paper, p. 6.

in a more restrictive way. Nevertheless, the drafters of the Directive seem to pay a special attention to this exception, since in Recital 43 they assert that "it is important that the Member States introduce all the measures in order to facilitate access to works by persons suffering from a disability". All the Member States have implemented this exception, but the quality and diversity of its content cast a doubt upon the reality and efficacy of the harmonisation.

The French example may serve as an illustration. As a matter of fact, whereas the content of Article 5(3)b of the Directive is short, the French provision is so long and complex that it leaves perplex many specialists, who expect it to be very difficult or even impossible to apply in practice[44]. For the moment, such enforcement has been delayed, since two years after the vote of the "Law DADVSI" of August 1st 2006, the implementation decrees have just been adopted[45]. Those decrees have defined the degree of disability to be required in order to benefit from the exception and listed the enterprises able to make the adaptations of works.
The implementation of this exception in national law is problematic due to the freedom left by the Directive to the Member States. Several questions appear.

2.1 The beneficiaries

Whereas the Directive does not make any distinction, some Member States choose to reserve the benefit of this exception to some categories of disabled persons. The French legislator refused such discrimination, but still reserves its benefit to persons having a high degree of disability. The result is a great diversity of national laws and in the most restrictive cases a disregard of the principle of equality of opportunities. A harmonisation is necessary and it seems advisable that it is made on the basis of absence of discrimination as to the nature of the disability.

Some right holders, among them the French national union of publishers[46], argue that this exception should not be allowed whenever a technical solution (e.g. robot, computer program) makes the work accessible to the disabled persons. This point of view is disputable. Disabled persons must often live in a costly and adapted environment; it is not advisable to subject their access to knowledge and culture to more material constraints, which could be avoided by an adaptation of works.

2.2 The works. The adaptations.

Lacking a distinction in the Directive, all the works should be made accessible to the disabled persons by any means, as long as they do not exceed what is necessary to the perception by the handicapped person: translation into Braille or large letters, digitalisation, or audio-book as for written works, inclusion of sub-titles, various colours or shapes for audiovisual works, etc. Databases protected under copyright or under the *sui generis* right should also be included in the exception. French law lacks precision on this point: it borrows from the Directive the expression "accessible formats", without defining them. During the discussions relating to the preparation of the decrees, certain right holders attempted to exclude from the exception the

[44] Ch. Geiger, The New French Law on Copyright and Neighbouring Rights of 1 August 2006 - An Adaptation to the Needs of the Information Society?, IIC 2007, p. 401 *sq.*; M. Vivant, Les exceptions nouvelles au lendemain de la loi du 1er août 2006, D. 2006, Dossier 2159, n°5; C. Caron, Droit d'auteur et droits voisins, Litec, 2006, No. 383; M.-E. Laporte-Legeais, La propriété littéraire et artistique à l'épreuve de la loi n° 2006-91 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, Rev. jur. Comm. 2006/6, p. 438.
[45] Decree No. 2008-1391 of December 19, 2008 and decree No. 2009-131 of February 2009.
[46] Letter by its President, Serge Eyrolles, to Mrs Albanel, French Minister of Culture.

adaptations taking the form of digital files and favoured the consultation on site of the adapted works, without renting of a physical support nor consultation on line[47]. Again, such a restriction seems to be discriminatory and contrary to the spirit of Article 5(3)b of the Directive. The duty to consult the works on site would keep many disabled persons from access to such works and will deprive them from the pleasure of their consultation. Moreover, it would introduce a discrimination as against persons suffering from a motion disability, who would widely benefit from the possibility of accessing to the adapted works online.

2.3 *The question of the remuneration*

The Member States deal in various ways with the problem of the remuneration of the right holders of the adapted works. The Directive does not expressly exclude such a remuneration, but it does not either seem to favour it, since it requires that the author of the adaptations do not act for commercial purposes. The duty to pay a remuneration might increase the cost (which may be already high as such) of the creation of adapted works and thus to keep the beneficiaries from using the exception. The Recitals 35 and 36 of the Directive state that such a payment should depend on the amount of harm suffered by the right holders as a consequence of the implementation of the exception. This harm seems to be very limited, since the public (the disabled people) is by hypothesis a minority as compared to the general public. Moreover, this exception for the sake of general interest aims at preventing the inaction of the right holders as for the making of adapted works: therefore they do not suffer a loss since they do not occupy this segment of the market. Finally, if an important loss would be evidenced, this would probably make the exception contrary to the "three step test".

2.4 The protection of the right holders of the adapted works

The main risk relating to the implementation of this exception does not seem to be financial, but rather consists of the possible dissemination on the Internet of the works adapted in a digitalised form. This is the reason why certain persons expect the French legislator to exclude such adaptations from the scope of the exception. Whereas this risk does certainly exist, the Directive permits to limit it, since the protection of adapted works by TPM is encouraged. Moreover it is possible, as is the case in French law, to reserve the management of such works only to trustful organisations. Finally, it may be reasonably expected than the public at large will not download the adapted works, which by definition are modified and thus much less attractive. The risk of piracy seems to be limited.

2.5 Conclusion

It seems that the exception should evolve in order to permit a better harmonisation[48]. In this view, Recitals 31 and 32 of the Directive invite the Member States to define the exceptions in a "harmonious" way and to implement them in a "coherent manner". This does not seem to be the case in reality. Harmonisation implies a more precise definition of the conditions required to benefit from the exceptions. It should be kept in mind that a Member State which chooses

[47] Ibid.

[48] It should be noted that the WIPO presently studies the possibility of a new treaty relating to an exception to copyright in favour of disabled persons. See: the WIPO press statement of Nov. 10, 2008: Member States Review Key Copyright Issues, Geneva, Nov. 10, 2008, PR/2008/575. See also J. Sullivan, WIPO Study on Copyright Limitations and Exceptions for Visually Impaired, Nov. 2008.

to implement an optional provision of a directive must implement it totally and not partially[49]. Thus, whenever an optional exception is implemented under such strict conditions that its scope is very limited, this amounts to a partial implementation, contrary to the EC law.

Recommendations:

1- To increase the Community harmonisation of this limitation:

   a. By making it mandatory for the Member States

   b. By defining the disabilities concerned in a more precise way but with an extensive understanding

   c. By making it applicable to all categories of works

   d. By authorising adaptations in a digitalised format, under the possible condition of protection of files by TPM.

2- To redraft Article 5(3)b as follows : "The Member States have the duty to implement exceptions or limitations to the rights provided for under Articles 2 and 3, in order to make a work accessible for non-commercial purposes, by analogical or digital forms, to any person suffering from a disability of any nature, and to the extent required by the disability. The adaptation of a work into a digital form may be subjected to its protection by technological measures".

3- Dissemination of works for teaching and research purposes

The first statutes on copyright in Europe and in the United States showed a wish to protect the legitimate interests of the creators in order, among other, to favour public instruction[50]. The protection is granted to intellectual works which push further "the limits of human knowledge"[51]. The authors' interests are protected in order to favour the dissemination of knowledge and progress. As from its origins, the aim of copyright is to favour exchange of knowledge and ideas, the progress of science and arts.

Although copyright consists of an exclusive right on the author's work, it does take into account the aim of favouring access to knowledge. In order to ensure the harmonisation of conflicting interests at stake, the legislator provides for exceptions to the exclusive right.
One of these exceptions is based on the teaching and research purposes of certain uses of the protected work. Some States expressly recognise such a specific exception; others admit exceptions which do not specifically apply to the use of works for teaching purposes, but nevertheless favour such activities. For instance, French law (and also other national laws)

[49] ECJ, Oct. 23, 2003, C-408/01: RIPIA 4/2003, n° 214, p. 87; Propr. ind. 1/2004, comment by Folliard-Montguiral; RTDcom. 2003, n°4, p. 502, comment by Galloux and Azéma; RJDA 3/2003, n° 374, p. 335; RTDcom. 4/2004, p. 706, comment by Bonet. On this decision see also G. Bonet, L'arrêt Adidas de la Cour de justice: du nouveau sur la protection de la marque renommée, Propr. intell. 2004, p. 593.
[50] This is made clear by the law of the French Revolution: the decree of 1793 on copyright was drafted by the Committee of Public Instruction as being part of a wider project on public education.
[51] Lakanal Report, Le Moniteur, July 20, 1793, n° 202, p. 863, session of July 19, 1793.

provides for an exception of short citation, private copy, or exceptions for the benefit of libraries[52].

The first one allows to cite an author's work on condition the citation is short and justified by the nature of the work in which it is inserted : the latter should be critical, polemical, educational, scientific or information. The second exception, which authorises the reproduction for private use is essential for the needs of teaching and research[53].
Moreover, some Member States adopted collective management systems, which are also important for the fulfilment of above mentioned aims. Such is the case in French law (which may be considered as "mixed"[54]), where the compulsory collective management of reproduction by photocopy allows teachers and researchers to freely reproduce works for the benefit of their students. The conditions of such acts of reproduction are laid down in the agreements concluded between the French State and the "Centre Français d'exploitation du droit de Copie" (CFC).

It should also be reminded that authors have tolerated numerous uses of their works for educational or research purposes. Such a tolerance does not however create rights for the benefit of third persons. The present trend is to comply with the exclusive rights, which implies the explicit recognition of a specific exception in this area.
Since many Member States accept such an exception, which seems to be justified[55], the Directive of 2001 allowed its introduction in a general manner. However, this exception being optional, its introduction into the national laws has not been uniform and its content and scope vary from State to State. Such differences show an unfortunate failure of harmonisation. From a practical point of view, this situation might entail more difficulties for the international teaching and research activities, as underlined in the Green Paper.
We do not intend to summarise and compare such differences, nor to analyse the French solution[56]. We wish to explore the requirements which should be taken into account with a view of reconciliation of the interests at stake in the knowledge economy.
From this point of view, it should be reminded that the general interest does not coincide with the interest of the State. Whereas it is essential to favour the dissemination and access to knowledge, general interest should not be put forward as a justification for rules which would in fact be explained by the concern for a limitation of the State expenses related to teaching and research[57].

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[52] Other examples: the exception allowing the reproduction of official speeches made in political, administrative or academic meetings (Art. L. 122-5, 3c, of the IP Code); the right to watch, study or test the functioning of a computer program (Art. L. 122-6-1 III, of the IP Code). See on this issue Ch. Alleaume, Les exceptions pédagogiques et de recherche, Comm. com. élect. 2006, n°11, étude 27.
[53] As noted by many authors: V. Nabhan, Reprographie et éducation, Droit d'Auteur 1983, p. 285; P. Geller, Reprography and Other Processes of Mass Use, RIDA July 1992, No. 153, p. 3.
[54] Meaning that certain photocopies do not have to be authorised by the author and are collectively managed, whereas others remain subject to authorisation, but are to be collectively managed.
[55] After reminding of the importance of IP rights and of the necessity of their harmonisation, the drafters of the Directive underline that it should promote the dissemination of knowledge and culture by a protection of the works, but "permitting exceptions and limitations in the interest of the public for teaching and education purposes" (Recital 14).
[56] This solution consists of a specific exception in force as from Jan. 1, 2009, upon expiration of the specific agreements between the Ministry of Education or the Universities with the collective management societies (Art. L. 122-5-3, e, of the IP Code). See Ch. Geiger, supra note 44.
[57] Nevertheless, the mission of public teaching and research which belongs to the State probably implies adaptations to the authors' exclusive rights.

This being said, let us list the most topical issues and difficulties in a view of a reconciliation of interests involved in the uses of works for teaching and research purposes, in order to propose possible answers.

As a minimum, all the States should allow the citation of a work when it is inserted in another work having an educational aim. In this case, it seems that the author's interests will be protected by his / her identification, as well as by the statement of the source[58]. This exception should not be subject to additional conditions, such as the "three step test", or any contractual provision. However, the exception of citation is not, as such, sufficient to promote the aim of favouring the dissemination of works[59]. This explains that many Member States introduced a specific exception following the Directive of 2001. The reconciliation of interests in this area implies the mandatory character of this exception. It also implies, as a counterpart of its mandatory character, that a remuneration is paid to the right holders and that the scope of the exception is precisely defined. The first question is to be easily solved[60]; the second one might be more difficult. The first limit is related to the specific aim of the exception: only acts having educational or research purposes should be permitted; this excludes all commercial activities[61]. As such, the exception should cover all educational activities[62], including apprenticeship, which is a hybrid form of education (the only limit being the educational aim of the acts)[63]. As explained in Recital 42 of the Directive, the exception should only take into account the educational aim of the use, and not the structure or the financial means of the teaching establishment. Moreover, there is no reason to set aside distance education, for online teaching is to be the mean of education of the future: why should it be subject to different rules[64]? The aim of the exception will be fulfilled only if it applies to the copyright as a whole without being limited to reproduction or performance of the work, nor to acts made in an analogue environment. Nevertheless, it is possible to account for the loss suffered by the right holders by providing for a compensation, depending on the nature of the acts performed under the umbrella of the exception. Finally, the purpose of the use implies the mention of the author's name and the identification of the source, unless impossibility is shown under strict conditions of evidence.

The nature of the works subject to the exception should not matter. For instance, the exception should not be limited to literacy works: graphic, plastic works or photographs should not be excluded. However, the harm to the authors' rights would be out of proportion with the aims of the exception if it would apply to works specifically made for teaching purposes, especially if reproduction or performance of the whole work were authorised. It seems thus necessary to

[58] Such references warranty the respect of the author's moral right on his/her work. When a statute states that the citation is still allowed when the identification is impossible, this is a praiseworthy provision; however, a true impossibility should be evidenced. But we come here to the question of orphan works; see supra.

[59] The other above mentioned exceptions which directly benefit teaching and research activities, are probably insufficient all together to satisfy the legitimate expectations which lead some States to recognise an exception in general interest for research and teaching purposes.

[60] This compensation should probably be negotiated and a solution should be provided in case of disagreement. It should also be underlined that this compensation relates a priori only to uses of a work that are not covered by other exceptions not implying a compensation.

[61] Teaching or research as such do not have a commercial aim, but they may be subject to the payment of registration fees.

[62] The Directive does refer in general terms to exceptions or limitations for teaching and research aims (Recitals 14 and 42).

[63] The recipients of the activity must be identified or at least limited. The condition relating to the educational aim implies that the acts of reproduction or communication are meant for a public of students or researchers.

[64] The Directive views the teaching online as being included in the scope of the exception for educational and research purposes (Recital 42).

exclude the works made for teaching purposes, or at least to strictly limit the authorised uses. In this scope, it might be difficult to define such educational works, which should be viewed in a strict sense[65]. This exclusion is to be justified as a condition of survival for such educational works[66]. From this point of view, the scientific community and especially authors of works made for education and research could be encouraged to favour their use for such aims. The publication by the universities is a way of enhancing the sharing of knowledge.

Recommendations:

1- In the frame of a global European framework on exceptions and limitations to copyright, a specific chapter should be devoted to those favouring educational and research activities in order to define precisely the main points related to the aim of dissemination of knowledge.

2- To limit the scope of the limitation to acts made for educational or research purposes, excluding any commercial aim.

3- To find a minimal common definition of the conditions of the limitation, which should be mandatory for the Member States.

4- User-created content: towards a limitation for creative purposes?

Article 47 of the Universal Declaration of Human Rights establishes a right to access to culture. In order to shape this right, is it possible to favour the emergence of a right to free creation? The overview of the French case law suggests signs of an evolution in this direction (1). If European Community law were to admit such a new exception to copyright, it should be located among other neighbouring exceptions (2). However, this evolution might entail unexpected consequences and its extension could open the door to many misuses (3).

4.1 The emergence of a freedom to create: the example of French law

French law already contains instances of exceptions to copyright for creative purposes. First, such an idea is implied in the exception for the purposes of parody, pastiche and caricature (Article L.122-5-4, Code P.I.). Apart from copyright, French courts protect the caricatures under the law of the press or under the person's "right to his own image" ("droit à l'image"). These decisions are grounded on the freedom of speech, which may be viewed as part of a more general freedom of creation. The growing importance of the former may explain the success of the latter.
Moreover, some decisions may be seen as referring directly to the freedom of creation. For instance, in the dispute between Victor Hugo's heirs and the author of a continuation of the novel "Les Misérables", the French Cour de Cassation reversed the decision of an appellate court which forbade the publication of the new novel, seen as an infringement of Victor

[65] A school or university text books are undoubtedly made for educational or research purposes as opposed to dictionaries or journals.
[66] In the same way, works the survival of which would be threatened by such an exception could be also excluded from its scope, or at least subject to a stricter limitation of permitted acts.

Hugo's "droit moral"[67]. The Cour de Cassation held that there was no evidence of any alteration of the original work and that the appellate court "failed to recognize the freedom of creation".
In the neighbouring field of registered designs and models, a court decided that a parody of a design was unlawful, since the statute does not provide here for an explicit exception of parody[68]. The opposite solution could have been reached on the basis of freedom of creation or freedom of speech.

4.2 A common ground for many limitations: free access to culture and freedom of speech

Several exceptions to copyright in French law may be explained by the aim of leaving free access to culture. Such is the case for the exception allowing the dissemination of works for teaching and research purposes (Article L.122-5-30, IP Code) and of the exception of parody or caricature (Article L.122-5-4, IP Code). In a more indirect way, exceptions based on the public right to information may also involve the idea of protecting culture or freedom of speech (Article L.122-3°, c, d, e,IP Code[69]). Therefore, it might seem permissible to admit a new exception for the benefit of users-creators. However, as attractive as it might seem, such an exception implies some risks.

4.3 A "Pandora's Box" limitation?

It does not seem advisable to reformulate various exceptions grounded on freedom of speech or free access to culture and to combine them into one new and simple exception for the sake of creation of new works. Such a synthetic draft would certainly allow a simplification, but it would give rise to difficult problems of boundaries. Authors' rights might be seriously injured by a vague definition of such an exception, leaving way to misuses and to loss of market power. An analytical treatment of the exception seems to be more acceptable. However, it is uncertain if a reference to "fair dealings" would be sufficient to define the boundaries of the new exception. References to "good usages", or to "purposes", as interesting as they might be, would not provide sufficient protection as such. Finally, the solution could be left to the national courts discretion under Article 10 of the ECHD relating to the freedom of speech. The French courts deal in this way with the "right to image" ("droit à l'image"), which is treated in the same way as copyright. However, the enforcement of exceedingly vague concepts could generate more legal uncertainty. Moreover, the principle of freedom of speech is too broad to serve as a base for an exception to copyright for cultural purposes.

The only possible solution seems to consist of drafting a new exception, but this would be a delicate task, in view of its confinement within acceptable limits. Moreover, it is not sure whether the authors' "droit moral", which is not harmonised in Europe, would effectively

[67] French Supreme court (Cass. First civ. ch.), Jan. 30, 2007, IIC 2007, p. 736. For a comment see Ch. Geiger, Copyright and the Freedom to Create, A Fragile Balance, IIC 2007, 707.
[68] TGI Paris, March 18, 2005, Propr. intell. July 2005, p. 339, comment by A. Lucas, confirmed by Paris Court of Appeal, Nov. 5, 2008, as yet unpublished.
[69] Dissemination of public speeches for information purposes; reproduction of images of art works in the catalogues for auction sales.

protect the authors' interests when the new work created under the umbrella of the exception would affect the spirit of the initial work.

The solution would consist of drafting an exception in a limited and precise way. The provision could read as follows: "After the author's death, the right holders may not forbid the works made on the basis of the existing ones, unless the spirit of the latter is affected, without prejudice to the right of caricature, parody or pastiche".

In order to reconcile freedom of creation with the prior author's rights, the new works created on the basis of an existing one would be allowed only after the author's death. This exception would not affect the derived works (e.g. adaptation or remake) authorised during the author's lifetime, while the heirs would not be allowed to enforce the "droit moral" in order to stand in the way of freedom of creation. It must be recognized that such a rule would affect the interests of the right holders *post mortem;* however such a limitation could be explained by the fact that the rights on derived works are often not exploited, but still are enforced against third persons willing to create new works on the basis of the common cultural heritage. An equitable compensation could be foreseen when the right holder makes his claim *post mortem*, in the spirit of what was proposed in the U.S.A. for orphan works[70]. In any case, the problem of the use of protected works for creative purposes should be debated at Community level, outside the question of exceptions and limitations to copyright.

Recommendations:

1. Either not to do anything, since the proper enforcement of the European Convention for the Protection of Human Rights allows reaching appropriate and proportionate solutions.

2. Or introduce into Community law a limitation which should be drafted in a limited and precise way, such as: "After the author's death, the right holder may not forbid the works created on the basis of an existing ones, unless the spirit of the latter is affected, without prejudice to the right to caricature, parody and pastiche, under condition than equitable compensation is paid".

General conclusions and summary

To sum up, the Commission is to be cheered for finally taking interest in the delicate question of exceptions and limitations to copyright and for collecting the opinion of the interested circles. However, the importance of the question requires more than a mere Green Paper; a true open and global reconsideration is necessary, taking into account the interested persons' opinions. From this point of view, it is regretted that the Commission takes a sector-related and limited approach, dealing only with certain exceptions, when other ones, not mentioned,

[70] Section 514, Orphan Works Act of 2006, 109th Congress, 2nd Session, H.R. 5439, introduced to the House of Representatives on 22 May 2006. On this bill *see* V. BRONDER, "Saving the Right Orphans: The Special Case of Unpublished Orphan Works", Columbia Journal of Law & the Arts 2008, Vol. 31, No. 3, 409 *sq*. Another very similar bill was introduced in April 2008 (Orphan Works Act of 2008, 110th Congress, 2d Session H.R. 5889, introduced 24 April 2008; for a comment see J. GINSBURG, "Recent developments in US Copyright Law. Part I 'Orphan' works", 217 RIDA 99 (2008). According to this bill, when an author creates a derived work starting from an orphan work (i.e. whose right holders cannot be found after a reasonable search), the right holder to the first work who subsequently reappears will not be able to prevent the exploitation of the derived work post hoc, but can only demand fair compensation.

play an important role in the making of a "knowledge society". The oversight of such instances as the right of citation, which is of the utmost importance for insuring a healthy public debate, or of the exception of private use, make fear that the Commission did not feel up to going until the end of this process. Moreover, it would also be necessary to listen to the authors, so that they might directly express their point of view. It should be kept in mind that the authors benefit from existing exceptions and limitations which facilitate the creation of their works, and that they do not always have such radical views as they are sometimes ascribed to them. In any case, the efficacy of the Community system should be warranted at the end of such a debate, by providing for a list of mandatory exceptions and limitations. This is to say such provisions could not be set aside by the Member States or by agreement, or made to be "out of order" by technical protection measures. The interpretation of the "three step test", keystone of the system, should also be precisely stated, in order to allow a fair balance of interests at stake.

As for the rest, in the frame of this Green Paper, we allow ourselves to refer to the recommendations proposed in the present document. Finally, the authors of this paper wish that all the opinions expressed on the occasion of this inquiry are really taken into consideration by the Community law makers. In such a way, the legitimacy of copyright will only be strengthened. All too often, the Commission appeared to launch a sham consultation, clearly ignoring the recommendations which were made, especially those coming from academic circles[71].

[71] See the recent proposal for a Directive modifying the Directive 2006/116/CE of the European Parliament and Council relating to the duration of protection of author's rights and certain related rights (COM(2008)464final), which states in its explanatory memorandum that "there was no need for external expertise". This proposal triggered a wide protest, especially among academics. See on this issue Ch. Geiger, The Extension of the Term of Copyright and Certain Neighbouring Rights:- A Never Ending Story?, IIC 2009, 78; R. M. Hilty, A. Kur, N. Klass, Ch. Geiger, A. Peukert, J. Drexl and P. Katzenberger, Comment by the Max Planck Institute on the Commission's proposal for a Directive to amend Directive 2006/116 EC of the European Parliament and Council concerning the Term of Protection for Copyright and Related Rights, 2009 EIPR 59; and the Common Academic Statement: Creativity stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings", 2008 EIPR 341.