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Lapatoura, I. orcid.org/0000-0002-3192-0120 (Cover date: 2022) Book review for S. Karapapa's 'Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet'. *European Intellectual Property Review*, 44 (4). pp. 250-252. ISSN 0142-0461

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Book Review for EIPR – Final Manuscript 29/12/2021

Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet

Stavroula Karapapa

Oxford University Press (2020)

ISBN 9780198795636

379 pages, GBP £84.00, hardback

Review by: Ioanna Lapatoura, University of Nottingham

In this book, *Defences to Copyright Infringement*, Professor Stavroula Karapapa provides an in-depth analysis of EU copyright infringement in the digital age and evaluates the effectiveness of the current copyright exceptions and limitations framework. In doing so, she pays particular attention to new technologies. On the one hand, she recognises the disruption they are causing on copyright law protection, due to their copying properties and in particular, their ability to infringe copyright works both easily and quickly. On the other hand, she points out that these copyright-threatening modern technologies can be beneficial to society, in terms of promoting innovation and encouraging the development of new business models, which are some of the EU copyright regime's overarching goals. As such, she argues that society is being deprived by those potential benefits, due to the fragmentation of new technologies by the limited availability, narrow scope and strict interpretation of copyright exceptions by the EU judges, as opposed to the extensive exclusive rights that copyright holders enjoy. Another reason she presents is the inequality of the status held by the exceptions and the much stronger user rights' status, even though the Information Society (InfoSoc) Directive¹ suggests that a fair balance should be maintained not only in relation to the rights and interests between right holders, but also between right holders and users of copyright works.

The author acknowledges the fact that the InfoSoc² and the Digital Single Market (DSM)³ Directives take emerging technologies into account, but finds them narrowly designed to cover only specific instances, highlighting the inflexibility over the scope of copyright exceptions and limitations. She translates this as effectively meaning that many novel copyright uses resulting from emerging technologies may be regarded unlawful, which would arguably be deemed unfair and unreasonable. And more than this, having extremely limited permitted uses, could have an adverse impact on some of the Directives' overarching goals, namely creativity, innovation and societal economic growth. Another instance that the author presents to highlight the existence of narrowly constructed exceptions and limitations, applied restrictively by the EU courts, and effectively, user rights, contrasted by the

¹ 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 (InfoSoc Directive), OJ L 167, 22 June 2001, Recital 31

² Ibid

³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17 May 2019

continuous expansive nature of protectable subject-matter, both at the legislative and judicial levels, is the shrinking of some internal copyright limitations, i.e. exhaustion and the 'new public' rule in relation to the rights of communication to the public.

For remedying this inequality, the author proposes for a broader and more liberal approach in interpreting the wording of the EU defences provisions, similar to the Canadian and United States' 'fair dealing' approach. The author supports that by following the paradigm of these two regimes, the EU legislature could create a more flexible and balanced-out copyright framework, founded on an understanding of the reasoning behind those provisions, rather than merely trying to tick certain boxes for an exception to be met. Prof. Karapapa also advocates for the recognition of copyright defences as user-rights that can be enforced before court, so as to conform with the aforementioned EU copyright regime's objectives in our modern society, where copying is inevitable.

Indeed, the major EU copyright developments of 2019 have a direct impact on this particular argument raised by the author. First of all, the enactment of the Copyright DSM Directive⁴ in 2019 and in particular, Article 17, appears to be favourable towards treating copyright exceptions and limitations, not necessarily as user rights, but nevertheless, as having a mandatory character. The Court of Justice of the European Union (CJEU) has taken a step forward and has addressed this issue in a trilogy of decisions, namely the 2019 cases C-469/17 *Funke Medien*⁵, C-476/17 *Pelham*⁶ and C-516/17 *Spiegel Online*⁷. In interpreting Article 17 of the Directive, the Court has expressly stated that the copyright exceptions and limitations should be understood as user rights, on the basis that they are intended to ensure a fair balance between two conflicting rights: the rights and interests of copyright owners against those of users of copyright protected works. This copyright balance is realised through rewarding copyright holders and at the same time, promoting the public interest. The significance of this affirmation is demonstrated by the fact that the Court has started treating copyright exceptions and limitations as a means for safeguarding fundamental rights, including freedom of expression and freedom of information, rather than mere limitations to the strong protection enjoyed by copyright holders. As such, this is an indication of the Court's acceptance that the exceptions and limitations enshrined under the InfoSoc⁸ should be treated as rights of users of protected works. But, despite this shift in recognising the copyright exceptions and limitations' legal status as user rights both by the CJEU and merely through the wording of the Directive, further guidance is yet to be provided as to the exact shape and form of the copyright exceptions' legal status⁹.

In terms of the structure and approach adopted in this book, Prof. Karapapa develops her analysis on EU copyright infringement and defences over 10 Chapters, having regard to the technology-infiltrated reality that we are commencing, while keeping in mind that copyright works can be used and re-used, thereby providing readers with a spherical overview of the

⁴ Ibid, Art. 17

⁵ C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623

⁶ C-476/17, *Pelham GmbH v Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2019:624

⁷ C-516/17, *Spiegel Online GmbH v Volker Beck*, ECLI:EU:C:2019:625

⁸ InfoSoc (n 1)

⁹ I.e. the Court is expected to offer clarifications as to whether exceptions are to be treated as overriding contractual terms, often contained in licencing agreements, that restrict users from relying on them (contractual override), or, if reliance on the exceptions is somehow limited, whether they are to take the form of positive rights, that users could enforce against right holders.

above-mentioned issues. At times, the author offers multi-jurisdictional comparisons on these issues through various real-life examples, which really help highlight potential problems and their real dimensions.

In Part A, which extends over Chapters 2-5, the author discusses defences that consist of the elements of denial of infringement, targeting on subsistence, scope, or authorisation to carry out an allegedly infringing act. Throughout Part A, the defence doctrines are carefully examined, while the author places them within the wider copyright and digital age framework of the book, often making references to their interrelation.

It is worth referring to one instance where the author sets out one out of various examples with real-life applicability and significance in the online environment as well as the real world. In explaining defensive claims on the basis of non-copyright subsistence in the allegedly infringed subject-matter, the author refers to derivative works or works with an input of a mere technical or functional nature, as examples of works that often lack originality. She continues, that subsistence negation extends to computer generated works as well as works created with the assistance of artificial intelligence (AI), that fall within that same category, due to their inherent difficulty in demonstrating the creative freedom and personal touch of the author, as well as the fact that such works are often merely following rules and instructions. Indeed, there is no EU policy to support that AI generated works are authorial works and copyright is generally regarded as a tool for protection that is confined to human creations.

In effect, this exclusion signifies that although certain entities which adopt computer generated or AI copy-reliant systems may benefit from copying works without committing infringement, they would nevertheless be unable to secure exclusive rights over their derivative works, unless evidence of subsistence of some additional creative effort can be demonstrated. Through this example, the author explains the practical implications of this particular exclusion from protection, that may not only be useful to law practitioners, i.e. those who advise technology companies, but also assist copyright holders of original works to better understand whether copy-reliant technologies can pose a real threat of violation of their exclusive rights in their creations.

The author adopts a similar approach, giving real-life examples and offering her analysis on the applicability in the online environment of various other defensive claims, i.e. uses that fall outside the scope of the right holder's exclusive rights in Chapter 3, uses of an incidental or transient nature, whose relevance is paramount online in Chapter 4, as well as instances where there is an allegedly express or implied consent by the copyright owner in relation to the activity at issue in Chapter 5 (i.e. use of protected content by search engines via hyperlinking and potential liability).

Equally, in Part B, the author explores the so-called copyright exceptions and limitations that justify an allegedly infringing act on the basis of complying with general legal rules, protecting fundamental human rights or promoting public policy objectives. These are subject to strict interpretation, in an attempt to balance the wide scope of the broadly defined exclusive rights. The author adopts a critical perspective over the narrow scope of those exceptions and limitations, especially in light of uses of copyrighted content in the online environment, thereby arguably undermining the degree of protection of the fundamental principles or public policy that they serve. In her analysis, the author discusses landmark copyright CJEU

decisions, as well as decisions from the national courts of various EU Member States, i.e. Greece.

Lastly, it is worth noting that the author also makes suggestions over a new categorisation of certain EU provisions. For instance, she argues that temporary copying, although enlisted as an exception under Art. 5(1) of the InfoSoc Directive¹⁰, should primarily be understood as a limitation on the scope of the reproduction right and therefore, being capable of negating infringement in certain cases. She justifies this suggestion not only because temporary copying is the sole compulsory exception for all Member States to implement under the InfoSoc¹¹, but also due to the CJEU guidance for its strict interpretation. As such, the author digs into the actual significance and effect that this provision, as well as others, should have in practice.

In conclusion, almost two years after its publication, this book remains relevant, offering the reader with a spherical and realistic break-down of the adaptability of copyright law to technological change, through the exploration of EU copyright defences, while determining how well those sit within the current copyright framework. This appears to have been achieved successfully, as the arguments made by Prof. Karapapa with regard to new technologies and copyright disruptions they cause, have been balanced out with an analysis over how they can, at the same time, be beneficial to society. Moreover, having a deep understanding of the changing copyright landscape over the past two decades, the author makes several suggestions for legislative reform and appears particularly critical towards the numerous 'pigeonholed' exceptions, subject to strict interpretation by the EU courts, thereby highlighting the deficiencies over their scope and application. Lastly, the author argues for the recognition of exceptions and limitations as user rights and for adopting a new and more flexible approach in translating copyright exceptions and limitations, especially in light of new technologies. Although certain positive steps have been taken towards this goal with the passing of the DSM¹² in 2019, Prof. Karapapa appears to be right in claiming that unless meaningful change in the EU approach takes place, the current copyright framework could prove to be overly restrictive for use of copyright works in the online ecosystem, hindering innovation and fragmenting the development of new business models.

¹⁰ InfoSoc (n 1), Art. 5(1)

¹¹ *ibid*

¹² DSM (n 3)