A Century of Dutch Copyright Law
Amsterdam, 31 August 2012

Limitations and Exceptions

Prof. Martin Senftleben
VU University Amsterdam
Bird & Bird, The Hague

The Problem

EU acquis in a nutshell

- broad exclusive rights
- exhaustive enumeration of exceptions
- three-step test

The Solution

Precisely-defined exceptions?

exception prototypes
at EU level

Learning from national laws
Necessity test

Inner distance test

Inner distance test

Free adaptation rule or parody exception?

Quotation right or implied consent?

Digital dangers or comparable functioning?

NL: District Court
The Hague
- internal press summary
- analogue exception (+)
- digital (-) conflict with three-step test
- digital version endangers normal exploitation of newspaper articles

D: Federal Court of Justice
- internal press summary
- analogue exception (+)
- digital (+) digital version has same function
- broad interpretation of exceptions if legal provision is outdated
Agreed Statement Art. 10 WCT

'It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.'

'Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.'

Work to be done

New Art. 5(5) Copyright Directive

'In cases comparable to those reflected in the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4, the use may also be exempted, provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder.'

- similar proposal in European Copyright Code
- WITTEM project, www.copyrightcode.eu

Application by analogy

- Dutch Supreme Court, 20 October 1995, Dior vs. Evora, para. 3.6.2
  - new exceptions on the basis of a comparable balancing of interests
  - but no freedom of speech underpinning, entrepreneurial copyright instead
  - later cases directly based on Art. 10 ECHR
- time ripe for analogy rule to safeguard freedom of expression/information?

CJEU, Eva-Maria Painer

'Article 5(3)(d) of Directive 2001/29 [= right of quotation] is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.'

(para. 134)

- impact of the EU Charter?
- also in contractual relations?
Levy system or enforcement?

The end. Thank you!

contact: m.r.f.senftleben@vu.nl