“User - created content v. Copyright : Two worlds collide?”

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Abstract

In the dawn of the 21st century the whole world is amazed by the spectacular development of new communication technologies that play the most crucial role to the configuration and function of the so-called “information society”. The daily life is, nowadays, substantially affected and by far determined by the very fast transmission of information. The Internet is, undoubtedly, a unique means of distance communication and the cornerstone of the today’s communication technologies.

However, new internet–based technologies (collectively called as “Web 2.0 technologies) go beyond of serving a mere communication goal and provide users with the technical ability to produce content for various reasons (commentary, criticism, entertainment, etc) and then display it publicly on the web. Such content (well known as “user-created content”) is usually based *on existing works* and is subsequently developed *to a new work* by means of a personal contribution.

In the abovementioned context, the most important issue that seems to arise is whether users infringe the owners’ exclusive right(s) both in the production process and at the time the new work is displayed publicly on the web, just in case that the already existing work is protected by copyright. If the answer to the previous question is affirmative, one has to further examine whether Intellectual Property Laws provide for a possible limitation or exemption to the owners’ exclusive rights for the sake of user – created content.

So, the proposed paper seeks to offer a wider discussion on the legal framework that is relevant to the previous questions and extract the most recent developments in this particular area of law. The analysis will begin in Part I by presenting the background of the “user created content” as a phenomenon in the Information Society. In this part, the author explains the use of “Web 2.0” technologies, its interaction with the web hosting services and the new role of the creative user in the information society.

In part II, the author will focus on the creative process. The central issue to be analyzed is how the copyright law (especially in the EU legal framework) perceives the acts of transforming an already existing copyrighted work into a new one and displaying such new works on the Internet. For the purpose of the analysis the author considers the existing works as already protected by copyright.

Part III is dedicated to the discussion of whether a possible exemption or limitation to the owners’ exclusive right(s) is provided for by the Intellectual Property Laws. In this interesting part, we first mention the relevant provisions of the Berne Convention, as envisaged by the TRIPS Agreement and the other WTO Treaties, incorporating the well known “*three-step test*”. After analyzing the test in the light of the relevant WTO Panel Reports, the WIPO official documents and the academic literature, we then turn our discussion into the European Community level. In this context, we examine the provisions of Directive 2001/29/EC “on the harmonization of certain aspects of

copyright and related rights in the information society" enhanced by the EU official documents, which also reflect the recent debate about the "creative content on line".

The final Part is dedicated to the conclusions of the analysis that took place above. The author attempts to assess the findings of the analysis in a critical way, thereby addressing the developments of law and presenting the problems arising out of the application of the existing Legal framework. The proposed paper purports to prefigure the future implications and the challenges of the existing regulatory framework.

1. User created content and the information society

The end of the earlier century is spotted by the emergence of the World Wide Web, a technological invention that would change the human kind's daily life for ever. This is often known as the "Web 1.0" phenomenon. The Internet, its key – tool was designed to facilitate world's distance communication thereby reducing time, money and human activity.

At first glance, that did not seem to be such an outstanding innovation, simply because it was difficult – in the common sense - for the advantages of this new technology to be immediately understood by the vast majority of people. The devolvement from the analogue to the digital world needed some time to be completed. It was just between the late of the earlier and the beginning of the 21st century, when the "Web 2.0" phenomenon invaded and the whole world welcomed the Information Age once for all. This phenomenon is largely responsible for the formulation and function of the so called Information Society, that is, "…a society in which the creation, distribution, diffusion, use, integration and manipulation of information is a significant economic, political, and cultural activity" [Wikipedia].

Web 2.0 technologies could be successfully determined as "…web applications that facilitate interactive information sharing, interoperability, user-centered design and collaboration on the World Wide Web." In other words, Web 2.0 applications allow its end-users to interact with each other as *contributors to a website's content*, in contrast to websites where users are limited to the passive viewing of information that is provided to them. Search engines (e.g. Google and Yahoo), blogs, wikis, distribution platforms (eg. You-Tube and Flickr), social networks (e.g. MySpace, Frendster, Facebook) and virtual worlds (e.g. Second Life) are just examples from the Web 2.0 inexhaustible technology list.

Web 2.0 applications are associated with the web – hosting services. A web hosting service, in particular, is a type of Internet hosting services which is constructed to perform a double task: In the first place, it allows individuals and organizations to provide their own website accessible via the WWW, while in a second place, third parties are able *to access these websites* and exercise additional capabilities *of uploading content in this particular part of the cyberspace* [I. Igglezakis, 2002].

In the abovementioned technology context, one should consider the much intended purpose for which those technologies are designed. Indeed, all of these web-based 2.0

applications present a unique and common characteristic, that of providing end users with the technical ability to create content and then make it available online. Users are nowadays able to upload content on – line, which is either of their own exclusive creation (e.g. post comments, book reviews or even upload their articles and other artistic works) or constitutes an already existing work (e.g. post songs, films or portions thereof on distribution platforms).

But between these two categories of content, one may identify the possibility of uploading content that derives from the combination of an *already existing work along with a personal contribution.* In that particular in-between category one may identify three possible activities, that is: *mashing up* (taking a digital media file containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources to create a new derivative work), *sampling* (taking a portion or sample of one sound recording and reusing it as an instrument or a different sound recording of a song) and *remixing* (taking samples from pre-existing materials to combine them into new forms according to personal taste) [Hemmungs Wirten, 2009]. Mash – ups, as songs composed entirely of pieces of pre-existing sound recordings, can be seen as "a subset" of sampling, while the scope of remixes is much broader than mash-ups, since the former can involve art, literature, or film in addition to music, and need not be composed entirely of pieces of pre-existing expression [Reynolds, 2009].

In any case, all of these types of "artistic appropriation" constitute a newly introduced phenomenon of the so - called "*user – created content* (UCC)" or "*user – generated content* (UGC)" or "*consumer-generated media*" (CGM). This concept is associated with the new web 2.0 technologies and actually implies various kinds of media content, publicly available, produced by end-users for various reasons (commentary, criticism, entertainment, etc), when acting outside their profession or business [G. Carlisle - J. Scerri, 2007, p. 2]. In other words, one may identify such content in the cyberspace, if three conditions are to be cumulatively met: i) content made publicly available over the Internet ii) which reflects a certain amount of *creative effort*, and iii) which is created *outside of professional routines* and practices [OECD, 2007].

Appropriation art is not a new concept – the practice was prominent a century ago, when Picasso was pasting oil cloth and newspaper clippings onto canvases. It certainly existed long before that, when Aristophanes was parodying the writings of Euripides and Sophocles, to when Dante was reimagining Virgil, and later when Shakespeare was seemingly freely borrowing from the entirety of English literature [Suzor, 2005].

In the UGC environment end-users (consumers) present an uncommonly active role in the production process. Put it differently, consumers produce. This new kind of users (commonly referred to as *Prosumers*,) constitutes an integral part of the digital citizens and plays a crucial role to the development of Information Society [Elkin-Koren, 2009]. Prosumers seem to present certain characteristics associated with the reasons for which UGC is produced. Thus, they are firstly animated by amateurism. Even if they are professionals, one could no longer deny the fact that a remixed song composed by a professional musician on the basis of a pre-existing one and then displayed publicly on the Web for free serves no more any professional goal. Moreover, it seems that Prosumers have a need in sharing their derivative works.

Most of the social networking sites or distribution platforms (or even peer to peer networks to the extent that "derivative works" are uploaded) are commonly understood as "recreation rooms" of the digital world, where end - users wish to criticize opinions, comment on posted materials or just entertain themselves along with the users of the rest community. Finally, Prosumers seem to be susceptible to collaborative efforts rather than individual ones. Wikipedia offers an excellent paradigm of this trend: users create a collective work due to their personal contributions (much of which may be regarded as derivative works and consequently UGC).

2. Facing Copyright

In the UGC environment, the user is able to do "almost everything". He is able to upload and download "user – created" works based on existing copyrighted ones to peer to peer networks, distribution platforms or social networking sites. He is also able to post "articles" and other content on bulletin boards or other web-hosting sites. But most importantly, the key-element in the Age of UGC is that all of these acts can take place in most cases "for free", that is, without payment to the alleged proprietor of the "content" (or part thereof).[1] In this context, one should bear in mind that the "posted" content may be protected (either in full or in part) by intellectual property rights and most importantly, by copyright and/or its related rights.

In view of the broadened extent of the phenomenon at question with regard to copyright law, the analysis of this Part will be classified into two categories, that is, evaluating from a legal point of view: the act of interfering with an existing copyrighted work and creating a derivative one (under 2.1.) and the act of uploading such a derivative work (under 2.2.). The analysis will also focus to the economic exclusive rights of the relevant right holders with particular emphasis to the EU legal framework.

2.1. Interfering with an existing copyrighted work – production of a "derivative" work

Many acts in the UGC environment may constitute the subject matter of exclusive rights in existing copyrighted works. *Remixing* or *sampling* and *mash-ups* (taking a digital media file containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources to create a new derivative work) would be definitely acts covered by the copyright owners' exclusive rights.

The Reproduction Right in the International framework

Article 9 (1) of the Berne Convention titled Right of Reproduction states:

> "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form"

At the same time Article 9 (3) of the Berne Convention is explicitly referred to sound or visual recordings to be considered as "reproductions" for the purpose of the Berne Convention.

Furthermore, the Guide to the Berne Convention explains that: "The words "…in any *manner* or *form*" are wide enough to cover all forms of reproduction : design, engraving … and all other processes *known or yet to be discovered*" [Guide to the Berne Convention, 1971].

On the other hand, the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994, specifically incorporated Article 9 (1) of the Berne Convention into its Article 9. The main legal consequence is that countries that defectively implement the "reproduction right" provision of the Berne Convention risk running afoul of their TRIPS obligations and becoming subject to dispute settlement.

The WIPO Copyright Treaty of 1996 (WCT) and the WIPO Performances and Phonograms Treaty of 1996 (WPPT) (collectively referred to as Internet Treaties) also contain provisions as regards the reproduction right. By virtue of Article 1 (4) of WCT, contracting parties to that Treaty have to comply – inter alia - with Articles 1-21 of the Berne Convention. In the Agreed statements concerning Article 1(4) of the WCT it is stated :

> "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, *fully apply in the digital environment*, in particular to the use of works *in digital form*. It is understood that *the storage of a protected work in digital form in an electronic medium constitutes a reproduction* within the meaning of Article 9 of the Berne Convention."

The provision of Article 7 in conjunction to that of Article 11 of the WPPT reads:

> "Performers [Producers of phonograms] shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms [phonograms], in any manner or form."

Similarly, the Agreed statement concerning Articles 7, 11 and 16 of the WPPT states:

> "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, *fully apply in the digital environment*, in particular to the use of performances and phonograms *in digital form*. It is understood that the *storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction* within the meaning of these Articles."

In the light of the provisions above, one may clearly suggest that all of the acts of artistic appropriation into which end- users engage may infringe the initial creators' exclusive right of reproduction. More specifically, the acts of remixing or sampling and mashing up consist in *two technical steps*, that is, the copyrighted material (or portions thereof) should be *obtained* and then *should be subjected to interference* by the end-user.

To obtain a copyrighted work in the electronic environment means that the work (data) should be *received and stored in a device that is controlled by the end-user*, either a permanent or a temporary one.[2] A usual way of receiving data from the Web is *to download* it. The act of downloading is usually accompanied by the subsequent act of storage of the data in a permanent storage device (e.g. the personal computer's hard disk or a CD, DVD, memory stick etc). After the work in question is stored, it is then capable of being modified by the end- user. For example, the act of remixing presupposes: the act of *downloading* a song in question (or part thereof) [*receiving*] , the subsequent act of *storing it* on a permanent storage device (e.g. hard disk) [*storage*] and the act *of interfering with it* in order to "build" a new "derivative" music [interference]. The first two acts purport at *obtaining the copy of a song* and the third act aims *at interfering with it*.

In the light of the provisions above, *to obtain* a copyrighted work without the owner's prior authorization constitutes – in the digital environment - a direct infringement of the exclusive right of reproduction, since the necessary action of storing the data in a permanent storage device is expressly covered by the reproduction right. It is also important to note that even *certain acts of interference* may constitute the subject matter of the reproduction right on top of storing the copyrighted work. For example, in the case of remixing the – after downloading and storing - subsequent act of *recording* the copyrighted sound (or part thereof) clearly infringes the owner's exclusive reproduction right (either in full or in part) by virtue of Article 9 (3) of the Berne Convention.

The reproduction right in the European framework

Copyright law is not yet harmonized across the EU Member States. However, the existing regulatory framework in the context of the information society consists basically of Directive 2001/29.[3] According to the provisions of this Directive, a copyright owner retains - in the context of information society - the following exclusive rights: 1) the reproduction right[4] 2) the right of communication to the public of works and the right of making available to the public other subject matter[5] and 3) the distribution right.[6]

As to the reproduction right, Article 2 of the Directive reads:

> "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, *temporary or permanent* reproduction by any means and in any form, *in whole or in part*:
>
> (a) for authors, of their works;
>
> (b) for performers, of fixations of their performances;
>
> (c) for phonogram producers, of their phonograms;
>
> (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
>
> (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite."

It is important to note that the formulation of Article 2 is quite broadened. The reproduction right is wider in its definition than it internationally is for authors (Berne Convention) and holders of related rights (WPPT, TRIPS) [IViR, 2007]. This is explained by the legislation itself, which states in recital 21 in its preamble that 'a broad definition of these acts is needed to ensure legal certainty within the internal market'.

Nevertheless, Article 2 seems to encompass the notion of "partial reproduction" within the sphere of the reproduction right. Indeed, this is probably the most important implication of the Directive towards acts that "*reproduce in part*" a copyrighted work. In *Infopaq International A/S v Danske Dagblades Forening*[7] the ECJ (after receiving a reference for a preliminary ruling from the Danish Court) recently ruled that an act occurring during a data capture process, *which consists of storing* an extract of a protected work (daily newspaper article) comprising *11 words* and *printing out that extract*, is such as to come *within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements thus reproduced are the expression of the intellectual creation of their author* [Recital 51]. The Court however noted that it is for the national court to make this determination. [Recital 51].

The reasoning of the Court is indeed useful in applying the rules of copyright to acts that relate to UGC. It seems that remixing, sampling or mashing up are surely acts covered by the reproduction right (in part) within the meaning of Article 2 of the Directive, if the part of the work is such as to express the author's own intellectual creation. In other words, if the referring national court finds out that the extract of 11 words constitutes "…an element of the work which, as such, expresses the author's own intellectual creation…" or that such extract "…may be suitable for conveying to the reader *the originality of a publication* such as a newspaper article, by communicating to that reader *an element which is, in itself, the expression of the intellectual creation* of the author of that article…", then there will be no doubt that, by analogy, the storing of a part of a musical work, which , by itself, expresses the owner's intellectual creation, will definitely constitute an act that "reproduces partially" the original copyrighted work within the meaning of Article 2 of the Directive.[8]

Translation and adaptation rights

Closely related to the right of reproduction is the right of adaptation, which provides copyright holders with the right to adapt a copyrighted work from one form of expression to another, or to authorize another to do so.

According to Article 12 of the Berne Convention "…Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works." Examples of adaptations include transforming a book into a movie or a song into a musical. The right of adaptation is also found in virtually all copyright systems. For example, Article 12 of the Berne Convention requires member countries to grant authors the right to authorize "adaptations, arrangements, and other alterations of" copyrighted works. The right of adaptation also encompasses the right to translate a work into other languages. Article 8 of the Berne Convention requires member countries to recognize this right of translation. In some legal systems, the

right of adaptation is expressed as the right to make “derivative works,” which use the original work as a starting point but are not direct copies of the original work.

In most countries, the reproduction right and the adaptation right are closely aligned. In other words, the majority of activities that violate the adaptation right also violate the reproduction right. However, there are exceptions. For example, cutting up a photograph to include it in a collage may violate the adaptation right (unless of course that behavior is excused by one of the exceptions or limitations). But, because that activity did not entail making a new copy, it would not violate the right of reproduction. However, the degree of overlap between these two rights varies somewhat by country. Which of the two rights is implicated by a particular case will sometimes make a difference; for example, if the copyright owner has granted a license for one of the rights but not the other [Harvard, 2009].

Most acts in the UGC world are probably covered by the “adaptation right”. However, it is important to note that copyright only protects the expression of ideas, not the ideas or facts themselves. Thus, it is self-explanatory that a work that is inspired by the ideas contained in another work but does not use any of the protected expression from the initial work is neither a reproduction nor an adaptation, and will not violate the copyright holder's rights. In that regard, Article 2(3) of the Berne Convention provides that authorized adaptations are protected by their own separate copyright, in addition to the copyright protection given to the original work [Markellou, 2009].

The scope of the right of adaptation has been the subject of significant discussion in recent years because of the greatly increased possibilities for adapting and transforming works which are embodied in digital format. These discussions have focused on the appropriate balance between the rights of the author to control the integrity of the work by authorizing modifications, and the rights of users to make changes which seem to be part of a normal use of works in digital format [WIPO, 2009].

2.2. Uploading a “user generated” work

The act of uploading a transformed copyrighted work to the Web could possibly be an act that constitutes the subject-matter of right holder’s two exclusive economic rights: a) the right of communication to the public of a protected work and b) the right of making available to the public a protected work

The right of “communication to the public” and the right of “making available to the public” in the international framework

The exclusive right of communication to the public was provided for by Articles 11 (1) (ii), 11bis (1) (i) and (ii), 11ter (1) (ii), 14 (1) (ii) and 14bis (1) of the Berne Convention, which conferred such right to authors of literary and artistic works but confined to performances, broadcasts, and recitations of works.

The new WIPO Internet Treaties (WCT and WPPT) provide for a broader definition of the communication right. In particular, Article 8 of the WCT provides:

> "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works* in such a way that members of the public may access these works from a place and at a time individually chosen by them."

In a first place, it seems that the wording of the abovementioned provision suggests that the "making available to the public" right is included in the broader context of the exclusive right of communication to the public.

At the same time, Articles 10 and 14 of the WPPT applies the communication right to performers and producers of phonograms. The WPPT defines these rights as ones of "making available to the public". Article 10 [and 14] of the WPPT provides:

> "Performers [producers of phonograms] shall enjoy *the exclusive right of authorising the making available to the public* of their performances [phonograms], by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."

After the adoption of the abovementioned provision it seemed that there was little doubt to claim that the "making available to the public" right is not an exclusive one at least as regards the performances and phonograms. In fact, the WIPO Internet Treaties broadened the extent of "the communication to the public" right, by introducing a new exclusive right of "making available to the public" copyrighted works. However, the Treaties left open the possibility to implement those provisions into the national legislations either on the basis of *an existing exclusive right* or through *enactment of a new right* [IFPI, 2003].

The broad formulation of the Internet Treaties' provisions as to the "making available right" covers all types of exploitation that allow consumers to have a choice as to the time and place to enjoy copyrighted content on-line. Thus, the implementing legislation should cover all services that allow e.g. the listening of music, the download of permanent copies of music tracks, on-demand services or other services with a like effect.

Moreover, the act of "making available" could be achieved by all means of delivery, either by wire or wireless means, but in such a way that members of the public may access the work or phonogram from a place and at a time individually chosen by them.

The "making available" right covers *both the actual offering* of the phonogram or other protected material *and its subsequent transmission* to members of the public. In other words, the act of "making available" is subject to the control of the phonogram producer or other rights owner *from the moment the work or phonogram is accessible to members of the public*, regardless whether it has been accessed or not. Put it differently, *it is the accessibility of the content* (that being capable for being received by the public) the decisive factor for an act to be caught by the provisions of the WIPO Internet Treaties.

In the light of foregoing, the act of uploading (for example) a part of a copyrighted song to a distribution platform (e.g. YouTube) is probably covered by the exclusive right of "making available to the public", since even the mere fact of uploading seems to be sufficient for the copyrighted content to be *accessible* by a considerable portion of the public, which has a choice as to the time and place to enjoy such content on-line.

On the contrary, as the Agreed statements concerning Article 8 of the WCT provides "*the mere provision of physical facilities* for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention." This essentially means that internet service providers that provide a mere access to a network could not be regarded as infringers of the exclusive "making available right" of the respective copyright owner [WIPO, 2005].

The right of "communication to the public" and the right of "making available to the public" in the European Framework

Article 3 (1) of the InfoSoc Directive provides authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. This paragraph reflects the international obligation of the European Communities as envisaged by Article 8 of the WCT.[9]

At the same time paragraph 2 of the same Article confers to performers, phonogram producers, producers of the first fixations of films and broadcasting organisations the exclusive "making available right", by wire or wireless means, as that envisaged in the first paragraph of that article. This second paragraph reflects the Communities' obligations in the light of Article 10 [and 14] of the WPPT. [10]

The European Commission opted in introducing this new "making available right" as a new exclusive one. It is further important to note that the "making available" right, as envisaged in Article 3 of the Directive conforms to WCT and WPPT norms, albeit that those instruments do not recognize a "making available right" for producers of the first fixations of films and broadcasting organisations [IViR, 2007].

The purpose of the making available right is, in legal terms, to ensure that copyright law applies to digital services on demand, that is, works selected interactively by the consumer at a time and place of her choosing [Recitals 23 to 27, Towse 2003].

The scope of application of Article 3 of the Directive 2001/29/EC in terms of the right to communication to the public was considered by the European Court of Justice (the "ECJ") in *Sociedad General de Autores v Editores de España (SGAE) v Rafael Hoteles SA.*[11] SGAE, the body responsible for the management of intellectual property rights in Spain, complained that the installation and use of television sets in the Rafael hotel involved the communication to the public of works falling within the repertoire which it managed. The national Spanish Court referred to the ECJ for a preliminary ruling on whether: a) the transmission of a broadcast signal through television sets to customers in hotel rooms constitutes communication to the public

within the meaning of Article 3(1) and b) the mere installation of television sets in hotel rooms constituted such an act.

The ECJ thought that a communication made in circumstances such as those constitutes, according to Art.11bis (1) (ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public *different from the public* at which the original act of communication of the work is directed, that is, to a *new public* [Recital 40]. The clientele of a hotel *forms such a new public* [Recital 41]. In line to what has mentioned above about acts to be regarded as "making available", the ECJ noted that:

> "…It follows from Art.3(1) of Directive 2001/29 and Art.8 of the WIPO Copyright Treaty that for there to be communication to the public *it is sufficient that the work is made available to the public* in such a way that *the persons forming that public may access it.* Therefore, *it is not decisive,* contrary to the submissions of Rafael and Ireland, *that customers who have not switched on the television have not actually had access to the works.*"[12]

Moreover, reflecting the underlying concept of the Agreed statements concerning Article 8 of the WCT and recital 27 of the Directive (in ruling on the second question referred) the ECJ stressed :

> "…While the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication within the meaning of Directive 2001/29, *the installation of such facilities may nevertheless make public access to broadcast works technically possible.* Therefore, *if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place,* irrespective of the technique used to transmit the signal."[13]

Despite the guidance offered by the ECJ in its ruling in *Sociedad General de Autores v Editores de España (SGAE) v Rafael Hoteles SA,* there is no case law at a community level to answer to the obvious question on whether the right of communication to the public and that of making available to the public (both as to authors and as to performers, phonogram producers, producers of the first fixations of films and broadcasting organisations) should cover the communication (or the making available) to the public of *a certain part of the protected work* in question.

Indeed, in the UGC context one should answer the question of whether the act of uploading a transformed copyrighted work infringes the owner's exclusive rights of communication to the public and/or that of making available to the public the protected work *only as regards the part of it that is "used" by the end-user.* For example, when uploading a remixed song, the user actually uploads the combination *of a (substantial) part of a pre-existing song* along with a personal music composition.

As already pointed out above (under 2.1.) the reproduction right covers the act of storing either the work *in whole* or *a certain part* thereof. In view of the ruling of the Court in *Infopaq International A/S v Danske Dagblades Forening* and the language of the Directive itself in Article 2 (*"…in whole or in part…"*), a "partial reproduction" is possible within the EU legal framework. This is, however, not the case in terms of the right of communication to the public and that of making available to the public, since

such wording is missing in Article 3 of the InfoSoc Directive. Unless an interpretative legal instrument suggests that a "partial communication" is an acceptable legal concept in the EU legal order, it would be rather difficult to assume that user – created content infringes the owner's exclusive broad "communication to the public" rights.

3. Limitations on Copyright

As already seen in the previous part, the act of obtaining a permanent copy[14] of a work in question (or a part thereof) constitutes a direct infringement of the owner's exclusive right of reproduction (either in full or in part). It is also understood that certain acts of interference violate the right of adaptation and in some cases the exclusive right of reproduction, as well. [15] Finally, in the light of artistic appropriation, into which end-users engage, it is not clear whether the newly created derivative work infringes the right of communication to the public and/or the right of "making available to the public", since the language of Article 3 of the InfoSoc Directive does not provide any argument in favour of the *"partial communication"* concept, as it expressly does in Article 2 with regard to the reproduction right.

But copyright law, as any other kind of law is not absolute. Under certain circumstances and to the extent that certain conditions are met, it allows limitations or exceptions to its rules.

3.1. Existing exceptions and limitations on Copyright of relevance to UGC

Article 5 (1) of the InfoSoc Directive provides for a mandatory[16] exception as to the reproduction right in terms of temporary acts of reproduction that are purely transient or incidental [and] an integral and essential part of a technological process, that are of no independent economic significance. As Recital 33 of the Directive explains "…this exception should include acts which *enable browsing as well as acts of caching* to take place, including those which enable *transmission systems to function efficiently*". However, in view of the fact that copyrighted works have to be stored in a permanent storage device in order to be subject to interference by the end-user, this exception is far from applicable in the case of UGC acts.

Furthermore, Article 5 (2) and (3) of the Directive does provide an exhaustive list[17] of optional[18] exceptions in the exercise of each one of the abovementioned exclusive rights. Of those, one may identify two possible exceptions associated with acts in the UGC context, namely: *i)* those acts that constitute "…quotations for purposes such as criticism or review" provided for by Article 5 (3) (d) and *ii)* uses that intend to "…caricature, parody or pastiche…" provided for by that article 5 (3) (k).

The first exception appears rather imprecise. On the author's opinion, the concept of the UGC, as phenomenon, appears much greater than the concept of the relevant exception. In other words, Article 5 (3) (d) refers to a typical case of quoting a copyrighted work for various purposes, while in our case the end-user engages into a creative effort to create a derivative work.

On the other side, the implementation of the parody exception in national laws varies. For example, there is no parody exception under UK law. In contrast, other national laws expressly provide for a parody exception (for example France, Belgium) or cover parodies under the umbrella of transformative use (Nordic countries) or of a free use defence (Germany[19] and Portugal for example) [Commission document, 2007].

Thus, the Commission correctly argues that *none of the exceptions* provided for by the Directive may relate to content originated by the user [Commission document, 2007].

The European Commission has long before identified that a legitimate exploitation of users-generated content, as part of the so called "creative content distributed online" will definitely present many advantages within the borders of the EU both from an economic and a social perspective [Communication from the Commission, 2007]. However, the creation of new or derivative works or the interference with existing copyrighted works remains a central issue to be resolved at a community level [Commission Document, 2007]. Thus, the European Commission has issued a Green Paper on Copyright in the Knowledge Economy calling for proposals on two basic issues: 1) *whether there should be more precise rules on what exactly is permitted to the end-user to do when interfering with copyrighted material on line* and 2) *whether an exemption regarding user –created content should be introduced in Directive 2001/29* [Green Paper, 2008]. Towards such an effort the Commission received many responses. All of them indicated, however, that *it is too early to regulate UGC*, because it is both unclear on whether amateurs and professionals should benefit from special rules on UGC and how rules on UGC would relate to existing limitations, such as quotations, incidental use, and "caricature, parody or pastiche" [Communication from the Commission, 2009].

At the same time, the European Council has invited the member states to launch consultations on finding solutions to develop legal offers of creative content on line and protecting the original creators' rights on existing copyrighted works [Council Conclusions, 2008]. In this context, however, the most important development seems to be the recent discussion within the EU on adopting a legal instrument on European Copyright, thereby regulating the matter in a uniform way, according to the principles of EU law including the *principle of proportionality* [Opinion, 2007].

3.2. The "three - step test" as the "limitation of limitations"

Anyway, it should be important to note at this point that even if an exception is to be introduced, either in a European or a national level, such an exception has to be in conformity with Article 5 (5) of the Directive, which states:

> "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied *in certain special cases* which *do not conflict with a normal exploitation of the work* or other subject-matter and *do not unreasonably prejudice the legitimate interests of the right holder*."

Recital 44 of the Directive offers guidance in terms of Article 5 (5) of the Directive:

> "…When applying the exceptions and limitations provided for in this Directive, they should be exercised *in accordance with international obligations.* Such exceptions and limitations may not be applied in a way *which prejudices the legitimate interests of the right holder* or *which conflicts with the normal exploitation of his work* or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, *the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter*."

It is obvious that Recital 44 and Article 5 (5) of the Infosoc Directive reflect an international obligation of the European Communities, well known as the "three – step test".

The "three – step test" first appears in Article 9 (2) of the Berne convention (in terms of the reproduction right), which states:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in *certain special cases*, provided that such reproduction *does not conflict with a normal exploitation of the work* and *does not unreasonably prejudice the legitimate interests of the author*."

This provision is considered to be the "limitations' limitation", in the sense that contracting parties may introduce exceptions in their national legislations, insofar as those exceptions pass successfully the relevant test.

The TRIPS Agreement also extended the scope of the "three step test" of the Berne Convention in its Article 13 [by virtue of its Article 9 (1)] concerning *any rights in literary and artistic works.* Article 13 titled (Limitations and Exceptions) of the TRIPS reads:

> "Members shall confine limitations or exceptions *to exclusive rights* to *certain special cases* which *do not conflict with a normal exploitation of the work* and *do not unreasonably prejudice the legitimate interests* of the right holder.

In addition, Article 10(2) of the WCT, similarly to Article 13 of the TRIPS Agreement, extends the application of the three-step test to all economic rights provided in the Berne Convention, while Article 16(1) of the WPPT provides that Contracting Parties may introduce "the same kinds of limitations and exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works".

An agreed statement was adopted concerning Article 10 of the WCT on limitations and exceptions, which reads as follows:

> "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 networked environment.* It is also understood that Article 10 (2) neither

> reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

This agreed statement is applicable, *mutatis mutandis*, also concerning Article 16 of the WPPT on limitations and exceptions.

This agreed statement requires appropriate interpretation. Both Article 10 of the WCT and Article 16 of the WPPT prescribe the application of the same three-step test as a condition for the introduction of any limitation on or exception to the rights granted by the Treaty as what is provided in Article 9 (2) of the Berne Convention concerning the right of reproduction and in Article 13 of the TRIPS Agreement concerning any rights in literary and artistic works. Thus, any limitation or exception may only be introduced (i) in *a certain special case*; (ii) if *it does not conflict with a normal exploitation of the works*, performances or phonograms, respectively; and (iii) if *it does not unreasonably prejudice the legitimate interests of the owners* of rights.

The WIPO study on the "Implications of the TRIPS Agreement on Treaties Administered by WIPO" refers to the fact that "[t]he Berne Convention contains a similar provision concerning the exclusive right of reproduction (Article 9(2)) and a number of exceptions or limitations to the same and other exclusive rights (see Articles 10, 10*bis* and 14*bis*(2)(b)) and, it permits the replacement of the exclusive right of broadcasting, and the exclusive right of recording of musical works, by non-voluntary licenses (see Articles 11*bis*(2) and 13(1))." After this, it states the following: "*None of the limitations and exceptions* permitted by the Berne Convention should, if correctly applied, *conflict with the normal exploitation of the work* and *none of them should*, if correctly applied, *prejudice unreasonably the legitimate interests of the right holder*. Thus, generally and normally, *there is no conflict between the Berne Convention and the TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned.*" [WIPO, 1997]

As indicated in that analysis, the application of the three-step test for the specific limitations and exceptions allowed by the Berne Convention is an interpretation tool: it guarantees the appropriate interpretation and application of those limitations and exceptions.

On the basis of this analysis, it is clear that what the above-quoted agreed statement refers to – namely the carrying forward and appropriate extension into the digital environment of limitations and exceptions "which have been considered acceptable under the Berne Convention"– should not be considered an automatic and mechanical exercise; all this is subject to the application of the three-step test. The conditions of normal exploitation of works are different in the digital environment from the conditions in a traditional, analog environment, and the cases where unreasonable prejudice may be caused to the legitimate interests of owners of rights may also differ. Thus, *the applicability and the extent of the "existing" limitations and exceptions should be reviewed when they are "carried forward"* to the digital environment, and they may only be maintained if -- and only to the extent that -- they *still may pass the three-step test* [WIPO, 2003].

The concept of the "three-step test" was considered for once by the WTO Panel in *United States – Section 110(5) of the US Copyright Act.*[20] In that case, the European Communities requested consultations with the United States of TRIPS Agreement, regarding Section 110(5) of the United States Copyright Act, as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998. In particular, the US provisions actually provided for a limitation on the owners' exclusive rights towards two directions: a) to communicate a transmission embodying a performance or display of a work by the public reception of such transmission on a single receiving apparatus of a kind commonly used in private homes[21] and b) to communicate by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public just in case that certain conditions were to be met.[22] Those provisions were claimed by the European Communities to be incompatible to Article 11*bis*(1) of the Berne Convention and the discussion of the case was inevitably led to the issue of whether the provisions of the US copyright law successfully pass the three-step-test as that envisaged at last in Article 13 of the TRIPS Agreement.

The Panel noted that, firstly, these three conditions apply cumulatively; a limitation or an exception is consistent with Article 13 only if it fulfils each of the three conditions.[23]

In the Panel's view, the first step of Article 13 ("…***certain special cases***…") requires that a limitation or exception in national legislation *should be clearly defined and should be narrow in its scope and reach*. On the other hand, a limitation or exception may be compatible with the first condition *even if* it pursues a special purpose whose *underlying legitimacy in a normative sense cannot be discerned.* The Panel also notes that *the wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute*. However, it stated that public policy purposes stated by law-makers when enacting a limitation or exception *may be useful from a factual perspective for making inferences* about the scope of a limitation or exception or the clarity of its definition.[24]

As regards the second step of Article 13 ("…***do not conflict with a normal exploitation of the work***…") the overall assessment of the Panel was reflected in that *an exception to a right rises to the level of a conflict with a normal exploitation of the work,* if *uses, that in principle are covered by the right, but exempted by the exception, enter into economic competition with the ways in which right holders normally extract economic value from that right, and thereby deprive them of significant or tangible commercial gains*.[25] At this point, it is also of crucial importance to note that the Panel thought that the condition of the "normal exploitation" of a work has to be judged *for each right* granted under copyright *individually*, rather than in the context of the entire rights conferred by copyright in a work.[26] Finally, the WTO Panel felt that it is *the potential damage caused by an exception* which is relevant to deciding whether it conflicts with normal exploitation, rather than the actual damage occurring at a particular time [WIPO, 2000].

With regard to the third step of Article 13 ("…***do not unreasonably prejudice the legitimate interests of the right holder*** …") the overall conclusion of the Panel was that prejudice to the legitimate interests of the right holders *reaches an unreasonable level if an exception causes, or has the potential to cause, an unreasonable loss of*

income to the right holder. [27] In practical terms, what the Panel was driving at, is that *it is the scale of losses to the right owners which is the determining factor* in judging whether an exception is unreasonable, and again it emphasized that *is potential, rather than actual losses,* which in its view are relevant [WIPO, 2000].

3.3. The "three - step test" and the "user-created content" exception

Having in mind the interpretation of the three step test, as envisaged in the WTO Panel's Report in *United States – Section 110(5) of the US Copyright Act*, there is probably little to say about the compatibility of acts related to UGC to the three steps of Article 13 of the TRIPS Agreement. Indeed, even if European legislators introduce an exception to the harmonised exclusive rights of the right holders in terms of content originated by the user, I personally do not think that there is still any possibility to pass the three step test successfully.

First of all, exceptions or limitations to the reproduction and/or adaptation rights in the course of acts of remixing/sampling or mashing up should be *clearly defined* and should be *narrow in its scope and reach*. That, however, could be possible if the relevant legislation pursues a *special purpose* (e.g. the creativity as a basic parameter for the dissemination of culture). As follows from the careful reading of the report, *public policy reports could assist towards the direction of clarifying the purpose* for which the exception of user-generated content is pursued.

Nevertheless, the matter seems to be much more complicated with regard to the second step. To consider an exception as a "normal exploitation", the exempted *use, that in principle is covered by the right, but exempted by the exception, should not enter into economic competition with the ways in which right holders normally extract economic value from that right* and thereby does not deprive them of significant or tangible commercial gains (a contrario). Whereas this test is applied to each of the exclusive rights separately, is it safe to assume that the downloading of a copyrighted song, or the subsequent recording of a copyrighted sound (acts covered by the reproduction right) *does not deprive copyright owners of significant or tangible commercial gains*? Or could someone claim convincingly that the subsequent alteration or modification of the copyrighted subject matter with a view to creating a new derivative work (acts covered by the adaptation right) does not *enter into economic competition with the ways in which the copyright owner normally extracts economic value from the (adaptation) right*? The answer is, in my view, absolutely negative. Things are also getting worse, if we recall that it is *the potential damage caused by an exception which is relevant to deciding* whether it conflicts with normal exploitation, *rather than the actual damage* occurring at a particular time.

The same applies, mutatis mutandis, as to the third step of the relevant test ("…*do not unreasonably prejudice the legitimate interests of the right holder …"*).

There is plenty of academic literature criticizing the much restrictive interpretation of the "three - step test" adopted by the Panel in *United States – Section 110(5) of the US Copyright Act*. As many commentators point out, a restrictive approach of the "three - step test", risks paralysing the development of copyright exceptions and harming the public interest in the digital environment [Geiger, 2007]. If the three conditions of the test are interpreted as cumulative requirements and if the second step is interpreted

restrictively as precluding most interventions into a right holder's market, there is a danger that the prohibition upon all conflict with a normal exploitation of a work will assume undesirable "show-stopping" status [Koelman, 2006]. In other words, whenever an excepted use deprives the right holder of a realisable commercial gain (current or potential), the second step will be infringed and the application of the exception will necessarily be curtailed, regardless of any competing public interest consideration that the exception at issue may serve [Griffiths, 2009]. Thus, as Ginsburg argues: "*…even traditionally privileged uses*, such as scholarship or parody, could be deemed "*normal exploitations*", *assuming copyright owners could develop a low transaction cost method of charging for them*" [Ginsburg, 2001].

As far as the digital technology is concerned, it should also be noted that, as a broader range of means of exploitation of copyright works becomes technically feasible, the scope of the potential "normal exploitation of a copyright work correspondingly increases and if a restrictive approach to the second step is adopted, the discretion of states (and courts) to maintain appropriately fashioned exceptions is diminished [Senftleben, 2004].

At a European level, it should be emphasized that it is also not clear whether Article 5 (5) of the InfoSoc Directive - encompassing the three step test - forms a rule directing to national legislatures or to the national courts. The distinction is of crucial importance, since the former would enable legislators themselves to enact "certain special" exceptions that would a priori fit to the three step test. On the contrary, if Article 5 (5) is a rule of "judicial review" that would undoubtedly form a powerful interpretative tool to define the legitimacy of the copyright exception in question [Griffiths, 2009]. However, the signs of the lack of a uniform application of the three step test have already arrived. There is much case law across the member states - some of which have implemented Article 5 (5) of the Directive literally in their national legislation - that indicates the divergent approaches taken by the court across the European Continent [Griffiths, 2009].

There are many proposed solutions as to the problems that arose due to the restrictive interpretation of the three step test that the WTO Panel adopted in its Report in *United States – Section 110(5) of the US Copyright Act*. Many of them seem to suggest the re-writing of the International Treaties, but this seems to be too optimistic a scenario, since the legislative process is a time-consuming and hard process at least in an international level. Others, however, seem to opt in offering new interpretative analysis of the test.

Of particular interest seems to be a recent declaration issued jointly by the Max – Planc Institute and the University of Queen Mary, London [Phillips, 2008]. The main concepts of the Declaration may be summarized in the following elements, namely that: i) the three steps are nothing, but individual elements informing one overall assessment ii) the limitations and exceptions are to be interpreted according to their objectives and purposes iii) legislatures and courts may introduce open ended exceptions under certain conditions iv) the limitations and exceptions do not conflict with a normal exploitation of a protected subject matter if they are based on important competing considerations or have the effect of countering unreasonable restraints on competition v) in applying the three step test account should be taken into the interests of the right holders and the interests of subsequent right holders (users) vi) the test

should be applied in a manner that respects the legitimate interests of third parties [Declaration, 2008].

The Declaration seeks to offer a balanced interpretation of the three – step test and is, at the time of writing, signed by leading scholars in the field of Intellectual Property. Unless the European Legislature or the European Courts of Justice adopt the much needed flexible approach of the test, exercising in that regard its explanatory power, the three step test will operate in the future copyright laws against the public interest and as an unjustifiable curtailment over justified exceptions and limitations.

4. Concluding Remarks: Two worlds collide?

The analysis into which the author of this contribution engaged focused on the newly apparent phenomenon of user – created content and its relationship with the existing copyright laws.

In the first part of it, we mentioned that due to Web 2.0 technologies users are able to upload content that is neither of their personal exclusive creation nor of other existing ownership. Instead, consumers base their creations on existing copyrighted works in order to create new derivative ones, by combining the former with a personal contribution. This newly introduced content originated by the user (the Pro-sumer) is commonly referred to as "user created/generated content" and plays quite an important role in the dissemination of the so – called "mashing up" culture within the information society. Alongside, Pro-sumers present an uncommonly active role in such a process thereby contributing to the development of "the production process" within the Information Society.

However, and to the extent already discussed in the second part of our analysis, the course of acts into which end-users engage in order to create new derivative works, infringe the owner's exclusive economic rights. Of those, the reproduction right and the right of adaptation seem to be the most vulnerable towards the acts of remixing and mashing-up, while it is not clear whether the newly created derivative work infringes the right of communication to the public and/or the right of "making available to the public". Those rights are provided for by International Treaties and the rules governing them are harmonized across the EU Member states by virtue of the provisions of the InfoSoc Directive.

On the contrary, as the third part mentioned, certain rules within the EU legal framework allow for possible exceptions under copyright laws, but still none of them may be relevant to UGC. Thus, the European Commission launched a consultation on whether acts related to content originated by the user may be specifically exempted from the application of the owner's exclusive rights.

Despite the fact that the recent responses stated the opposite, the author discussed such a possibility and went on to analyze the compatibility of such a possible exception in the light of the "three step test", as that envisaged by Article 13 of the TRIPS Agreement. The three – step test defines the scope of the application of the exceptions and limitations, so that an exception to the copyright laws must

successfully pass it in order to be considered as lawful. Unfortunately, the much restrictive interpretation of the "three - step test" adopted by the Panel in *United States – Section 110(5) of the US Copyright Act*, leaves no possibility for the relevant exception to be compatible to Article 13 of the TRIPS Agreement. It seems that at this point of analysis that the "user created content" exception loses the battle against the copyright law.

But that last statement may be of some relevance. The much restrictive interpretation of the "three - step test" adopted by the Panel in *United States – Section 110(5) of the US Copyright Act* and the lack of a teleological interpretation gave rise to a considerable part of society (users and especially academics) to form a balanced interpretation of the three – step test that takes into serious account the concept of the "public interest". If such an approach is finally adopted by the official EU legislature, or better by the European Courts of Justice - exercising in that regard its explanatory power - there will be no question that the "user created content" exception lost a battle *but not the war* against the exclusivity power of copyright law.

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ENDNOTES

[1] There is also no willingness to pay for such activities on behalf of the users. See in that regard Commission, (2009), Commission staff working document, accompanying document to the Communication from the Commission, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, SEC 2009, 1103 final

[2] However, in view of the purpose of the end – user to create a derivative work, the storage of the copyrighted work in question should take place rather in a permanent storage device than a temporary one. In any case, the permanent or temporary character of the storage device is not – in principle – the decisive factor for the act to be deemed as reproduction but rather a matter of whether there is a possible exception under copyright law. See in that regard Eric H. Smith , (2001), *The reproduction right and temporary copies, The International Framework, the U.S. approach and practical implications*, Paper presented to the SOFTIC Symposium, Tokyo, November 20-21, 2001

[3] Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167

[4] Article 2 of the Directive

[5] Article 3 of the Directive
[6] Article 4 of the Directive
[7] *Infopaq International A/S v Danske Dagblades Forening*, (2009) Case C-5/08: Judgment of the Court (Fourth Chamber) of 16 July 2009
[8] See in that regard the reasoning of the Court in Recitals 44 - 51
[9] See Recitals 15,19 and 61 of the Directive
[10] Ibid
[11] *Sociedad General de Autores v Editores de España (SGAE) v Rafael Hoteles SA*, (2006) Case C-306/05 [2006] ECR I-11519
[12] At recital 43
[13] At recital 46
[14] We recall that even the act of obtaining a temporary copy infringes the reproduction right. Nevertheless, the act of obtaining a copy in the UGC context presupposes that such copy should be stored in a permanent storage device, so that the user will be able to interfere with it at any time in the future; that is why the analysis of the previous part focused on the receiving of the data (by downloading) and storing them on a permanent storage device (e.g. computer's hard disk).
[15] See above at 2.1. as regards the recording of copyrighted sounds with a view to remixing
[16] The exception is mandatory, in the sense that Member States have to incorporate such an exception of copyright into their national legislation.
[17] The list is exhaustive in the sense that member States may not adopt additional exceptions. See in that regard recital 32 of the Directive
[18] The exceptions are optional in the sense that member States are able to opt in adopting them in their national legislation or not.
[19] The scope of the German "free use" rule appears, however, narrow. The Regional Court of Hamburg, in its "thumbnails decision", held that the reproduction of thumbnails on the Internet did not constitute a "free use" of the original image. The Court stated the reduction of an image into a smaller thumbnail was an entirely automatic process that did not reflect any human activity. In addition, the reduction of an existing image to a "thumbnail" was not undertaken to create a new work but to create a smaller version of an image for the sole purpose of indexing and creating a link to the original. See Regional Court of Hamburg, (2004) JurPC Web-Dok, 146/2004.
[20] *United States – Section 110(5) of the US Copyright Act*, (2000), WT/DS160/R
[21] Section 110 (5) A of the US Copyright Act (well known as the "homestyle" exemption)
[22] Section 110 (5) B of the US Copyright Act (well known as the "business" exemption)
[23] Report of the Panel, United States – Section 110 (5) of the U.S. Copyright Act, WT/DS160/R15, June 2000, at para. 6.74
[24] Report of the Panel, United States – Section 110 (5) of the U.S. Copyright Act, WT/DS160/R15, June 2000, at para. 6.112
[25] Report of the Panel, United States – Section 110 (5) of the U.S. Copyright Act, WT/DS160/R15, June 2000, at para. 6.163 – 6.219
[26] Report of the Panel, United States – Section 110 (5) of the U.S. Copyright Act, WT/DS160/R15, June 2000, at para. 6.173
[27] Report of the Panel, United States – Section 110 (5) of the U.S. Copyright Act, WT/DS160/R15, June 2000, at para. 6.220 – 6.272