MEDIA ANALYSIS AND COPYRIGHT:
EUROPEAN PERSPECTIVES VIEWED FROM THE ATLANTIC *

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Summary: 1.The European information market. 2 Media analysis activities and copyright harmonizing instruments. 3. Minimal standards and minimal harmonization. 4. The Bern and Rome Conventions. 5 The exclusive right of reproduction. 6. *Fait divers*. The 'fair use' principle. 7. Media analysis as an information service. 8. Monitoring and clipping. 9. The system of compulsory licenses, private copy of works and commercial use. 10. The case for an equitable compensation. 11. The free flow of information and the EC Directive 96/9 on database protection. 12. The interests of media analysis undertakings, the interests of their clients, the interests of the right holders, and the general interest.

1. The issue I'd like to start from concerns the improvement of the European information market. This improvement requires the creation of a legal framework, so that media analysis activities can be carried out within this market, which has specific rules concerning free provision of services and free circulation of goods. Media analysis poses new problems in terms of copyright; their solution depends on finding the right answers using the legal instruments already provided. I will thus proceed to analyze these instruments.

To begin with, there is a legal vacuum in terms of European law: media analysis activities are not regulated at the European level. Moreover, there is a strong diversity between member states regulations. This diversity and the absence of European regulations hinder the creation of a European information market. In the case of media analysis activities, we can evaluate the interests at stake using the metaphor of the scale. On one dish we have the interests of media analyst undertakings and their clients, which claim the lawfulness of this activity, while on the other dish we have the copyright and neighbouring rights holders, which claim their exclusive rights to reproduce their work. The needle of the balance is embodied by the community's general interest, in the name of which it is possible to justify certain restrictions on the exclusivity of copyright.

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Which methods should be followed to balance these two claims? I will now discuss some topics which could be taken into consideration when dealing with the problem of copyright in Europe.

There are four main issues.

Firstly, harmonized copyright measures have to respect national traditions. According to primary European law, certain countries may impose some restrictions on the free provision of services and free circulation of goods in order to safeguard their interest in terms of intellectual property. This means that harmonization should provide for minimal standards, so as to respect that faculty which European primary law reserves to member states. We know that in Europe there are different conceptions of copyright and very strong traditions in terms of copyright national law. The harmonizing measures to be adopted on copyright should also take into consideration other 'Precedents of European measures on copyright. There are several precedents of this kind, as for example the legal protection of computer programs.

For what media analysis is concerned, it is important to consider EC Directive 92/100 on rental right, lending and certain neighbouring rights and EC Directive 96/6 on legal protection of databases. These two directives already provide some legal criteria to discuss media analysis activities. For example the EC Directive on rental rights allows the use of short fragments for information purposes, while the Directive on legal protection of databases, although it does not establish any free use of works, states that the databases created by media analysis are protected. These two directives are thus one and the same problem: media analysis implies the creation of databases while the databases thereby created are legally protected.

Other useful legal tools are contained in the International Conventions on intellectual property. We will focus our attention on two conventions, which seem to offer answers to the problem we are dealing with: the Bern Convention and the Rome Convention.

The Bern Convention establishes a union for the protection of author's rights providing an international platform for the protection of works. It guarantees a minimal protection, which is conferred independently from formalities. It is based on the principle of equal treatment between the countries of the union.

A recent decision of the European Council stated that all member states have to adhere to the Paris Act of the Bern Convention. So this Treaty is something like an umbrella and represents the first step we have to take if we want to solve our problem.

2. We find here three main ideas. The first is the principle that media works - and let's not forget that media analysis implies the reproduction of media works - are protected by copyright laws. In economical terms this means the author has the exclusive right of reproduction, he is the only one authorized to take economical advantage of that work through its reproduction.

In this context, I'd like to mention an example from the WIPO (World Intellectual Property Organization) conference on copyright and neighbouring right questions, which took place in Genoa in Dec. 1996. The conference stated that the reproduction rights set out in Art. 9 of the Bern Convention and the exceptions permitted there under fully apply in the digital environment, in particular to the use of works in the digital form. It is understood that the storage of protected work in digital from in an electronic medium constitutes a. reproduction within the meaning of the Art. 9 of the Bern Convention.. This means, for example, that electronic clipping constitutes a reproduction within the meaning of the Bern Convention. And reproduction is in principle an exclusive right of the author. So in principle media analysis undertakings should need an authorization from copyright holders. However, the same the Bern Convention provides certain legal tools which seem adequate to deal with this problem.

First, it establishes an exception to the scope of protection, as mere information items are not protected. This means that media analysts may collect these items of media information even from works where this information is simply included. This cannot be considered free use because it not even use. Therefore, it is not protected by copyright.

Then we have two other legal tools, which have to be taken into consideration. They are the principle of fair use and the system of compulsory licenses. As a matter of fact, the Bern Convention allows under the principles of fair use, which is embedded in Art. 1O, quotations of works, including quotations from newspaper articles in formal press summaries, but only in so far as those quotations are compatible with fair practice. In this context, the concept of fair practice allows the use of works protected by copyright.

This is closely connected with the European Convention on human rights, which states that the free flow of information is a fundamental value in democratic societies. Our society is the society of information. Information is the blood of economics, politics, academy. Therefore property rights over one's work have to be pondered in connection with fundamental values such as the free flow of information.

Art. 1O bis Par. 2 and implicitly Par. 1 of the Bern Convention provide for free use of media work for informative purposes and state the importance of promoting the free flow

of information within the EU. This justifies the fairness, i.e. the lawfulness, of the use of protected works, which would otherwise be prohibited. So the first question to be answered by any future harmonizing measure is whether media analysis activities reproduce media works with informative purposes, which can be justified by the principle of fair use. In principle, it seems that media monitoring and clipping activities have an informative nature. These activities provide an informative service, without it, this information would not flow freely. The principle of fair use thus represents an important legal tool to justify the lawfulness of reproduction of media works required by monitoring and clipping.

However, I believe that this fairness principle justifies mainly monitoring, as clipping is harder to justify. The reproduction involved in clipping should probably be treated under a compulsory license system.

The Bern Convention gives indications also about compulsory license systems. Art 9. Par. states that member countries can establish compulsory licenses in certain cases, provided that such reproduction does not contrast with the normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author. The system of compulsory licenses is designed for the so-called private copies. It is generally understood that private copies are reproductions made by the single consumer in order to satisfy his personal needs. On the contrary, unlawful reproduction means making copies for commercial use. So, if we follow this distinction between commercial use and personal need (a distinction consecrated in also Portuguese law), the harmonizing measures will have to answer the question of whether the copies of media works made by media analysts are for commercial use or whether there is not a commercial use.

According to the argument followed so far, eventual harmonizing measures could establish a compulsory license system for the reproduction of works within media analysis activities. In more detail, I think we should take a dualistic approach: fair use for monitoring and compulsory license for clipping.

Media analysis is something like media recycling. Considering the potential danger of prejudice and that media analysis profit from some one else's works, it reasonably follows that something should be offered as a counterpart and equitable compensation. But what form should this equitable compensation take?

Well, directly there is no commercial use of these copies. In fact, they are included free of charge on special request of the clients as proofs of the correctness of the information provided. Media analysts do not sell copies, they provide information about one’s media

image or about one's advertising performances, about one's competitors and their media strategies, but they do not to sell copies. Therefore, since these activities do not imply that copyright holders sell less relevant quantities of copies, there is not an unreasonable prejudice against the legitimate interest of the author or copyright owner.

In Portugal, for example, there is a collective compensation, which comes from a levy on reproduction tools. This means that if I buy a tape recorder I pay a small "tax" that is deposited in a collective fund established for the benefit of authors, interpreters, and copyright holders in general.

I also wanted to talk about the Rome Treaty on neighboring rights, but this is really a subsidiary treaty, as all the principles we need are already contained in the Bern Conventions. The relevant article of the Rome Convention is Art. 15.

3. In conclusion, the thread that run through my discussion and that I think should run through any discussion on harmonization concerns the development of the European information market.

This market has to respect the rules of a free market, namely free circulation of goods and free provision of services. But, since the main issue at stake is that of intellectual property, any attempt to harmonize and regulate copyright will have to respect the right of each member state to protect its general interest, and its traditions. EU harmonization should thus only provide minimal standards. The principles to be included in this minimal harmonization could be on the one hand the principle of fair use. (mainly for monitoring) and on the other hand a compulsory license system for clipping services, all combined with an equitable compensation for copyright holders.

This brings us back to the metaphor of the scale we started from: on one dish we have copyright and on the other we have free flow of information, a fundamental right in contemporary democracies. I think that a free market in Europe should be founded upon rules that allow this freedom; the legal tools referred to seem adequate to deal with this issue and to find the balance between the two dishes of our scale.

Abstract - The construction of the European information market has justified the adoption of several harmonizing measures on copyright law. The approach followed is to establish minimal standards and minimal harmonization. However, media analysis activities claim special rules of protection, having in consideration the Bern and the Rome Conventions, concerning the exclusive right of reproduction, the protection of *fait divers* and the principle of copyright fair use. Media analysis is an information service that includes monitoring and clipping activities. Some argue that these businesses could be justified under the private copy exception as mandates of their clients. However, the commercial nature of this use seems notorious. Perhaps it should be more adequate to establish a system of compulsory licenses for these activities, in exchange for an equitable compensation to copyright holders. Moreover, it is remarked that the free flow of information should not be eclipsed in the interpretation of the EC Directive on database protection. In any case, the solution to the conflict of interests placed by these activities should take in due consideration not only the interests of media analysis undertakings and the interests of their clients, but also the interests of the right holders and the general interest.