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# THE ECHO OF AMERICAN FAIR USE AND ITS BOUNDARIES IN THE EUROPEAN UNION AND ITALY: A COMPARATIVE ANALYSIS IN THE WAKE OF THE FOX NEWS VICTORY OVER TVEYES

After a long copyright lawsuit that began in 2013, on January 18, 2019, Fox News informed the Second Circuit that it had reached a settlement agreement with TVEyes, pursuant to which TVEyes is no longer permitted to transmit copyrighted material from Fox News. TVEyes is a media monitoring service that records programming from over 1,400 television and radio stations and compiles the recorded programs into text-searchable databases. For a fee, TVEyes subscribers could not only search the database by keyword or date and time, but also watch, archive, download, and email the up to ten-minute-long clips.

In 2013, Fox News sued TVEyes for copyright infringement. While the District Court seemed to favor TVEyes' defense—holding that most of TVEyes' functions were protected by fair use—the Second Circuit reversed this decision and held that TVEyes' services did not constitute fair use because, even if the use was somewhat “transformative,” the impact on Fox News's potential revenues was significant.<sup>1</sup> The Second Circuit held in *Fox News Network, LLC v. TVEyes, Inc.* that TVEyes' news monitoring functions, other than the archiving of video clips, do not constitute fair use of Fox News's broadcasts and thus infringe Fox News' copyright.<sup>2</sup> TVEyes sought to appeal this decision to the U.S. Supreme Court, but the Supreme Court denied TVEyes' petition for a writ of certiorari,<sup>3</sup> leading the parties to settle. The settlement was reached almost one year after the Second Circuit's decision.

This case provides an opportunity to explore the boundaries of fair use and to compare the fair use doctrine, as developed in the U.S., with certain exceptions to and limitations on an author's exclusive rights under the laws of the European Union (EU) and Italy.

## I. FAIR USE IN THE UNITED STATES

Fair use is a concept born and developed in the common law systems; in particular, pursuant to U.S. law, the fair use doctrine permits limited use of copyrighted material without the need to acquire authorization from the legitimate rightholder. Broadly speaking, fair use can be defined as the copying of copyrighted



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material for a limited and “transformative” purpose, hence causing minimal harm to the rightholder's legitimate markets.

Fair use is often used as a defense against a claim of copyright infringement. The U.S. Copyright Act requires courts to consider at least the following four factors when analyzing fair use claims:

- (1) “the purpose and character of the use”;
- (2) “the nature of the copyrighted work”;
- (3) “the amount and substantiality of the portion used”; and
- (4) “the effect of the use on the potential market for or value of the copyrighted work.”<sup>4</sup>

But what is “transformative” use, and how has this concept been used in other recent U.S. cases to rule out copyright infringement?

“Transformative” use is also known as the “Fifth Factor.” A work is “transformative” if it uses another work in completely new or unexpected ways. Sometimes, courts have found copies made as part of the production of new technologies to be transformative uses. For example, in the seminal case *Authors Guild v. Google, Inc.*, the Second Circuit found fair use where Google Books enabled users to search databases of books to view short passages or “snippets” containing the user's desired keywords.<sup>5</sup> In that case, the court noted that Google Books presented a unique set of facts that “test[ed] the boundaries of

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fair use,”<sup>6</sup> while in *Fox News*, the court concluded that TVEye’s “exceeded those bounds.”<sup>7</sup>

## II. FAIR USE IN THE EUROPEAN UNION

Derogations to authors’ exclusive rights are also permitted in EU copyright law, but with a less flexible regulatory framework. In fact, EU law (consistent with civil law systems, including that of Italy) lays down an exhaustive list of “free utilizations.” In particular, Article 5 of the EU Copyright Directive, also known as the Information Society Directive (InfoSoc Directive), provides a catalogue of optional exceptions that each EU member state could transpose into its own national system.<sup>8</sup> However, each exception must be applied in compliance with the strict “three-step test” specified under Article 5(5) of the InfoSoc Directive: that is, exceptions and limitations can only occur (1) “in certain special cases”; (2) “which do not conflict with a normal exploitation of the work or other subject-matter”; and (3) “do not unreasonably prejudice the legitimate interests of the rightholder.”<sup>9</sup>

Article 5(3)(d) of the InfoSoc Directive allows quotations “for purposes such as criticism or review,” provided that (1) “they relate to a work or other subject-matter which has already been lawfully made available to the public”; (2) “the source, including the author’s name, is indicated, ... unless this turns out to be impossible”; (3) “their use is in accordance with fair practice”; and (4) “to the extent required by the specific purpose.”<sup>10</sup>

Thus, when considering exceptions to copyright law, EU courts can decide to adopt a more or less flexible approach, within the margins of their discretionary power, which power is especially exercised in adapting the normative paradigm to new technologies.

In the EU, there are many decisions where, as in the *Fox News* case, the interest of the rightholder was protected in relation to retransmission of audiovisual content on internet platforms. As an example, the Court of Justice of the European Union (CJEU) case *ITV Broadcasting Ltd. v. TVCatchup, Ltd.* is notable.<sup>11</sup> In that case, several commercial television broadcasters, including ITV Broadcasting Ltd., filed a lawsuit against TVCatchup Ltd. (TVC) in the United Kingdom, alleging breach of copyright of their broadcasts and films, due to the online diffusion of TV programs offered by TVC. In particular, TVC permitted its users to receive, via internet, live streams of free-to-air television broadcasts. By authenticating the user’s location and refusing access where the conditions imposed on users were not satisfied, TVC ensured that users could obtain access only to content which they were already entitled to watch by virtue of their television license.

In its preliminary ruling, the CJEU gave an expansive interpretation of the “communication to the public” right included among by the author’s exclusive rights in Article 3(1) of the InfoSoc Directive. According to the court, this concept encompasses retransmission of works included in a terrestrial television broadcast, where the retransmission is made by an organization other than the original broadcaster by means of an internet stream made available to subscribers. This is the case even though subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on TV.<sup>12</sup> The decision did not address free-use exceptions, but it is consistent with the approach of granting a high level of copyright protection in the internet environment.

In other decisions, the CJEU clarified that the conditions provided must be interpreted strictly, because the quotation exception is a derogation from the general principle established by the InfoSoc Directive (namely, the requirement of consent from the copyright holder for any reproduction of a work). On the other hand, the CJEU has also found that the interpretation of those conditions must permit the effectiveness of the exception itself to be safeguarded and its purpose to be observed.<sup>13</sup>

## III. FAIR USE IN ITALY

Italian legislators implemented the quotation exception enumerated in Article 5(3)(d) of the InfoSoc Directive through a statutory provision. Article 70 of the Italian Copyright Act sets out the principle whereby, under certain conditions, the partial quotation, summary, or reproduction of a work, and its communication to the public, are free. In particular, these uses are allowed:

- When performed for purposes of criticism and discussion, within the limits of such purposes and provided they do not compete with the commercial exploitation of the work; or
- When performed for purposes of teaching or scientific research, the use must only have illustrative and non-commercial purposes.<sup>14</sup>

This principle also applies when the use in question (quotation, summary, and so forth) occurs on the internet. In addition, the same article allows a specific digital use, namely the online, free-of-charge publication of low-resolution or degraded images and music, but only for teaching or scientific use and for a non-profit purpose.<sup>15</sup>

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The few reported cases in Italian case law on enforcement of the quotation exception in online use confirm a quite rigid interpretation of Article 70 of the Italian Copyright Law. One very interesting case dealt with the online diffusion of footage from the famous TV reality-show program “Il Grande Fratello” (“The Big Brother”) through the video-sharing platforms YouTube and Google Video.<sup>16</sup> In that case, TV broadcaster RTI, owner of the exclusive rights to use and economically exploit the program in Italy, obtained an order of immediate removal of the web content concerned. According to the court, the quotation exception under Article 70 could not be successfully invoked, because the online diffusion at stake had a solely commercial purpose, resulting from the considerable commercial advertising present on YouTube and Google Video.<sup>17</sup>

In another case, RTI filed a suit against the owner of the internet portal “ItaliaOnLine,” complaining about the presence on this platform of video fragments of several TV programs owned by RTI.<sup>18</sup> In particular, by typing in the title of the program, it was possible to search for snippets published by users; through key-word advertising, such snippets were associated with sponsored links.

The court acknowledged that, in the abstract, the exercise of the quotation right (or another fair-use right) could exclude a platform owner’s responsibility towards the rightholder. Yet, the exception could not operate in this specific case, because the defendant had not been able to prove the fulfilment of the conditions set out by the law for the exercise of the fair-use (quotation) right. ItaliaOnLine had limited itself to alleging its right in general terms, without producing any specific video that could be viewed to determine if the required conditions were present.

Finally, another Italian case on the retransmission of copyrighted audiovisual content (although not on the internet) was brought before the Milan Court of Appeal some years ago.<sup>19</sup> Considerable snippets of the TV program “La notte degli Oscar” (“The Oscar Night”), covered by copyright, were retransmitted within another TV program (“Fuego”), belonging to a different TV broadcaster (RTI). The court pointed out that Fuego could not qualify as a TV program with informative nature; in fact, it was not limited to giving and commenting on news, because, by virtue of specific production choices, it also provided an artistic show, competing with “The Oscar Night” itself. The extended duration of the clips broadcast, as well as the mode of transmission, were further elements considered by the court, which excluded the application of the quotation exception provided under Article 70 of Italian Copyright Act.<sup>20</sup>

#### IV. CONCLUSION

Although the normative approach to fair use in the U.S. as opposed to the EU and Italy is different, case law suggests that these approaches converge toward the same outcome, particularly when dealing with similar issues about copyright protection in the digital environment. Indeed, in 2007, the Italian government, in answering a parliamentary question on the possibility of regulating fair use in Italy, specified that Article 70 of Italian Copyright Law must be interpreted to permit fair use in the Italian national system. This clarification appears indicative of an alignment between the Italian and American approaches.

In addition, with reference to the EU, there has been a push toward online copyright protection, exemplified by the EU Commission’s Proposal for a Directive on Copyright in the Digital Single Market, issued on September 14, 2016, and very recently finalized.<sup>21</sup> The directive “provides for rules to adapt certain exceptions and limitations to digital and cross-border environments,”<sup>22</sup> and its Article 13 focuses on the use of protected content by internet providers giving access to audiovisual works, like video-on-demand platforms and user-uploaded-content platforms (YouTube, Facebook, and so forth).<sup>23</sup> The final amendments to the original text of that article specifically aim to ensure that rightholders are properly remunerated.

The underlying tension between the need to protect authors’ exclusivity and the public interest in the diffusion of creative works arises with increasing frequency in the digital environment, where the scope of fair use needs to be structurally realigned and adapted to accommodate socially valuable uses provided by new technologies. The internet, which has become the main venue for access to audiovisual content, facilitates the transmission, reproduction, and modification of videos, images, audio files, and the like. Thus, it can be difficult for rightholders to seek protection and remuneration for the online exploitation of their works.

In both the U.S. and in the EU the fair use doctrine has been described as “the most troublesome in the whole law of copyright,”<sup>24</sup> and we should all be aware—in particular when dealing with innovation (inside or outside inside the tech space)—that it is becoming more and more difficult to rely on the assumption that the use of copyrighted works will in the end be considered “fair.”

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## ENDNOTES

- 1 883 F.3d 169 (2d Cir. 2018).
- 2 *Id.*
- 3 *TVEyes, Inc. v. Fox News Network, LLC*, 139 S. Ct. 595 (2018).
- 4 17 U.S.C. § 107.
- 5 804 F.3d 202 (2d Cir. 2015).
- 6 *Id.* at 206.
- 7 883 F.3d at 173.
- 8 European Parliament & Council Directive 2001/29/EC of May 22, 2001 *on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 2001 O.J. (L 167) 10-19, art. 5 ¶¶ 2-3.
- 9 *Id.* art. 5(5).
- 10 *Id.* art. 5(3)(d).
- 11 Case C-607/11, *ITV Broadcasting Ltd. v. TVCatchup, Ltd.*, 2013 E.C.R. 147 (March 7, 2013).
- 12 *Id.* ¶¶ 19 & 35.
- 13 *See, e.g.*, Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, 2011 E.C.R. 798 (Dec. 1, 2011).
- 14 Legge 22 aprile 1941, n.633/1941, G.U. 16 luglio 1941, n.166 (It.), art.70.
- 15 *Id.* art. 70-bis.
- 16 Tribunale di Roma Ordinanza [Court of Rome], sez. nove ordinanza, 16 dicembre 2009, *RTI Reti Televisive Italiane SpA v. YouTube LLC, Google UK Inc., Google UK Ltd. (It.)*, confirmed 11 febbraio 2010.
- 17 *Id.*
- 18 Tribunale di Milano [Tribunal of Milan], sez. speciale, 7 giugno 2011, No. 7680, *RTI Reti Televisive Italiane SpA vs. Italia On Line S.r.l. (It.)*.
- 19 Corte di Appello di Milano [Milan Court of Appeals], sez. speciale, 24 novembre 2010, No. 3225, *RTI Reti Televisive Italiane SpA vs. Telepiù S.r.l. (It.)*.
- 20 *Id.*
- 21 Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Eur. Parl. Doc. (COM 593) (2016).
- 22 *Id.* recital 3.
- 23 *Id.* art. 13.
- 24 Harold A. Ellis, *Fair Use of Unpublished Works: an Interim Report and a Modest Proposal*, WASH. L. REV. 69:4, 1231, 1231 (1991) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam)).

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