

**Opinion of the European Copyright Society
concerning the scope of the economic rights in light of case C-161/17,
Land Nordrhein Westfalen v. Dirk Renckhoff ('Córdoba case')**

Introduction

1. The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law.¹ Its members are scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders.
2. As a group of academics concerned about the interpretation and development of copyright law in the European Union, the ECS has some comments and concerns arising from the decision rendered by the European Court of Justice on 7 August 2018 in the case *Land Nordrhein Westfalen v. Dirk Renckhoff* v, C-161/17 (hereinafter *Córdoba* case).

Opinion of the ECS

3. The *Córdoba* case is symptomatic of the problems arising from the current copyright system's inability to adapt to the digital environment. The case arose in Germany, where the photographer Dirk Renckhoff sued the state of North-Rhine Westfalia because a student had included Renckhoff's photograph of the city of *Córdoba* in an assignment which her school subsequently made available on its website. The photograph had originally been published on a website of an online travel magazine with the consent of the photographer. The student had downloaded the photograph and copied it into her assignment (a slide presentation).
4. In his Opinion of 25 April 2018, the Advocate General expressed the view that the posting of the assignment, including the photograph, on the school's website was not an act of communication to the public.² This Opinion was criticized inter alia for not being compatible with the Berne Convention.³ In its decision of 7 August 2018, the Court of Justice (CJEU) held, by contrast with the Advocate General, that "the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website" constitutes an act of communication to the public within the meaning of Art 3(1) of the 2001/29 Directive (the Infosoc Directive).

¹ All opinions of the European Copyright Society are available on its website:
<https://europeancopyrightsociety.org/opinions/>

² Case C-161/17, *Land Nordrhein Westfalen, v. Dirk Renckhoff*, Advocate General Opinion, EU:C:2018:279.

³ See ALAI Opinion of 29 May on Case C-161/17 (*Land Nordrhein-Westfalen v Dirk Renckhoff*), available at <http://www.alai.org/en/assets/files/resolutions/180529-opinion-land-nordrhein-westfalen-en.pdf>

5. The ECS considers that a use such as that in question in this case should not be subject to authorization by the right holder. Given that such use is covered by the exclusive right granted under Article 3(1) of the Infosoc Directive, it can and should be clearly exempted by the means of a copyright exception or limitation.

6. As follows from the ruling of the CJEU, the posting of copyright protected material on the Internet, as in the present case, must be considered as an act of communication to the public pursuant to Article 3(1) of the Infosoc Directive. The ECS agrees with the CJEU that downloading (reproducing) content freely made available on the Internet and uploading (posting) it on another website is to be distinguished from the establishment of hyperlinks to such content.⁴ As explained by the CJEU, in the former situation the copyright holder is no longer in a position to exercise his power of control over the communication of that content, since “as a consequence of that posting, such a work may remain available on ... [that other] website, irrespective of the prior consent of the author and despite an action by which the rightholder decides no longer to communicate his work on the website on which it was initially communicated with his consent”.⁵ Instead, in the case of hyperlinking, “the preventive nature of the rights of the holder are preserved, since it is open to the author, if he no longer wishes to communicate his work on the website concerned, to remove it from the website on which it was initially communicated, rendering obsolete any hyperlink leading to it”.⁶ Notwithstanding the fact that the CJEU’s approach to linking is different from the view expressed by the ECS,⁷ and the practical enforcement difficulties that the CJEU’s ‘new public doctrine’⁸ currently raises (and which are not the subject of this opinion), the ECS considers it legally sound to distinguish between the posting of hyperlinks that refer to another website and the uploading and posting of content found on another website.

7. Nevertheless, the outcome of the Córdoba case raises concerns insofar as it may lead to a finding that the posting of a student’s assignment containing a copyright protected work found on the Internet constitutes a copyright infringement. While the Advocate General’s interpretation of the concept of ‘communication to the public’ has correctly been overturned, it should also be noted that his Opinion made appropriate reference to the application of considerations of reasonableness in a case such as this. In doing so, he sought to avoid the rigidity that characterizes the current copyright regime.⁹ As noted by the Advocate General in the introduction of his Opinion, schoolwork containing photographs, illustrations and drawings from books and magazines was, in the not so distant past, fixed to cardboard and displayed in schools without authors claiming remuneration for this type of use of their works. There is no immediate reason why the situation should be different because the school assignment, including the photograph, is created and disseminated by digital means.

⁴ See also Ansgar Ohly, “Umittelbare und Mittelbare Verletzung des Rechts der öffentlichen Wiedergabe nach dem “Córdoba” Urteil”, (2018) 120 Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 996–104.

⁵ See Case C-161/17, *Land Nordrhein Westfalen, v. Dirk Renckhoff*, EU:C:2018:634, para. 44.

⁶ See Case C-161/17, *Land Nordrhein Westfalen, v. Dirk Renckhoff*, EU:C:2018:634, para. 44.

⁷ See ECS Opinion on the reference to the CJEU in Case C-466/12 *Svensson*, available at <https://www.europeancopyrightsociety.org>.

⁸ See Case C-466/12, *Svensson et al. v. Retriever Sverige AB*, EU:C:2014:76

⁹ Compare Ohly (*supra* fn. 4) 996.

8. If copyright in the digital environment is to restrict behaviour that in the eyes of the general public is, and has been, considered to be reasonable and justified, the system will be at a risk of losing its social support and legitimacy. This, in turn, may lead to an even greater lack of respect for copyright law. Such a situation benefits no-one in the long run. The Advocate General showed sensitivity to these considerations, in particular, where he noted that there is no substantial difference between the displaying of a photograph on the school's intranet, extranet or Internet site, as the audience will probably be identically limited to the students, their family members and teachers in all instances.¹⁰

9. In its *Córdoba* decision the CJEU has emphasized that Article 5(3)(a) of the Infosoc Directive must play a role in this case, "as regards the pursuit of a balance between the right to education and the protection of the right to intellectual property," and reminded Member States choosing to transpose this exception that it must be restricted to "the sole purpose of illustration for teaching or scientific research and to the extent justified by the non-commercial purpose to be achieved".¹¹ However, the CJEU did not examine whether the facts in this case could be exempted under Article 5(3)(a) or under any other exception or limitation in copyright law. This is understandable given that the referring court (the German Federal Supreme Court) did not ask for such interpretation, but it should not lead to a misconstruction of the CJEU's ruling. In his opinion, the Advocate General went in this instance further than the CJEU, holding that the exception in Article 5(3)(a) was applicable to the facts of the *Córdoba* case.¹² In any case the quotation exception guaranteed by the mandatory provision set out under Article 10(1) of the Berne Convention and by Article 5(3)(d) of Infosoc Directive, could be applicable in situations such as the one in the *Córdoba* case.¹³

10. On a general level, the ECS will emphasize that when examining the application of exceptions or limitations in the *Córdoba* scenario, it is important to take into consideration the fact that the use in question does not appear to affect the economic interests of the right holders. There is arguably no economically significant market that the re-use of the photograph on the school website could negatively affect.

11. Although not embraced by the CJEU (which repeatedly refers to the need to strike a fair balance and to the principles of effectiveness and proportionality when interpreting

¹⁰ Case C-161/17, *Land Nordrhein Westfalen, v. Dirk Renckhoff*, Advocate General Opinion, EU:C:2018:279, fn. 81.

¹¹ Case C-161/17, *Land Nordrhein Westfalen, v. Dirk Renckhoff*, EU:C:2018:634, para. 43. It must be recalled that, as regards the pursuit of a balance between the right to education and the protection of the right to intellectual property, in Article 5(3)(a) of Directive 2001/29, the EU legislature provided an option for Member States to provide for exceptions or limits to the rights laid down in Articles 2 and 3 of that directive so long as it is for the sole purpose of illustration for teaching or scientific research and to the extent justified by the non-commercial purpose to be achieved.

¹² As pointed out by the Advocate General, the referring court's silence on this point may be due to the belief that German law does not provide for an exception in the case in question. See Case C-161/17, *Land Nordrhein Westfalen, v. Dirk Renckhoff*, Advocate General Opinion, EU:C:2018:279, para. 110 with fn. 75. See, however, Ohly (supra fn. 4) 1003 for a comprehensive overview of the legal situation in Germany, including the possibility of invoking the quotation right in Section 51(3) of the German copyright act in this situation.

¹³ Compare Lionel Bently and Tanya Aplin, "Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism", University of Cambridge Faculty of Law Legal Studies, Paper 34/2018, available at <https://www.law.cam.ac.uk/ssrn>.

exceptions and limitations),¹⁴ the traditional approach, which combines broadly defined exclusive rights with narrowly interpreted exceptions and limitations, (mis)leads national courts and legislators into taking an overly restrictive and rigid approach to copyright interpretation. The ‘closed list’ of optional exceptions and limitations in Article 5 of the Infosoc Directive certainly does not help in this respect. The background of cases like *Córdoba* again demonstrates the need for a recasting or restructuring of the economic rights in order to bring copyright closer to economic and technological realities.¹⁵ Realizing that this is a long-term solution, the ECS recommends that less rigid readings of exceptions and limitations should be adopted in the meantime, in order to preserve and safeguard copyright’s legitimacy. Such a flexible and purposive interpretation of the exceptions and limitations is fully compatible with the case law of the CJEU and is mandated by EU primary law, in particular by the Charter of Fundamental Rights of the European Union.¹⁶ Provisions like Article 5(3)(a) and Article 5(3)(d) of the InfoSoc directive must therefore be interpreted in the light of the fundamental rights involved, in this case particular of Article 14 of the Charter which protects the right to education.

12. Additionally, the ECS submits that the CJEU should consider developing a general *de minimis* rule in European copyright law, dealing with uses that have minimal impact on the interests of right holders. The desirability of such a rule becomes ever more apparent as the development of technology and markets constantly redraws the boundaries of copyright and the scope of the exclusive rights granted to authors and copyright owners into question. At the same time, and precisely for the same reasons, it is of paramount significance that some degree of flexibility should be permitted when interpreting the scope of exclusive rights and deciding on copyright’s boundaries.¹⁷ Traces of a *de*

¹⁴ In fact, the CJEU has moved away from a narrow interpretation of limitations in favour of an interpretation that promotes the effectiveness of an exception in the light of its purpose and the principle of proportionality (see e.g. Case C-201/13, *Johan Deckmyn Vrijheidsfonds VZW v. Helena Vandersteen et al.*, EU:C:2014:2132, para. 19-23; Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH et al.*, EU:C:2011:239, para. 132-133; Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd et al. v QC Leisure et al.*, EU:C:2011:631 para. 162-164; Case C-604/10, *Football Dataco Ltd v Yahoo! UK Ltd*, para. 163; Case C-117/13, *Technische Universität Darmstadt v. Eugen Ulmer KG*, EU: C:2014:2196, paras. 27, 31]. The ECS has welcomed this development (see the Opinion of the ECS, “Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*” (2015) 46 *International Review of Intellectual Property and Competition Law* 93; and the “Opinion of the European Copyright Society in relation to the pending reference before the CJEU in Case C-476/17, *Hutter v Pelham*”, available at www.europeancopyrightsociety.org).

¹⁵ See, for example, the various contributions in P. Bernt Hugenholtz, *Copyright Reconstructed. Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, Alphen aan den Rijn: Wolters Kluwer (2018); Daniel J. Gervais, (Re)Structuring Copyright. *A Comprehensive Path to International Copyright Reform*, Cheltenham UK/Northampton MA: Edward Elgar Publishing (2017).

¹⁶ See detailed and with further references the Opinion of the ECS, “Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*”, and the “Opinion of the European Copyright Society in relation to the pending reference before the CJEU in Case C-476/17, *Hutter v Pelham*”, available at www.europeancopyrightsociety.org.

¹⁷ In the context of the exceptions and limitations to copyright, the ECS has argued in favour of the introduction of further flexibility to permit the adaptation of the copyright system to changing technological circumstances and social needs, see “Opinion of the European Copyright Society in relation to the pending reference before the CJEU in Case C-476/17, *Hutter v Pelham*”, and ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*’, *supra* note 9. In this last opinion, the ECS noted that it would be “a timely moment to introduce such an ‘opening clause’ within the European copyright framework. Several jurisdictions around the world have recently reviewed or are currently reviewing their regime of E&L, in order, among other things, to introduce greater flexibility” (Par. 12 of the Opinion).

minimis principle may be found in the Infosoc Directive, e.g. in Article 5(3)(o), which exempts certain existing analogue uses of minor importance. The ECS would, however, favour the adoption of a general *de minimis* rule for copyright infringement, allowing the design of solutions *ex aequo et bono*.¹⁸ Statements concerning the purpose of copyright in the recitals of the directive may support the recognition of such a general *de minimis* rule,¹⁹ along with statements emphasizing that “a fair balance of rights and interests between ... the different categories of rightholders and users of protected subject-matter must be safeguarded”.²⁰ It is also to be noted that *de minimis non curat lex* is an accepted principle in European Union law that is often applied in competition law and applies also in other substantive areas of law.²¹ This principle could usefully be carried over into copyright, where it could be employed to safeguard the legitimacy of the law.

Drafting Committee:

- Prof. Christophe Geiger, Director, Centre d’Etudes Internationales de la Propriété Intellectuelle (CEIPI), University of Strasbourg, France
- Prof. Marie-Christine Janssens, Professor of Intellectual Property Law, University of Leuven, Belgium
- Prof. Ole-Andreas Rognstad, Professor of Law, Department of Private Law, University of Oslo, Norway
- Prof. Alain Strowel, Professor, UCLouvain and Université Saint-Louis, Belgium
- Prof. Raquel Xalabarder, Chair on Intellectual Property, Universitat Oberta de Catalunya, Barcelona, Spain

Signatories:

- Prof. Lionel Bently, Professor, University of Cambridge, United Kingdom
- Prof. Estelle Derclaye, Professor of Intellectual Property Law, University of Nottingham, United Kingdom
- Prof. Thomas Dreier, Director, Institute for Information and Economic Law, Karlsruhe Institute of Technology (KIT), Germany
- Prof. Jonathan Griffiths, Professor of Intellectual Property Law, School of Law, Queen Mary University of London, United Kingdom
- Prof. Reto Hilty, Director, Max Planck Institute for Innovation and Competition, Munich, Germany
- Prof. P. Bernt Hugenholtz, Director, Institute for Information Law, University of Amsterdam, Netherlands

¹⁸ For a theoretical approach to the application of *de minimis* rule with regard to copyright law, see Andrew Inest, “A Theory of *De Minimis* and a Proposal for Its Application in Copyright, (2006) 21 Berkeley Technology Law Journal, 946-995.

¹⁹ For example, use of terms like ‘appropriate rewards’ and ‘adequate protection’ in the Directive 29/2001/EC (Infosoc Directive), Recital 10, indicating that the high level of protection called for in Recital 9 is not tantamount to maximum protection. See in this respect also case C-403/08 et al. (*Premier League*) para. 108.

²⁰ Directive 29/2001/EC (Infosoc Directive), Recital 31.

²¹ See eg. Jajna Hojnik, “*De Minimis* Rules within the EU Internal Market Freedoms”, (2013) 6 European Journal of Legal Studies.

- Prof. Martin Kretschmer, Professor of Intellectual Property Law, University of Glasgow, and Director, CREATE, United Kingdom
- Prof. Axel Metzger, Professor of Civil and Intellectual Property Law, Humboldt-Universität, Berlin, Germany
- Prof. Alexander Peukert, Goethe-Universität Frankfurt am Main, Germany
- Prof. Marco Ricolfi, Chair of Intellectual Property, Turin Law School, Italy
- Prof. Thomas Riis, Professor, Centre for Information and Innovation Law, University of Copenhagen, Denmark
- Prof. Martin Senftleben, Professor of Intellectual Property, VU University of Amsterdam, Netherlands
- Prof. Tatiana Synodinou, Professor, University of Cyprus, Cyprus