

Exceptions and Limitations  
to Copyright in the EU  
Under Pressure **& Bird & Bird**

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# *Exceptions and Limitations to Copyright in the EU Under Pressure*

- Manifestations of a push for greater flexibility
  - UK –
    - Hargreaves Review
      - ~ "Digital Opportunity - A Review of Intellectual Property and Growth" 2011
    - IPO Consultation 2012
  - Ireland
    - Copyright Review Committee Consultation Paper –
      - ~ "Copyright and Innovation" 2012
  - Netherlands
    - Hugenholtz & Senftleben 2011:
      - ~ "Fair Use in Europe – In Search of Flexibilities"
    - Ministerial Speech at
      - ~ "Towards Flexible Copyright" Conference 2012

# *Exceptions and Limitations to Copyright in the EU Under Pressure*

- The problem – why do we lack flexibility?
  - Exclusive list of permitted exceptions and limitations in Article 5 Copyright in the Information Society Directive 2001
    - Legislative history – not policy based
    - See prescient critique, in Hugenholtz 2000 –
      - ~ "Why the Copyright Directive is unimportant, and possibly invalid"
  - “Three step test” also incorporated in Article 5(5) of the Directive
    - Uncertain relationship to list of permitted exceptions and limitations
  - Vagaries of national implementation and legislative traditions
    - Civil law countries
    - Common law countries
      - ~ eg UK CDPA 1988 - Sections 28–75 (ie 65 sections)
  - Little or no prospect of legislative response at an EU Level

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- The answer (from a national legislative perspective)?
  - Fair use?
    - Inconsistent with 2001 Directive
    - Is it desirable anyway given the assumed lack of predictability?
      - ~ Griffiths 2009 – "The "Three-step Test" in European Copyright Law: Problems and Solutions"
      - ~ Samuelson 2009 – "Unbundling Fair Uses"
      - ~ Hugenholtz & Senftleben 2011
  - Explore scope for flexibilities within 2001 Directive?
    - Consider existing apparently permissive national legislative implementations of Article 5
      - ~ eg right of quotation under Article 5(3)(d)
    - Simply write Article 5 of the 2001 Directive into national laws in place of existing provisions
      - ~ relying on "three step test" in Article 5(5) to modulate their scope
  - Explore flexibilities outside the 2001 Directive
    - Right of adaptation, not harmonised at an EU level??

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- A UK "answer" (as to the EU)
  - UK Government Response to Hargreaves Review:
    - "The Government will aim to secure further flexibilities at EU level that enable greater adaptability to new technologies including use of data for research. We support a review of relevant EU legislation to this end and will be in dialogue with European partners to identify how this can best be achieved."
    - "IPO will make the removal of EU-level barriers to innovative and valuable technologies a priority to be pursued through all appropriate mechanisms."
    - "Given the possible time required for change at EU level, the Government will also explore what more can be done at UK level." ...

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- A UK "answer" (as to the UK)
  - UK Government Response to Hargreaves Review:
    - "... the Government agrees with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to three important factors:
      - ~ "That the amount of harm to rights holders that would result in "fair compensation" under EU law is minimal, and hence the amount of fair compensation provided would be zero. This avoids market distortion and the need for a copyright levy system, which the Government opposes on the basis that it is likely to have adverse impacts on growth and inconsistent with its wider policy on tax."
      - ~ "Adherence with EU law and international treaties."
      - ~ "That unnecessary restrictions removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception."

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- Specifics of a UK "answer" (as to the UK)
  - UK Government Response to Hargreaves Review:
    - "The Government will therefore bring forward proposals ... for a substantial opening up of the UK's copyright exceptions regime on this basis. This will include proposals for:
      - ~ a limited private copying exception;
      - ~ to widen the exception for non-commercial research, which should also cover both text- and data-mining to the extent permissible under EU law;
      - ~ to widen the exception for library archiving; and
      - ~ to introduce an exception for parody"

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- Where is the CJEU on interpreting Article 5?
  - Interpreting Article 5
    - Cases C-467/08 *Padwan* & C-462/09 *Stichtung de Thiuskopie*
      - ~ Article 5 (2)(b) – Private copying
      - ~ Article 5(5)
    - Cases C-5/08 *Infopaq I* and C-302/10 *Infopaq II* –
      - ~ Article 5(1) – Transient or incidental etc temporary reproductions
      - ~ Article 5(5)
    - Case C-145/10 *Painer*
      - ~ Article 5(3)(d) – Quotations for criticism or review
      - ~ Article 5(3)(e) – Public security
      - ~ Article 5(5)
  - But in other related contexts under the 2001 Directive...?

# *Exceptions and Limitations to Copyright in the EU Under Pressure*

- How are courts in the EU relieving the pressure?
  - Apparently adding new exceptions and limitations
    - *Dior v Evora* (NL HR 1995)
  - Extending implied licence theories
    - *Google Thumbnails* (BGH 2010)
  - Applying fundamental rights
    - *Germania 3* (DE Federal Constitutional Court 2000)
    - *Scientology v XS4ALL* (NL Hague CA 2003)
    - *HFA v FIFA* (FR C de C 2007)
    - cf *Nadia Plesner v Luis Vuitton* (NL Hague 2011)
      - ~ Applied in PI proceedings as to Community Design Right
    - cf Cases C-275/06 *Promusicae*, C-70/10 *Scarlet Extended v SABAM* and C-360/10 *SABAM v Netlog* (CJEU 2008, 2011, 2012)
      - ~ Applied to requests for identity of IP address owners and to filtering injunctions under Article 8(3) 2001 Directive

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- Where are we headed?
  - Legislatively
    - Nothing at an EU level
    - Tinkering at a national level
  - In the Courts
    - Increasing reliance on fundamental rights?
      - ~ Not only under ECHR but under EU Charter
      - ~ Extending not only to freedom of expression and information (Article 11 of Charter)
      - ~ But also freedom to run a business (Article 16 of Charter)
      - ~ Rejecting any suggestion that right to intellectual property (Article 17(2) of Charter) is “inviolable and must be absolutely protected”
  - Leading to the very legal uncertainty that many fear with fair use?

Thank you **& Bird & Bird**

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# *Exceptions and Limitations to Copyright in the EU – Under Pressure*

## ● References

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  - "Why the Copyright Directive is unimportant, and possibly invalid" European Intellectual Property Review 2000 p 499
- Griffiths 2009
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