By way of introduction

For most of the things
That you aren’t to do
There’s always exceptions
In one case or two

Most often a teacher
Can break all these rules
In order to teach in
A setting like school

And also a scientist
Or engineer, too,
Has leeway to copy
An item or two

There are other exceptions:
Recording for blind ones
Or making performance
For blind or for veterans

But I’m not a lawyer
Don’t rely just on me
Go find one to ask,
Better yet, two or three1

As this simple text demonstrates, identifying permissible use and complying with legal exceptions has become difficult. With the adoption of a ‘paracopy-

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right’, exercising exceptions may require heavy brainwork and – in the case of uses in an online environment – even turn out to be impossible. In sum, while provisions relating to exclusive rights have remained fairly transparent over decades, the same cannot be said for exceptions and limitations.

The aim of this chapter is both to give a critical account of the harmonization achieved by the European Commission in the field of exceptions to copyright and to look at future perspectives. As the findings will reveal that the number of possible exceptions that can be invoked to escape copyright liability varies considerably across Member States, I have chosen to concentrate on certain issues, mainly deficiencies, which relate to the current failure to harmonize exceptions in Europe.

By way of introduction, and in further clarification of the poem quoted above, I wish to dwell briefly upon the feeling of ‘malaise’ that currently seems to surround the copyright system and that inevitably also affects its ingrained system of exceptions and limitations. Not only is the copyright realm very vast today, but, in contrast to other IP rights, its border is more difficult to define, to such an extent even that copyright has become ‘a catch-all’ notion. Copyright not only covers a collection of Campbell soup cans,
Tracey Emin’s rumpled bed, urinals and pints of frozen blood, but also common appliances and utensils such as coffee machines, baker’s bicycles, industrial machinery and many more such creations. The recent expansion of copyright protection (e.g. adding the *sui generis* right and providing for (over)protection of technological measures) has intensified the feeling of ‘omnipresence’ mentioned earlier. Although this latter discussion is beyond the scope of the present analysis, it is already important at this stage to highlight the constant need for careful reflection on how far copyright should extend if it is not to lose touch with its basic rationale, as well as for balancing at the same time protected interests between rightholders and beneficiaries of exceptions.

1. **EU exceptions and limitations revisited**

1.1 *International background*

The legal construction of exceptions and limitations is as old as copyright itself.7 Turning to the international texts, the oldest treaty – the Berne Convention signed on 9 September 1886 – paved the way with its (old) article 7, which allowed the reproduction of newspapers or similar articles for the purpose of reporting current events with a view to guaranteeing the freedom of the press.8 Further articles dealing with exceptions and limitations in the older versions of this Convention were, however, scarce.9 Copyright exceptions, apparently, were not the main concern of the drafters of the Convention and those that were accepted were very restricted in scope or received relatively unsystematic treatment as a result of serious compromises.

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9 There was also article 8 – currently 10(2) – in relation to the reproduction of works for educational or scientific purposes, which, however, left ample discretion to the national legislators; see e.g. Ricketson and Ginsburg (2006), *supra*, 789; R. Xalabarder (2007), ‘On-line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?’, in Torremans, P. (ed), *Copyright Law. A Handbook of Contemporary Research*, Series Research Handbooks in Intellectual Property, Cheltenham, UK and Northampton, MA: Edward Elgar, 373–401, at 377.
Nevertheless, there is no doubt that the issue of exceptions was viewed as an essential part of the copyright system from the very start, as is confirmed by the legendary words spoken by Numa Droz, President of the preparatory Diplomatic Conferences of the Berne Convention, in 1884:

Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.\(^\text{10}\)

Despite its age, this statement remains as valuable today as it was in 1886. Cohen Jehoram rightly observes that it would have constituted a worthy clause for a preamble to the Berne Convention,\(^\text{11}\) but unfortunately preambles did not exist at that time.\(^\text{12}\)

The Berne Convention has been revised several times\(^\text{13}\) in order to ensure a minimum international level of protection and harmonize existing standards, taking into account challenges posed by technological development and the recognition of new rights. Since the last revision of 1971, however, it has proved very difficult to advance the level of copyright protection. In fact, it became impossible to alter the Berne Convention, partly due to objections from developing countries.\(^\text{14}\) It was the WTO that came to the rescue with the TRIPs Agreement,\(^\text{15}\) which imposed higher standards for all IP rights. Finally, in 1996, WIPO managed in time to put copyright on the digital track, although it is reasonable to assume that the major industrialized countries, including the European Commission, largely drafted the agenda for the WIPO Treaties on copyright (WCT) and on the protection of performers and phonogram producers (WPPT).

As regards the issue of exceptions (and possible revisions), the lack of amendments to the Berne Convention seems to indicate that the drafters were

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\(^{10}\) Numa Droz in an address to the members of the conference, quoted in *WIPO 1886, Berne Convention, Centenary 1986*, Geneva 1986, 195; see also Ricketson and Ginsburg (2006), 756.

\(^{11}\) H. Cohen Jehoram (2005), ‘Restrictions on Copyright and their Abuse’, *EIPR* 359. See also T. Vinje (1999), ‘Copyright Imperilled’, *EIPR*, 21 (4), 192, at 207, observing that such a mediating role between rights and public interest is central to copyright’s mission.

\(^{12}\) Preambles were only added to the text of the last revision (Paris 1971) but no mention of exceptions was made at that time; see also *infra* (Preamble to WCT).


\(^{14}\) Cornish (2004), *supra*, at 3.

not particularly in favour of including exceptions. In its current version, the Berne Convention comprises a handful of exceptions which are scattered throughout the text. After all, the aim of the Convention, as indicated in its first preamble, is ‘to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works’. Even when the need for revision was felt, for example because many national legislations had already adopted certain exceptions in relation to the (new) performance right – and because ‘each country defended its own traditions here like the gold in the vaults of its national bank’ – a consensus could at best be reached by approving a subtle statement relating to ‘minor exceptions’ in the Conference report. For Cohen Jehoram, this reference could nevertheless be regarded ‘as a first slight opening of the Berne regime of a closed list of narrowly defined restrictions’. The greatest change that the Convention would ever adopt was agreed upon during the Stockholm revision in 1967. This time, it was inserted into the text of the Convention itself as a second section to article 9 (exclusive right of reproduction), which would assume a life of its own as the so-called three-step test. Ever since, this test has become an essential part of

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16 The revision conferences of Stockholm (1967) and Paris (1971) were predominantly concerned with special provisions for the developing countries and finding solutions in order to support the universal effect of the Convention; WIPO Intellectual Property Handbook (2004), 265.

17 See articles 10 (rights of quotation and uses for teaching purposes), 10bis (press usage), 11bis (conditions for the exercise of broadcasting and other rights), 13(2) (reservations on the exercise of mechanical reproduction rights) and, for developing countries, 30(2)(b) and Appendix.

18 Cohen Jehoram (2005), supra, at 360.

19 This is what happened at the Brussels Conference in 1948. See WIPO 1886, Berne Convention, Centenary 1986, Geneva 1986, 181 for the famous statement by general reporter Marcel Plaisant on the possibility available to national legislations ‘to make what are commonly called minor reservations’ with reference to examples such as ‘religious ceremonies, military bands and the needs of child and adult education’. Plaisant also noted that ‘these references are just lightly pencilled in here in order to avoid damaging the principle of the right’. This statement was endorsed at the Stockholm Conference in 1967. For more details on this ‘minor reservations’ rule, see Ricketson and Ginsburg (2006), 830.

20 Cohen Jehoram (2005), supra, at 361.

21 During this conference, many efforts were also made – albeit in vain – to come up with a catalogue of exceptions. For more details, see Ricketson and Ginsburg (2006), supra at 761; P.B. Hugenholtz et al., The Recasting of Copyright & Related Rights for the Knowledge Economy, Final report, Study contract, European Commission DG Internal Market Study, no. etd/2005/im/d1/95, at 66, (hereafter referred to as IVIR report (2006)).

22 ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of those works in certain special cases, provided that such reproduction
various treaties, European Directives and national copyright acts. In some respects, and maybe unwittingly, the negotiating parties seem to have moved towards an open-minded approach to exceptions. On the other hand, it cannot be denied that this test has various controversial aspects, which are beyond the scope of the present study. It is undisputed that the three-step test sets general parameters to the freedom of national legislators to create exceptions, even though it also provides national legislators with some leeway to consider new provisions.

In the area of neighbouring rights, reference should be made to article 15 of the Rome Convention, which includes an exhaustive list of four optional exceptions: in particular, article 15 allows Contracting States to provide limitations on private use, the use of short excerpts in the context of reports of current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, and use for educational and scientific purposes. Not all these provisions, however, are as narrowly defined as the corresponding limitations in the Berne Convention. In addition, paragraph 2 contains a general clause referring to the exceptions permitted under copyright law.

The adoption of the two WIPO Treaties in 1996 marked another milestone in the history of copyright. Unfortunately, although they are widely praised – and rightly so as regards certain solutions to digital challenges – the WCT and
WPPT treaties do not make much progress towards providing further guidance on exceptions and limitations. These two so-called ‘Internet Treaties’ restrict themselves to an article which reiterates, in two paragraphs, the three-step test to determine the limitations and exceptions allowed. It is accompanied by an Agreed Statement that permits Contracting Parties ‘to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws’ as well as ‘to devise new exceptions and limitations that are appropriate in the digital network environment’. For the present study, the most interesting part is to be found in the last preamble of both the WCT and WPPT, which recognizes ‘the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’. The justification for exceptions and limitation is no longer confined to Numa Droz’s legendary statement but is henceforth embedded in international texts!

To conclude this section, it must be noted that Contracting States have ample leeway to adopt (or not) exceptions along the lines of those foreseen in the Berne Convention, the TRIPs Agreement and the Internet Treaties. Only the exception permitting quotations in article 10 of the Berne Convention is mandatory. The international norms nevertheless have some important points of view in common. First, exceptions should conform to the three-step test, although no clear common understanding of its significance seems to exist yet. Secondly, the various texts suggest that the provisions relating to exceptions are designed to prevent any commercial exploitation. Finally, and faithful to the Berne Convention’s restrictive philosophy, the provisions on exceptions are, in most jurisdictions, subjected to the generally accepted notion that they should be construed narrowly as they limit the scope of the exclusive rights.

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26 In the WCT, they relate to exceptions to the rights granted under this Treaty and to the Berne rights, successively.

27 Under article 9(2) of the Berne Convention, this test is applicable only to the right of reproduction, while both paragraphs of article 10 of the WCT cover all rights provided for in the Treaty and the Convention respectively. In this, these provisions partly – i.e. only in respect of the Berne provisions – overlap with article 13 of the TRIPs Agreement. This latter provision continues, however, to constitute the most important legal norm given that, contrary to the Berne and WCT provisions, it is fully justiciable through the mechanism of the WTO’s Dispute Settlement Procedure. For more details on the TRIPS provision, see C. Correa (2007), *Trade Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement*, Oxford: Oxford University Press, 134–55.

28 See more details on this statement in Correa (2007), *supra*, at 143.


30 Cornish (2004), *supra*, at 46; D. Lipszyc (1999), *Copyright and Neighbouring*
1.2 The European Union and exceptions to copyright

This short historical excursion not only reveals that the international agreements hardly provide adequate starting points to the problem at hand, but above all that the issue of exceptions and limitations is a delicate one in all possible ways. For the European Commission, it unmistakably presented a hard nut to crack given the vast differences in the purpose, wording and scope of limitations existing at the national level, many of which reflect local cultural traditions or business practices.31

In what follows, I will briefly describe the solutions which the European Commission has devised to maintain a fair balance between the specific interests of copyright owners and the broader public interest, since it launched the process of harmonization of copyright in June 1988 with the Green Paper on ‘Copyright and the Technological Challenge’.32

We should bear in mind that, at that time, the world was very different from the world in which the copyright system was developed. Reality had radically changed with, first of all, the advent of the internet era33 followed by the continuous convergence of media, communication channels and devices. At the same time, the system had to respond to new perceptions and to altered cultural, economic, legal and social values. With regard to its aims, in addition to stimulating creativity, the copyright system was now also expected to encourage economic growth, employment and investment.34 Against this background, a legislator (whoever he may be) can hardly be expected to come up with simple rules to balance all the interests that copyright seeks to foster. Any solution will easily become the target of criticism and, admittedly with hindsight, it is of course easy to find fault with past achievements.

Looking back, however, it is more appropriate to highlight in the first place the many positive achievements. It is no exaggeration to say that, since 1988,

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31 For an overview of these differences, see B. Hugenholtz and D. Visser (1995), Copyright Problems of Electronic Document Delivery, Report to the Commission of the European Communities, Luxembourg, 1995.

32 COM (88) 172.

33 Cf. Cornish (2004), supra, at 41: ‘The Net is bulldozing the ramshackle castles of the copyright industries – the palisades of publishing, the strongrooms of sound recording, the Festungen of film and audio-visual production, the Bastilles of broadcasting, and, separately but very distinctly, the Castelnuovi of computing itself.’

34 I would even suggest that the various adaptations of copyright during the last decades have been mainly prompted by economic factors. No doubt, these ‘mercantile’ interests have contributed to awakening the interest of the European Commission.
The European Commission has made huge efforts to harmonize national legislation relating to copyright. The first effects could be felt with the publication of the Council Directive of 14 May 1991 on the protection of computer programs.\textsuperscript{35} During the following decade, six more Directives were published in the field of copyright, four of which contain – and often mandatorily impose – very detailed limitations on exclusive rights. In view of the topic under discussion, it is appropriate to provide an overview of these provisions, albeit not an exhaustive one.

The 1991 Software Directive introduces a number of exceptions that are specifically adapted to the software field\textsuperscript{36} and that remain in full effect today.\textsuperscript{37} In the 1992/2006 Rental Right Directive,\textsuperscript{38} article 10(1) lists several limitations to the neighbouring rights, all of which are optional.\textsuperscript{39} In a second part, this article allows Member States to further provide the same kinds of exceptions with regard to neighbouring rightholders as they provide with regard to authors.\textsuperscript{40} In this Directive, rightholders are moreover given an exclusive public lending right, but the Member States are entitled to derogate from the exclusive nature of such a right. Such derogations may not deprive Community authors of the right to remuneration, but the States may exempt certain categories of establishments from the payment of that remuneration. In the second chapter of this same Directive, the exclusive right granted to performers and producers with regard to broadcasting and communication to the public is replaced with a right to equitable remuneration when a commercially available phonogram is broadcast or communicated to the public.\textsuperscript{41}

\begin{footnotesize}
\begin{enumerate}
\item[36] See, in particular, article 5.1 (necessary acts by lawful acquirer); article 5.2 (making a back-up copy), article 5.3 (using the program for observation and testing) and article 6 (decompiling it for purposes of interoperability).
\item[37] See Recital 50, \textit{in fine}, InfoSoc Directive: ‘Articles 5 and 6 of that (Software) Directive exclusively determine exceptions to the exclusive rights applicable to computer programs’.
\item[38] Directive 92/100 on rental and lending rights and on certain neighbouring rights which was replaced by Directive 2006/115/EC of 12 December 2006, OJ 2006 L 376/28. In these Directives recognition is given to the existence of the rights of performing artists, phonogram producers, film producers and broadcasting producers. All exceptions listed in this Directive are applicable to these four groups.
\item[39] This list is quasi-identical to the list of article 15 of the Rome Convention (see, \textit{supra}, text accompanying footnote 24).
\item[40] In line with this provision, it is generally accepted that article 5 InfoSoc Directive, which I will discuss below, can also be applied in the field of neighbouring rights, even if there is some overlap. See S. Bechtold ‘Directive 2001/29/EC’, in Dreier and Hugenholtz (2006), \textit{supra}, at 370.
\item[41] See also the related article 12 of the Rome Convention.
\end{enumerate}
\end{footnotesize}
the Database Directive of 11 March 1996, the provisions relating to exceptions are scattered over two chapters. In the second chapter of this Directive, articles 5 and 6 enumerate the mandatory or optional exceptions that Member States should/can apply to databases that are protected by copyright. A certain analogy can be found in articles 8 and 9 with the *sui generis* right chapter although the exhaustive list of optional exceptions does not include the possibility of introducing traditional exceptions as is the case for copyright. These limitations also remain in force and cannot be replaced or modified along the lines of article 5 InfoSoc Directive.

Finally, and just as all ways lead to Rome, any discussion of the issue of exceptions and limitations in the European Union will inevitably lead us to the InfoSoc Directive and its article 5, which will be the focus of the following section.

### 1.3 Article 5 of the InfoSoc Directive or ‘the Avenue to Disunity’

#### 1.3.1 THE INFORMATION SOCIETY DIRECTIVE OF 22 MAY 2001

The development of the Information Society urged not only the international community but also the European Commission to adjust the general regulatory framework in the field of copyright and related rights. This is, however, not the place to dwell on the events leading to the adoption of the InfoSoc Directive. Relevant documents are the 1995 Green Paper on ‘Copyright and

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43 These will in any case have to include users’ freedom to perform acts that are necessary for accessing the database and using its contents in the normal way (article 6.1). Furthermore, this article optionally allows maintaining or introducing exceptions relating to the reproduction of non-electronic databases for private purposes, the use for teaching and research purposes, the use for purposes of public security or administrative or judicial procedures and any other use that is traditionally authorized under national law.
44 This more restrictive approach can be explained by the fact that the exclusive right to prevent extraction and re-utilization only applies to substantial parts of a database. Hence the producer of the database can never prevent the use of non-substantial parts (article 8.1) except in cases of repeated and systematic extraction and/or re-utilization (articles 7.5 and 8.2).
Related Rights in the Information Society’ and the 1996 Follow-up Paper, which respectively initiated and resulted from extensive discussions exploring the new avenues that the European Commission should take to adequately respond to evolving technology and new economic realities. These texts led the Commission to adopt the proposal of 10 December 1997 and the amended proposal of 25 May 1999 for a Directive harmonizing aspects of rules on copyright and related rights. In turn, but only after an unprecedented lobbying effort, these proposals led to the final InfoSoc Directive. The goal of this Directive was twofold. Its first aim was to bring the rules on copyright and related rights into conformity with the 1996 WIPO Treaties. Secondly, on this occasion, a further attempt was made to harmonize, horizontally, basic aspects of substantial copyright law. While this Directive undoubtedly marks a turning point in the history of European copyright harmonization, I will argue in what follows that its results are disappointing as regards the issue of exceptions provided for in its article 5.

1.3.2 THE PROVISIONS OF ARTICLE 5 OF THE INFOSOC DIRECTIVE IN A NUTSHELL

The general European view of exceptions is currently expressed in article 5 of the InfoSoc Directive, which aims at safeguarding ‘a fair balance of rights and interests (. . .) between the different categories of rightholders and users of

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48 COM (95) 382.
49 COM (96) 568.
54 For more details on the scope of the various exceptions see, in particular, Bechtold in Dreier and Hugenholtz (2006), supra, at 371.
protected subject-matter (and to reassess) the existing exceptions and limitations to the rights as set out by the Member States in the light of the new electronic environment.  

Article 5 applies to all subject-matter protected by copyright and related rights with the exception of software and databases. As Recital 32 points out, article 5 provides an exhaustive enumeration of limitations on the exclusive rights of reproduction, public communication and distribution that are harmonized in the InfoSoc Directive and that the Member States may provide in their national copyright acts. Adding or maintaining exceptions that are not included in the various lists of article 5 is not allowed.

From a formal point of view, article 5 presents a rather transparent structure with five different subsections. They successively set out the only mandatory exception (5.1), four optional exceptions to the reproduction right (5.2), fifteen optional exceptions to the rights of reproduction and/or public communication (5.3) and the possibility to apply all previously listed exceptions to the distribution right (5.4). Subsection 5.5 finally reiterates – and hence ‘communitizes’ – the general obligation that all exceptions should conform to the three-step test to determine their legitimacy. The wording ‘reiterates’ is, however, not entirely correct as the community text contains an important deviation from its international counterparts in the Berne Convention, the WIPO Treaties and the TRIPs Agreement. In these treaties, the addressee of the test is the national legislator. By using the wording that the exceptions ‘shall only be applied in certain special cases, etc.’, the Directive seems to suggest – but this view is currently the subject of much controversy – that article 5 not only ‘communitizes’ but also ‘nationalises’ the test, making it applicable by the courts of the Member States. More clarification from the

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56 See, supra, Section 1.3.1 and infra, footnote 81.
57 Not all exclusive rights are addressed in articles 2–4 of this Directive. Consequently, article 5 has no impact on the author’s moral rights, his rental and lending rights, his rights to authorize transmissions by cable or satellite, or – but this is disputed – to the right of adaptation or the right of public performance; IVIR report (2006), 63.
58 Except in relation to the uses that are allowed under article 5.3.(o) (see, infra, footnote 139), non-conforming exceptions that exist in the national law should be deleted or amended.
59 Reinbothe (2001), supra, at 740. For the sake of completeness, we recall that the three-step test is also – although not always consistently – incorporated in all other Directives dealing with limitations (Software, Rental and Database Directives). For further details on the differences amongst them, see IVIR report (2006), 69–70.
60 See Gotzen (2007), supra, at 26: ‘The big difference between this interpretation and the first one lies in the extent of the court’s supervisory power. In the second (interpretation), the court can go beyond the stage of examining whether the legislature
European Court of Justice as regards the two possible interpretations would be highly welcome, especially because a few national courts have already applied the test,\textsuperscript{61} while other courts and commentators continue to reject this approach.\textsuperscript{62}

As a closer look at the text of article 5 reveals, there is, first, the obligatory exception to the reproduction right for transient or incidental acts of temporary reproductions which are dictated by technology and have no separate economic significance. To the extent that they meet these conditions, this exception should include the acts of browsing and cashing.\textsuperscript{63} All other exceptions are optional, indicating that the EU recognizes and preserves Member States’ authority to govern what is clearly a sensitive issue. This decision is not only regrettable but also remarkable in view of the observation in Recital 31 that ‘existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright’. In an even more puzzling passage, Recital 31 acknowledges that ‘such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities (and that) in order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously’. Even if it might be argued that the Directive has tried to overcome these obstacles by stipulating that the provisions of article 5 are exhaustive, this argument is unconvincing. As noted above, it only means that Member States are as a rule not allowed to apply any other exceptions than those explicitly listed.

1.3.3 IMPLEMENTATION OF ARTICLE 5 INFOSOC DIRECTIVE IN THE MEMBER STATES

According to Article 12 InfoSoc Directive, the European Commission must

\textsuperscript{61} See, for instance, the decision of the French Cour de Cassation of 28 February 2006 in the \textit{Mulholland Drive} case (\textit{Auteurs & Media}, 2006, 177). In the Netherlands, the test was further applied by a lower court (Tribunal of The Hague, 2 March 2005, \textit{(2005) Computerrecht}, 143); for comments on these decisions, see Geiger (2006), \textit{IIC}, 684 (footnote 3).


\textsuperscript{63} Recital 33 InfoSoc Directive.
submit a report examining the application of, inter alia, article 5 in the light of the development of the digital market. A study to this effect was undertaken by the Dutch Institute IVIR. Apart from very interesting policy considerations on a wide variety of general and topical issues, this extensive report also includes a survey of the implementation of the InfoSoc Directive in the various Member States, which was undertaken in collaboration with the Queen Mary IP Research Institute. I also refer to the initiative undertaken by the RIDA journal to publish summary reports of the implementation activities by the Member States in three of its issues with a concluding synthesis by Gotzen.

These reviews confirm that, as far as article 5 is concerned, the Member States have legislated in a ‘disorderly manner’. This falls short of the ambition expressed in Recital 32, according to which ‘Member States should arrive at a coherent application of these exceptions and limitations’. The only exception to this finding relates – not surprisingly – to the sole mandatory provision on transient copies, which has been implemented rather literally. All other extensive possibilities offered by the optional provisions of sections (2)–(4) of

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64 Hugenholtz et al. (2006), supra.
66 RIDA, no. 202 (October 2004) contains reports from Germany, Austria, Denmark, Greece, Italy, Luxembourg and the UK; RIDA, no. 206 (October 2005) contains reports from Belgium, Ireland, the Netherlands, Portugal and Sweden and RIDA, no. 210 (October 2006) contains reports from Spain, Finland and France.
68 For further details about the transposition of article 5 in the national copyright laws, I refer to the excellent aforementioned reports.
70 Westkamp report (2007), supra, at 12. It is, however, noted in this report that there exist ambiguities in the scope and understanding of the text as well as deviating interpretations concerning the question of the correct addressee.
article 5 have tempted the vast majority of Member States to introduce new exceptions. Gotzen reports that France, Belgium and the Netherlands have added six new exceptions. Other Member States to have supplemented their lists with new exceptions include Italy (four), Germany and Spain (two); Austria, Greece and Sweden (one).\footnote{Gotzen (2007), supra, at 16. The author further reports that only Denmark, the United Kingdom, Finland and Ireland have not introduced new exceptions.} Portugal has gone the furthest, as it has adopted all the possibilities listed in the European provision while also keeping its old ones. Of course, these numbers don’t tell us much, as they should be considered in the light of existing exceptions. In this respect, it appears that most Member States have not only extended their lists of exceptions but have moreover seized the opportunity to modify or extend the conditions of existing exceptions.

As regards the three-step test, implementation policies adopted in the Member States offer an equally mixed picture, with some countries carefully avoiding repeating the text in their national laws\footnote{Germany, Austria, Denmark, Sweden, the United Kingdom and Finland.} while other states have included\footnote{Greece, France, Italy, Luxembourg and Portugal and Ireland (partly).} – or maintained\footnote{Spain, Belgium (but only in relation to certain exceptions, which only adds to the confusion).} – the whole or certain parts of the text of article 5.5 InfoSoc Directive in their copyright act.\footnote{For more details, see the Westkamp report (2007), supra, at 48–9; Geiger (2007), supra, at 486.}

Finally, major (if not most) discrepancies continue to subsist with regard to issues of remuneration and compensation. I recall that three of the reproduction exceptions are subject to the condition that rightholders should receive fair compensation to adequately compensate them for the use that the law permits. This is the case for the exceptions of reprography, private copying and reproductions by social institutions. However, Member States remain free to decide how to comply with this obligation\footnote{In relation to the private copying exception, however, some constraints are imposed (‘fair compensation which takes account of the application or non-application of technological measures’). For further discussion of this subject, I refer to the separate contribution by S. Dusollier and C. Ker in this book.} as well as to decide whether to maintain or introduce a remuneration system in relation to all other exceptions.\footnote{Recital 36 InfoSoc Directive. Where compensation is provided, exceptions thus take the form of statutory licences.} It is noteworthy that, in this respect, only very few Member States seem to have updated existing law. As a result, roughly four systems can be distinguished within Europe, ranging from the possibility to ‘make a claim’ to special forms of (collective or individual) licence schemes or – as is the case
in most Member States – the operation of levy schemes that are imposed on physical carriers, devices and/or a variety of other uses.78

1.3.4 MAJOR CRITICISM

ARTICLE 5 FALLS SHORT OF THE GOAL OF HARMONIZATION I share the view of many commentators that article 5 has largely failed to achieve the aim of harmonization and that, moreover, the whole system of exceptions seriously lacks coherence.79 As part of a Directive that inherently aimed at streamlining national laws – in which traditionally the number and nature of exceptions already varied considerably – article 5 falls disappointingly short of expectations.

This criticism is, first, prompted by the fact that previously existing but divergent systems of exceptions (software and databases) are left intact. The concurrent application of these regimes in relation to creations that can mutually be combined (literary works, software and databases) inevitably leads to incompatibilities or gaps.80

A second ground for criticism is the vast number of optional exceptions from which Member States can ‘pick and choose at will’.81 Article 5 seems to consist of a random collection of cases that should not be forgotten, rather than listing certain uses that should be permissible on the basis of a clear justification. It is known that this situation was caused by the many heated discussions, resulting in political deals and concessions to lobbying pressure.82 It was, however, the Commission’s original aim to limit the list of exemptions to a bare minimum, exhaustively enumerated.83 Unfortunately, the Community

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78 For more details, see Westkamp report (2007), supra, at 49–50.
80 For example, the exception of transient copying does not apply to computer programs and databases. For other examples, see IVIR report (2006), 215. See also p. 64, where this situation is qualified as the ‘biggest source of inconsistency in the regime of limitations on copyright’.  
82 See supra, footnote 51.
The issue of exceptions

The legislator was not strong enough to withstand the pressure of Member States, which all tried to consolidate existing provisions, with the result that the number of exceptions increased from seven in the first proposal to no fewer than twenty optional cases in the final text.

Finally, the turbulent genesis of article 5 has clearly left its scars upon the phrasing of many provisions, in such a way that many alternatives are left open in critically important areas. In view of the numerous vague, ambiguous or even obscure provisions, it is largely up to the individual states to determine the provisos and the extent of most limitations on copyright. It has already been concluded that significant differences have emerged at the level of their implementation at the national level. Further differences are likely to arise at the level of the application of these non-defined terms by local courts in the Member States. Given the optional nature of all but one of the exceptions, even the European Court of Justice will probably not be in a position to reconcile the divergent viewpoints. Consequently, during the years to come, we will be confronted with a variety of solutions that, paradoxically, will have to operate in ‘one internal market without barriers’.

**ARTICLE 6 DISTORTS THE TRADITIONAL BALANCE WHERE EXCEPTIONS ARE CAUGHT IN A ‘PINCER MOVEMENT’**

The next major problem that affects article 5 concerns the intricate mechanism set up in article 6, and more particularly in its section (4), which deals with the intersection between the protection of technological protection measures on the one hand and exceptions to the exclusive rights on the other hand.

With the legal protection for technological measures *per se*, copyright holders (i.e. industries) have been given a new arsenal of tools that allows them to control the use of content on the internet in unprecedented ways. These provisions have been drafted against the background of the early internet days, when copyright owners had to struggle to stay in command of unauthorized use of their works and technological measures were seen as the answer to the

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84 See, supra, Section 1.3.3.
85 In line with the decisions in SENA/NOS (6 February 2003 – C-245/00) and SGAE/Rafael Hoteles (7 December 2006 – C-306/05), the ECJ could probably hold at most that certain notions as they are used in the Directive – such as ‘equitable remuneration’ and ‘public communication’ – have to be given a uniform interpretation but that it is ‘for each Member State to determine, in its own territory, the most appropriate criteria for assuring (. . .) adherence to that Community concept’ (quote from SENA case). Cf. Promusicae v. Telefonica de Espana (29 January 2008 – C-275/06) (Member States can, but are not required, to order ISPs to disclose personal data about subscribers suspected of online piracy).
87 Hilty (2004), supra, at 764.
countless challenges. Their prayers were answered successively by the international legislator,\textsuperscript{88} by the European lawmaker in article 6 of the InfoSoc Directive and, at the national level, through the implementation of this latter provision. We recall that the scope of application of the European provision goes well beyond the international obligations, including as it does the possibility of control over permitted uses.\textsuperscript{89} Hence, the provisions of article 6 may render copyright exceptions nugatory as they can be locked behind technological measures. In view of these disastrous effects upon the system of exceptions, it has repeatedly and rightly been stated that copyright’s traditional doctrines of limitations no longer apply in this new legal space.\textsuperscript{90}

What is most worrying is the lack of a clear solution to the problem of how exceptions can be exercised in practice when works are access- or use-protected by TPMs. The European legislator has worked out a sophisticated construction in article 6(4) which, however, only made matters even more intricate for national legislators, copyright holders and users. Instead of the legislator, rightholders have been entrusted with the ‘task’ of providing the necessary measures to make material available if needed for the exercise of an exception.\textsuperscript{91} This solution, which implies a remarkable policy reversal, risks seriously undermining the copyright balance as rightholders may want to overlook or ignore the goals that the system of exceptions embraces. In fact, with the fourth paragraph that was added to article 6(4), and in which it is plainly declared that the obligation to allow access to beneficiaries of exceptions does not apply in relation to material that is made available ‘on demand’, it seems as if rightholders have been given legal permission to undermine essential user freedoms.

\textsuperscript{88} Anti-circumvention provisions and measures to protect tools relating to electronic management information were imposed in articles 11–12 (WCT) and 18–19 (WPPT) in 1996.

\textsuperscript{89} Dusollier (2005), supra, at 162.


\textsuperscript{91} For an overview of the different ways in which this obligation was implemented, see Gotzen (2007), supra, at 41; N. Braun (2003), ‘The Interface between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and in the European Community’, \textit{EIPR}, no. 11, 496, at 501.
2. Road map for the future: constructing an ‘Avenue to Unity’

2.1 Starting point
Proposal alternative solutions to remedy the deficiencies discussed above is a hazardous task. Now that all Member States have (finally) succeeded in transposing the many obligations imposed by the InfoSoc Directive into their national laws, it seems rather unlikely that they will be eager to even consider re-examining their systems of exceptions. On the other hand, some Member States have already indicated that their current framework may not adequately respond to the steady advance of technology and new market evolutions. Moreover, since the very day the InfoSoc Directive was enacted, the European Commission has also been constantly involved in continuing harmonization efforts. So, in the end, it is not so odd to reflect upon missed opportunities and future avenues for the current system of exceptions. While I do not aim to come up with a ready-made solution, I will sketch a few guidelines for addressing some of the current imperfections that may serve as a starting point for discussion and more in-depth research.

2.2 Some guidelines

2.2.1 THE PURPOSE OF THE REVISED SYSTEM SHOULD BE TO REDRESS THE BALANCE IN A TRANSPARENT WAY THAT ACHIEVES COMPREHENSIVE HARMONIZATION
The central focus and ultimate goal of any new (legislative) intervention relating to exceptions should be threefold. First, it should put in place a system of exceptions that would remedy the acute lack of harmonization within the European Union along the lines

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92 See e.g. the ‘Copyright Exceptions Consultation’ process, which was recently (8 January 2008) launched by the UK’s Intellectual Property Office and which, *inter alia*, relates to a reform of copyright exceptions (for more details, see http://www.ipo.gov.uk/consult-copyrightexceptions.pdf, accessed 12 January 2008). Also in Germany the Bundesrat identified on 21 September 2007 a need to start to work on a ‘Third Basket’ (third law for the regulation of copyright in the information society) as soon as possible.

93 See *infra*, footnote 153.

94 In the 2006 IVIR report, eight issues of actual or potential sources of tension relating to exceptions are listed and discussed. Apart from the exhaustive character of the list included in article 5, the optional character of the exceptions, the lack of guidelines regarding the contractual overridability of the limitations and the notion of lawful user, which we will address below, this report also refers to the question of transient and incidental copies (p. 68), the three-step test (p. 69), equitable remuneration vs. fair compensation (p. 70) and the discrepancies regarding the private copy exception (p. 73).
proposed in Section 2.2.4 below. Such an endeavour may moreover help to resolve the European Union’s inability to articulate a ‘European position’ at the round tables of international copyright organizations.\textsuperscript{95} In spite of this fact, I would not go as far as to claim that the whole European effort has thus far been in vain. Even though the results are rather meagre, article 5 of the InfoSoc Directive seems to have created a sort of ‘spontaneous harmonization’ of exceptions in the various Member States. Countries have more limitations in common and share more notions and issues relating to exceptions than ever before.\textsuperscript{96} This may put us in a slightly more comfortable position to achieve our goal than at the end of the 1990s and remedy the deficiencies that were described in a previous section.

Secondly, any new legislative initiative should reassess the balance between rights and the public interest. As was pointed out in the introduction, there is a certain ‘malaise’, which has been nourished by the constant expansion of exclusive rights over the last decades.\textsuperscript{97} This evolution goes hand in hand with growing concerns that the previously fair balance has become threatened. Changing the current system of exceptions to achieve a more balanced solution therefore seems obvious, if not absolutely essential.\textsuperscript{98}

Thirdly, the legislature should aim at more transparency of the copyright rules. Today copyright law has become over-intellectualized and detached from reality.\textsuperscript{99} ‘Asking two or three lawyers’, as was recommended in our introductory poem, may not even be sufficient. It is important that users are able to understand the ‘sense’ behind the copyright system and its balancing mechanisms, which, in turn, may enhance proper observance of the rules.\textsuperscript{100}

\begin{flushleft}
\textsuperscript{95} Hilty (2004), supra, at 775. Currently, the EU has to account for 27 national options, which of course seriously weakens its negotiating position.

\textsuperscript{96} See the various reports on the implementation in the Member States referred to above and from which it follows that, contrary to initial expectations, a majority of countries have added new exceptions to their list and redrafted their conditions in a way that better conforms to the Directive. See, supra, section 1.4.3.

\textsuperscript{97} See, supra, Introduction.

\textsuperscript{98} Cf. Hilty (2007), supra, at 351 stressing the ‘urgent need for a rapid adjustment’ and proposing (at least) that article 6.4.4 be abolished and new specific exceptions introduced to guarantee access to scientific and knowledge-relevant information.

\textsuperscript{99} See, infra, the example given in relation to the application of the teaching exception (Section 2.2.4).

\textsuperscript{100} This task is probably much tougher today than Mark Twain thought in 1903 when he wrote that ‘only one thing is impossible for God: to find any sense in any copyright law on the planet’. See also the famous statement by J.J. Rousseau (‘si on veut qu’on respecte la loi, il faut faire qu’on l’aime’). See more details in M.C. Janssens (2004), ‘Transparantie in het auteursrecht: een brug te ver?’, AMI (NL), 2004/6, 205.
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In an indirect way, this objective may be served through achieving the two first goals of more harmonization and a better balancing of the various interests.

2.2.2 THE SYSTEM SHOULD ABANDON THE APPROACH OF ONE CLOSED AND EXHAUSTIVE LIST OF EXCEPTIONS

In 2001, the European legislator opted for a nearly closed system in the form of a long exhaustive list of exceptions, with many provisions drafted in inflexible or technology-specific language. The result is a ‘photographic print’ of the situation around the turn of the century. Not only are there important drawbacks to this approach, but it is moreover ‘dangerous and short-sighted’. With the rapid technical evolutions taking place on and outside the internet, the meaning and impact of individual exceptions is, indeed, subject to continuous fluctuations. As most commentators already abhor the current length of the list of article 5, merely adding new exceptions to the list will certainly not solve the problem.

For these reasons, the choice of a closed list should be abandoned and such a list should be replaced by a more flexible system that will allow a more rapid response to new business models, novel uses or urgent situations that will continue to arise, undoubtedly, in the dynamic information society. As will be explained below, I would propose a system that combines a list of mandatory exceptions, some of which are given imperative character, with an exhaustive list of optional provisions coupled to a ‘window provision’.

2.2.3 FAIR USE IS NOT AN ALTERNATIVE

An obvious alternative to an exhaustive and closed system of exceptions would be to provide for an openly worded set of application criteria by analogy with the ‘fair use’ system. The fair use concept certainly has some advantages as it provides for a flexible defence to copyright infringement, allows for ‘ad hoc’ exceptions, leaves more latitude to take into account the specific circumstances of the case, and, very importantly, also allows for its application to new

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101 Hilty (2004), supra, at 766. Admittedly, this choice also has certain merits, the most important being the legal certainty that is given to rightholders and users about what kind of use is (not) exempted from prior authorization.
103 For other reasons that are advanced in the literature against the use of an exhaustive list, see IVIR report (2006), supra, at 66.
(unforeseen) evolutions. On the other hand, ‘fair use’, which is measured on
the basis of four essential factors,\textsuperscript{105} constitutes a rather intricate concept that
has not ceased to challenge even IP specialists. These factors are, moreover,
only guidelines and the courts are free to adapt them to particular situations on
a case-by-case basis. In summary, even more than in a closed system, users in
a fair use system are left at a loss as to what uses they are – or are not – allowed
to make.\textsuperscript{106} I am therefore not unhappy that the predominant view seems to
oppose the adoption of a plain concept of fair use (even though proponents
keep returning to the idea).

2.2.4 THE LIST SHOULD INCLUDE A CONSIDERABLE NUMBER OF MANDATORY
EXCEPTIONS
To achieve meaningful harmonization, it is essential that as many exceptions
as possible are uniformly applied in all Member States. A truly Single Market
without borders will always be handicapped as long as permitted uses to copy-
right continue to be different among the various national territories.\textsuperscript{107} Today,
users across the EU have to acquaint themselves with the copyright laws of
twenty-seven different jurisdictions. This is especially true with regard to uses
in a digital environment. The exception of use for educational or scientific
purposes provides but one of the many examples which touches the raw nerve
of the failure to harmonize. Let us consider the case of a professor who scans
parts of a textbook, copies some digital articles, uploads them to the univer-
sity’s web server and refers his registered students – from home and abroad –
to this material for further study by copying it or accessing it at the premises
of a library.\textsuperscript{108} Before this occurs, the professor, the students and the relevant

\textsuperscript{105} Judges use the four following factors in resolving fair use disputes: the
purpose and character of the use, the nature of the copyrighted work, the amount and
substantiality of the portion taken, and the effect of the use upon the potential market.
See more details on http://fairuse.stanford.edu/.

\textsuperscript{106} Jaszi (2005), \textit{supra}, at 2.

\textsuperscript{107} Clearly, the issue of ‘territoriality’ presents the most important obstacle here.
So far, the EU legislator has left the territorial nature of copyright virtually untouched,
and the IVIR report rightly points to the necessity of confronting this issue, as there is
an apparent contradiction between a Single European Market and copyright rules, the
application of which is confined to the borders of the Member States (IVIR report
(2006), \textit{supra}, at 212–14 and 218). See on this issue also Torremans (2007),
‘Questioning the Principles of Territoriality: The Determination of Territorial
Handbook of Contemporary Research}, Series Research Handbooks in Intellectual

\textsuperscript{108} A comparable case scenario has been explored under five European jurisdic-
tions by S. Ernst and D. Haeusermann (2006), ‘Teaching Exceptions in European
Copyright Law – Important Policy Questions Remain’, Berkman Center for Internet &
educational institutions themselves should carefully scrutinize the laws of each country in the EU to determine whether a specific use of the protected work is allowed without asking permission. Even a rough examination of the possibly applicable provisions, reveals that it would amount to a ‘mission impossible’ to assess the permissibility of all these acts. National provisions do, indeed, not only differ in scope but also contain many variables relating to (analogue or digital) modes of copying, types of works and purpose of use as well as limitations regarding quantity, numbers, premises, etc.\textsuperscript{109} Allowing for so much differentiation seems to constitute a paradox in a European Union where the legislator is at the same time thoroughly seeking to align and ‘euro-panise’ the sector of (higher) education and to boost e-learning systems. Hence, mandatory effect should particularly be conferred on exceptions that tend to have transnational or cross-border effects.

While it is not yet clear what such a list of exceptions operating for the whole internal market would look like – as this would require a more elaborate study – it is obvious that a short mandatory list will always provide a better alternative than the current long list with many optional exceptions.\textsuperscript{110} In view of past experiences, we should moreover not be too ambitious. Limitations traditionally reflect an assessment of the need and desirability for society to use a work against the impact of such a measure on the economic incentive for rightholders.\textsuperscript{111} Nevertheless, if one supports the ultimate goal of achieving a coherent European copyright system,\textsuperscript{112} it will be necessary to (gradually) abandon the long cherished belief that the notion of what constitutes a legitimate or public interest should always accommodate national particularities.\textsuperscript{113} Such a concern was understandable at the start of the harmonization process in Europe at the end of the 1980s and may even still

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\textsuperscript{109} In reality, the picture is even much more complicated (non-transparent) as – in compliance with the InfoSoc Directive – use for educational/scientific purposes may also be allowed, subject to varying conditions, under the exceptions of reprography, private copying, quotation and communication by terminals on the premises of establishments.

\textsuperscript{110} J. Corbet (2005), ‘La transposition en droit belge de la directive droit d’auteur dans la société de l’information’, RIDA, October, no. 206, 4, 55.

\textsuperscript{111} IVIR report (2006), \textit{supra}, at 59.


\textsuperscript{113} In this respect, the belief that the background of different copyright families also accounts for different perceptions on the nature and scope of exceptions should equally be put in perspective; see Burrell and Coleman (2005), \textit{supra}, 201.
be justifiable in the international context. With the continuing integration of the European market, however, we should move on and make an effort to reconcile different perceptions, at least with regard to exceptions that are essential within the current borderless and multicultural knowledge economy. Not only do the factors of ‘society’ and ‘economic impact’ increasingly constitute a matter of European policy, but I would even argue that the notions and values that justify the exceptions (such as ‘public interest’, ‘cultural heritage’ and ‘individual user rights’), should equally, be it more gradually, be considered from a more ‘community-oriented’ angle.

In view of the goals of harmonization and transparency, finally, the mandatory exceptions should be precisely worded, leaving national legislators little leeway and, in particular, excluding the possibility of alternatives in critically important areas. While this approach may lack flexibility, it does promote relative certainty, thus encouraging activities that users might be unwilling to undertake if relying on open provisions.

2.2.5 THE LIST OF MANDATORY EXCEPTIONS SHOULD DISTINGUISH BETWEEN BINDING AND NON-BINDING EXCEPTIONS (TWO-TIER SYSTEM)

I have pointed out above how, during the preceding decade, rightholders were given powerful tools to control access to content in technical terms.\(^{114}\) In addition, such control can be gained based upon contractual terms – particularly standard form licences and e-contracts – that rightholders can impose upon users. Also in such a case, control can be extended beyond the very scope of copyright, as agreements can relate to non-protected material as well as to uses exempt from the copyright monopoly.\(^{115}\) If one takes the traditional system of exceptions seriously, it is imperative that this issue is re-examined and that new counterbalances are considered with a view to ‘liberating’ exceptions.

\(^{114}\) See, supra, Section 1.4.4 (second part).

\(^{115}\) Over recent years, commentators and congresses have regularly addressed – and rightly expressed – the concern that the copyright system is (mis)used to create barriers to access to information as well as to the cultural and scientific heritage. These evolutions have a worrying impact on the whole copyright system and have surely contributed to the ‘malaise’ referred to in the introduction. See in this regard Hilty (2007), supra, at 332; Geiger (EIPR, 2006), supra, at 366; Cornish (2004), supra, at 50 and 55; Cohen Jehoram (2005), supra, at 364; IVIR report (2006), supra, at 67; J. Ginsburg (1999), ‘Copyright or InfoGrab’, in L. Blauch, G. Green and M. Wyburn (eds), ALAI Study Days, The Boundaries of Copyright, Australian Copyright Council, 55; Vinje (1999), supra, at 194. See also British Academy, Copyright and Research in the Humanities and Social Sciences. A British Academy Review, 2006, 15 and several contributions in Proceedings of the ALAI Congress of 2001, New York: Columbia University School of Law, 2002.
from both the technological and the contractual constraints currently imprisoning them. 116

One way of solving the problem of the technological barriers or the contractual signing away of statutory exceptions117 is to turn these exceptions into rules of mandatory law. Claiming that certain exceptions should have an imperative nature conferred upon them may at present sound like ‘a voice in the wilderness’118 but I would nevertheless like to make a case for this proposal.119

In European copyright law, the question whether copyright limitations can be overridden by contractual agreements remains unresolved, and very little legislation or case law exists in this respect.120 The InfoSoc Directive itself takes a rather hostile attitude towards the preferential treatment of exceptions. First, article 9 confirms that ‘this Directive shall be without prejudice to provi-
sions concerning in particular (…) the law of contract’. 121 Furthermore, recital 45 explains that the exceptions and limitations referred to in article 5(2), (3) and (4) should not prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law. Finally, and even though the Directive does not explicitly state that exceptions should not, or cannot, be given imperative treatment, article 6.4, dealing with the intersection between the protection of TPMs and exceptions, removes every doubt in its fourth paragraph, which stipulates that

117 An additional solution would be to introduce a consistent copyright contract law; see Hilty (2004), supra, at 772.
118 Although I am not the first to raise this idea. See also Vinje (1999), supra, at 195; Dusollier (2005), supra, at 507; Riis and Schouvsbo (2007), supra, at 1. Contra: Cohen Jehoram (2005), supra, at 364.
119 Incidentally, my own country has gained experience with such a solution. Belgium is indeed one of the only Member States to have clear legal provisions on this topic, which generally grant all copyright exceptions the status of mandatory law (except in situations of interactive on-demand services). For more details, see M.C. Janssens (2000), ‘Implementation of the 1996 Database Directive into Belgian Law’, International Review of Industrial Property and Copyright Law, 52, at 61; Corbet, supra, at 53; Dusollier (2005), supra, at 503; Janssens (2006), supra, at 59; Gotzen (2007), supra, at 44. This should also be the case in Portugal and, to a certain extent, in Denmark (Westkamp report (2007), 11).
120 Bechtold in Dreier and Hugenholtz (2006), supra, at 370; Vinje (1999), supra, at 195 and 207. As Cornish notes, there even seems to be little inclination in general to disallow contractual terms that purport to override exceptions; Cornish (2004), supra, at 62. See also Cohen Jehoram (2005), supra, at 364.
121 See also Recital 30, in which the European Commission confirms the importance of preserving contractual practices.
in situations of ‘on-demand’ only contractual agreements will serve as the law for those who have made them.

On the other hand, looking at the prior acquis communautaire, my proposal to confer a binding nature on certain exceptions is not as revolutionary as it might seem at first sight. There are precedents in the Software Directive: article 9(1) prohibits three very specific exceptions from being contractually overridden.122 Analogously, in the Database Directive, article 15 makes clear that any contractual provision contrary to articles 6(1) (necessary acts by lawful users to access and/or use the contents of a database) and 8 shall be null and void. Hence, the InfoSoc Directive’s silence on this point, which at the same time confirms the full effect of the provisions of the Software and Database Directives, is remarkable.

In my view, the community legislator should reopen this discussion and attempt to find a consensus on a provision precluding the possibility of contracting away certain exceptions included in the list with mandatory provisions. This basic assumption requires further mental gymnastics, as it involves the delicate task of selecting the individual exceptions that should be given a binding nature123 as well as phrasing their imperative terms of application.124 What follows are only some ideas on how the European legislator could move towards a decision regarding the (non-) imperative status of an exception.125 What is important is to realize that prime (if not exclusive) consideration should be given to the fundamental value for society of allowing certain uses rather than to the interests of lobbying groups. Many exceptions that are contained in a European Directive were indeed the result of industry-specific compromises. Hence – above all – an effort should be made to transcend perceptions of purely individual or national (economic) interest. Selection should primarily be based on the purpose underlying the exceptions.126 As is sufficiently well known, the many permissible uses that are currently recog-

122 This article expressly provides that any contractual provisions contrary to article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.
123 With regard to exceptions that are not given a binding nature, users could avail themselves of the (admittedly poor) remedies available in the general rules of law, such as competition law or consumer protection law.
124 Given the very ‘exclusive’ status that such exceptions will be allocated, I take the view that their range of application should be confined to precisely defined situations that exclude any possible commercial use and fully comply with the three-step test. A broader scope could possibly be considered in a second part of the provision which is not given imperative status.
125 As stated above, it is not my intention to individualize all exceptions that should figure on this or other lists.
126 Let us not forget that this process of differentiating between exceptions is already known from the Software and Database Directives.
nized are justified by a broad range of reasons, not all of which should be given the same weight.\textsuperscript{127} In general, it can be said that exceptions aim at accommodating societal interests, ranging from fundamental rights and freedoms (such as privacy and free speech), over public interest concerns (such as preserving material that is culturally or historically valuable) to practical solutions (such as overcoming market failure). But also other factors, such as the impact of exceptions upon the exclusive rights or their effect on certain (digital) markets should be given due reflection.\textsuperscript{128} Indeed, exceptions should not merely aim at safeguarding users’ interests, but their effect should continuously be balanced against the protection of exclusive rights.

Without going into too much detail, it is reasonable to assume that the list will include exceptions serving very strong, overriding public interests such as uses for news reporting or the quotation exception. It is in fact remarkable that, given the fact that this latter exception is already mandatory as a result of the Berne Convention,\textsuperscript{129} the European legislator did not impose it in a more binding way in the InfoSoc Directive. Imperative treatment should, more generally, be given to uses that safeguard fundamental rights, such as the principles of freedom of speech and expression.\textsuperscript{130} The list should moreover include uses that ensure public security, education and science or that are necessary to preserve the historic and cultural heritage (library and museum archiving). In these cases, however, preferential treatment would probably not need to be granted to all kinds of possible uses, and it may, for the purpose of conferring (non) imperative character, be appropriate to distinguish between types or circumstances of use.\textsuperscript{131} Finally, in view of the consolidation of the acquis,
this system should integrate the exceptions of other Directives, whether or not in binding terms and/or in separate sections to take account of the particularities of certain creations (e.g. computer programs).

To be consistent, the legislator should, when considering imperative character, in fact go further and also introduce a prohibition on technical devices preventing a use that is privileged by law. This decision would be far-reaching, as it could mean the death of technological measures in the long term, so I would advocate this idea with due caution awaiting further study.132

2.2.6 THE SYSTEM SHOULD INCLUDE AN EXHAUSTIVE LIST OF OPTIONAL EXCEPTIONS LINKED TO A ‘WINDOW PROVISION’

It was suggested above that the system of exceptions should not be closed to avoid it becoming anachronistic or sclerotic. To address this concern, two approaches seem possible. Either the Community legislator draws up a second list with optional provisions that allows a degree of variety on a country-to-country basis, or it limits itself to drafting a more general open-ended provision.133 In view of our main goal of harmonization and given the fact that recent experience with the implementation of article 5 InfoSoc Directive has demonstrated that even optional provisions may generate a ‘spontaneous’ harmonizing effect,134 I would prefer the first option.

Hence, I would propose that the community legislator should design an optional list that would essentially include uses having no or little impact on multi-territorial exploitations.135 Rather than providing for its non-exhaustive character,136 this list could build in additional flexibility through a ‘window provision’ that would allow Member States, subject to certain conditions,137 to respond more appropriately to national societal developments or take into account the particularities of certain creations.

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132 P. Samuelson (1999), ‘Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to be Revised’, Berkeley Tech. L.J., 14, 519, at 547 and Geiger (2006), supra, at 371 have also advanced this idea. See further Dusollier (2005), supra, 543 proposing an in-between solution, which was adopted, for example, in Belgium and whereby the circumvention of a technological measure in order to benefit from an exception is not actionable (Westkamp report (2007), supra, at 132).

133 This latter solution is proposed in the IVIR report (2006), supra, at 217.

134 See, supra, Section 2.2.1.

135 This could include uses in relation to, for example, religious ceremonies, military happenings and performances during public exams.

136 Such an unlimited open-end solution would probably be more harmful to the goal of harmonization.

137 This competence should, for example, be subject to the condition that new exceptions do not prejudice or interfere with exceptions included in the list with mandatory exceptions and that they fully comply with the three-step test.
account local (cultural) policy. Such a provision is not to be compared to the fair use concept nor to the limited grandfather clause of article 5.3(o) InfoSoc Directive. While I have already indicated the drawbacks of the former, the latter solution does not sufficiently enable legislators to meet unforeseen situations, because it is constrained by three cumulative conditions that seriously diminish its impact. To the extent that the proposed clause would allow some discretion to add and/or maintain purely national exceptions, it could perhaps be qualified as a ‘mini fair use’ provision for legislators. Whether such a ‘fair-use effect’ should be extended to courts and, in particular, whether the window provision would allow Member States to entrust courts with the competence to grant exemptions or even to apply existing exemptions to new situations by analogy is a more delicate question to answer. For the same reasons as mentioned below in relation to the three-step test, a provisional answer would tend to be negative.

2.2.7 THE SYSTEM SHOULD IMPOSE BINDING GENERAL MINIMUM REQUIREMENTS

Evidently, the three-step test, which is dictated by the international framework, will have to be included as an umbrella provision applicable to all exceptions. Considering the current debate, the legislator must clarify the addressee of the test in a compulsory way. Although direct application of the three-step test by courts seems an attractive tool to allow for more flexibility, it entails certain dangers in terms of legal uncertainty. To the extent that the proposed window provision is adopted, I currently do not really support the possibility of directly applying the three-step test. With innumerable courts in twenty-seven Member States, I fear that it will lead to growing heterogeneity of the system of exceptions in Europe, thus seriously harming the goal of harmonization.

As a second general rule, it should be explicitly required that the protected material for which an exception can be invoked should (first) have been lawfully made available. In article 5 InfoSoc Directive, the condition of lawful use only applies to the mandatory exception of temporary and transient copies (5.1). The provision fails to clarify whether this or any other exception also

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138 See, supra, Section 2.2.3.
139 This provision, which is commonly referred to as a ‘grandfather clause’ because of its potential to cover various non-defined situations, can only be used in relation to exceptions that already exist in the national legislation and provided they only cover analogue use, that such use is of minor importance and that it would not affect the free circulation of goods and services within the Community.
140 See, supra, Section 1.3.2.
141 Geiger (2006, IIC), supra, at 694.
applies to infringing copies, and much diversity currently exists in this regard. For example, some countries have imposed the lawfulness of the copy as a preliminary condition (Germany\textsuperscript{142}), while other countries consider this condition inapplicable in the absence of clear legislative confirmation (Belgium\textsuperscript{143}) or give commentators and courts a free hand (France\textsuperscript{144}). It will, of course, be necessary to agree on a uniform interpretation of this requirement. Despite the current controversy over the meaning of similar notions in previous Directives\textsuperscript{145} such an endeavour should not pose an insurmountable problem.\textsuperscript{146} The interpretation given to article 10 Berne Convention might offer a good starting point.\textsuperscript{147}

Finally, though my proposal is far from exhaustive, some more binding rules should be imposed to cover remuneration and compensation issues. While I have advocated the importance of strong mandatory exceptions, it is clear that some of them should be construed in the form of statutory licences, including a claim for remuneration for rightholders. This issue touches upon a highly controversial debate, which still has its roots in the varying legal traditions of the Member States and currently constitutes the major source of deviation.\textsuperscript{148} As it has kept the European Commission busy in recent years\textsuperscript{149} I will

\textsuperscript{142} The ‘Second Basket’ copyright reform that entered into force on 1 January 2008 restricts the possibility for private copies by means of a ban on copies from ‘illegal sources’. Hence, only copies of the original are admissible.

\textsuperscript{143} The provisions on exceptions only impose the general requirement that the work should have been lawfully divulged. In Belgium, the majority doctrine holds that this condition does not concern the ‘legality’ of the copies of the work that are used but only relates to the moral right of divulgation; M.C. Janssens (2006), ‘Commentaar Artikel 22’, in F. Brison and H. Vanhees (eds), Hommage à Jan Corbet. La Loi Belge sur le droit d’auteur, Brussels: Larcier, 117, at 121.

\textsuperscript{144} E.g. Cour de Cassation, criminal division, 30 May 2006 (no. K 05-83.335 F-D).

\textsuperscript{145} The notion of lawful user or lawful acquirer is not new in community copyright law. Unfortunately, the relevant texts in the Software, Database and InfoSoc Directives are inconsistent, as there are differences in terminology (‘lawful acquirer’, ‘lawful user’ and ‘lawful use’). See more details on these differences in IVIR report (2006), supra, at 71–2. See also V. Vanovermeire (2000), ‘The Concept of the Lawful User in the Database Directive’, \textit{IIC}, no. 1, 172.

\textsuperscript{146} I do not, on the other hand, want to minimize the delicate character of the exercise as it will touch upon moral rights considerations and necessitate considering the (distinguishable) notions of unpublished and non-disclosed works.

\textsuperscript{147} See Dreier, in Dreier and Hugenholtz (2006), supra, at 44: ‘A work has been lawfully made available to the public, if the public can access it and if this possibility of access has been either authorized by the rightholder, provided for under a permitted compulsory license, or is permitted by a statutory licence.’

\textsuperscript{148} See, supra, Section 1.3.3, \textit{in fine}.

\textsuperscript{149} See the many consultations and studies on the scope of the private copying
restrict myself to mentioning the importance of the issue and its relevance for the common market.

Conclusion
The internet and its offspring (such as advanced mobile networks) have changed the map of the copyright world considerably. From the first days of this (r)evolution, the future of copyright has been predicted in every possible way. Whereas some prepared for its funeral, others have striven for its revival and reinforcement. Thus far, the latter trend seems to have prevailed.

I do not for a moment dispute that authors and other creators should be afforded the necessary protection for their intellectual creations. ‘Ensuring a robust protection of intellectual property rights’ continues to be of utmost importance. This aim should not, however, overshadow the need to constantly monitor the balancing mechanism between exclusive rights and exceptions, a mechanism that is ingrained in the copyright system and is of paramount importance for its legitimacy and credibility. Clearly, the reality of the digital environment has made it necessary to redefine the scope of exclusive rights. Unfortunately, as I have tried to demonstrate above, this goal has been pursued in a way that was heavily biased towards stronger protection and thus strengthened the monopoly grip of right owners. As a result, a pressing need has arisen to redress the balance by reassessing the scope of exceptions as well as acknowledging their binding nature. For the European Commission – which is again very active with new initiatives in the field of copyright –
the additional challenge will be to respond to this need in a way that achieves more harmonization and remedies the InfoSoc Directive’s failure to do so.  

How should the Commission proceed? The recent past has taught us that it seems to favour alternative (softer) legal instruments over directives or regulations such as recommendations. These instruments may indeed be helpful to pave the way for issues that are not yet ripe for compromise. As these instruments lack binding effect, however, I am not convinced that they constitute the best legislative approach towards harmonizing the exceptions. Notwithstanding the valid criticism against the use of directives, this instrument should continue to be utilized ‘tactfully’, if only to counter the current view that efforts to harmonize Europe’s copyright landscape are languishing and to allow us to pursue the dream of establishing and achieving a European internal market in the field of copyright (exceptions).

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154 Obviously, it will be necessary to overcome objections to the EU’s legislative competence with regard to copyright in general and exceptions in particular in the light of the EC Treaty. An examination of these (major) obstacles goes beyond the scope of the present study. For more details, see e.g. IVIR report (2006), supra, at 221 and Hilty (2004), supra, at 762–3 and 770.


156 See ibid., 211–12, which explains how previous Directives have involved considerable expense in terms of time, public finance and other social costs as well as an enormous burden on the legislative apparatus of the Member States.