

Copyright Limitations & Exceptions in the EU

CICLO DE CONVERSACIONES SOBRE DERECHOS DE AUTOR EN LA AGENDA INTERNACIONAL , Buenos Aires, 19 October 2023



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EU Information Society Directive (2001)

Limitations & Exceptions

- Mandatory *transient copying* exemption (5.1)
 - To enable transmissions by ISP's, and enable lawful end uses (e.g. 'browsing')
- Long 'shopping list' of permitted limitations (5.2 + 5.3)
 - In some cases *fair compensation* (levies) required
- All limitations subject to "three-step test" (5.5)

CJEU *ACI Adam* (C-435/12)

- Private copying from illegal source (e.g. The Pirate Bay) not permitted because of conflict with “three-step test”
- Therefore, private copying levy schemes do not extend to downloading of unlawful content

InfoSoc Directive: Permitted Limitations

Reproduction right

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- Reprography*
 - Private use*
 - Libraries, schools, museums, archives
 - Ephemeral recordings
 - Hospitals, prisons*

* ‘fair compensation’

Repro & communication right

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- Teaching & research
 - Disabled
 - Reporting of current events
 - Criticism & review (quotation)
 - Official proceedings, speeches
 - Religious ceremonies
 - Public places
 - Exhibitions
 - Caricature, parody, pastiche
 - Repair
 - Library networks
 - Existing analogue exemptions

EU Digital Single Market (2019)

Directive: new mandatory exceptions

- Text and data mining (3-4 DSM)
 - Non-profit research
 - Commercial uses (incl. training AI), subject to ‘opt-out’
- Digital (distance) education (5 DSM)
 - Secure electronic environment
- Preservation of cultural heritage (6 DSM)
 - Works in libraries, archives, museums
- Use of out-of-commerce works by CHI’s (8 DSM)
 - Unless (extended) collective licensing agreement

Justifications for Limitations & Exceptions in EU

EU InfoSoc Directive, Rec. 3:

“The proposed harmonisation [...] relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.”

Justifications for Limitations & Exceptions in EU

EU Digital Single Market Directive, Rec. 6:

“The exceptions and limitations provided for in this Directive seek to **achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other.**”

Fundamental rights basis of L&E's (EU Charter, Eur Conv HR's)

- **Freedom of expression & information** (11 EUCh):
 - Ex: quotation, news reporting, parody, works in public places, access to government works

Fundamental rights basis of L&E's

- Freedom of expression & information (11 EUCh)
- **Protection of personal data & privacy** (7-8 EUCh):
 - Ex: private copying levy scheme

Fundamental rights basis of L&E's

- Freedom of expression and information (11 EUCh)
- Protection of personal data & privacy (7-8 EUCh)
- **Freedom of arts & sciences** (13 EUCh):
 - Ex: parody, research, text & data mining

Fundamental rights basis of L&E's

- Freedom of expression and information (11 EUCh)
- Protection of personal data & privacy (7-8 EUCh)
- Freedom of arts & sciences (13 EUCh)
- **Right to education** (14 EUCh):
 - Ex: education, library privileges

Fundamental rights basis of L&E's

- Freedom of expression and information (11 EUCh)
- Protection of personal data & privacy (7-8 EUCh)
- Freedom of arts & sciences (13 EUCh)
- Right to education (14 EUCh)
- **Non-discrimination** (21 EUCh):
 - Ex: access for disabled, visually impaired

EU's closed but open structure of L&E's CJEU *Spiegel Online* (C-516/17)

- Harmonization purpose of InfoSoc Directive does not allow exceptions based directly on fundamental freedoms beyond 'shopping list'
- But exceptions must be (broadly) interpreted in compliance with fundamental freedoms of EU Charter
- 'Quotation right' (art.5.3 d InfoSoc) extensively interpreted
 - includes making available of entire newsworthy document via hyperlink to server

CJEU *Spiegel Online* (C-516/17)

In striking the balance [...] between the exclusive rights of the author [...] and [...] the rights of the users [...] a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, **fully adheres to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.**