

The Hargreaves Review of *Intellectual Property and Growth*

Exploring the Flexibilities Available to UK Law:

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A. Background

1. This paper considers the freedom that the United Kingdom Government has to adopt broad exceptions and limitations on copyright owners' rights, akin to the fair use exception in the United States.
2. In my view, **there is considerably more flexibility than others have hitherto appreciated**. In particular, people have tended to overestimate the constraints imposed on the UK by the Information Society Directive, 2001/29. However, Article 5 of that Directive only constrains the application of exceptions in national law with respect to the reproduction right, the communication right and the distribution right. As we will see, this leaves scope for some flexibility in national law for arrangements/adaptations, and translations.
3. The effect of this analysis is that the UK may adopt broader exceptions to translation rights and adaptation rights. I also suggest that legislative action could be possible in relation to non-literal copying and the authorisation right. Finally, I will say something about remedies and works.

B. Exceptions

4. Clearly, the ongoing review is interested in the development of a 'fair use' exception. The US fair use exception is structured in such a way that, for the most part, applications of the test fall within certain predictable fields (educational uses, private uses, reporting current events). However, the test is open-ended, so that judges are able to permit certain uses not hitherto envisaged.
5. My own view is that a real case can be made for the desirability of such a defence because of the flexibility it would afford, a matter which is particularly significant

when new technological developments offer new modes of exploitation (or change our understanding of old modes).

6. The chief difficulty with the UK now adopting such a solution lies in the Information Society Directive.

1. Information Society Directive

7. As is well known, article 5 on the Directive sets out a range of optional exceptions to the reproduction right (Art 5(2)), and the reproduction and communication to the public right (art 5(3)). These can also be applied to the distribution right: Art 5(4).
8. **The text of the Directive suggests the list of exceptions is a closed list.** Recital 32 of the Information Society Directive states that '[t]he Directive provides for **an exhaustive enumeration** of exceptions and limitations to the reproduction right and right of communication to the public.' This seems to imply that there is no flexibility to add further exception.
9. Recital 32 was previously recital 22 of the original proposal (*COM(97) 628 final — 97/0359 (COD), 98C/108/03*) and the amended proposal – at which time Art 5(2) contained 3 and art 5(3) contained 5 exceptions.

10. Although recitals are only aids to construction, and it might be said that there is an inherent tension between recital 22 and Art 5(3)(o),¹ the *travaux* strongly support the view that the list was indeed intended to be exhaustive.

11. In fact the *travaux* of the Directive reveal that the ‘closed’ nature of the list of exceptions was one of the biggest stumbling blocks to its adoption:

- (i) The Opinion of the Economic and Social Committee (98/C 407/06 (para 3.7.2.7)) was to the effect that that Member states have freedom to retain existing minor exceptions.
- (ii) More significantly, the question was discussed repeatedly in the Council, in particular in the Working Party. Initially, Denmark, the UK and the Netherlands sought more flexibility. (Working Party on IP(Copyright) March 29 & 30; Perm Reps Committee, June 4, 1999 File No 97/0359(COD). The Danish delegation proposed the text of a new Art 5(4) that would permit ‘other exceptions... including such exceptions which have traditionally been recognised in national law.’ This was supported by the UK, Netherlands, Sweden, Finland, Luxembourg and Ireland.
- (iii) Nevertheless, the Commission resisted any such change. Instead, it accepted amendments to the proposal from Member States incorporating further specifically defined exceptions (in Art 5(2) and, especially, Art 5(3)). As a concession to requests for further flexibility, it proposed a minor, analogue exception (which became art 5(3)(o)):² see Working Party on Intellectual Property, June 30, 1999.

¹ Moreover, recital 7 indicates that differences “not adversely affecting the functioning of the internal market need not be removed or prevented.” Given more time, I would have liked to attempt to develop an argument that, despite the wording and intent evidenced during the passage of Art 5, it cannot in fact be regarded as exhaustive of exceptions that Member states can adopt (in part because of the importance of overarching principles of European law, in part as a consequence of various premises upon which the legislature operated). However, this would be a significant academic exercise, not feasible in the time available.

² Art 5(3)(o) allows “use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of

- (iv) In the view of the Commission any Member State that, in the future, wished to introduce an exception that would operate in the digital environment would need to do so via the European legislature. The reason offered for this was a fear that different member states would develop different exceptions, leading to fragmentation of the Internal Market. This is reflected in general in recitals 6 and 7 of the Directive as adopted which indicate that there is concern with inconsistent national responses, particular to technology, leading to re-fragmentation of the Internal Market, and recital 31 emphasises this in relation to exceptions. See Green Paper, para 88.
- (v) The matter was still unresolved at the meeting of the Committee of Permanent Representatives on November 19, 1999. At the Working Party meetings of December 22, 1999 and January 20, January 24, 2000, Denmark, Sweden, the Netherlands, Finland and the UK still held reservations on the recital's reference to 'exhaustive enumeration.'
- (vi) However, in due course this minority dropped its opposition.

12. Thus the drafting history confirms to a large extent that art 5 was intended to be exhaustive. In my view, it is unlikely that the Hargreaves Review will take a different approach. If that is right, even were UK law to frame a 'fair use' exemption that included the exceptions specified under Article 5(2) and (3) (as Robert Burrell proposed), that categorisation could not be open-ended.

13. Nevertheless, there is **some flexibility** both *within* and *outside* Art 5.

goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article." It is not just narrow in being limited to "analogue uses" but also that the exception in question must already exist under national law.

2. Flexibility within Art 5

14. As Robert Burrell indicates in *Copyright Exceptions: The Digital Impact*, (CUP, 2005) p. 275 and 277, the Information Society Directive ‘provides a list of flexible, but not entirely open-ended, provisions.’

15. Indeed recital 2 of the Directive recognises the need ‘to create a general and flexible legal framework at the Community level in order to foster the development of the Information Society in Europe.’ Moreover, recital 3 refers explicitly to the need to comply with ‘the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.’ This amendment was introduced by the European Parliament. See (1999) OJ C 150/171. Recital 31 refers to the need to safeguard a ‘fair balance of rights and interests’ ‘between the different categories of rightholders and users of protected subject-matter’. See, also, *Green Paper*, para. 34.

16. Clearly, the Hargreaves Review could recommend that the UK take advantage of these exceptions. As Burrell accurately highlight the scope of the exceptions, I will not repeat that analysis. However, a few general points are worth making.

(a) Implementation of the Exceptions: All or Nothing?

17. Given the harmonizing intent of the Directive, it may be thought that the menu of exceptions falls to be implemented on a ‘take-it-or-leave-it’ basis. That is, subject to the normal rules about the implementation of Directives, Member States have to give full effect to any exception it chooses to implement, so cannot add conditions.

18. Apparently, the Dutch assumed the exceptions are all-or-nothing, and so removed national law qualifications eg in relation to the parody exception. Certainly, that is also the approach taken by the CJEU in relation to article 5(2) of the Trade Marks Directive. Member States could introduce protection against ‘dilution’ in full, or not at all: they could not subject it, for example, to a confusion requirement. See *Davidoff v Gofkid*.

19. Von Lewinski takes a different view. She states (in *Walter & v Lewinski*, *European Copyright Law* (2010) 1021 (para 11.5.09) that

“Member States are only free not to introduce one or several of the listed exceptions and limitations, or to provide for the listed exceptions and limitations only in respect of certain selected aspects or under stronger conditions”

20. I think the position is less clear in relation to the Information Society Directive, where some of the exceptions are so vaguely worded as necessarily to permit different conditions of implementation (eg as to fair compensation.) Consider, for example, Article 5(2)(b): one can imagine a system in relation to private copying of sound recordings only, linked to compensation by way of a levy on CDs or mp3players.

21. The answer may be that some of the exceptions are “take-it-or-leave-it” and others not. In implementing the provisions, it is suggested that the IPO should err on the side of implementing the exceptions to their fullest extent (rather than adding additional conditions).

(b) The Language of Fair Use

22. There is some debate over whether, in implementing the freedoms under the Directive, the UK should adopt the term ‘fair use’. Some suggest it is politically unattractive to adopt the language of US law. Others note that many of the exceptions possible under EU law are not limited, as a matter of substance, to uses which are “quantitatively fair”.
23. However, in my view there could be value in such language as offering some positive guidance to the judicial interpretation of the exceptions.
24. Moreover, I am less certain that it would be politically inappropriate to use the term ‘fair’ or ‘fair use.’ It seems relevant, in support of this, to note that the *Follow Up to the Green Paper on Copyright in the Information Society* in 1996, the Commission talked about introducing a ‘fair use’ exception to the reproduction right. It advocated:

‘For other cases the envisaged legislation will set out closely defined **fair use exceptions** /limitations to the exclusive right destined to accommodate the interests of users or the public at large...’

(c) Framing Rubric

25. Even if ‘fair use’ is to be avoided, there might be merit in some sort of explanatory rubric, pointing away from narrow construction of the exceptions. One framing device could be to include the language of the WIPO Copyright Treaty:

‘Recognising the need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information.’

26. In my view there would be no reason why Chapter III of the CDPA could not be framed as follows:

‘Recognising that copyright is intended to encourage and not to impede authorship, creativity, or innovation;

Recognising the need to maintain a fair balance between the rights of authors and the rights of users;

Recognising the large public interest, particularly education, research and access to information.’

27. An alternative approach would be to break down the exceptions in the manner suggested by the Wittem code (see Appendix). Here the permissible exceptions are grouped by reference to their rationales. This offers the courts further help with interpretation. I was involved with the Wittem Group, so have quite a liking for this approach, though I would not necessarily agree with all aspects of the categorisation.

28. Recital 22 of the Directive exhorts Member states to ‘arrive at a coherent application of these exceptions and limitations.’ In my opinion, the framing devices – titles, statements of purpose, and sub-categories are one way of ensuring coherent application.

(d) Quotations

29. It is worth noting in particular the breadth of Art 5(3)(d) that permits quotations. This goes well beyond the current definition of ‘fair dealing for criticism or review.’ Expanding the UK defence to cover all quotations (not just those made for criticism or

review) would be a very useful amendment. Indeed, many of the activities that would fall within the US conception of fair use could be described as a ‘quotation’.³

30. Art 5(3)(d) in fact reflects art 10 of the Berne Convention. As you will be aware this states:

It **shall be permissible** to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

31. **What I would like to draw your attention to here is the mandatory nature of this exception.** The international law of copyright requires the UK to adopt a broader exemption than that currently provided by section 30

32. This view is shared by Ricketson & Ginsburg, *International Copyright and Neighbouring Rights*, pp. 788-9 refer to ‘mandatory character’. See also Goldstein and Hugenholtz, *International Copyright: Principles, Law, Practice* (2d ed. OUP, 2010) 360 (but with a more qualified account at 379).

33. However others disagree, drawing on the proposition that the convention sets minimum standards (see Art 19). See Ficsor, *The Law of Copyright and the Internet* (OUP, 2002) paras 5.10-12; Von Lewinski, *International Copyright Law and Policy* (OUP, 2008) para 5.163 (arguing not obligatory).

³ Of course there are some uses, such as non-display uses, caching, browsing, private recording (eg for time-shifting) etc, where the whole work is reproduced. So the flexibility contained in this provision is not completely equivalent to that offered by “fair use”.

34. But if that were right, there would be no difference between ‘may’ and ‘shall’. The different wording, in my view, must be intended to have had some significance.

(e) Press Reproduction/Current Events

35. Further flexibility exists in relation to reporting current events. The existing UK provision on ‘fair dealing’ is fairly narrowly conceived. Art 5(3)(c) permits not only ‘use of works or other subject-matter in connection with reporting current events’ but also

‘reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved and as long as the source, including the author’s name, is indicated....unless this turns out to be impossible.’

It is worth noting that at the Council meeting, on Sept 15, 2000, the Netherlands highlighted that ‘Member States remain free to further define in their legislation the notion of ‘press.’’ The point being made, I understand, was that press was not restricted to conventional print news media, and could extend to new modes of operation by which articles of current interest are circulated.

36. This provision echoes Art 10bis(1) of the Berne Convention:

It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not

expressly reserved. Nevertheless, the source must always be clearly indicated....

37. This could form the basis of a bespoke defence for news aggregation sites. Ricketson & Ginsburg certainly are of the view that the provision could apply to on-line newspapers: 801, para 13.53(4).

38. However, certain limitations in the scope defence may nevertheless be problematic. One obvious problem is that news aggregation sites may cover more than just 'economic, political or religious topics.'

3. Flexibility Outside Article 5

(a) Limited Harmonisation Effected By the Information Society Directive

39. The key insight of this opinion is that Article 5 is limited in its effect to exceptions relating to three rights: reproduction, communication and distribution. It does not cover adaptation or translation. Exceptions to these rights are a matter for national law (subject to international law).

40. Art 2 of the Information Society Directive deals with 'reproduction.' No mention is made of 'adaptation' or 'translation.' In contrast, while art 5(a) of the Database Directive harmonizes the reproduction right, Art 5(b) deals with translation, adaptation, arrangement and any other alteration. A similar approach is taken in the Software Directive: Art 4(a) deals with reproduction, Art 4(b) with translation, adaptation, arrangement and any other alteration. The irresistible conclusion is that the Information Society Directive leaves translation, adaptation, arrangement and any other alteration to national law.

41. The view that adaptation is excluded from the Information Society Directive is shared by commentators: see Michel Walter in Walter & Lewinski, *European Copyright Law* (Oxford: OUP, 2010) 964 (para 11.2.4). See also Lewinski in *ibid* at 1479 (paras 16.0.35-6).

42. A distinction between reproduction and adaptation also informs the Berne Convention. Art 9(1) states that

Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

Distinctly, Art 12 requires that

‘Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.’

43. According to Ricketson & Ginsburg (652, para 11.34), ‘adaptation’ refers to ‘the rewriting or remodelling of a work into another form’, such as by dramatization or novelization. ‘Arrangements’ refer to musical arrangements. Other alterations would ‘include abridgements, parodies, burlesques and caricatures.’

44. The distinction between reproduction and adaptation, it should be noted, is blurred in the case of the situation where a film is made from a novel or play. Here Berne gives a specific right (Art 14), which it ambiguously terms ‘cinematographic adaptation or reproduction’.

45. It follows from this that **exceptions relating to adaptations and arrangements are a matter of national law. The question of a ‘transformative use’ exception, mooted in Gowers as requiring action at an EU level, in fact does not require such action.**⁴

46. Michael Walter has recognised the scope for such a defence. See Walter in Walter and Lewinski, *European Copyright Law* (Oxford: OUP, 2010) 970 (para 11.2.21):

‘In any case if such parts are incorporated in an entirely new production and substantially adapted according to the national legislation of the Member States, the ‘free adaptation’ clause may apply under a given national law – a concept that is not harmonized at the European level.’

(b) The Three Step Test

47. Nevertheless, any limitation to the adaptation or translation right would need to comply with the three step test.

48. Art 13 TRIPs states that

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

49. Art 13 TRIPs, as is well known, derives from Art 9(2) of the Berne Convention. This reads:

⁴*Gowers Review of Intellectual Property*, para. 4.88 (“At present it would not be possible to create a copyright exception for transformative use (but see the discussion of parody below) as it is not one of the exceptions set out as permitted in the Information Society Directive.⁷⁴ However, the Review recommends that the Government seeks to amend the Directive to permit an exception along such lines to be adopted in the UK.”)

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

50. This was adopted first at the 1967 Stockholm Revision. It is worth quoting from the Report of the conference, as it offers a clear impression that the exception was not intended to operate in a particularly restrictive manner. Explaining the inter-relation of the three steps, the Report continues:⁵

A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.

What is remarkable here is that the making of complete copies for private, and semi-private use, seems to be envisaged as compatible with the 3 step test.

51. The *Green Paper on Copyright in the Information Society* (p. 51) described Art 9(2) of Berne in these terms:

This is one of the most controversial provisions in the Convention, and the result has been uncertainty as to its exact scope, divergent interpretation by the authorities in different countries, and very different arrangements in respect of reprography and private copying

⁵ The Report is available online as part of a “companion” to the Ricketson & Ginsburg text: <http://www.oup.com/uk/booksites/content/9780198259466/15550029>

in particular, ranging for example from a straightforward ban on private copying to legalization without compensation of rightholders.

52. There has been widespread discussion about whether the limitation of exceptions to ‘certain special cases’ precludes a flexible fair use defence such as that in section 107 of the US Copyright Act.
53. The issue was referred to by the WTO Dispute Panel in WT/DS160/R on section 110(5) of the US Copyright Act. The Panel indicated that ‘certain’ meant ‘clearly defined’, and did not necessarily each and every possible situation to be ascertainable *ex ante*. Rather it reflected general requirements of legal certainty (para 6.108). It indicated further that exceptions should be ‘limited in its field of application’ and normal, ‘narrow in scope and reach.’ The Panel thus left unclear whether the US version of fair use would pass muster.
54. Some commentators have taken the view that it would not do so.⁶ Other commentators are of the view that the fair use defence would comply. This is, in part, because the existing jurisprudence makes the operation of the defence, though open-ended reasonably well-defined and predictable. See Burrell *Copyright Exceptions: The Digital Impact*, 272-273; Goldstein and Hugenholtz, *International Copyright: Principles, Law, Practice* (2d ed. OUP, 2010) 360 (‘The governing treaties permit these exceptions to copyright, within limits...’). Senftleben, *Copyright, Limitations and the Three Step Test* (The Hague: Kluwer, 2004) 162-168. Yet others are neutral. Cf. Von Lewinski, *International Copyright Law and Policy* (OUP, 2008) 161 (para. 5. 179) (no opinion expressed).

⁶ Herman Cohen Jehoram, ‘Restrictions on Copyright and their Abuse,’ [2005] EIPR 359, 360; Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7 (2003) 67-68.

55. The political reality is that it is highly unlikely that the compatibility of the US fair use defence would ever be challenged. Indeed, a number of common law countries, such as Singapore and Israel have recently adopted open-ended exceptions regimes.

56. My own view, for what it is worth, is that a 'fair use' exception would be acceptable, so long as there is sufficient *structure* to make its application predictable. Thus, a provision such as that in the Wittem code, Art 5.5, which leaves open the development of 'analogous exceptions' seems to offer flexibility to respond to cultural and technological change, but to provide sufficient legal certainty to satisfy Art 13.

(c) Possible Concrete Exceptions to the Adaptation and Translation Rights

57. Returning to the question of exceptions to the adaptation right: a 'transformative use defence' would need to comply with Article 13 of TRIPs (just as the minor exceptions doctrine to public performance was held to be subject to TRIPs in WTO/DS/160/R).

58. One might envisage a provision of the following sort:

'[Except in the case of computer programs and databases] [t] he exclusive right to adapt, arrange or alter the work is not infringed by any [fair] use which does not conflict with normal exploitation of the work and does prejudice the legitimate interests of the author or rightholder.'

Such a provision might, however, be problematic in the light of what I have said about the first component ('certain special cases') of the 3-step test. Moreover, the WTO has indicated that the exception should be relatively small in relation to the scope of the right. Hence it is necessary to identify more precisely the sorts of transformation we

are interested in having adopted. It also would probably be necessary, in the light of the specific right to make a cinematographic adaptation of the work under Berne Art 14, to exclude those types of transformation from the exception.

59. One possibility would be:

‘Copyright is not infringed by the making (and dissemination) of an adaptation or arrangements of the work (other than making a cinematographic adaptation of the work), where as a result of the adaptation or arrangement, a new work with a substantially different meaning, or of a significantly different genre, is thereby created.’

60. It would be possible to limit this to ‘fair adaptations’ or to indicate that the exception only applied to exploitation of such adaptations and arrangements for non-commercial purposes. This could cover a substantial amount of user-generated content.

61. Alternatively, a qualification echoing the latter two steps of the three step test might be adopted:

‘Copyright is not infringed by the making (and dissemination) of an adaptation or arrangements of the work (other than making a cinematographic adaptation of the work), where

(i) as a result of the adaptation or arrangement, a new work with a substantially different meaning, or of a significantly different genre, is created; and

(ii) *the exploitation of the new work does not significantly compromise the commercial interests of the original creator or copyright owner.*⁷

62. A similar approach could be taken to the translation right. Translation rights, like adaptation rights, have not been harmonized at a European level except in relation to Computer Programs and Databases: Directive 91/250 Art 4(b) and 96/9 Art 5(b).

63. At an international level, the right is found in Article 8:

‘Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the originals of works.’

64. Von Lewinski indicates that exceptions to the translation right are possible under Berne in the same circumstances as they could be available for reproducing the work. Von Lewinski, *International Copyright Law and Policy* (OUP, 2008) 141 (para 5.121).

65. It would be possible for UK law to be altered as follows

‘The exclusive right to translate a work is not infringed by making a temporary translation of the work [or a reasonable extract from the work] using an automatic translation program’

66. One question that might arise is whether, even if such acts did not infringe the adaptation/translation right, they might infringe the ‘reproduction right’, and this latter

⁷ Drawing on Gowers, para. 4.87.

right has been harmonised. Ansgar Ohly for example suggests that the position is unclear ('Economic Rights' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 212, 218. Noting that the EU has not yet harmonized the adaptation right he observes:

'It is unclear whether, consequently, the task of distinguishing between adaptation and free use is left to the Member States or whether all or at least some adaptations may also be reproductions.'

67. However, from the *travaux* it seems that the notion of reproduction in Art 2 of the Information Society Directive, while broad and technologically neutral, is limited to literal reproduction and was not intended to cover transformations.

68. This is also reflected in the *Green Paper on Copyright in the Information Society* (p. 50) that preceded the Information Society Directive, where, having observed that Berne, Art 9, refers to reproduction in any manner or form, explained:

'These are very broad terms, and are understood to cover all methods of reproduction, whether known - drawing, lithography, offset and other printing processes, photocopying, recording etc. - or unknown. Paragraph 3 redundantly states that 'Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention'.

The *Green Paper* cites as examples of reproduction digitisation, reprography and private copying.

69. T

he *Follow-Up* (at p. 10) talks about scanning, uploading and downloading. In declaring the action it recommends, the *Follow-Up* (at 11) states:

Any initiative will define the exact scope of the acts protected by the reproduction right with respect to all its beneficiaries - authors and related rightholders. This should be done along the lines of the *acquis communautaire*. Such an approach could clarify that the digitisation of

works and other protected matter, as well as other acts such as scanning, or uploading and downloading of digitised material are, in principle, covered by the reproduction right. It would also cover, for the same reasons, transient or other ephemeral acts of reproduction. Unless, as a starting point and without prejudice to explicit limitations or exceptions, such a wide coverage is provided for at EU level, consistent protection across Member States would remain ephemeral.

70.

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In contrast, transformative uses are discussed in the *Green Paper* (at 65) in the context of moral rights. There it observed

‘The right to object to modification is similar to the right of adaptation; the right of adaptation is also an exclusive right, but is an "economic" right rather than a "moral" one... One aspect of the information society is that total digitization of works and other protected matter combined with interactivity over networks means that it is becoming easier and easier to transform works, to colourize them, to reduce them and so on. The time is coming when anyone will be able to change the colours in a film, or replace the faces of the actors, and return the modified film to the network. This capacity to amend works in whatever way and to whatever extent one likes is regarded in some quarters as one of the great advantages of digitization. The creators of works, however, are greatly concerned that this technical capacity will be used to mutilate their works, and are asking for moral rights to be strengthened.’

71. On the other hand, it might be argued that there would have been no need for an exception relating to ‘caricature, parody or pastiche’ (Art 5(3)(k)) had the reproduction right not covered such acts. The *travaux*, in any case, reveal that Article 5(3)(k) was introduced at the behest of the French in the Council meetings. The French may well have been under the misapprehension that the European reproduction right covered transformation, as that is the position under French domestic law. So the delegate may have assumed a specific exception was needed, when in fact it was not, because adaptation (etc) were not being harmonized.

72. If advantage is taken of the flexibility on offer, in my view it would be useful to clarify that the reproduction right and the adaptation/translation right are mutually exclusive, and/or at least that a permitted use in relation to the adaptation right does not implicate the reproduction right.

C. Strategies to Introduce Flexibility that Do Not Involve Exceptions

77. Although I have been asked to examine the UK's freedom to adopt 'exceptions', I have taken the liberty to go further and examine how flexibility might be introduced elsewhere.

1. Substantiality

78. As a number of commentators have noted the history of British copyright law suggests that it was the legislature's intention, in 1911, to incorporate the existing case-law on fair use both into the notion of 'substantiality' and into the specific 'fair dealing exceptions.'

79. In some ways, this was seen not long afterwards in the case of *Glyn v Weston Features* [1916] 1 Ch 261, where a parodic use was treated as not infringing because it did not reproduce a substantial part of the underlying work (Elinor Glyn's *Three Weeks*).

80. However, over the next few decades, what had been thought to be a 'codification' came instead to be treated as a 'code.' The fair dealing exceptions were recognised as narrow, and the substantiality inquiry itself transformed. Ever smaller components of works were treated as 'substantial', while the 'transformative' contribution of the creative re-user was regarded as irrelevant.

81. Despite a valiant attempt by Laddie et al to resuscitate fair use, the relatively restrictive interpretation of ‘substantiality’ was affirmed by Lord Hoffmann in *NLA v Marks & Spencer* [2003] 1 AC 551 and the House of Lords in *Designers’ Guild* [2001] FSR 113.
82. I would have suggested that this be made a topic for legislative reconsideration. In *Nova v Mazooma* [2007] EWCA Civ 219, Jacob LJ indicated that the question of substantiality was one that had not yet been harmonized.
83. However, the CJEU decision in Case C-5/08 *Infopaq* [2009] ECDR 16 means that this is almost certainly now a question for European law. There the CJEU held that what constituted a reproduction in ‘part’ was a matter of European law:

That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.

In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination.

84. This was followed in the decision of the Third Chamber of the CJEU in Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* and by the opinion of AG Kokott in Case C-403/08 and C-429/08 *FAPL v QC Leisure* (Feb 3, 2011) in the context of the rights of broadcasting organisation.
85. Nevertheless, it is, perhaps, worth noting two aspects of *Infopaq* (and its progeny). First, harmonization appears to be restricted to the reproduction right (art 2), though logically it must also apply to arts 3 and 4. Secondly, the case-law all concerns literal copies. Consequently, the question must remain open as to the position with regard to non-literal copying, as well as other rights such as the ‘adaptation right’ and ‘translation right’.
86. As we have observed, Art 2 of the Information Society Directive embraces a ‘broad ‘ of reproduction (‘by any means and in any form’) That said, there is nothing to indicate that the reproduction right under Article 2 is intended to extend to ‘non-literal’ copying. See, in particular, the previous discussion at paras 62 ff of this opinion. And note also, the Commission’s opinion, offered during the passage of the Database Directive (set out below) to the effect that an abstract of a work would not infringe copyright in the work from which the abstract was taken.
87. With respect to international law, the better view is that the application of the reproduction right contained in Article 9 of Berne to non-literal copies is a matter left to the laws of the members of the Berne Union: see Ricketson & Ginsburg, 644, para 11.26.
88. It is possible that Member States are left freedom in relation to non-literal copying in relation to the reproduction right. Certainly, the German law suggests that is so. Article 24 of the German Copyright Act states that:

‘an independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work.’

89. Such a provision could form a model for a UK amendment.

90. Even if this is not so, the ‘part’ test can be modified in relation to the adaptation right.

91. One possibility is as follows:

‘[Except in relation to computer programs and databases] The exclusive right to adapt, arrange or alter a work, is only infringed where the work constitutes a substantial part of the [structure, sequence or organisation of the] adaptation, arrangement or alteration.’

92. Such a provision would not focus on how much was taken, but what was added and whether there was, as a result of what was added, a transformation of what was taken. In effect, compilations comprising small takings that are synthesised into a new work would be permissible.

93. Following a similar line of reasoning, another valuable clarification might be to amend section 60 to clarify that the use of abstracts is permissible in the digital environment:

‘Copyright in a work is not infringed by making (or dissemination) a short abstract or summary of the contents of the work .’

2. Defining Rights

94. As we have seen, only certain rights have been harmonized at the European level. A certain freedom remains to define the other rights. We have already explored the possibility of having limitations, or modified tests of infringement, in relation to translations and adaptations of works. Here I wanted to draw attention to the ‘authorisation right’ and the ‘making available’ right.

(a) Authorisation Right

95. Section 16(2) states that ‘copyright in a work is infringed by a person who without licence of the copyright owner does, or authorises another to do, any of the acts restricted by copyright.’

96. The ‘authorisation right’ was also introduced in 1911. It has become rather confused in its scope, and is nested into a bunch of rather opaque common law rules concerning joint tortfeasance.

97. Similar language appears in the international conventions. Berne refers to the exclusive right of ‘authorizing’ the reproduction, public performance etc if the work.

98. According to von Lewinski this means ‘the right to grant licences and to prevent third parties from using the work in the relevant manner’ (*International Copyright Law and Policy* 138 (para 5.110))
99. Likewise the various EU Directives confer rights ‘to authorise or prohibit’.
100. In contrast, the notion of ‘authorise’ in the common law countries that derive their laws from the UK’s Copyright Act 1911 has often been given a particularly broad meaning.
101. Broadly conceived, the UK authorisation has the capacity to render the developers of new technologies liable for infringing uses of those technologies that lie beyond their control.
102. The authorisation right could be defined to ensure that technology providers and service innovators are not liable for actions of users in the UK that might be thought to infringe, such as where users utilise translation programs, where infringing works are uploaded outside the UK but are accessible here; or by virtue of the fact that hyperlinks to news stories take users readily to pages where, because of licence terms, they may be regarded as infringing.
103. Two aspects of the right are worth considering further: its territorial reach; and its scope.

Territorial Reach

104. It has been held that the authorisation right, in contrast to other rights, applies to authorisations outside the UK to commit acts of infringement within the UK: *ABCKO v MCI* [1995] RPC 657; *Football Dataco v Sportradar* [2010] EWHC 2911 (Ch). Thus, for example, someone who uploads an infringing work onto YouTube in the US might be said to be authorising download/reproduction in the UK, where the infringing work can be accessed.

105. In practice, it is unrealistic to expect the operator of a social networking service in one country to be aware of the specific limitations available in any country from which a work can be accessed. In so far as the authorisation right requires this (as regards UK law, and the other legal systems that operate the right), we think it imposes unjustified transaction costs on these service providers and has the potential to inhibit freedom of expression (by obliging global compliance with the most restrictive version of national copyright).

106. As a matter of principle, the broad interpretation of the authorisation right might be considered an undesirable extension of UK protection beyond acts that occur within its territory, and it might be more consistent with the concept of territoriality to provide that acts outside the UK shall only be regarded as authorisation of infringement within the UK where, having regard to all the circumstances of the case, the authorisation can be said to be specifically targeted at the UK.

Scope

107. As to its scope, it is worth noting the emergence of divergent approaches. In the UK, the authorisation right has been defined narrowly (in *C.B.S. Songs Ltd and others v Amstrad Consumer Electronics Plc* [1988] 1 A.C. 1013) as granting or

purporting to grant the right to do an infringing act. Australian law has, at least occasionally, preferred a broader characterisation – to sanction, countenance, or approve. In *Moorhouse v UNSW* [1976] RPC 151, the Australian High Court Gibbs J. said, at p. 159:

‘a person who has under his control the means by which an infringement of copyright may be committed - such as a photocopying machine - and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use.’

See also *Universal Music Australia v Cooper* [2006] FCAFC 187; *Universal Music v Sharman License Holdings* [2005] FCA 1242.

108. Worryingly, in *Twentieth Century Fox Film Corporation v Newzbin*, [2010] EWHC 608 (Ch) Kitchin J. (at para. 95) suggested there was no difference between the approach in the UK and Australia.

109. There would be significant advantages to a clarification to the effect that

(a) *To authorise means ‘to licence’ (leaving questions of third party liability to general principles of joint tortfeasance);*

Or

(b) *The mere provision (by sale, rental, supply or otherwise) of a technology (whether it be a technology that enables copying, translation, or making available) or services capable of being used to infringe is not to be regarded as authorisation of any acts of infringement carried out using that technology or service;*

And that

(c) *the provision of hyperlinks to material on the Internet should not, of itself, be regarded as authorisation of any act of infringement that occurs if and when someone uses the link to access the material.*

(b) Communication to the Public

110. The ‘communication to the public’ right has been harmonized at European level. However, it is clear from the *travaux* that the EU did not regard it as appropriate at that stage to resolve at the legislative level the identification of the place where the act of making available occurs. In the Memorandum introducing the proposal for the Information Society Directive, the Commission observed

‘This issue was explored during the consultation exercise following the Green Paper, and, as explained in the Communication of 20 November 1996, was not considered appropriate for the time being for legislative action at Community level.’

111. In my view, this remains an issue for Member States. The policy arguments are well-known and were put before the IPO when implementing the Information Society Directive.
112. We recommend that the UK Government take the lead in enacting that: (i) making available takes place at the place where the individual who, or organisation which, has responsibility and control of the content, carries out the act which renders the material accessible.
113. Such a position is entirely consistent with that approved of by the Committee of Experts at WIPO which considered the matter shortly before the adoption of the WIPO Copyright Treaty. See Committee of Experts on a Possible Protocol to the Berne Convention , 4th Session, Dec 5-9, 1994 (1994) Copyright 214, 226-227 (para 88-90). See also Committee of Experts on a Possible Protocol to the Berne Convention , 2nd Session, Feb 10-17, 1992, (1992) Copyright 93, 105 (paras 121-128) (expressing a similar preference for country of emission).

4. Defining Copyright Works (Excluding Titles).

114. The question of protected works has not, in general, been the subject of harmonization at regional level. Of course, the Software and Database Directives require protection of computer programs and databases.
115. Elsewhere, however, the Directives operate on the assumption that Member states protect works corresponding to the general requirement of Article 2 of the Berne Convention. This reads:

The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may

be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

116. However, it is recognised that a wide level of freedom was left to members of the Berne Union as regards matters not specifically referred to in the list in Article 2. See Ricketson & Ginsburg, *International Copyright and Neighbouring Rights* Ch.8. As to the freedom in relation to titles, see *ibid*, 510 (para 8.115).

117. The only doubt hanging over the freedom of Member States in this field arises from the recent decision of the Third Chamber of the CJEU in Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (para. 46), where the Court indicated that a ‘graphic user interface’ is a ‘work.’ However, it is possible that the Court was merely operating on the assumption that the national law so regarded graphic user interfaces.

118. In my view, consideration should be given to seeking an exclusion of reference information (the author’s name, title, metadata) from the notion of works.

119. Such a possibility was previously canvassed at a European level in relation to databases. The *Follow Up to The Commission Green Paper on Copyright and the*

Challenge of Technology, (1991) COM (90) 584 final, when discussing databases it was agreed that (p.19):

‘The question of the inclusion in a database of protected works was raised. A large majority believed that normal copyright rules should apply. **All participants agreed that indexing (inclusion of bibliographical information) of protected works without authorization of the rightholder should not be an infringement of copyright.** The same rule could apply to **abstracts of protected works** provided that they did not substitute for the original protected works themselves. Normal copyright rules should apply in this instance.’

120. The Explanatory Memorandum accompanying a proposal for the Database Directive drew a distinction between information about a work and the work itself. The inclusion of the former was not to be regarded as an infringement of copyright:

However one clarification has been introduced into this Directive in respect of bibliographical material and similar data. In cases where the materials in question do not substitute for a work but are merely informative about the work, these materials should be capable of being incorporated into a database without authorization, although this exception is without prejudice to the question of whether the material is itself subject to copyright.

121. Article 4 of the Proposal (COM(92)24 final –SYN 393, May 13 1992) was as follows:

1. The incorporation into a database of bibliographical material or brief abstracts, quotations or summaries which do not substitute for the original works themselves, shall not require the authorization of the rightholder in those works.

122. The Amended Proposal, COM(93) 464 final - SYN 393, retained this provision. It explained:

The order of paragraphs has been reversed to give first the rule and second the limitation, and clarifications to the text on limitations have been made to ensure that only **those works or materials which are not subject to copyright (references)**, which do not infringe copyright in the pre-existing work (short abstracts) or which fall within Article 10 of the Berne Convention (quotations) can be incorporated into a database without authorisation. It is not intended that a database creator could incorporate abstracts written by third parties into his database without authorisation if such abstracts are themselves subject to copyright protection. The database creator may however make his own abstracts of pre-existing works and incorporate them into his database providing that the abstracts do not infringe the copyright in the pre-existing work by being ‘substantial descriptions or summaries of the content or the form’.

123. Art 5(2) of the Amended Proposal thus read:

2. The incorporation into a database of bibliographical references, abstracts (with the exception of substantial descriptions or summaries of the content or the form of existing works) or brief quotations, shall not require the authorisation of the owners of rights in those work provided the name of the author and the source of the quotation are clearly indicated in accordance with Article 10(3) of the Berne Convention.

124. The provision seems to have been omitted from the Directive during its reformulation in coming to a Common position, and thus was not in the Directive as adopted. What is important, however, is the Commission’s stated view that

- (a) bibliographical material are not regarded as works;
- (b) abstracts are not generally substantial enough to infringe.

125. Although this material precedes adoption of the Information Society Directive, it lends support to the view that that Directive could not have been intended to preclude Member States from defining works so as to exclude bibliographic information.
126. Moreover, the exhaustive nature of the exceptions in Article 5 of the information Society, coupled with the *Infopaq* ruling, means that the exclusion of titles from copyright protection can only now be achieved by definition of “works” or notions of “implied licence”. At the same time, it must be inferred from Art 5(3)(c) which requires that “the source, including the author’s name, be indicated,” that the use of such bibliographic material cannot itself be controlled by the copyright holder. Otherwise one would be required to infringe in order to avail oneself of an exception.
127. I would suggest that the Hargreaves Review be urged to amend section 3 of the Copyright, Designs and Patents Act 1988 to state:

“Copyright does not subsist in names, titles, items of bibliographical data or metadata.”

4. Remedies

128. Finally, there is flexibility to limit financial liabilities.
129. Under section 96 of the Copyright, Designs and Patents Act 1988 all remedies are available in respect of copyright as “any other property right.” These include damages, accounts of profits and additional damages under s. 97(2).
130. Section 97(1) limits the award of damages where the infringer was innocent. It states:

‘Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.’

131. Two aspects of this are worth observing:
- (a) The narrow notion of innocence, which is limited to ignorance as to “the subsistence” of copyright in the work;
 - (b) The limitation does not prevent the award of an account of profits. Cf. Patents Act 1977, s.62(1), where the limitation applies to both damages and accounts.
132. The UK Government has freedom to operate in this field. Directive 2004/48/EC requires Member states to make available compensatory remedies in cases of *knowing engagement in an infringing activity*. Freedom is left to Member states under Art 13(2) as regards innocent infringement. See Michel Walter and Dominik Goebel, Ch 13, in Walter and von Lewinski, *European Copyright Law*, 1308 (para 13.13.8), 1311 (para. 13.13.20).
133. In the light of the uncertainties surrounding exploitation of works in the digital environment, there would be much to be said for limiting the availability of financial remedies to other types of “innocent activity.” For example, if the rules on “authorisation” are not amended, and a service provider or technology provider is deemed to authorise the making of translations of works via, such liability will turn on matters outside the third party’s knowledge: what work is being translated, and whether the translation is for commercial or non-commercial purposes (CDPA, s. 29(1), s.29(1C), s.178 (defining ‘private study’). Equally, if a news aggregator makes links to publicly accessible sites available to subscribers, but the site only allows access to non-commercial users, and the use of the link is thus deemed authorisation or making available, the aggregator’s liability would be predicated on the existence of a licensing condition of which it was unaware. We think in these cases that no financial remedy is appropriate.

134. The e-Commerce Directive may provides a suitable precedent here. It deals with hosting, and immunises an innocent hoster from financial liability. Innocence is defined not merely by reference to the “subsistence of rights” but their violation: “illegal activity”.⁸

135. One possible model could be:

Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that the act was unlawful, the plaintiff is not entitled to damages or an account of profits against him.

Or

Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant acted in good faith without reason to believe that its acts infringed copyright, the plaintiff is not entitled to damages or an account of profits against him.

136. Such a provision would enable a defendant to avoid financial liability

- (i) (as under the present law) where they had no reason to think copyright subsisted in the work; but also
- (ii) where they believed that their actions were licensed (either expressly or impliedly);

⁸ Article 14 Hosting reads:

“1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider **does not have actual knowledge of illegal activity** or information and, as regards claims for damages, **is not aware of facts or circumstances from which the illegal activity or information is apparent**; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”

- (iii) where they believe their actions fell within a defence;
- (iv) where they had no reason to think any works were involved at all.

137. Considerably more work will be needed to fashion this idea into a workable legislative model. Care would need to be taken not to unduly prejudice rightholders's interests, so that they are constantly met with unmeritorious defences of this sort. Two possibilities worth considering would be

- (i) To limit the beneficiaries of the innocence defence to intermediaries, providers of services and technological means that are used to infringe;
- (ii) To give the court a discretion to withhold financial remedies. The latter would look something like this:

Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant acted in good faith without reason to believe that its acts infringed copyright, the court may, if it considers it just to do so, refuse to award damages or an account of profits against him.

March 3, 2011

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Appendix 1: The Wittem Group's European Copyright Code

Chapter 5: Limitations

Art. 5.1 Uses with minimal economic significance

The following uses with minimal economic significance are permitted without authorisation, and without remuneration:

- (1) the making of a back-up copy of a work by a person having a right to use it and insofar as it is necessary for that use;
- (2) the incidental inclusion of a work in other material;
- (3) use in connection with the demonstration or repair of equipment, or the reconstruction of an original or a copy of a work.

Art. 5.2 Uses for the purpose of freedom of expression and information

(1) The following uses for the purpose of freedom of expression and information are permitted without authorisation and without remuneration, to the extent justified by the purpose of the use

- (a) use of a work for the purpose of the reporting of contemporary events;
- (b) use of published articles on current economic, political or religious topics or of similar works broadcast by the media, provided that such use is not expressly reserved;
- (c) use of works of architecture or sculpture, made to be located permanently in public places;
- (d) use by way of quotation of lawfully disclosed works;
- (e) use for the purpose of caricature, parody or pastiche.

(2) The following uses for the purpose of freedom of expression and information are permitted without authorisation, but only against payment of remuneration and to the extent justified by the purpose of the use:

- (a) use of single articles for purposes of internal reporting within an organisation;

(b) use for purposes of scientific research.

Art. 5.3 – Uses Permitted to Promote Social, Political and Cultural Objectives

(1) The following uses for the purpose of promoting social, political and cultural objectives are permitted without authorisation and without remuneration, and to the extent justified by the purpose of the use:

(a) use for the benefit of persons with a disability, which is directly related to the disability and of a non-commercial nature;

(b) use to ensure the proper performance of administrative, parliamentary or judicial proceedings or public security;

(c) use for the purpose of non-commercial archiving by publicly accessible libraries, educational establishments or museums, and archives.

(2) The following uses for the purpose of promoting important social, political and cultural objectives are permitted without authorisation, but only against payment of remuneration, and to the extent justified by the purpose of the use:

(a) reproduction by a natural person for private use, provided that the source from which the reproduction is made is not an obviously infringing copy;

(b) use for educational purposes.

Art. 5.4 –Uses for the purpose of enhancing competition

(1) The following uses for the purpose of enhancing competition are permitted without authorisation and without remuneration, to the extent justified by the purpose of the use:

(a) use for the purpose of advertising public exhibitions or sales of artistic works or goods which have been lawfully put on the market;

(b) use for the purpose of reverse engineering in order to obtain access to information, by a person entitled to use the work.

(2) Uses of news articles, scientific works, industrial designs, computer programs and databases are permitted without authorisation, but only against payment of a negotiated remuneration, and to the extent justified by the purpose of the use, provided that:

- (i) the use is indispensable to compete on a derivative market;
- (ii) the owner of the copyright in the work has refused to license the use on reasonable terms, leading to the elimination of competition in the relevant market and
- (iii) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright in the work.

Art. 5.5 – Further limitations

Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties. <http://www.copyrightcode.eu/index.php?websiteid=3> - [ftn55](#)

Art. 5.6 – Relation with moral rights

- (1) Uses under this chapter are permitted without prejudice to the right of divulgation under article 3.2. <http://www.copyrightcode.eu/index.php?websiteid=3> - [ftn56](#)
- (2) Uses pursuant to articles 5.2, 5.3, 5.4 and 5.5 are permitted without prejudice to the right of attribution under article 3.3, unless such attribution is not reasonably possible.
- (3) Uses pursuant to articles 5.1, 5.2, 5.3 and 5.5, are permitted without prejudice to the right of integrity under article 3.4, unless the applicable limitation allows for such an alteration or the alteration is reasonably due to the technique of reproduction or communication applied by the use.

Art. 5.7 – Amount and collection of remuneration

- (1) Any remuneration provided for under this chapter shall be fair and adequate <http://www.copyrightcode.eu/index.php?websiteid=3> - [ftn57](#).
- (2) A claim for remuneration according to articles 5.2(2) and 5.3(2) can only be exercised by a collecting society.

Art. 5.8 – Limitations prevailing over technical measures <http://www.copyrightcode.eu/index.php?websiteid=3> - [ftn58](#)

In cases where the use of copyright protected works is controlled by technical measures, the rightholder shall have an obligation to make available means of benefiting from the uses mentioned in articles 5.1 through 5.5 with the exception of art. 5.3(2)(a), on condition that

(a) the beneficiary of the limitation has lawful access to the protected work,

(b) the use of the work is not possible to the extent necessary to benefit from the limitation concerned, and

(c) the rightholder is not prevented from adopting adequate measures regarding the number of reproductions that can be made.