

# EU copyright directive

a glance at  
exceptions & limitations  
the need for revision



“How can society make cultural works available to the widest possible public at affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them to navigate the economic system?”

It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator.”

**Francis Gurry,  
Director General, World Intellectual Property Organisation  
February 2011**

“Internationally, the World Intellectual Property Organisation is looking into a range of new copyright exceptions and limitations. Nationally, an increasing number of Member States are recognising the need for reforms, and testing new ideas in this field. But we need a common European solution, to avoid fragmentation and to seize benefits for a European Digital Single Market.”

**Vice President Neelie Kroes  
European Commissioner for Digital Agenda  
September 2012**

“Copyright involves a necessary balancing of divergent interests. When new opportunities arise, the law sometimes needs to adapt so that the right balance is maintained.”

**Professor Ian Hargreaves CBE  
Professor of Digital Economy, Cardiff University  
May 2011**



# INTRODUCTION

Despite the increasing relevance of copyright law to their daily lives consumers are provided with hardly any information when it comes to copyright.

A number of permitted uses of copyright-protected material are only allowed as exceptions and limitations to the copyright owners' exclusive rights. However, these exceptions and limitations are not absolute conditions and consumers often face unclear boundaries as to which acts are permitted under the current copyright legislation.

The Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society makes everyday activities of consumers, such as back up and copying of legally bought music, films and e-books to play on a different music player, illegal. Under current laws parodies and pastiches which have gained new cultural relevance in the digital 'mash up' culture are illegal.

The Directive has also failed to achieve the objective of harmonising the copyright laws of EU Member States. Significant divergences exist with regards to the scope of the exceptions and limitations, which create legal uncertainty for both consumers and creators. What is legal in one country may be illegal in another.

During the past years, the European Commission has focused on extending the length of copyright protection against the interests of creators and to the benefit of record companies and on supporting enforcement measures that put fundamental rights and freedoms of consumers and citizens at risk. As a result, these policies have eroded public support for copyright in general, as demonstrated by the mobilisation against ACTA.

The European Union needs a future-proof and balanced legal framework that will allow consumers access digital content in Europe's single market, while at the same time ensuring fair compensation of creators.

It is time the European Commission revised Directive 2001/29 in order to restore the balance and adapt the rules to the new century. The focus of the Directive should be to further harmonise copyright exceptions and limitations in order to accommodate the needs of society, of consumers and creators.



# EXCEPTION FOR PRIVATE COPYING

## Law :

Member States may provide for exceptions or limitations to the reproduction right in respect of **reproductions on any medium made by a natural person for private use** and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

In cases where rightholders have **already received payment in some other form**, for instance as part of a licence fee, no specific or separate payment may be due. In certain situations where the **prejudice to the rightholder would be minimal**, no obligation for payment may arise.

## REALITY CHECK :

- There is significant divergence in the implementation of this exception by EU Member States.
  - In some countries, a set number of permitted copies is specified, in others compensation is only due for private copying of music, in others for printed and audio-visual works.
  - In Italy, the exception applies only to sound recordings and audiovisual works, in Estonia only to audiovisual works. In the UK, the time shifting only applies to broadcasts.
  - In Denmark, consumers pay to distribute private copies they made for their "close family".
  - In Germany, private copying of sheet music is prohibited except when copied by hand.
  - In the majority of Member States, digital copies for private use are often prohibited by terms and conditions and digital rights management systems.
- There is significant divergence in systems of fair compensation at EU Member States.
  - In some Member States, the private copying exception is not accompanied by a system of compensation (Malta, Cyprus and Luxembourg) and other states are currently reassessing whether their levy systems are relevant and appropriate (The Netherlands and Spain).
  - National copyright levies systems vary significantly from one Member State to the other: the same 32GB iPod Touch bears a levy of €1.42 in Latvia and €12.48 in Sweden.
- Despite the increasing relevance of copyright in their daily lives, consumers find it very difficult to differentiate what is legal and illegal when it comes to downloading, copying and playback of digital content. Academics, public authorities and right holders face the same difficulty.

# EXCEPTION FOR PRIVATE COPYING

Below the results of a survey by the Norwegian Consumer Council, clearly showing the divergence of views when it comes to the legality of specific acts and in systems of fair compensation.

Issue	The Ministry	Professor Jon Bing	Kripos	IFPI	EFN
Arne is interested in Japanese samurai films. They can only be bought from Japan, and are only available in <b>region 3</b> . Arne makes his DVD-player (including the player on his PC) <b>multi-region capable</b> in order to be able to watch these films.	Legal	Legal	Legal, certain limits	Legal	Legal
Arne's 3-year-old daughter has a tendency to mangle the children's DVDs that he buys for her. She has destroyed a number of them. Arne therefore starts <b>backing up his DVDs</b> after buying them. As he isn't great with computers, he gets a colleague to do it for him.	Legal, certain limits	Undecided	Illegal	Illegal	Illegal
Arne has a lot of DVDs. When he is travelling, he <b>transfers some of them to his iPod</b> in order to watch them during flights.	Undecided	Undecided	Undecided	Illegal	Undecided
Arne has downloaded thousands of songs from various online shops. This has cost him hundreds of pounds. Arne isn't able to back up everything himself, but he knows that backups are important. He therefore uses an <b>external data warehousing service</b> (e.g. mp3tunes.com) in order to ensure that his music won't disappear if his computer dies.	Legal	Undecided	Legal	Illegal	Illegal
Arne uses some of the songs that he has bought online as <b>ring tones for his mobile</b> .	Legal, certain limits	Undecided	Undecided	Illegal	Legal, certain limits
Arne's mother was given a Creative MP3-player for Christmas. Arne has bought loads of music from iTunes that she would like to listen to. So Arne <b>converts</b> the music he bought on iTunes so that it can be played on his mother's Creative MP3-player.	Undecided	Undecided	Undecided	Legal, certain limits	Undecided
In the US, Arne found a great computer game for children. When he got home, he found that it couldn't be used because it had been bought in the wrong zone. He therefore wants to <b>modify his Playstation</b> so that his daughter can use the game.	Legal	Legal	Illegal	Legal	Legal
Arne's wife is <b>blind</b> . Many of her favourite authors have published books that are only available as <b>e-books</b> . She would like to get the books read on to an audio book. This is <b>impossible</b> . Therefore Arne uses a programme he finds on the Internet to read the books.	Legal	Legal	Undecided	Legal	Undecided

IFPI - International Federation of the Phonographic Industry

EFN - Electronic Frontier Norway

Kripos - Norwegian National Criminal Investigation Service



# EXCEPTION FOR PARODY, CARICATURE OR PASTICHE

## Law :

Member States may provide for exceptions or limitations to the rights of reproduction and communication to the public when a **work is used for the purpose of caricature, parody or pastiche.**

## REALITY CHECK :

- The exception has been implemented differently across EU Member States:
  - Parody exceptions exist in a number of EU Member States, including France and Spain, but not in the United Kingdom or Ireland;
  - In France, in order to qualify, the parody must have been intended to be humorous in nature and there must be no risk of confusion with the original work. In Germany and Sweden parody exceptions have been carved out by the Courts rather than by statute.
- There is no evidence that a parody may result in lost sales of the original due to confusion between the original work and a parody.
- Greenpeace had their most creative campaigning videos removed from YouTube because they dared to remake Volkswagen's Star Wars themed adverts. Greenpeace's video used the same theme and imagery, but instead framed Volkswagen as the evil Galactic Empire, with the objective of destroying Earth with its VW-branded Death Star.

The parody aimed to bring Volkswagen's activities into question in the public mind. No consumer would become confused and think that the video was actually produced by Volkswagen. The market for the original advert was not harmed. Greenpeace did not aim to gain financially from their video.

The parody was taken down from Youtube following a notice of copyright infringement, but then put back simply because it was under US jurisdiction in which this specific case was permitted under the fair use doctrine.



# EXCEPTION FOR USER-CREATED CONTENT

## Law :

There is **no exception specifically for user-created content** or for creative, transformative or derivative work. The existing exceptions for parody and criticism are too narrow to accommodate the needs of user-created content.

## REALITY CHECK :

- Consumers are not only users but are increasingly becoming creators of content. Web 2.0 applications such as blogs, podcasts, wiki, or video sharing enable users to easily create and share text, ideas, views, comments, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination.
- Consumers increasingly use legitimately acquired material in content they create themselves for non-commercial purposes.
  - In making a home video of a family member dancing to a popular song and posting it online, under existing copyright law there is no exception or limitation that would justify the use of the song. The video would be illegal on the grounds of copyright infringement.
  - In order to prepare a homemade video of their wedding, a couple would have to use a number of copyright protected material, including the music from a CD collection played during the ceremony, the music played by the band at the reception, the photos from the professional photographer. The couple have to clear the rights of numerous right holders in order to use the material in the video.
- An exception for user-created content should introduce the possibility to reuse existing works where a licensing transaction is not reasonable and there is no demonstrable impact on the market for existing works.

# EXCEPTION FOR PEOPLE WITH DISABILITIES

## Law :

Member States may provide for exceptions or limitations to the rights of reproduction and communication to the public when a work is used for the **benefit of people with a disability**, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.

## REALITY CHECK :

- The exception has been implemented differently across EU Member States:
  - In Greece, the exception applies to blind, deaf and mute people. In the UK, it only applies to the visually impaired; in Latvia, it applies to visually and hearing impaired only.
  - The exception only applies to certain types of copyright works. In Sweden, sound recording and talking books are excluded. In Malta, the scope of the national exception is broader and includes translations and distributions of works. In the UK, films are excluded and therefore the making of an audio description that enables a visually impaired person to access a film is not allowed.
  - In Slovenia and in Austria the exception only applies upon payment of remuneration to the right holders.
- People with other disabilities, like dyslexia, or people who cannot hold a book or turn a page due to physical disability, do not currently benefit from the exception.
- Less than 5% of all books across the EU are accessible to those who are fully or partially blind.
- 21% of European persons over 50 experience severe vision, hearing or dexterity impairments.





## EXCEPTION FOR LIBRARY PRESERVATION ACTIVITIES

### Law :

Member States may provide for exceptions or limitations to the rights of reproduction and communication to the public in respect of specific **acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives**, which are not for direct or indirect economic or commercial advantage.

### REALITY CHECK :

- The institutions who benefit from the exception differ significantly from one Member State to another. In Austria, the exception applies to all establishments that have as their purpose the collection of works, but the scope of permitted acts remains limited. In Poland, higher educational establishments are excluded. In Slovakia, the exception only applies to libraries and archives.
- In Estonia and in Greece, the exception is limited to a single copy of the work already in the permanent collection of the entitled institutions. In Belgium, only a limited number of copies are permitted if necessary for the preservation of the works.
- The EU Directive does not contain clear rules on the format shifting and scanning necessary for the digital preservation of works.
- All institutions should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats.
- The simple fact of format shifting should not give rise to new exclusive rights over the digitised copies. Material in the public domain is an important source of use/reuse and inspiration, as well as a driver for innovation and creativity and should not be subject to new rights.

## Law :

The Copyright Directive allows Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public when a **work is used for the sole purpose of illustration by teaching**...as long as the source, including the author's name is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.

## REALITY CHECK :

- There is significant divergence in the implementation of the exception at national level. As a result, identical acts could be legal or illegal depending on the country. This is problematic for distance learning, where students enrol for courses in another country.
- In the majority of EU Member States, distance learners, such as students with disabilities or those who work from remote locations, cannot benefit from the exception.
- In Spain, school books and university handbooks are excluded from the scope of the exception.
- In the Scandinavian countries and in Germany, the use of works in a classroom is subject to negotiation of a contract with associations representing right holders. If negotiations fail, the use of copyrighted protected material is not allowed.
- While in Malta, the whole work can be copied, in the UK, only 1% of a work per quarter can be copied. For a book of 200 pages, this would mean that only two pages can be copied.
- In Cyprus, Greece and Bulgaria, copies made for teaching uses within the exception are subject to any payment. On the contrary, France requires the payment of compensation.



# EXCEPTION FOR SCIENTIFIC RESEARCH

## Law :

The Copyright Directive allows Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public when a **work is used for the sole purpose of illustration for...scientific research**, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.

## REALITY CHECK:

- Scientific research goes beyond borders. Researchers increasingly work in more than one Member State. The patchy availability of the exceptions makes their work difficult, because what is lawful in one country is sometimes unlawful in another.
- Even for basic use, researchers needed to look at licensing restrictions for each article with terms that vary greatly.
- Data and text mining is currently excluded from the scope of the exception. Given the vast amount of data, researchers are increasingly using computers to analyse it - a technique known as data and text mining.
  - If data mining was allowed, a medical researcher would be able to write a computer programme to search thousands of online articles looking for a link between a certain protein and a certain cancer.
  - By having access across different journals and time periods, researchers would be able to have a complete overview of how species migrate over time as part of studies on global warming.
- Current requirements to seek permission to text or data mine are not proportionate, cost effective or scalable. When additional permissions are required, academics often do not know how to seek permission.



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# digital rights

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