Copyright in the Digital Age: Analysing the Achievements and Flaws in the EU Copyright Exceptions Domain

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Copyright exceptions are an important part of international and European copyright frameworks, designed to ensure the balancing of copyright with other fundamental rights and policy objectives. More and more, the increasing use of digital technology has challenged previously accepted copyright norms.[1] As a result, the EU and its Member States alongside many other states have sought to reform and update their laws to meet the challenges posed by a new era of creative works. The domain of copyright exceptions is no different. Ranging from the Information Society (InfoSoc) Directive in 2001[2] to the most recent Digital Single Market (DSM) Directive,[3] the EU has consistently sought to create a more unified and harmonious market ecosystem for intellectual property. These efforts have been targeted at reducing market fragmentation and ensuring the protection of core exceptions to copyright that are grounded in fundamental rights. However, such efforts have not always borne fruit and problems remain. For example, critics point to the limited and inflexible nature of the current framework which results in new technologies being stifled or else being unable to benefit from the protections offered by narrowly-drafted exceptions. In fact, in some cases, the approach taken by the EU in attempting to reform the area of exceptions has counter-intuitively led to more fragmentation of the internal market.

This article aims to critically analyse the EU's policy and legislative approach toward copyright exceptions, examining, with a view to reform, the achievements and shortcomings of the EU's legislative efforts. For the purposes of this article, the term 'exceptions' will be used to refer to provisions within EU and Member State law that refer to similar concepts like limitations, defences, and so forth, although the author acknowledges that these terms can in and of themselves denote a certain preference as to the ideological conception of copyright.[4] It will begin by delving into the core reasoning for the existence of copyright exceptions, exploring the historical context found in the Berne Convention and the broader international and European copyright system. The article shall focus on a number of key exceptions falling within the scope and context of the InfoSoc Directive, using the areas of the 'three-step test', parody, private copying and temporary reproduction to illustrate the achievements and flaws within the copyright exceptions framework. The aim is to identify common principles and overall criticisms which pervade the domain of EU copyright exceptions. It will then move to examine the DSM Directive and the relevant achievements and flaws present there. The article will then move to consider the ways in which improvements could be made, including a brief consideration of the benefits of a 'user right' framework. Finally, the article will conclude by summarising the broad analysis of the EU copyright exceptions domain, its successes and failings, and the overall impact of such exceptions on the digital and tangible markets.

1 See for instance Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 Northwestern University Law Review 1607.

2 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, (herein '**InfoSoc Directive**')

3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) PE/51/2019/REV/1 OJ L 130, 17.5.2019 (herein, '**DSM Directive**')

4 Annette Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test?' (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04, 2008) <https://ssrn.com/abstract=1317707> accessed 1 December 2021.

Copyright Exceptions: Rationale and Policy Objectives

To contextualise the discussion of copyright exceptions, it is worthwhile to first consider why exceptions are necessary in the first place. One of the most oft-advanced arguments in favour of exceptions is on economic and creative grounds. This argument in essence states that copying is a vital component of almost all creation and innovation, whether it be scientific, academic or purely recreational. Indeed, many services beneficial for knowledge-sharing, like Google Books, make use of copying technology.[5] This is particularly the case in the digital age, where online services like news aggregators, streaming services and meta-aggregation engines all challenge traditional norms in their use of works. While these copy-reliant services use other works, they are absolutely vital in the creation of a pluralistic and dynamic creative economy, one where innovation can thrive.[6] On further market-based grounds, the argument can be made that the use of material and its transformation can also encourage growth for the original work, such as with music sampling.[7] Many of the technologies and innovations today are built upon caching and temporary reproduction exceptions, thereby illustrating the clear necessity of exception in fostering a mature digital market. As a result of these benefits, market and innovation reasons are strongly embedded in the EU's legal efforts at copyright exception harmonisation and the Union has explicitly acknowledged the benefits of copy-reliant technologies in the preambles to these directives.[8]

Moreover, exceptions have their policy rationale firmly grounded in free expression and in related fundamental rights.[9] This line of policy argument in favour of exceptions is often raised in respect of the use of works for satire or parody purposes as well as for enabling access to information to those who are disabled, for instance the making available of materials to the blind.[10] This addition of speech considerations adds a constitutional dimension to any intervention in this area, meaning that competing rights must be weighed in any legislation. Although these rationales are supported by key human rights justifications, the scope of such rationale is narrow, often requiring non-commercial usage or attribution. Free expression is of course not an absolute right and must be balanced with the rights of creators to the benefits and usage of their intellectual property as guaranteed in the EU Charter of Fundamental Rights.[11]

Without doubt, copyright exceptions have a clear and important place in the overall legislative frameworks that underlie the system. It can clearly be observed by examining these policy aims that the goal of copyright exceptions is the balancing of copyright privileges with other rights and objectives. As a result, it is important to analyse the successes and failures of EU copyright exceptions through this lens, identifying if and how the law on exceptions achieves a balancing act between copyright protection and other policy goals. Although nuance is important, for the sake of clarity, the core exception policy rationales for the purposes of this essay can be generally summarised thus:

Firstly, the fostering of innovation and growth and the enabling of technological functionality. This goal is inherently linked to high-levels of market integration and the ease of cross-border trade.

Secondly, the safeguarding of fundamental rights, particularly free expression albeit with the balancing of said rights with intellectual property protections.

Having now established and mapped out the key policy objectives of the EU copyright exceptions regime, it is possible to evaluate effectively the impact that has been had by the various interventions into the domain.

Copyright Exceptions in European Law: Vertical to Horizontal Development

Copyright exceptions have a long history and can be traced far back. The Berne Convention, for instance, contains only one mandatory exception, specifically regarding quotation from works that have been made available lawfully to the public and only where that use is fair and not in excess of what is necessary.[12] Aside from that specific mandatory exception, all others are optional for contracting states, for instance in respect of teaching and research.[13] The test is also found in the TRIPS agreement[14] and in the World Copyright Treaty.[15]

When considering copyright in the EU, it is vitally important to consider the drafting background and policy rationales that informed the creation of key legislative provisions. Prior to the introduction of the InfoSoc Directive, harmonisation of the copyright system across the EU was undertaken on a relatively piecemeal basis, generally targeted at very specific areas.[16]The first such efforts at harmonising exceptions came in the form of the Software Directive[17] with the Database Directive[18] following on in 1996. Both of these Directives contained mandatory exceptions that served to facilitate key policy goals in these specific areas, namely the encouragement of growth and innovation in these two technological areas.

Although the concept of the digital single market is a relatively recent policy initiative, the idea of a more harmonised ecosystem

5 For a critical analysis see Pamela Samuelson 'Google Book Search and the Future of Books in the Cyberspace' (2009) 94 Minnesota Law Review 1308, 1353.

6 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 4.

7 Mike Schuster, David Mitchell, Kenneth Browne, 'Sampling Increases Music Sales: An Empirical Copyright Study' (2019) 56(1) American Business Law Journal 177.

8 See for instance InfoSoc Directive Recital 4 and DSM Directive Recitals 2, 5 and 18 etc.

9 See European Convention on Human Rights (1950), Article 10.

10 Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242.

11 Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, Article 17(2).

12 Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Texts, Cases and Materials* (2nd edn, Oxford University Press 2013) 203.

13 Berne Convention for The Protection of Literary and Artistic Works (Paris Text 1971), Article 10(2).

14 Agreement of Trade-Related Aspects of Intellectual Property Rights, Article 13.

15 World Copyright Treaty, Article 10.

16 Annette Kur and Thomas Dreier, *European Intellectual Property Law: Texts, Cases and Materials* (1st edn, Elgar Publishing 2013) 270.

17 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009.

18 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996.

for digital trade in the internal market is of much more substantial vintage. This is seen in the Commission's move from piecemeal reform to a more concerted effort which manifests in the InfoSoc Directive. In essence, this was a move from vertical to horizontal legislative initiatives, aimed at ensuring the harmonisation of the internal market.

The InfoSoc Directive: Lessons from Copyright Exceptions

The InfoSoc Directive aimed to be a more ambitious attempt at modernising the copyright system, ensuring its suitability for the digital age. In particular, it came about as a response to concerns about the lack of harmonisation that existed between Member States in respect of artistic and literary works, something initially sparked in the *Patricia* decision.[19] The most key change to the framework was the introduction of a closed list of exhaustive exceptions.[20] However, it should be noted from the outset that only one, temporary reproduction, was a mandatory exception.

The following sections will now analyse key exceptions and provisions, in essence using them as examples to illustrate the broader successes and failures of the InfoSoc Directive's approach to copyright.

Article 5(5) and the Three-Step Test

Before launching into an analysis of the specific exceptions within the overall domain, it is useful to first consider one of the major early achievements of the InfoSoc Directive in achieving the key goals of EU copyright policy. The notion of the 'three-step test' is an important mainstay of the copyright system. The test originates from the Berne Convention's 1967 revision.[21] It is set out as follows:

> "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."[22]

The test essentially was designed to act as a 'catch-all' provision to limit the scope of available exceptions to the reproduction right, something textually evident above.[23] The test was included in both TRIPS and the WIPO Copyright Treaty, with its aim being to act as a criterion for consideration in analysing compliance of all national exceptions.[24]

Article 5(5) of the InfoSoc Directive formally imports and establishes the test within the EU legal order. Mazziotti notes that the inclusion of the 'Three-Step Test' in Article 5(5), and therefore specifically in EU law, constitutes a remarkable step toward the harmonisation of copyright exceptions within the Union.[25] The inclusion of the test ensures that national courts are steered toward a uniform application of copyright exception jurisprudence.[26]

Without doubt, one of the key achievements in this regard has been the inclusion of the test, not only in mere international law but as a key part of the EU's copyright framework, meaning it benefits from the doctrine of supremacy in its applicability. The imposition of the test helps to guide national courts in their adjudication, ensuring the harmonised application of the test across the EU and safeguarding against the risk of fragmentation arising from differing interpretation.

Overall, the inclusion of the test in the InfoSoc Directive alongside the CJEU's guidance has helped to cement the hard limits of copyright exceptions within the EU copyright framework. It is submitted that in this respect, Article 5(5) represents a major achievement in the domain of EU copyright exceptions. The fact that the 'three-step test' is now universally applied and interpreted across Member States serves one of the key policy objectives in this area, namely the harmonisation of exceptions across the Union. This positively impacts the market environment by ensuring consistency for creators, rights-holders, and users.

The InfoSoc Directive's Parody Exception: Striking A Balance

One of the key areas where there has been achievement in the domain of EU copyright exceptions is in relation to parody works. The area of parody is one of the key collision points between intellectual property rights and fundamental rights, namely free expression.[27] As discussed above, it is important for legislators and the courts to strike a balance between these two categories of rights in order to protect both creators and users. It is important to note that in spite of the role of fundamental expression rights in the rationale for this exception, EU law does not conceive of this exception as a type of users' right.[28] As such, this does not grant an actionable right in parody works but rather acts to permit an activity that would normally be infringement.[29]

Parody by its very nature poses major problems from a copyright standpoint. Generally speaking, parody requires some form of a riff being made on a pre-existing work, meaning that some level of copying or infringement is essentially inherent in the creation of parody works.[30] It is for this reason that parody is not found as an explicitly acceptable ground under the Berne Convention[31] and Ricketson suggests that the provision of such a ground poses valid concerns for the EU's compliance with the Berne Conventions obligations.[32] It is submitted that a parody exception is in keeping with the Berne Convention, insofar as it should be seen as constituting a special case not overly prejudicial to authors in

19 Case C-341/87 *EMI Electrola v Patricia* [1989] ECR 79 para 11.
20 InfoSoc Directive, Article 5.
21 Berne Convention for The Protection of Literary and Artistic Works (Paris Text 1971), Article 9(2).
22 Ibid.
23 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 134.
24 Mihaly Ficsor, *The Law of Copyright and the Internet: the 1996 WIPO Treaties , their interpretation and implementation* (Oxford University Press, 2002) 521.
25 Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (1st edn, Springer 2008) 84.
26 Ibid, 85.
27 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 169.
28 Sabine Jacques, *The Parody Exception in Copyright Law* (1st edn, Oxford University Press 2019) para 2.2.
29 Ibid.
30 For further see Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 170-171.
31 Although see Article 9(2).
32 Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (SCCR/9/7, WIPO 2003) 72.

accordance with Article 9(2) and thus compliant with the 'three-step test'.[33] This is especially so given the free expression rationale and the safeguards against abuse present in European interpretation of this exception.

Notwithstanding the lack of clarity regarding the Berne Convention, parody, pastiche and satire are specially recognised as exceptions to copyright in the InfoSoc Directive. Article 5(3)(k) of the Directive grants an exception to reproduction rights for parody works. The CJEU provided considerable guidance on the interpretation of the parody exception in the case of *Johan Deckmyn and another v Helena Vandersteen and others (Deckmyn)*.[34] The instant case involved calendars that were produced by the first named party, a politician from the far-right Belgian political party, Vlaams Belang. The calendar's cover comprised a parodied image based on a comic book drawing by Mr Vandersteen, which depicted the mayor of Ghent showering coins onto the ground for immigrants. As a result, the heirs of Mr Vandersteen launched proceedings for copyright infringement. In its preliminary reference, the Belgian court asked the CJEU for guidance in relation to whether parody constituted an autonomous concept in EU law and whether it was required to have certain characteristics to benefit from protection.[35]

The Court held that, in order to satisfy the harmonisation goals in the Directive, the provision must be given 'an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.'[36] Jacques notes the strong emphasis placed by the Court on the nature of parody as an autonomous concept, ensuring the uniformity of its interpretation across Member States.[37] The Court further decided that permissible parody must display its own original character, be reasonably attributed to a person aside from the author of the original work, and also relate to or mention the source of the parody.[38] The test adopted in this instance clearly is not predicated on any element of the transformative nature of the parody work, which can be contrasted to the position internationally, for instance in the US.[39] However, the CJEU does require that the parody have an element of humour, which Karapapa notes is problematic for free expression, especially in a digital context.[40]

Overall, however, it is submitted that the case of parody provides a good example of the achievements present in the EU's approach to copyright exceptions. Through its decisive and rounded judgment in *Deckmyn*, the CJEU has acted in many ways as the driver of European copyright policy objectives. Its strong emphasis on the autonomous conception of parody can be observed as a clear indication of the Court's desire to advance the harmonisation objectives of the Directive. While a preference is obviously present for better legislative provision, the Court's emphasis on the core policy objectives ensures the success of this exception.

33 Sabine Jacques, *The Parody Exception in Copyright Law* (1st edn, Oxford University Press 2019) para 2.4.1.
34 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132
35 Ibid, para 13.
36 Ibid, para 16.
37 Sabine Jacques, 'Are national courts required to have an (exceptional) European sense of humour?' (2015) 37(3) European Intellectual Property Review 134, 135.
38 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132, para 33.
39 *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994) (USA).
40 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 175.

Private Copying: Disparity and Discord in the Internal Market

One of the best examples of where (due to the lack of mandatory exceptions) the degree of choice is left up to Member States is the issue of private copying exceptions. This area has generated a degree of debate in academic circles.[41]

Private copying is set out in Article 5(2)(b) of the InfoSoc Directive.[42] It allows for a natural person to copy a work, provided it is done so in a non-commercial way and that the rights-holder receives 'fair compensation'.[43] Member States can therefore create levies, allowing them to choose the arrangement of the scheme, the level of fair compensation to be paid out and, indeed, consider how harm is caused to right-holders in this situation.[44] Where private copying is an exception, a lack of fair compensation requires Member States to phase out levies in favour of technological solutions i.e., DRM technologies.[45] While the level of fair compensation was largely left to the discretion of the Member States, the CJEU clearly identified it as an autonomous concept in EU law.[46] In Padawan, the CJEU held that as a result, uniformity was required amongst all states that had implemented the exception regardless of the Directive's granting of derogation in this respect.[47] The administration of these levying systems has also raised a number of issues ranging from intermediary costs to lack of efficiency in collecting agencies.[48] It has also led to a great deal of legal action in which key clarification has been needed such as to whether national budget provision was acceptable[49] and other specific administrative details.[50]

In many ways, the private copying exception acts as a case study in the risk of fragmentation that comes with the à la carte approach adopted in the InfoSoc Directive. It perfectly encapsulates the contradictions present in the internal market logic, where one private copying use can be totally legal in one Member State subject to fees while completely prohibited in another Member State. Similarly, the decision as to which devices should be subject to levies also was left to the Member State, meaning that the administration of levies will be localised to that state, thus creating a fragmented market. Indeed, even the levies charged vary widely between Member States, creating confusion and disparity, which serves to complicate cross-border digital trade. In spite of the CJEU's interventions to provide clarity, the impact of non-mandatory exceptions is illustrated clearly in this example, highlighting one of the copyright exception domain's most problematic flaws.

41 DigitalEurope, *Private Copying: Assessing Actual Harm and Implementing Alternative Systems to Device- Alternative Systems to Device-Based Copyright Levies* (Digital Europe, Brussels 2015) 4. <https://www.digitaleurope.org/wp/wp-content/uploads/2019/01/Private%20Copying%20Assessing%20harm%20and%20implementing%20alternatives%20to%20copyright%20levies.pdf> Accessed 11 December 2021.
42 InfoSoc Directive, Article 5(2)(b).
43 Ibid.
44 Giuseppe Mazziotti, *Copyright in the EU Digital Single Market* (CEPS, 2013) 97.
45 Ibid.
46 C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECLI:EU:C:2010:620
47 Ibid, para 33-37.
48 Giuseppe Mazziotti, *Copyright in the EU Digital Single Market* (CEPS, 2013) 103.
49 It wasn't - C-470/14 EGEDA and Others [2016] ECLI:EU:C:2016:669.
50 C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] ECLI:EU:C:2015:750.

Interpretation and Flexibility from the CJEU

Moving on from specific exceptions, on a more general level it can be seen that the CJEU has in many cases acted as a driving force behind the harmonisation of exceptions, a fundamental aim of EU copyright policy in this domain. Another such example of this role can be seen in the area of interpretation under the InfoSoc Directive, specifically in regard to exceptions. There exists in the domain of copyright exceptions the general principle that any exceptions provided must be interpreted by the courts in a strict way. This has been acknowledged by the CJEU in a number of decisions.[51] The Court's interpretative role was also seen in the substantial jurisprudence arising out of the temporary reproduction exception.[52] There, a strict interpretation was identified as being vital to harmonisation, and the aim was to facilitate the operation of new technologies which relied on such an exception to exist.

However, in general, the InfoSoc Directive aims to strike a balance between rights-holders' interests and those of users, seen for instance in Recital 31. That Recital mandates that exceptions should be effective in achieving their stated aim.[53] This means that the strict interpretation normally applied can be tempered to allow an exception to fulfil its purpose. Further precision has been added to this by the CJEU's jurisprudence, most notably in the *Painer* decision.[54] This case involved the claimant, Ms Painer, a photographer whose photographic portraits of a missing girl were used in newspapers without her consent. In interpreting the quotation exception, the Court held that the strict interpretation can give way to a more purposive understanding of the provision which strikes a better balance between copyright and free expression.

As was further noted in the aforementioned *Deckmyn* decision, the strict interpretation cannot be allowed to make the exception redundant. Although the stricter interpretation errs on the side of protecting the rights-holders as per the general principle, the Court acknowledged that a risk was posed to the functionality of the exception if the interpretation was too rigid.[55] Thus, it held, the correct approach was to allow the exception to fulfil its policy purpose. What these judgments illustrate is the CJEU's overall desire to adopt a more purposive approach, with the broader aim of protecting exceptions and the policy objectives they pursue. While the argument can certainly be made that the EU approach to copyright exceptions is overly strict and rigid, this is an example of how flexibility from the courts can best advance the fundamental aims of copyright policy, namely in facilitating new technological growth.[56]

51 See for instance C-435/12) *ACI Adam BV v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* [2014] ECLI:EU:C:2014:254 at para 23.

52 See for example Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465; Case C-302/10 *Infopaq International A/S v Danske Dagblades Forening* [2012] EU:C:2012:16; C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083

53 InfoSoc Directive, Recital 31.

54 Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2013] ECLI:EU:C:2013:138

55 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 at 14, 23.

56 Asta Tūbaitė-Stalauskienė, 'EU Copyright Law: Developing Exceptions and Limitations Systematically – An Analysis of Recent Legislative Proposals' (2018) 11(2) Baltic Journal of Law and Politics 162.

The DSM Directive: Exceptions for a Mature Digital Market

While the InfoSoc Directive was not the only update to copyright law at a European level, in many ways copyright remained fairly static even in the face of a rapidly changing digital economy. In the realm of exceptions, one example is the Orphan Works Directive[57] which simplified and harmonised the system for the use of orphan works across the Union, although it is still subject to substantial academic criticism.[58] Overall, however, with unprecedented technological advancements, the proliferation of online content sharing and an explosion in the popularity of user-generated content, it was clear that updates were seriously needed to the copyright framework. After over a decade of policy considerations, the DSM Directive aims to update copyright in the EU, including in the area of exceptions.

For example, Article 3 of the DSM Directive provides for a mandatory exception in respect of text and data mining, one which previously existed only in domestic legislation.[59] One of the key benefits of this exception is that it is mandatory, ensuring that lawful users (i.e., researchers and universities) can benefit from their work across all Member States.[60] Another area where the DSM Directive brings some clarity is the cross-border online teaching exception, which previously lacked harmonisation and created much legal uncertainty for teachers with resultant discord for the internal market in that area.[61] Again, it is posited that one of the primary benefits to be found here is the fact that this exception is mandatory, ensuring consistency and legal certainty.

Unfortunately, there are concerns about the impact that the DSM Directive will have on freedom of expression. Article 17 of the DSM Directive, in practice, requires online content-sharing service providers to obtain authorisation from rights-holders for user content that makes use of copyrighted works based on the designation of their activities as being 'communication to the public'.[62] However, in order to know that user content contains copyrighted works, these services will have to engage in oversight which enables them to act accordingly.[63] The Article thus seemingly creates an obligation to monitor or filter content, although bizarrely this would contradict Article 17(8)'s exemption from general monitoring.[64] This is something which will inevitably be performed using algorithmic moderation systems.[65] The use of algorithmic

57 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA OJ L 299, 27.10.2012.

58 Elenora Rosati, 'The Orphan Works Directive, or throwing a stone and hiding the hand' (2013) 8(4) Journal of Intellectual Property Law and Practice 303.

59 For example, the Irish Copyright and Other Intellectual Property Law Provisions Act 2019 s14.

60 DSM Directive, Article 3(1).

61 Asta Tūbaitė-Stalauskienė, 'EU Copyright Law: Developing Exceptions and Limitations Systematically – An Analysis of Recent Legislative Proposals' (2018) 11(2) Baltic Journal of Law and Politics 163-164.

62 DSM Directive, Article 17(1)

63 Celine Castnets-Renard, 'Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement' (2020) 2 U. Ill. J.L. Tech. & Pol'y 283, 297.

64 Indeed, this is being disputed in legal action by Poland, see Michaela Cloutier, 'Poland's Challenge to EU Directive 2019/790: Standing up to the Destruction of European Freedom of Expression' (2021) 125(16) Dickinson Law Review 161, 187.

65 See Youtube's Content ID system: *Using Content ID* (Youtube 2020) <https://support.google.com/youtube/answer/3244015?hl=en> Accessed 10 December 2020.

or artificial intelligence-based content moderation as envisaged under the directive arguably places many of the expression-based exceptions at risk, given the lack of nuance that can often be observed in AI systems. For instance, one can easily imagine an algorithm having difficulty establishing whether a piece of parody content is unique enough to avoid being removed. While there may be the opportunity to appeal, it is argued that such measures will invariably have a chilling effect on free expression.[66] Such a result is therefore a clear indication in the failure of the legislation to safeguard the raison d'être of the parody exception.[67] While some exceptions are carved out, it remains to be seen how effective they will prove and whether the parody exception can be protected in this new regime.[68] Overall, the DSM Directive provides a number of new and necessary exceptions that fundamentally serve the aims of EU copyright policy. There certainly are flaws that underlie the system generally but it is argued that several of the new inclusions are welcome additions.

Critical Analysis and Opportunities for Reform

While it might appear that the harmonisation achieved in respect of exceptions is substantial, in fact the overall impact is more modest. The fact that many of the exceptions are optional has meant that a contradiction exists between the stated policy goals of the legislation[69] and the actual outcome that has occurred as a result. Indeed, a large degree of disparity exists between domestic copyright laws across the Member States more broadly.[70] One of the lessons that can be drawn from analysing the provisions under EU copyright law is that the failure to provide for mandatory exceptions has led to divergence and discord for the market, something clearly evident from the private copying exception. While the development of an exhaustive list of copyright exceptions is indeed an achievement in the harmonisation of this area of law, unfortunately the failure to make the exceptions mandatory undermines that achievement.[71]

It is argued that the key failure of exception policy is the lack of mandatory exceptions which has caused numerous issues. In general, future reforms to the area of copyright exceptions would be well served by ensuring that they are mandatory and that the choice offered to Member States to derogate is severely reduced. This would help to prevent fragmentation within the digital single market and provide clarity to creators and users, thereby allowing for innovation and growth in line with broader policy objectives. It also would ensure universal protection of free expression rights, without the need for judicial intervention to clarify the area. One possibility for truly harmonised reform would be the introduction of a European copyright code, one that is mandatory and comprehensive. The author is sceptical as to the feasibility of such a proposal.

Arguably, many of the issues identified throughout the areas considered above could be remedied by a radical shift in the conception of exceptions. One possible way for this to occur would be through the reform of the exceptions system to provide for a broad user rights norm that would grant flexibility and user-based enforceability to the current domain.[72] Mazziotti argues that shifting from a system of exceptions toward a system of user rights would help to better balance the rights of copyright holders and those of end-users.[73] He envisages categories of non-waivable and harmonised user rights that fall within the broader fair use structure, overall serving the purposes of market integration.[74] While it is not possible in the scope of this essay to engage in a broader discussion about the need for a shift to a user rights framework, the author is of the view that this would be a positive way to ensure that copyright remains balanced in the digital age and it would safeguard a rights-based approach. Furthermore, a mandatory system of user rights would enable a smoother harmonisation, limiting the ability for Member States to derogate too widely and thereby undermine a core policy objective.

Nonetheless, while the DSM's provisions seem to take a step in the right direction, it can be observed that the copyright exceptions system currently in place is a patchwork of measures, each with achievements and flaws. While the achievements have served the policy goals well, the flaws have harmed the internal market and hindered harmonisation.

Conclusion

In conclusion, it is clear that in many ways the domain of copyright exceptions is a mixed bag with clear successes and failures evident in legislation and case law. The core aims of the exceptions are to further enhance the growth of innovation and growth while also protecting fundamental rights that could be restricted by strict insistence on copyright protections. Intrinsic to these goals has been the harmonisation of copyright exceptions in order to provide clarity and legal certainty to rights-holders and end-users alike.

In specific areas, it is apparent that the domain of copyright has achieved successes. This is especially the case regarding the inclusion of the 'three-step test' within Article 5(5) which ensures the uniformity of interpretation across the Member States. Furthermore, the parody exception illustrates that a balance can be struck between rights within the scope of the InfoSoc Directive. However, while there are successes, shortcomings are also present in the framework. One of the key failures is the complete absence of more mandatory exceptions, which leaves the system for copyright exceptions largely fragmented and lacking in certainty. This problem is best showcased in the area of private copying, where the non-mandatory character of that exception has led to a broad divergence in its application. This lack of clarity invariably has impacts on the integrity of the single market, both in a digital and physical sense. The unfortunate contradiction is that exceptions, which are designed to ensure stronger and more dynamic markets, end up causing fragmentation and weakening the efficacy of cross-border market exchanges of cultural and creative works.

66 Timothy Chung, 'Fair Use Quotation Licenses: A Private Sector Solution to DMCA Takedown Abuse on YouTube' (2020) 44(1) Columbia Journal of Law and the Arts 69.

67 See the cautionary commentary in *Deckmyn*.

68 Celine Castnets-Renard, 'Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement' (2020) 2 U. Ill. J.L. Tech. & Pol'y 283, 301.

69 See generally InfoSoc Directive Recitals 1, 4, 6, 7, 9 etc.

70 Christophe Geiger and Franziska Schönherr, 'Defining the scope of protection of copyright in the EU: The need to reconsider the acquis regarding limitations and exceptions' in Tatiana Synodinou (ed.) *Codification of European Copyright Law: Challenges and Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2012) 142.

71 Bernd Justin Jütte, *Reconstructing European Copyright Law For The Digital Single Market: Between Old Paradigms and Digital Challenges* (1st edn, Nomos 2017) 244.

72 Asta Tūbaitė-Stalauskienė, 'EU Copyright Law: Developing Exceptions and Limitations Systematically – An Analysis of Recent Legislative Proposals' (2018) 11(2) Baltic Journal of Law and Politics 174.

73 Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (1st edn, Springer 2008) at 288.

74 Ibid 289.

On a general level, it can be observed that the CJEU has time and again been the driver of copyright exceptions policy, reiterating the fundamental balance that must be achieved between copyright and the objectives of exceptions. Finally, it is submitted that the DSM Directive aims to take copyright policy in general into a more innovative and technologically advanced age. While the introduction of new exceptions for text/data mining among others are welcomed, concerns remain from an expression-based perspective about the risks that Article 17 may pose.

Without doubt, copyright exceptions have a vital role to play in maintaining the overall functionality of the copyright system. Indeed, it is argued that this is especially the case in the digital market where exceptions are absolutely vital to enable the growth and development of innovative creative industries. It is argued that reforms are needed in the copyright system to best ensure that the EU's key goals are met and that exceptions, contained within a well-designed framework, can serve as the counterweight to intellectual property rights, thus enabling an innovative marketplace and the safeguarding of rights.