

Towards a three-tiered framework of exceptions in EU copyright law (or why we really need a residual fair use standard)

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Almost two decades after its adoption, Article 5 of the InfoSoc Directive keeps generating disagreement. The vast majority of commentators and civil society organizations criticize it for lacking the flexibility that is necessary in times of rampant technological change, while arguing that it also fails to provide an adequate degree of legal certainty. In contrast, a stronghold of scholars defends Article 5 on grounds that it offers ample legal certainty, as well as sufficient flexibility.

Both sides of the barricades agree that the prevailing solution should seek to balance these two values. Strikingly, however, there is scant in-depth reflection on the meaning of “flexibility” and “legal certainty” in the EU copyright literature. Participants in the debate have been employing these concepts in a rather loose, unspecified manner.

Against this background, section 1 of the paper offers operative and theoretically grounded conceptualizations of “flexibility” and “legal certainty”, dividing each into three benchmark criteria. Section 2 systematically evaluates the InfoSoc framework of exceptions against those criteria and considers avenues for reforming it. Section 3 concludes that the solution that strikes the best compromise between flexibility and legal certainty is a three-tiered framework, which would combine (i) a catalogue of mandatory and precisely formulated exceptions for recurring uses with an internal market impact; (ii) a catalogue of optional exceptions with negligible relevance for the functioning of the internal market; and (iii) a residual open-ended exception that would empower courts to accommodate unenumerated uses. This section further argues that this open-ended exception should be crafted as a balancing test modelled after US fair use, but incorporating European-specific factors.