

# The Role of the Court of Justice in Interpreting Exceptions & Limitations

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# The perceived problems with Article 5

- Options for Member States
- Provisions of Directive not susceptible to immediate reliance – “categorically worded prototypes”
- Diversity of national practice
- Relationship with contract law
- Tendency to redundancy – no apparent flexibility

# The CJEU's solutions to these problems (1)

- Assumption of responsibility for the meaning (upper limits) of the provisions – “autonomous interpretation” (e.g. “parody”)
- Organisation of jurisprudence around controlling concepts – “harm”, narrow interpretation, “fair balance”
- More recently – suggestion that Court also controls *lower* limits of the provisions – i.e. if a state takes an option, it takes it as it is

# The CJEU's solutions to these problems (2)

- Techniques for turning prototypes into a workable code of exceptions / limitations (e.g. *Deckmyn*)
- Exceptions and limitations as *rights*
- The influence of fundamental rights – likely consequence that a number of the limitations are imperative
- The influence of fundamental rights – functioning to “open” the list to some extent

# Problems with the solutions

- Court stretching to harmonise?
- Unwilling to acknowledge that it creates new rules
- Employment of “principles” to fill gaps
  - Some principles inherently problematic
  - Principles not applied consistently – a legality problem

# Particular problems

- Strict interpretation
- “Purposive” interpretation
- Reliance on fundamental rights
- The use of the “three-step test”

# Field of enquiry

- Close reading of jurisprudence
  - (C-145/10) *Painer v Standard VerlagsGmbH*
  - (C-510/10) *DR, TV2 Danmark A/S v NCB*
  - (C-201/13) *Deckmyn v Vandersteen*
  - (C-117/13) *Technische Universität Darmstadt v Eugen Ulmer KG*

# Strict / restrictive interpretation

- Origins (*Infopaq*)
- Accompanied by purposive approach since *FAPL*
- Mutual incompatibility?
- Rhetorical neutralisation
- Ignored in some instances – e.g., *DR, TV2 Danmark; Technische Universität Darmstadt*
- Stated, but not applied in others – e.g. *Deckmyn*



# Purposive interpretation

- In some instances, purpose of specific provisions discussed – e.g., *DR, TV2 Danmark* (ephemeral copies for broadcasters); *Technische Universität Darmstadt* (dedicated terminals in libraries)
- In other instances, more general purposes – e.g. “principal purpose” of Directive is “high level of protection” for authors – e.g. *Painer* (public security)

# Fundamental rights

- Increased reference to the Charter – promoted actively by the Court – e.g. *Deckmyn; DR, TV2 Danmark*
- Concept of the “fair balance” between competing rights
- But no detailed interrogation of the content of the rights
- Critique of “balance” concept

# The “three-step test”

- Incorporated within Art 5(5)
- Functioning to support the “narrow interpretation” rule in *Infopaq*
- Not employed as such in reviewed cases
- Used as a check on extensive interpretation of provisions within Art 5 (e.g. *Painer*)
- Described as a form of proportionality control (*Technische Universität Darmstadt*)
- Sometimes not mentioned at all (e.g. *DR*, *TV2 Danmark*)
- When mentioned, reasoning not elaborated

# Reflections on these conclusions (1)

- The unreasonable impressions of a common lawyer?
- Should we simply take advantage of the Court's work and be thankful?
- Lessons for the CJEU?
- Advantage of legislative solutions?

## Reflections on these conclusions (2)

- Clarification of extent of Member State discretion
- Address legislative presumptions directly
- Abandon the rule of restrictive interpretation
- Consider the appropriate role of fundamental rights
- What is Art 5(5) for?
- Problem for a fair / flexible use limitation – soluble?