

**Thomas Dreier**

# **FUNDAMENTAL THOUGHTS ON LIMITATIONS & EXCEPTIONS**

**RIGA, 27.03.2015**

# 1. INTRODUCTION

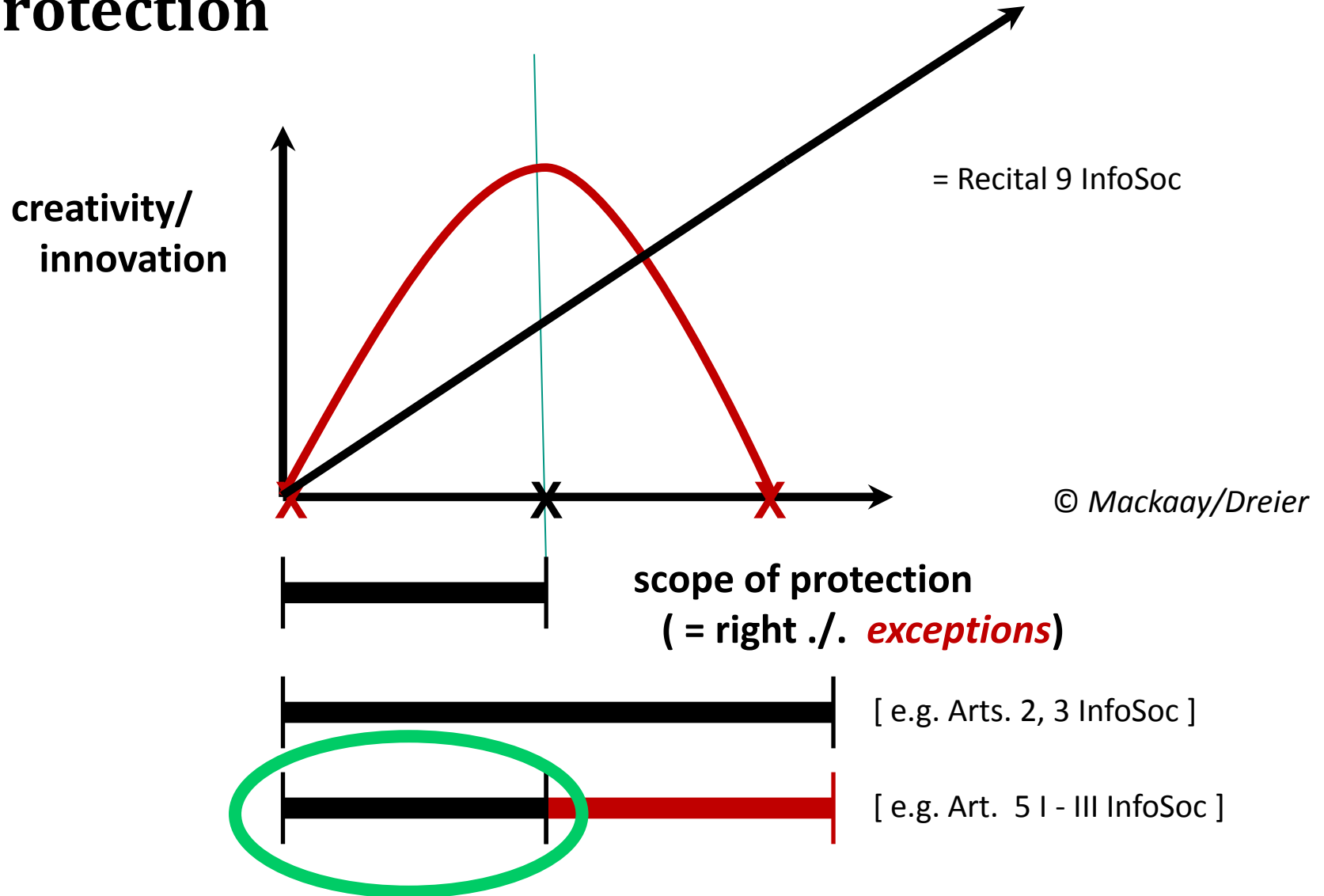
- **To begin with ...**
  - Before discussing any details
  - and before deciding how to adapt Art. 5 InfoSoc
  
- **Some fundamental considerations are called for:**
  - **[1]** The general role of exceptions/limitations in the ©-system
  - **[2]** A remark regarding the details of the review

## 2. GENERAL ROLE OF LIMITATIONS/EXCEPTIONS

- What exactly are „*Exceptions and Limitations*“?
- Economics: **Creativity & Scope of Protection**
- Exceptions/Limitations: **Review options**
- Exceptions/Limitations and **Flexibility**
- Exceptions/Limitations *v. Contracts & TPM*

- What exactly are „*Exceptions and Limitations*“ (Art. 5 InfoSoc) ?
  - Do the both exist? Are they different?  
Are they one and the same thing?
- The **wording** is *ambiguous*:
  - „Exception“ = *Deviation* from the rule
  - „Limitation“ = *Definition* of the boundaries of the rule itself
- **Effects** of the difference:
  - Designing and interpreting limitations/exceptions

# Economics: Creativity & Scope of protection



# Intermediate conclusion

- **„Exceptions and Limitations“** (Art. 5 InfoSoc)
  - **Define** the **boundaries of the exclusive rights** as such
  - They are **not mere „exceptions“ to broad rules** that will have to be narrowly drafted and interpreted
- **And:**
  - **„Exceptions and Limitations“ fulfill certain purposes in the public interest**  
*{see below, discussion of waivability and the example in section on „Details“}*



- Harmonizing the existing catalogue of Art. 5 I-III:  
***General options:***
  - ***Retain limited optional catalogue:*** no harmonization
  - ***Make smallest common denominator mandatory:*** too restrictive
  - ***adequate list of exceptions*** according to purpose:  
*e.g. WITTEM-proposal (with/without compensation)*
    - Uses with minimal economic significance
    - Freedom of expression and information
    - Promotion of social, political, cultural objectives
    - Enhancing of competition

- Remaining problem: *flexibility*
  - **Needed** in times of fast technological development
  - ***Otherwise***
    - Socially and economically desirable access and re-use will be hindered, or
    - National courts will create their own „safety valves“ (*analogies; implied consent et al.*)
  - ***Entrusting CJEU*** with the task is ***not a solution***:
    - CJEU bound by EU-law; making fundamental rights operational cumbersome and uncertain; number of cases too small

- **Flexibility:** *Possible legislative strategies*
  - *„fair use“* (US-style): alien concept, probably too vague and possibly too far-reaching
  - *„fair dealing“* (UK): only national idea of what is considered „fair“ and most likely too narrow
  - **WITTEM-approach:** comparable uses (same purpose) allowed, provided within 3-step-test
  - Unless (suggested by draft *Reda-Report*):  
**completely open norm** (*within limits of 3-step-test*)

- Limitations and Exceptions v. **Contracts**
  - *Public choice ./.* private ordering
  - **Examples of „built-in“ preference for contracts:**
    - Art. 5 (1) Computer Programs [*legitimate user*]
    - Arts. 6 (1), 8 (1) Databases [*legitimate user*]
    - Art. 5 (3) (n) InfoSoc [*library terminals*]
    - Art. 6 (4) (4) InfoSoc [*online-uses*]
  - **Only *limited unwaivability*:**
    - Art. 8 (2) Computer Programs: Arts. 5 (2), (3) and 6
    - Art. 15 Databases: Arts. 6 (1) and 8

- Limitations and Exceptions v. Contracts {cont'd}
  - **Possible solutions:**
    - Leave to „invisible hand“ of the market (and **correct** market/access-failures **ex-post**)
    - **Differentiate** between **standard terms and conditions** and **individually negotiated** restrictions
    - **Differentiate** according to **purpose** (**strong public interest** v. **weaker** public interest)?
    - Declare **more exceptions/limitations unwaivable**?
    - **Any combination of the above?**

- **Limitations and Exceptions v. TPM**
  - Similar problem
  - **„blind eye“ of the courts**, including **CJEU**  
(e.g. C-466/12 – *Svensson*; C-348/13 – *BestWater*)
  - **Solution (1): Incite use of TPM** (shift from „having“ to „accessing“), or
  - **Solution (2): exclude private ordering via TPM** altogether (draft *Reda-Report*)?

# 3. **DETAILS** OF LIMITATIONS/EXCEPTIONS

# Some Details

- Review strategy should be „**purpose-oriented**“  
(i.e., craft exceptions/limitations so that they fulfill the particular purpose in question in the digital environment)
- E.g.: Museums may advertise exhibitions and store advertisements, (Arts. 5 (2) (c) and (3) (j), but **may not** make historic advertisements publicly available on-line  
(i.e., they *currently cannot properly fulfill their role as memory institutions*)



# Some Details

- **Required:**
  - ***Mustering through*** of **all exceptions** currently listed in Arts. 5 (2) – (3) InfoSoc accordingly
  - ***Add*** appropriate ***new*** exceptions
    - *e.g., for non-commercial sharing of pictures*
    - *e.g., for transformative use in social media*
    - *e.g., other?*
- **Probably not necessary** to extend ***all*** analog exceptions to digital uses

# 4. CONCLUSION

# Conclusion (*DON'Ts and DOs*)

- ***DON'Ts:***
  - ***Do not*** reduce exceptions/limitations as far as possible
  - ***Do not*** accept lowest common denominator of exceptions and limitations accepted by all Member States
  - ***Do not*** retain the closed list
  - ***Do not*** make all exceptions limitations subject to unlimited contracting and/or TPM

# Conclusion (*DON'Ts and DOs*)

- **DO's:**
  - **Do** consider exceptions/limitations as *true „limitations“* of the exclusive rights, *fine-tuning* the *balance* between (proprietary) controlling interests with interests of accessing without licensing: after all, © is not limited to the protection of authors and rightholders, it's a *communication's law*
  - **Do adapt** exceptions/limitations to *digital needs* according to the *purpose* of each exception/limitation

# Conclusion (*DON'Ts and DOs*)

- **DO's:**
  - **Do** create some room for *flexibility* (not US-style „fair use“, but more predictable „smaller scale“ flexibility)
  - **Do** state clearly *which* exceptions/limitations can be *contracted away* and/or factually be *eliminated by TPM*



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