

**Review of EU Copyright**  
**Riga, 26 March 2015**

# **The Three-Step Test Tragedy**



**Prof. Dr. Martin Senftleben**  
**VU University Amsterdam**  
**Bird & Bird, The Hague**

# **Current EU legal framework**

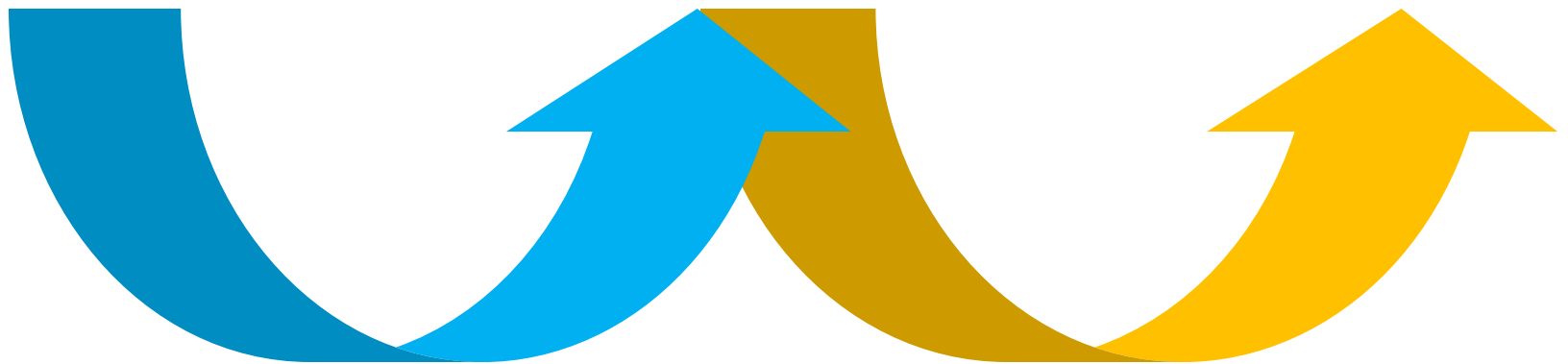


# EU acquis (InfoSoc Directive)

broad  
exclusive  
rights

exhaustive  
enumeration of  
exceptions

three-step  
test



## Art. 5(5) InfoSoc Directive

‘The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall **only be applied in certain special cases** which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

# CJEU, Infopaq

‘...that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly [...]. This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.’ (para. 56-57)

# CJEU, Infopaq

‘This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’ (para. 58)

# **Worst case scenario**



# Comparison: legal traditions

## Anglo-America

- open limitations
- factor analysis
- case-by-case approach (judge)
- flexibility
- quick reactions to new developments

## Continental Europe

- specific limitations
- fixed requirements
- closed catalogue of limitations (legislator)
- legal certainty
- slow reactions to new developments



# EU legal framework

European Union

= worst case scenario

- closed catalogue
- controlled by open factors
- no flexibility
- no legal certainty
- *very* slow reactions to new developments
- structural problem
- not only if three-step test in national law (+) (France)
- but also if three-step test in national law (-) (The Netherlands)

Civil law judges capable of applying  
open-ended limitation?

**Yes, absolutely.**

# Unnecessarily restrictive



## Recital 44 InfoSoc Directive

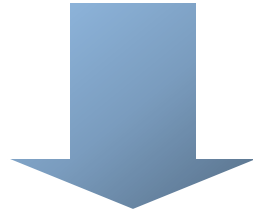
‘When applying exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter.’

Three-step test as a straitjacket?

**flexible**  
**international**  
**acquis**

# Family picture

**Article 9(2) BC**



**Article 13 TRIPS**



**Article 10 WCT**

# Agreed Statement Art. 10 WCT

‘It is understood that the provisions of Article 10 permit Contracting Parties to **carry forward and appropriately extend** into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.’

‘Similarly, these provisions should be understood to permit Contracting Parties to **devise new exceptions and limitations** that are appropriate in the digital network environment.’

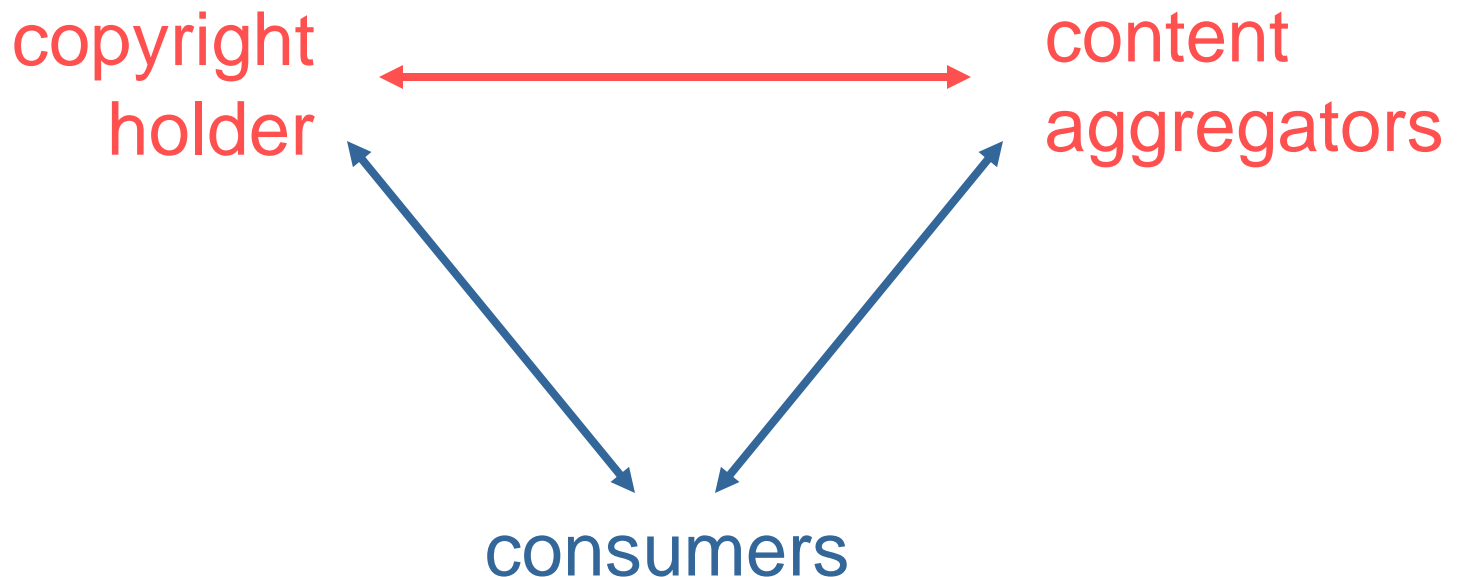
# **Impact on EU single market**

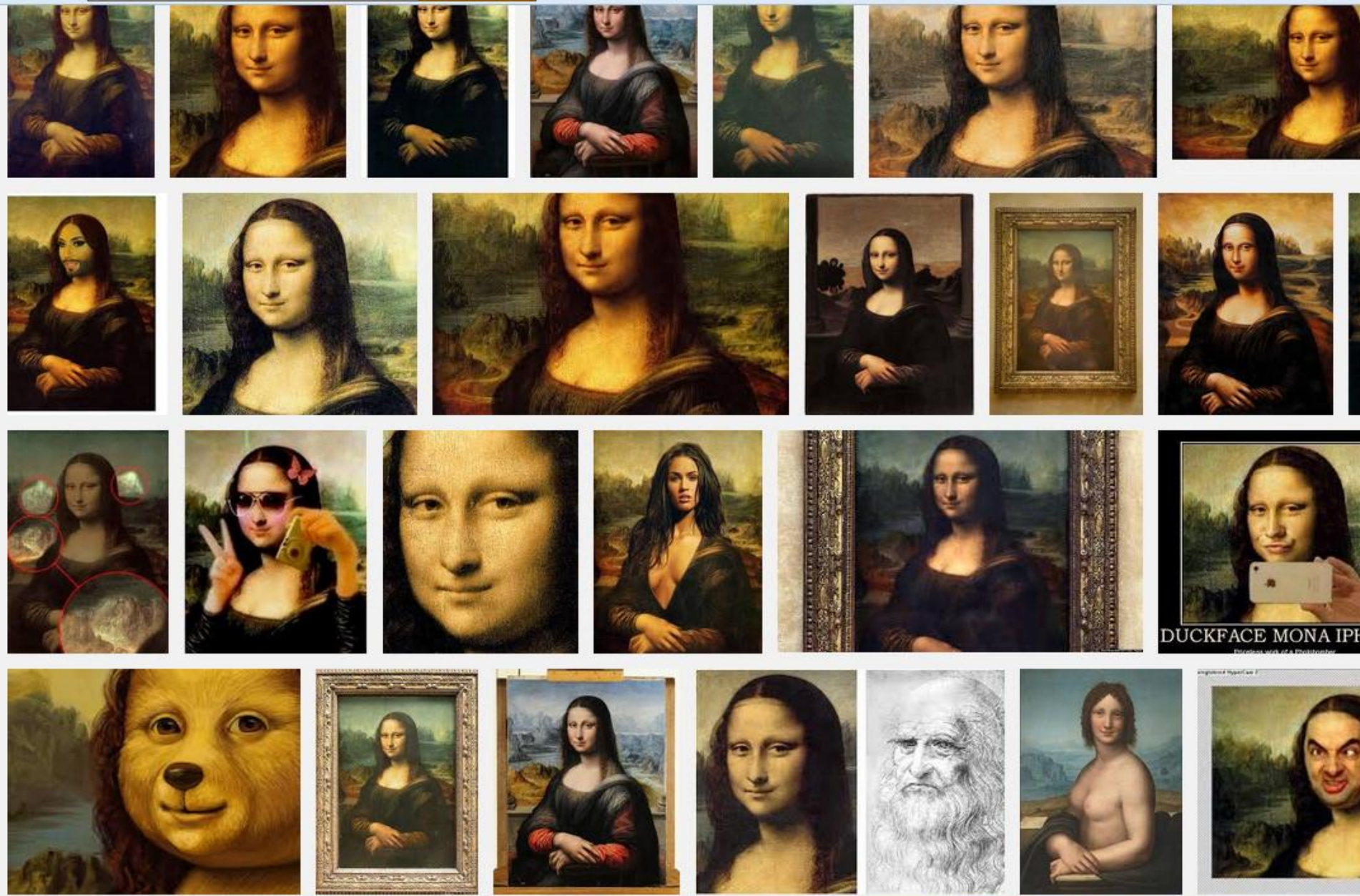




# Missed opportunities

- insufficient room for new business models and information services
- less freedom of expression and information











# **The end. Thank you!**

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contact: [m.r.f.senftleben@vu.nl](mailto:m.r.f.senftleben@vu.nl)