ancing of the competing values of copyright protection and the legitimate interests of the public with regard to the particular instances defined under Article 5.

However notwithstanding the limited possibility offered under the Directive for the balancing of copyright and the public interest, substantial arguments exist in favour of the introduction of a broad-based general exception to copyright independent of Article 5 of the EC Copyright Directive.

Firstly although the limitations set out under Article 5 are fairly comprehensive in scope they cannot foresee all possible instances which would require the limitation of copyright in the public interest.

Secondly as has been noted earlier, save the mandatory limitation to the right to reproduction under Article 5(1) all other limitations are merely optional and are to be adopted by Member States at their discretion.[133] Thus all the limitations set out under Article 5 may not in fact be available within the legal systems of all Member States, which would necessitate the existence of a general exception to copyright in order to effect an adequate equilibrium between copyright and the public interest.

2. Overcoming the Bar under Recital 32

Hence it remains to be considered as to whether possible means exist by which the bar placed by Recital 32 to the introduction of further limitations and exceptions to the rights enumerated thereunder may be circumvented.

133 Article 5(2) *"Member States **may** provide for exceptions and limitations to the reproduction right provided for in Article 2 in the following cases…"* (emphasis added)
Article 5(3) *"Member States **may** provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases…"*(emphasis added).

A possible means of achieving this may be by basing the public interest exception to copyright upon the freedom of expression and the right to information as guaranteed under Article 10 of the ECHR.

Since the fundamental freedoms guaranteed under the ECHR form an external and overriding consideration to the principles enumerated within the Directive, this would make it possible to argue that a public interest exception based upon these freedoms form an overriding consideration external to the scope of the rule in the Directive.

Although the EU is not a party to the ECHR, the ECHR does regulate the conduct of the EU within its own legal order since it has been incorporated into the EU Law. Article 6 (2) of the Treaty of the European Union states that 'The Union shall respect fundamental rights, as guaranteed by the European Convention…and as they result from the constitutional traditions common to the member states, as general principles of law.'

As established in the case of *Karner*[134] the possibility exists to challenge the validity of EC legislation on the basis of its incompatibility with fundamental rights as recognized under EU law. In this respect the fundamental freedoms enumerated under the ECHR is of special significance.[135]

The case of *Laserdisken ApS v Kulturministeriet*,[136] was an instance in which Article 4(2) of the EC Copyright Directive which

134 C 71/02 *Herbert Karner Industrie-Auktionen GmbH v. Trootswjik GmbH* ECR I-3025 [2004].

135 *Id.* para. 48 *"...according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; and Case C-112/00 Schmidberger [2003] ECR I-5659 paragraph 71). ".*

136 C-479/04 *Laserdisken ApS v Kulturministeriet* ECR 1-8089 [2006].

provides that the distribution right of copyright holders shall not be exhausted within the Community in respect of the original or copies of the work except where the first sale or other transfer of ownership in the Community is made by the rightholder, was sought to be invalidated before the European Court of Justice.

The arguments put forward in support of the invalidation of the provision proceeded upon the basis *inter alia* that the provision had the effect of depriving citizens of the Union of their right to receive information, as well as the freedom of copyright holders to communicate their ideas and hence was in breach of Article 10 of the ECHR.

The ECJ, citing the case of *Kaner* upheld the principle that in accordance with settled case-law, fundamental rights form an integral part of the general principles of law of the EU[137] and that the freedom of expression, enshrined in Article 10 of the ECHR, is a fundamental right the observance of which is ensured by Community courts[138]

The Court in this instance found that Article 4(2) did not result in an infrignement of the freedom of expression as guaranteed under Article 10 of the ECHR.[139]

However it concluded that the rule under Article 4(2) maybe capable of restricting the freedom of citizens of the Union of their right to receive information under Article 10 of the ECHR.

Significantly however the ECJ cited 10(2) of the ECHR which states that the freedom of expression and the right to information as guaranteed under Article 10(1) maybe subject to limitations justified by objectives of the public interest,

> *"…in so far as those derogations are in accordance with the law,* ***motivated by one or more of the legitimate aims*** *under that provision and necessary in a democratic society, that is to say* ***justi-***

137 *Id* para. 61 citing *Karner.*

138 *Id* para. 62 citing *ERT*C-260/89 [1991] ECR I-2925, para. 44.

139 *Id.* para. 63.

fied by a pressing social need *and, in particular,* ***proportionate to the legitimate aim*** *pursued."*[140] (emphasis added)

Accordingly they held that in this instance, the alleged restriction on the freedom to receive information was justified in the light of the need to protect intellectual property rights, including copyright, which form part of the right to property.[141]

Hence the decision of the ECJ in the *Laserdisken* case forms a recognition that the restriction of the freedom of expression and the right to information under EC law maybe justified if it is necessary for the purpose of the protection of intellectual property, which in the interpretation of the court evidently constitutes a 'pressing-social need' the protection of which may comprise a legitimate reason for the restriction of fundamental freedoms as guaranteed under the ECHR.

Thus the issue arises as to whether the rule in Recital 32 may similarly be found to be justified in the interests of the protection of intellectual property.

It is submitted however that it may be possible to distinguish the rule in Recital 32 from Article 4(2) of the Copyright Directive, and to make an argument against the validity of the restriction imposed upon the freedom of expression and the right of information under Recital 32 on the basis that it contravenes the principle of proportionality, which is a basic tenant of Community law.

---

140 Id. para. 64 citing C-71/02 Karner ECR I-3025 [2004], para.50. "Whilst the principle of freedom of expression is expressly recognized by Article 10 ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of *the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. " (emphasis added).*

141 *Id. para. 65.*

The principle of proportionality as recognized under EU law requires that measures implemented through Community law provisions must be,

(a) appropriate for attaining the objective pursued, and;
(b) must not go beyond what is necessary to achieve it.[142]

As per the dicta in the case of *Karner* derogations to fundamental freedoms by provisions in EC law are similarly subject to the test of proportionality.

Hence it follows that in line with the above dicta, derogations in EC legislation from the freedom of expression in the interests of copyright protection should,

(a) be appropriate for attaining the protection required, and;
(b) must not go beyond what is necessary for attaining such protection.

It is submitted that the blanket restriction imposed by Recital 32 upon the introduction of limitations to copyright external to those enacted under Article 5, is neither appropriate nor necessary for the attainment of the objective sought by it which is the achievement of enhanced standards of uniformity in copyright protection within the Member States of the EU.

It is noted that as observed earlier the rule in Recital 32 effectively vetoes the ability of Member States to bring about an adequate balance between the competing values of copyright protection and the preservation of the freedom of expression and the right to information in relation to uses which do not come within the activities enumerated under Article 5. In the light of the public interest dimension of copyright which sees the ultimate aim of copyright as the promotion of social good, such a restriction comprises an unwarranted protection of the interests of copyright holders as against the interests of the public and therefore goes beyond what is 'necessary' for the legitimate protection of copyright.

142 C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* ECR I-11453 [2002], para 122.

Although the limitations set out under Article 5 can be seen to form a comprehensive list of limitations, these cannot be considered to constitute an *exhaustive* list of instances which could give rise to a potential conflict between copyright and the legitimate interests of the public *vis a vis* the preservation of their fundamental freedoms

As Hugenholtz comments in the context of uses of copyrighted materials on the internet,

> *"The last thing the information industry needs in these dynamic times are rigid rules that are cast in concrete for the years to come. How can a legislature in his right mind even contemplate an exhaustive list of limitations, many of which are drafted in inflexible, technology-specific language, when the Internet produces new business models and novel uses almost each day?"*[143]

It is observed that this argument may be held valid not only with regard to uses in the internet but with regard to the use of copyrighted material in all other contexts as well.

It is noted that the three-step test incorporated into the Directive under Article 5 (5) should in combination with the list of copyright limitations, provide a basis for bringing about a sufficient degree of harmony within Community copyright law.[144] Hence the imposition of a further restriction on the Member States in the form of an exhautive list of limitations seems an unwarranted as well as unnecessary measure for the purpose of securing an enhanced level of harmonization of copyright within the EU. The futility of such a provision is further highlighted in terms of the fact that the Directive itself does not succeed in securing any great measure of harmonization

143 Hugenholtz *"Why the Copyright Directive is Unimportant, and Possibly Invalid* 11 EIPR 501,502 [2001] http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html.

144 Article 5(5) "*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 the normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder."*.

within the EU by virtue of the fact that most limitations introduced under it are to be adopted by Member States at their discretion.

Hence it may be argued that Recital 32 read with Article 5 of the Copyright Directive may be challenged upon the basis that it constitutes a derogation from the fundamental freedoms guaranteed under Article 10 of the ECHR in a manner that is not proportionate to the legitimate aim of the provision.

Thus it may be considered that the possibility exists for Member States to circumvent the impediment placed by the EC Copyright Directive and to enact a broad-based public interest exception to copyright within their domestic legal systems.

B. The Berne Convention and the Three-Step Test

All EU Member States are also signatories to the Berne Convention. The EU being a Member State of the World Trade Organization, all EU Member States are bound by the TRIPS Agreement[145] and hence have adhered to the Paris Act of the Berne Convention of 1971.[146]

Thus the provisions of the Berne Convention Paris Act with regard to the the limitation of copyright, particularly Article 9 (2) are binding upon the EU legal framework as well as the domestic legal frameworks of the individual Member States.

As such the "three-step test" to copyright limitations under Article 9 (2) has also been incorporated into several of the EC Directives on Copyright law, namely the Computer Programs Directives, the Database Directive, the Rental Rights Directive and as mentioned earlier the Copyright Directive.

145 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (Annex 1C to the Agreement Establishing the World Trade Organization), http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

146 Thomas Dreier *Berne Convention for the Protection of Literary and Artistic Works* in *Concise European Copyright law* Thomas Dreier and P Bernt Hugenholtz (eds.) 9 Kluwer Law (2006).